Vol. XX • No. 2 Spring 2017

NEXO

The Official Newsletter of **The Julian Samora Research Institute**
The Midwest's Premier Latino Research Center

IN THIS ISSUE

JSRI's mission is to generate, disseminate, and apply knowledge to serve the needs of Latino communities in the Midwest and across the nation.

MICHIGAN STATE UNIVERSITY | University Outreach and Engagement, Julian Samora Research Institute

Julian Samora Research Institute
University Outreach and Engagement
Michigan State University
219 S. Harrison Road, Room 93
East Lansing, MI 48824
(517) 432-1317
Webpage: www.jsri.msu.edu
Email: jsamorai@msu.edu
www.facebook.com/JSRIMSU

The Erosion of Due Process in the American Immigration System: Expedited Removal

page 6

H-2A and Farm Workers in theNation's Agricultural Fields

page 12

NEXO

NEXO is the official newsletter of the Julian Samora Research Institute (JSRI), University Outreach and Engagement at Michigan State University (MSU) in East Lansing, Michigan. All contents remain the property of the original authors or artists, JSRI, and/or MSU. Some of the views expressed by contributors may not represent those of JSRI or MSU. Reproduction of this publication without written permission of JSRI is restricted except for educational purposes. Printable copies of the newsletter are available online.

JSRI at Michigan State University is committed to the generation, transmission, and application of knowledge as it relates to Latinos and Latino communities throughout the Midwest and the nation.

Editor
Rubén Martinez

Layout Designer
Marcos Martinez

MICHIGAN STATE
UNIVERSITY

Julian Samora Research Institute
University Outreach and Engagement
Michigan State University
219 S. Harrison Road, Room 93
East Lansing, MI 48824
Ph: (517) 432-1317
Fax: (517) 432-2221
Email: jsamorai@msu.edu
Webpage: www.jsri.msu.edu
Facebook: facebook.com/JSRIMSU

Lives of Fear

Rubén O. Martinez
Director

The election of Donald J. Trump as the 45th President of the United States shocked most Americans along with many others across the globe. A large segment of the electorate felt traumatized after having been openly insulted, derogated, and threatened by Trump throughout the presidential campaign. Now that Trump is the President of the United States, he has issued a series of executive orders that have further polarized the electorate and pushed the boundaries of executive authority to the point of what some call an impending "Constitutional Crisis." People's lives have been negatively impacted by these executive orders which have mobilized both his base of supporters and a large number of Americans who stand against the orders and seek to protect the nation's values, the Constitution, and American Democracy.

It took President Trump only eight days to fall below a 50% favorable rating on a Gallup poll, when it took nearly four years for George W. Bush and three years for Barack Obama to fall to that level. This startling statistic may portend what is in store for the nation over the next four years. Large numbers of the American electorate are pressuring their local legislators to address and protect the Affordable Care Act, and make it better. Others are demanding that their Republican legislators do their jobs by serving the people, letting them know that they work for the citizens and not for the Republican Party. Still, others are demanding that legislators stand up to the President and his team on behalf of American Democracy and limit the influence of his political initiatives, which will unnecessarily cost billions of dollars, cut social programs, limit the capacity of the administrative state to carry out its functions, and empower the plutocracy.

Many serious questions come to mind when considering the political conditions in this country. One is whether we arrived at today's dogmatic and highly polarized political environment because of the leadership of one unorthodox man or because there are broader systemic forces at play. Consider, for example, the confluence of political and economic changes in which a political movement is reaching its apex and Americans are having to stand up on their own behalf to promote progressive measures against a political regime that promotes autocratic and punitive measures likely to set American progress back a century or more. One thing is certain, a fractured political climate has emboldened persons harboring racist sentiments to commit racist acts.

Here at MSU there was a brief flurry of openly racial incidents, some of which were reported to the police and/or administration, and some which went unreported. Emboldened by the election of then Candidate Trump, some students released their pent-up racial sentiments, carried away by the "collective effervescence" that excited some individuals to engage in racist behaviors. At the University of Michigan, racist e-mail messages were sent to hundreds of engineering students. The Mayor of Warren in Macomb County was accused of making offensive remarks about African Americans, women, and disabled persons. In Canton, a White police officer resigned after an internal investigation

got underway focusing on a "racist social media posting" made by the officer.

These and many other racial incidents directed at Latinos, African Americans, Jews, Muslims, women, LGBTQ, immigrant, disabled and other minority communities revealed the depth of hatred felt by some Americans toward members of these populations. These sentiments, which reside within cultural subgroups of White Americans across the country, are also linked to the decline of American manufacturing, reduction of social programs, changing demographics, and the promotion of extreme conservative ideologies within a frame of victimization. These features of the contemporary period are attended by the human tendency to scapegoat the vulnerable for societal ills.

Immigrants, especially Latin American immigrants, are one of the main targeted groups driving the call for mass deportations and the construction of a border wall. According to President Trump, a "military operation" is underway to round up "illegal immigrants" and deport them. This "military operation" has intensified the trepidation among immigrant communities, who fear the breakup of their families despite their "good citizen" behaviors. Characterized by Candidate Trump and conservatives as criminals, rapists, and drug traffickers, Mexican immigrants are now feeling terrorized by the threat of family breakup and the hardships that come with detention and deportation.

President Trump has said that he represents all the people but, like many previous administrations, his policies are out of step with the needs and desires of the majority of the population. For instance, according to a Gallup Poll last July, approximately 76% of Republicans favored a pathway to citizenship for undocumented immigrants, and 62% supported building a wall. In contrast, 67% of Americans opposed deporting undocumented immigrants and building a border wall. Finally, 84% in the U.S. favored a path to citizenship for undocumented immigrants. These are the views of "the people," yet U.S. Immigration and Customs Enforcement (ICE) is instead executing "military operations" that threaten families and keep children unable to eat, sleep, and study.

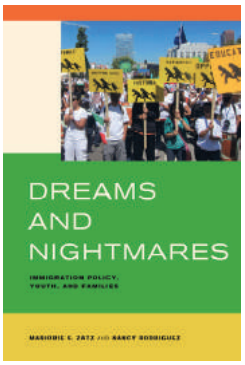
Many children of undocumented immigrant parents spend their birthdays in detention centers. One teen that turned 16 years of age in one of these centers said she did not do anything on that day except cry. Families in detention are in a state of limbo; they often receive little information about their specific case, yet some have been detained for more than a year. Some are in private detention centers contracted by the Federal Government, while others are in local government units that also have contracts with the Federal Government. These entities have vested interests to keep detainees as long as they can, and studies show that they do. While profits are being made, the lives of young people are traumatized, leaving lasting effects on the course of their lives. Can you imagine the significance of the memory of having spent one's 16th birthday in an immigrant detention center?

Other children have seen their parents being handcuffed and "jailed," an image that leaves a lasting memory in their minds, knowing that their parents are "not bad people." A sense of social injustice is planted in the personalities of these young people that will last long beyond the lives of the individuals who implanted the memories. A prime example of such a person is Joe Arpaio, who as Sheriff of Maricopa County in Arizona, profiled Latin American immigrants and terrorized their families. These memories will shape the lives of those impacted by the ICE and Arpaio raids and will set in motion lifetime commitments toward achieving a more just society. But why are today's elected officials, especially Republicans, pursuing such socially destructive policies? What became of human progress in an increasingly interconnected world? What became of achieving a higher level of civilization?

We are living in a historical moment in which the U.S. is at a major crossroads. Will it continue down the path of increased social and income inequality, or will it pursue higher values that will lead to a greater America, one in which government promotes the highest quality of life for all residents? Will the radical policies of free market fundamentalism, which have produced and continue to produce increasing inequality, ultimately lead to revolutionary violence and the breakup of the United States of America? In our lifetime, we saw the breakup of the Soviet Union, a disintegration that shocked many Americans. A stagnant economy and isolation led to its downfall.

Today, not just the United States, but humanity faces the negative effects of climate change, increasing poverty and inequality, growing populations, and increases in "surplus populations" that reveal the limitations of an economy based on infinite growth and the concentration of wealth, and which is increasingly mechanizing production. These are some of the critical structural issues confronting the United States and humanity as a whole. As awareness of these issues slowly increases among the American population at large, Latin American immigrants will continue to lead lives of fear at the hands of a President pursuing the status quo, or a status lost long ago, rather than a higher civilization.

Dreams and Nightmares: Immigration Policy, Youth, and Families



by Marjorie S. Zatz and Nancy Rodriguez. 2015. Oakland, CA: University of California Press.

Reviewed by Juan David Coronado

In recent years, immigration has been a topic of great concern among policy makers, citizens and non-citizens in the United States. Despite the great need for comprehensive immigration reform, the subject matter is tossed about like a political football to sway and divide the American public. The U.S. immigration system is broken, and the reasons and solutions remain a mystery to most Americans. Given the complexities that surround immigration, including domestic and international concerns, this book by Marjorie S. Zatz and Nancy Rodriguez, *Dreams and Nightmares: Immigration Policy, Youth, and Families* is not only opportune, but welcomed.

Through sociological and legal lenses, Zatz and Rodriguez provide critical insights into the issues pertaining to immigration policy and practice, and how they persist within a system in great need of comprehensive reform. The main aim of the authors is to address the systemic issues at the core of the outdated immigration policy. In a concise study, divided into six chapters, in which the authors draw upon archival and government records along with a vast collection of interviews with persons involved with immigration at some level, Zatz and Rodriguez address real and important concerns regarding the U.S. immigration system.

It has been over thirty years since the last major comprehensive immigration policy, the Immigration Reform and Control Act (IRCA), was signed into law in 1986. Passed under President Ronald Reagan and his conservative administration, the act legalized approximately 3 million immigrants who were here without proper documentation or unclear statuses. A decade later in 1996, in response to the legalization component of IRCA, legislative critics passed two bills, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA). These Acts greatly empowered state and local law enforcement with the ability to enforce immigration laws. Hence, from a progressive immigration perspective, we have the police state of today.

Although the text provides a brief contemporary history of immigration in the U.S., it glosses over the history of U.S. intervention in Latin America and skims the surface of the forms of domination that prevail. To the authors' credit, they briefly mention corrupt American-backed regimes in Central America and the intervention by the U.S. military that has historically brought instability to the region. American intervention has repeatedly shaken Latin American countries to the core, making some places inhabitable for many and forcing them to seek refuge, asylum, or a new beginning in the U.S. For example, there are the Central American unaccompanied minors that came into the country at crisis level numbers, which peaked at 57,496 in 2014. All in all, immigration and the cases of immigrants are neither simplistic nor clear as black and white, as many shades of gray lie within the complex intersections of each individual case.

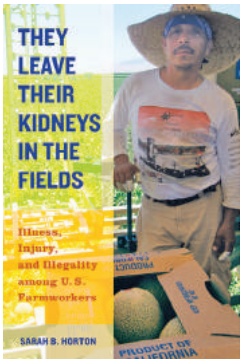
Zatz and Rodriguez shed light on the powers of the executive branch and its ability to prioritize immigration policies and practices, including prosecutorial discretion. Under Barack Obama's Presidency, prosecutorial discretion became significant as he responded aggressively to public safety concerns regarding immigration, while at the same time "easing the plight of the unauthorized living in the shadows" (p. 5). Amid the criticisms by liberals, who believed the policy was not broad enough to address immigration issues, and those by conservatives, who felt the policy served as temporary amnesty, U.S. Immigration and Customs Enforcement (ICE) used prosecutorial discretion to prioritize deportations. The policy was based on "positive and negative factors" that targeted those with criminal records while granting a pass to those without criminal records and with strong family ties in the U.S. In response to a congressional inability to pass immigration reform, the Obama administration, through a series of executive orders, extended prosecutorial discretion in the form of Deferred Action for Childhood Arrivals (DACA), allowing teenager and young adults meeting certain criteria to have legal presence and to work without fear of deportation.

The authors also address the obstacles that 11 million undocumented people face, including Dreamers, undocumented students seeking higher education, in seeking to have normal lives. Contrary to popular belief, undocumented families live in constant fear of deportation. Even undocumented parents with children who are citizens often forego applying for benefits their children qualify for as they dread any attention that may jeopardize their living situation. Zatz and Rodriguez give attention to the trauma and stress children face as the emotional toll of living under constant threat affects them deeply. Many families are challenged as the immigration statuses among their members include citizen, non-citizen, and resident alien. This creates a complex vulnerability for these families, especially when they are broken-up, as members face detention and or deportation. The intense fear created by the increase of deportations under the Obama administration has convinced some families to self-deport regardless of each family member's immigration status.

Still, without a real comprehensive immigration reform the problems remain. Despite President Obama's efforts to establish compassionate practices through executive orders, these "best practices" are currently on the verge of being completely wiped out by the new administration. With the nationalist wave that swept the country in the aftermath of the great economic recession, an anti-immigrant fervor has dominated the nation and given rise to "pro-American" sentiments, which more often than not are equated to whiteness.

Continued on page 19

They Leave their Kidneys in the Fields: Illness, Injury, and Illegality among U.S. Farmworkers



by Sarah Bronwen Horton. 2016. Oakland, CA: University of California Press.

Reviewed by Jean Kayitsinga

In *They Leave their Kidneys in the Fields*, Sarah Bronwen Horton brilliantly takes us into the melon and corn harvesting fields of California's Central Valley to understand the lives and everyday experiences of migrant farmworkers and why they experience death and suffer heatstroke and chronic diseases. This is an excellent book that illustrates the powerful influences of oppressive social and political structures on the lives of individuals, and in this case, migrant farmworkers.

Conceptually, Sarah argues that migrants' illnesses and deaths are a result of "structural vulnerability," that is, their social position within overlapping social and political structures. She highlights how the web of immigration and labor policies influence migrant farmworkers and exposes them to the risks of illness and death in California's fields and across the nation. Sarah also uses Bourdieu's concept of "habitus" to illustrate how migrant farmworkers' decisions are not only shaped by immediate social and political structures, but also emerge from their historical habitus that discourages them from taking breaks when they are ill or injured.

Methodologically, Sarah uses ethnographic and epidemiological research approaches. She highlights in great detail the perspectives of farmworkers and situates their heat illnesses and individual risk factors in broader social and political contexts, thereby complementing what is already known about heat illness from epidemiological studies.

Why have heat deaths continued among migrant farmworkers in Central Valley, California fields despite the state's protective regulations? Sarah indicates that heat deaths are portrayed as poor individual decision making such as deciding when to take a break and rehydrate. Yet, she reminds us that we need to take into consideration the larger contexts, in this case federal and state policies, which influence individual behaviors. Farmworkers' work behaviors cannot be separated from the immediate work and broader policy contexts that shape them. She argues that the very organization of industrial agriculture contributes to heat deaths. Not only does the hierarchical supervision of labor crews intensify the pressures on field hands, but its competitive structure also undermines their job security.

Sarah illustrates how field supervisors exploit and capitalize on men's pride in their labor capacity, encouraging them to press on despite their illnesses. She argues that the shame that ill fieldworkers feel at being sick is the embodied print of "symbolic violence." Men constitute the majority of fieldworkers and hence establish a norm of labor capacity to which all workers aspire. Gendered constructions of male prowess and female frailty are inscribed in the division of labor in melon harvesting. According to Sarah, men take pride in working in the most physically demanding and dangerous jobs whereas women fill less strenuous jobs that involve less exposure to the perils of the sun.

Historically, Mexicans and Salvadorans have had different paths of migration to the United States, which have been shaped by U.S. trade and foreign policies. For Mexicans, the strong demand for labor in the U.S. has been the main pull factor contributing to their migration to the U.S. to work in agricultural fields since the late 19th century. Programs such as the Bracero Program (1942-1964) and the North American Free Trade Agreement (NAFTA) (1994) also contributed to the rise of immigration by Mexicans to the U.S. to work on railroads and/or as agricultural laborers. By comparison, Salvadorans only began arriving in the U.S. in the late 1970s. They first came as economic migrants, in search of better livelihood opportunities, and then later as political refugees fleeing the El Salvador's civil war and political instability thereafter.

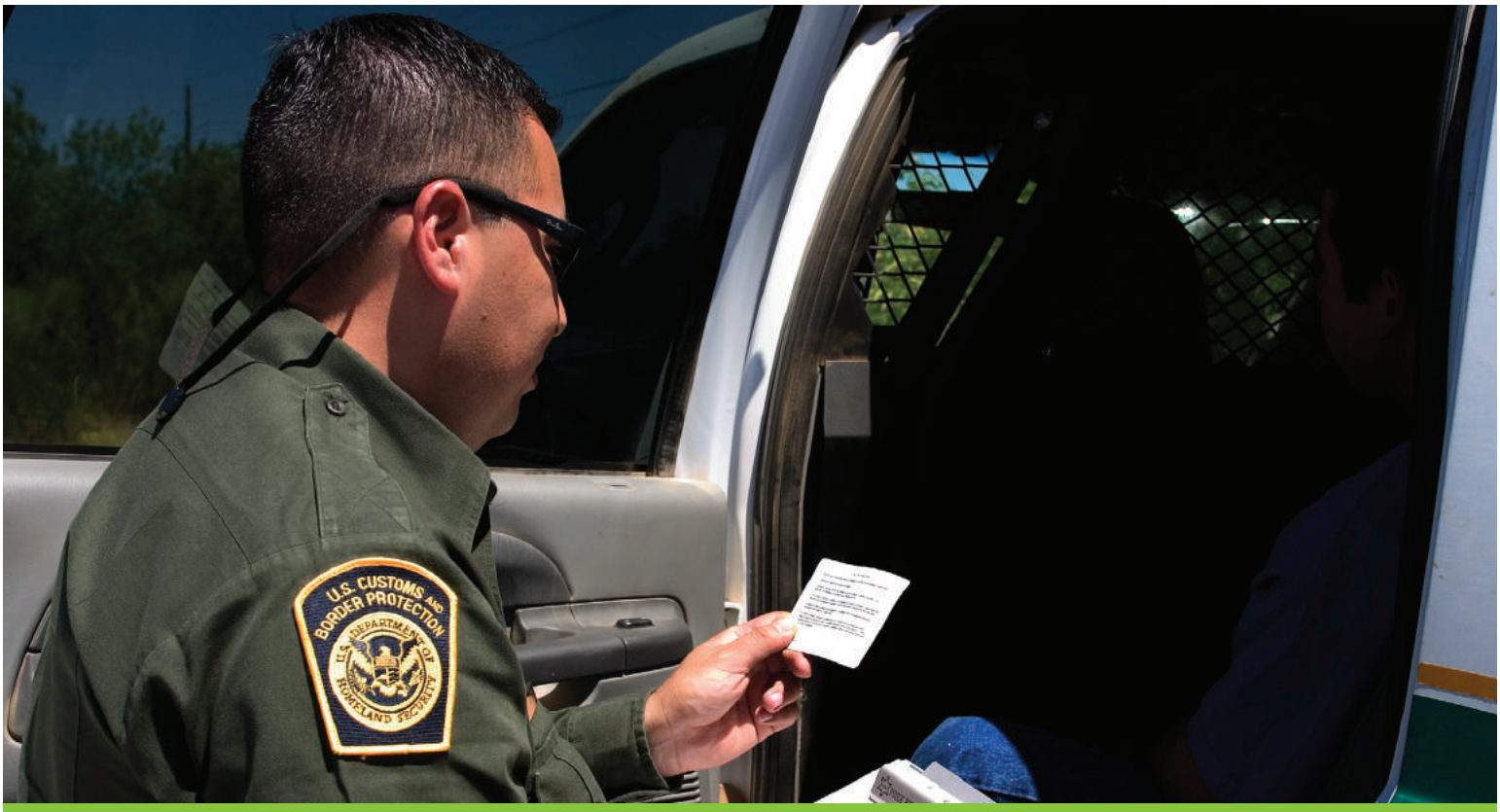
Growing up in rural environments, migrant men are socialized to work hard, become breadwinners for their families, and prefer and consider farm work as more dignified than working in other low-wage occupations. Once in the U.S., however, the hierarchy of supervision among the labor crews in California's fields, combined with the vulnerability of farmworkers, allows supervisors to impose productivity demands through abusive behaviors. Sarah indicates that the scarcity of jobs open to migrants, combined with migration debts and limited labor protections, push farmworkers to continue to work even when they are sick.

Sarah also shows that recent changes in immigration enforcement further deepen migrant workers' vulnerabilites at work. The convergence of immigration and criminal law systematically impedes migrants' long term incorporation. Recent federal and state laws increasingly cast undocumented migrants as criminals who undermine homeland security. Consequently, immigration enforcement has expanded from controlling the nation's border to policing its interior. The criminalization of migrants over the past two decades, according to Sarah, has rendered migrant farmworkers, especially undocumented migrants, more vulnerable to manipulation and coercion by employers.

In addition to work stress, migrants experience immigration stress which may cumulatively contribute to hypertension. Migrant farmworkers tend to suffer from hypertension at significantly higher rates than the general population. In California's Central Valley a legacy of racial segregation and a history of ICE raids make the threat of deportation a constant and menacing threat. These ICE raids have negative subjective and physiological effects on migrant farmworkers. The recent shifting of immigration enforcement functions to local authorities has heightened anxiety among all noncitizens.

Sarah argues that farmworkers' repeated exposures to heat stress may yield long-term kidney damage. Indeed, there is an epidemic of kidney disease among U.S. farmworkers remains undetected.

Continued on page 27



Expedited Removal: The Erosion of Due Process in the American Immigration System

Adriana C. Zambrano[1]

Despite the symbols and history that form the world's perception of the United States as a welcoming society, a closer look shows a long-standing tradition of rejection and hostility toward immigrants. When Irish Catholics came to the American East Coast escaping poverty and starvation in the mid-1800s, a largely Protestant America greeted them with claims that their religion and economic class rendered them unfit for citizenship. Similarly, Americans received Italians fleeing social and economic disturbances in the late 1800s with prejudice, exploitation and violence. At around the same time, an increase in trade with China and the California Gold Rush produced a large-scale migration of Chinese laborers to the West Coast. The government outright turned them away through the Chinese Exclusion Act of 1882, a pivotal document in the evolution of American immigration law that forced the Chinese already in the country to obtain a residence certificate within a year or be deported. The Act deemed any Chinese person, or person of Chinese descent, to be present in the country illegally unless they could affirmatively prove otherwise.

The Chinese American community promptly challenged the Exclusion Act in *Fong Yue Ting v. United States* (1893) – and lost. Supreme Court Justice Horace Gray reasoned for the majority on the bench that Chinese laborers, "so long as they are permitted by the Government of the United States to remain in the country," were entitled to Constitutional safeguards and to the protection of the laws. "But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws, and therefore remain subject to the power of Congress to expel them or to order them to be removed and deported from the country whenever, in its judgment, their removal is necessary or expedient for the public interest" (*Fong Yue Ting v. U.S.*, 1893). The modern conversation regarding due process for non-citizens in the United States began with the affirmation of a law that summarily rejected them. It continues to this day with the expansion of policies that seek to eliminate access to legal protections for non-citizens. In the previous administration, these policies were enacted under the guise of bartering enforcement for reform. In the current administration, reform in favor of immigrants is not even on the table.

On June 28, 2008, presidential candidate Senator Barack Obama, speaking at the National Association of Latino Elected

and Appointed Officials Annual Conference in Washington D.C., recognized the need for reform in order to get 12 million undocumented people "out of the shadows" and to "assert our values and reconcile our principles as a nation of immigrants and a nation of laws" (NA, 2008: Barack Obama on Immigration). His 2012 re-election, heavily fueled by the Latino vote, was immediately followed by a four-part legislative proposal for comprehensive immigration reform that prioritized enforcement (Slack, 2013). But all efforts to pass immigration reform through the legislature failed, even though the Congressional Budget Office estimated that the proposed bill would save $158 billion during the first decade of implementation, including the costs of securing the border, and an additional $700 billion in the following ten years (Congressional Budget Office, 2014).

The highlight of Obama's legacy in favor of immigrants is perhaps the creation of the Deferred Action for Childhood Arrivals (DACA) program through executive action, which prompted hundreds of thousands to come out of the proverbial shadows and register their identities with the Federal Government in exchange for access to work, education, and the temporary deferment of their removal. All the information collected through the DACA program is now in the hands of the new administration, which in November 2016 vowed to deport "probably 2 million" and possibly 3 million people who are in the country without proper documentation (Chapell, 2016). This essay explores the dangerous expansion of the expedited removal statute under the new administration and the two ways in which it erodes due process rights for immigrants: 1) the denial of judicial review and 2) the mandatory detention of vulnerable populations (women and children asylum-seekers).

The number of foreign-born noncitizens[2] that can be charged under the expedited removal statute has increased since it was created in 1996. It was purposely designed with the flexibility to reach large proportions of recent arrivals as well as immigrants who have formed ties with the United States. The statute hardly provided any administrative or judicial checks. In 2014, President Obama began to enforce the expedited removal statute to resume and expand the policy of family detention in hopes of detering the immigration of persons, particularly minors, seeking protection from extreme violence in El Salvador, Honduras, and Guatemala. The administration sought funding for up to 6,300 beds in detention facilities (Grassroots Leadership, 2016). Through the unrestrained implementation and expansion of this statute over the past two years, Obama manufactured a deportation machine through which the new administration can carry out its frightening plan to deport millions.

It is critical to highlight that the scheme of family detention disproportionately affects women and children from the Northern Triangle countries. Fathers with children are rarely ever detained. As of November 17, 2016, only mothers with children, and zero men, were held in the three functioning family detention centers in the United States: the South Texas Family Residential Center in Dilley, TX, the Karnes City Residential Center in Karnes City, TX, and the Berks County Residential Center in Leesport, PA (Author's Notes, 2016). Since then, this continues to be the case. Also noteworthy is the fact that family detention drives profits for the private prison industry, which has benefitted from robust contracts with the Federal Government. The for-profit private prison company GEO group operates the Karnes facility; Corrections Corporation of America (CCA), also privately run, operates Dilley; whereas Berks is operated by the County of Berks.

The fact that this profit tool was developed by an administration purporting to be sympathetic to the immigrant cause should make us question our identity as a country. If we were truly "a nation of immigrants and a nation of laws," we would not accept the obvious reasons for this shift away from the progress offered by Obama's initial campaign promises. On the contrary and as confirmed by recent events, such as the Executive Orders on immigration issued recently by President Trump, the United States is a nation of a large number of White nationalists who fear losing their American greatness to immigrants of color (Parker, 2014). Over the next few years, we are likely to see the leaders of this constituency use expedited removal, mandatory imprisonment for profit, and whatever other tools at their disposal to exclude and disempower immigrants, no matter how contrary to the constitution, to justice and to humanity.

History of Expedited Removal and Mandatory Detention for Asylum Seekers

The most important instrument that regulates the admission, removal and detention of non-citizens is the Immigration and Nationality Act (INA), first enacted in 1952. Before expedited removal became law, the INA provided arriving noncitizens with a hearing before an Immigration Judge to decide on the person's removal on grounds of inadmissibility and any possible defenses (Siskin & Wasem, 2005). At this hearing, the noncitizen could formally submit an application for asylum as a defense against removal (Siskin & Wasem, 2005). Under INA Section 101 (a) (42), a person can qualify for asylum if he or she has a reasonable fear of future persecution on the basis of one of five protected grounds (race, religion, nationality, membership in a particular social group, or political opinion).

Photo courtesy of U.S. Immigration and Customs Enforcement (ICE)

Each of the elements of this definition is extremely nuanced, outlined by decades of international law, domestic case law and administrative policy. Therefore, regular immigration court proceedings (known as 240 proceedings) were, and continue to be, subject to administrative review by the Board of Immigration Appeals (BIA), and a BIA decision is, in turn, subject to judicial review by the corresponding federal circuit court.

In response to a dramatic increase in arrivals of Cuban and Haitian asylum seekers to the South Florida shores in 1980, the government sought to curb the appeal of immigration to the United States without proper documents and, at the same time, reduce perceived abuses of the asylum process (Siskin & Wasem, 2005). Congress attempted several times over the years to enact legislation providing for the screening of asylum seekers without triggering the existing formal asylum process and its mechanisms for review.The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) articulated the expedited removal statute, or 235(b) proceedings. The statute strips the layers of review that ensure a fair decision on an asylum claim or even the contemplation of any other defense against removal.

Section 302 of IIRIRA revised the entirety of Section 235 of the INA. Its relevant provisions include that any foreign-born noncitizen, regardless of whether he or she arrived at a port of entry or was intercepted in international or United States waters is subject to the statute (INA Sec. 235 (a) (1)). Also, it provides that the Attorney General may decide and modify, *at any time and without review*, which classes of foreign-born noncitizens are subject to the statute, with extremely limited exceptions (INA Sec. 235 (b) (1) (A) (iii)). Further, it adds that an immigration officer may order the foreign-born noncitizen removed *without further hearing or review* unless he or she indicates an intention to apply for asylum or a fear of persecution (INA Sec. 235 (b) (1) (A) (i)). If so, the noncitizen is to be referred to an asylum officer for a "credible fear" interview ("CFI") (INA Sec. 235 (b) (1) (A) (ii). Finally, it directs that persons subject to these provisions be subject to mandatory detention *until a credible fear is established, or until removed* (INA Sec. 235 (b) (1) (B) (iii) (IV)). The unreviewable character of these provisions is emphasized and promoted in Section 11(c) of the January 25, 2017 Executive Order "Border Security and Immigration Enforcement Improvements."

The essence of due process is notice and a meaningful opportunity to be heard before being deprived of life, liberty or property. This becomes impossible when the law applied is vaguely discretionary and contains express provisions against review by a higher authority. This is precisely what the expedited removal statute does. The mandated deprivation of liberty is not only a due process violation in itself, but also an even larger obstacle in any effort to build and present a defense.

Constitutional Provisions, Flores and Castro

The Fifth Amendment provides that "[n]o person shall be … deprived of life, liberty, or property, without due process of law…" (U.S. Const. Amend. V). The Constitution makes no distinction regarding personhood based on immigration status. In *Wong Win v. United States*, the U.S. Supreme Court asserted that "all persons within the territory of the United States are entitled to the protection [of the Fifth Amendment] and … even aliens shall not be … deprived of life, liberty or property without due process of law" (1896). While the question of whether immigrants have Constitutional due process rights seems to have been settled in favor of immigrants by *Wong Win* over a century ago, it is still up to Congress and the administrative agencies to establish whatever process they consider is sufficiently appropriate. In the case of expedited removal, this power has resulted in a narrow mechanism for review that has, therefore, limited protections.

Due process rights for immigrants are at higher risk when the laws and regulations concerning immigrant rights are expressly designed to exclude the possibility of judicial review. The ongoing case *Castro v. Department of Homeland Security* deals with the issue of whether the courts have jurisdiction over expedited removal orders sustained by an improper screening mechanism that violates due process rights (2016). At the time of filing (November, 2015), the 29 adult and 35 children Petitioners had been subject to mandatory detention under the

expedited removal statute. They filed petitions for *habeas corpus* relief to have their cases independently reviewed by a federal court. The legal sources for a writ of habeas corpus are found in immigration case law and in Article I, Section 9, Clause 2 of the U.S. Constitution, or the Suspension Clause: "The Privileges of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion of Invasion the public Safety may require it" (U.S. Const.). Typically, habeas corpus relief is sought by prisoners challenging the legality of their detention, but it can be used by anyone who wants a restriction on their body reviewed by a court. The *Castro* petitioners were not seeking review over the validity of their detention at the time of filing. Instead, they sought access to the courts to review the validity of their expedited removal orders. So far, this access has been denied.

Judicial review protects due process guarantees, particularly for more vulnerable populations. For example, in January 1997, the class-wide lawsuit *Flores v. Meese* reached a settlement agreement, now known as the Flores Agreement. Only some of the stipulations of the agreement were codified, but its provisions still apply to the class of "[a]ll minors who are detained in the legal custody of the INS" (Flores Agreement, 1997, ¶10). The Flores Agreement "sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS" (Flores Agreement, 1997, ¶9). Immigration authorities must treat "all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors." (Flores Agreement, 1997, ¶11). The Flores Agreement continues to be an essential tool in challenging policies that deny constitutional due process rights to children. But the expedited removal statute has been used to circumvent the Flores protections to children through the scheme of family detention.

The trend is toward recognizing additional protections for those persons who are present within the country without authorization, but have more ties to the country, as opposed to those recently arriving to U.S. borders (Wasem, Lake, Seghetti, Monke, & Vina, 2004). But the statute as written could capture those who have been in the United States for up to two years regardless of the ties they have formed during that time. More troubling, current developments in both the Flores and the Castro cases reveal a callousness on the part of the government, a lack of consideration for the vulnerability of the persons involved, a stubbornness against protecting children from the arbitrariness and harm of prolonged detention, and an eagerness to punish those who dare to challenge the constitutionality of the expedited removal statute.

Due Process Implications of Discretionary Power and Vagueness Under 235 (b)

The courts acknowledge that granting the right of access to lawyers, the ultimate guardians of due process, would dismantle the expedited removal statute. On February 7, 2017, the Ninth Circuit ruled in *U.S. v. Peralta-Sanchez* that persons subject to expedited removal have no constitutional right to legal counsel, warning that the introduction of lawyers risks destroying the expedited nature of 235 (b) proceedings, increasing detention and legal costs to the government. This concession reveals that the statute is specifically designed to deny a meaningful opportunity for defense.

Discussions on the implementation of Section 302 of the IIRIRA, as recorded on the March 6, 1997 Federal Register, elaborate on the intent behind the wide discretion given to the Attorney General in determining who is a foreign-born noncitizen subject to the statute. The Attorney General has delegated this classification authority to the U.S. Customs and Border Protection (CBP) Commissioner through the regulations implementing 235 (b). A major purpose of the provision was to allow a rapid, effective and flexible response "to situations of mass influx or other exigencies." However, there is no concrete definition of a "mass influx" within the statute, its discussions, or anywhere else in codified law. A numerical reference is found in the *Flores* settlement agreement of 1997, which deals with federal custody of immigrant children. It defined an "influx of minors into the United States" as a time when over 130 minors are eligible for placement in federal custody (Aronson, 2015). This is an absurdly low threshold considering that, for example, in March 2016 alone, apprehensions of children with their families at the border reached 4,452, and those of unaccompanied children reached 4,240 (Krogstad, 2016).

Continued on page 20

H-2A and Farm Workers in the Nation's Agricultural Fields

Barry Lewis[1]

Immigration has a long history of regulation in the United States and Mexican workers have often been exempted from restrictive policies, with U.S. employers often relying on contract workers from Mexico. They even came to be exempted from the nation's first major restrictive law, the Immigration Act of 1917, with hundreds of thousands, if not millions, entering the U.S. to work in the nation's fields. They journeyed with the hope of one day landing a good job and establishing themselves to provide for their families both here and in their country of origin. Workers from Mexico and other Latin American countries have historically played key roles in the U.S. economy. Many came and continue to come as guest workers authorized to work only in agriculture or other manual-skilled jobs, and through this they have helped sustain the livelihoods of Americans. These workers continue to be an important component of the American economic fabric. Since the United States consistently relies on the labor of foreign workers, the government has established programs that allow these workers entry into the country to work temporarily.

Due to the labor shortages created by the Second World War, the United States partnered with Mexico to create the Bracero Program of 1942. The agreement mainly brought in guest workers to meet the labor shortages in the agricultural industry. The program guaranteed Mexican workers basic human rights, including food and adequate housing. In practice, however, participating workers were often abused and seen as disposable commodities, with Americans often developing hostile sentiments toward them. This dynamic created an environment that perpetuated continuing injustices against migrant workers.

Currently, the H-2A Program continues to allow guest workers to be employed in the nation's agricultural fields on a short-term basis. They come not only from Mexico, but also from other Latin American countries, as well as from Africa and Asia. Similar to issues faced by Mexican workers in the Bracero Program, these workers are often promised good pay and amenities, only to arrive in the U.S and find that things are not always as they were told. Given the lack of protection by the Department of Labor, some of these workers are subject to abuses and exploitation. Some have their visas held by third-party contractors, which forces them to labor in highly dependent situations where they work 12 or more hours a day, while others are provided inadequate housing, including living in small houses without heat or running water. This article highlights the

problems that are occuring within the agricultural guest worker program known as H-2A, as well as provides some possible solutions to remedy the situation.

History of Injustice

The Immigration Act of 1917 created the first major labor agreement between the United States and Mexico. Its origins came at a time when the United States was facing a mass labor shortage due to World War I and extensive industrialization of the economy. Thousands of rural families flocked to burgeoning metropolises hoping to obtain good paying jobs at emerging factories.

However, crops still needed to be planted, fertilized, harvested, processed, and sold to American consumers. Due to the labor shortages, the U.S. government was actively looking for other labor sources. The main intent of the Act was to use literacy as a requirement to restrict immigration into the country. The Act forbade contracted labor but allowed temporary workers to enter the country to meet the labor shortages, especially in agriculture. In 1921, guest workers were allowed to work in the nation's mines and railroads. Mexican workers stepped up to meet the nation's need for cheap labor, working in agriculture, mining, and the railroads. By the 1920's, Mexican workers had become the principal workforce on many southwestern farms, which propelled American reliance on Mexican labor after the war ended.

Due to the growing dependence on Mexican workers and given the shortage of American workers, the U.S. began to recruit Mexican laborers more heavily as a way to sustain the country's economy. With the exemptions provided in the Immigration Act of 1917, Mexican laborers did not have to pay a head tax or complete literacy requirements because they were not coming in as immigrants. This helped set two important precedents, the first being the relaxation of immigration laws when it was "convenient" to import Mexican guest workers and the other being the "necessity" to restrict their entrance to the country and exclude them when they were no longer needed.

Mexican labor was and still is viewed as expendable, or as something that can be utilized when needed, but discarded when it is no longer deemed useful. The work provided by these laborers has been highly beneficial not only for developing the American economy but, equally important, for bringing food from the agricultural fields to the tables of millions of Americans across the country. Despite their hard work, however, they are still treated and viewed as exploitable people with no real place in the United States. It is important to note that both countries contributed to the "unequal" treatment of Mexican workers, even if at times Mexico attempted to protect its workers.

The American and Mexican governments facilitated this mass importation of Mexican workers, which helped establish the gatekeeper border policy that has continually allowed workers from Mexico to enter the United States when the economy is booming and prevent their entrance when the economy is stagnating or declining. The institutionalization of Mexican workers as a flexible "reserve" labor pool for the benefit of American capitalism has led to their mass deportation time and time again. During periods of nativism, these workers are portrayed as nuisances and undesirables, though the United States economy continues to depend on them even as some Americans remain hostile toward them. As a result, the use of these workers has been normalized within a prevailing context that needs them, exploits them, and degrades them. It is from this cynical viewpoint that these workers are sent back to their home countries once their contracts end. Yet, the demand for Mexican labor endures despite the political backlashes against having Mexicans in the United States. In the 1950s, Operation Wetback, the second major forced deportation that heavily targeted Mexican communities across the country did not stop America's reliance on these contracted agricultural laborers. The Bracero Program continued until 1964, nearly two decades after the end of WWII.

Bracero Program

Like the Immigration Act of 1917, the Bracero Program "opened up" the border and allowed many workers temporary access into the United States. This program was essentially an indentured servitude program that allowed Mexican agricultural workers temporary access into the United States from 1942 through 1964. The Bracero Program created and helped sustain the historical and legal precedent to exploit Mexican and Central American workers in the United States. During its existence, it is estimated that around 4.6 million guest workers were employed in the U.S. The Immigration and Naturalization Service (INS) originated the program with help from the Department of Justice and the Department of Labor, and in cooperation with the Mexican government. The INS held the most power among all of these entities, as it held administrative discretion over *bracero* entries, departures, and desertions.

The mandate of the INS was to control illegal immigration without disrupting America's economic benefits of having a steady supply of farmworkers. The strategy of the INS was to convert "illegal" workers into legal *braceros*, which helped ensure farms would have sufficient farmhands to curtail their use of undocumented migrants. Even though this relationship was beneficial for both countries, the United States government had more power and ability to influence working conditions than did

the Mexican government. Mexico, though a willful participant in the Bracero Program, was rarely able to get concessions from the United States, as the U.S. government would override most provisions. This meant that when workers were sent to the United States and subjected to working long hours in poor working conditions while living in dilapidated housing, Mexico would advocate for better conditions for its workers, but the U.S. government was not always able to protect the guest workers.

Still, Mexico continued to provide workers to the States in order to benefit from the economic trickle-down effects the program provided. The program provided jobs for thousands of impoverished and unemployed Mexicans who in return sent a good portion of their wages back to Mexico, which helped feed its economy. Further, the recruitment of these workers was economically beneficial to Mexico as government officials were often bribed by aspiring *braceros*, which helped keep the government content with the program.

The American political push to incorporate Mexican workers into the U.S. economic fabric was approached with a nationalist ideology. As more and more rural populations moved to industrial areas, farmers that stayed in the rural areas began to advocate for better, cheaper labor for their fields. Farmers were allowed to rely on "waves" of newcomers, who had few other job prospects, to fill vacant farmworker positions.

Through the use of these workers, farm owner income increased as workers' wages remained at a constant low. Landowners greatly capitalized from the use of immigrant workers and their low wages, which was the basis for their tendency to resist immigration and labor policies that would raise worker wages. Therefore, the *bracero* era was marked by a lack of farm labor reforms that contributed to the continual use and exploitation of guest workers on the nation's fields. This was due to the growing demands of World War II that allowed government officials to overlook farm labor issues and place more emphasis on winning the war. Again, this period was marked by an increased nationalist rhetoric that prompted Americans across the nation to advocate for the continued use of "foreign" farm labor. Pleas by farmers to continue the use of *braceros* to "produce food to win the war" minimized farm labor reform efforts aimed at stopping the importation of Mexican workers, who were often used to break labor strikes by domestic farmworkers. Their pleas helped shape foreign labor policy between the United States and Mexico, as these interests helped sustain the use of Mexican workers on American farms and enlist Mexico's support in the war effort.

Economic push-pull factors led to the initial development of the Bracero Program, but they also resulted in a significant increase in immigration to the United States from countries south of the border, especially during the 1950s. It is well known that economic conditions were the main reason people sought to leave or return to their country. People are more likely to emigrate during periods of economic recession and least likely to do so when economic conditions are good. People are also more likely to move to countries with booming economies and less likely to go places where the economy is stagnant or declining. Therefore, immigration from Mexico to the United States should be understood in the context of the economic conditions of both countries.

Latino immigration to the United States increased throughout the second half of the last century, and U.S. farm labor dependence on these workers persisted. In fact, this dependence grew even stronger as farm owners sought hard-working, low-wage workers. In particular, the use of this program met the demands of farmers with labor-intensive crops, and influenced their crop production. According to Martin and Teitelbaum (2001):

> …Guest worker programs are virtual recipes for mutual dependence between employers and the migrants who work for them. Employers naturally grow to depend on the supply of low-wage and compliant labor, relaxing their domestic recruitment efforts and adjusting their production methods to take advantage of the cheap labor. History has shown that in agriculture… a pool of cheap workers give farm owner's strong incentives to expand the planting of labor-intensive crops rather than invest in mechanized labor-saving equipment and the crops suitable for it… farmers adapt in ways that ensure their continued need for workers willing to accept such low wages (p. 119).

Without the use of cheap foreign labor pools, farmers argued that their crops would be detrimentally impacted, which would have a devastating effect on the countless Americans that depended on them for their food.

The Bracero Program and the recruitment of foreign labor had other consequences on the United States as well. As mentioned before, farmers felt deeply and strongly about the foreign workers that they hired to work on their farms. Of course, in American capitalist culture, the power of a dollar and the ability to stretch it or do more with it continues to shape behavior. Additionally, this vast recruitment and hiring of Mexican and other foreign laborers meant greatly to the workers as well. Not

only were they enticed by the "American Dream," a promised land filled with "milk and honey," but they were also motivated to immigrate by the employment opportunities and economic stability that occurred in the post-war years. Therefore, Latin Americans began immigrating in increasing numbers to the U.S in pursuit of a better life for themselves and their families.

History of Farmworker Abuse

Historically, abuse and exploitation have been on-going issues for migrant workers. As mentioned before, farm owners are constantly recruiting migrant workers to harvest crops that will eventually be sold to the masses of consumers. Contrary to popular belief, farm owners often have to depend on undocumented immigrants to harvest their crops. Today, this is especially the case as American workers are not interested in performing farm work. This "underground" relationship is rife for abuse as undocumented farmworkers are vulnerable to deportation and consequently are not likely to raise concerns about labor issues. Ironically, farm owners are dependent on this type of workforce and at the same time know the hidden advantages of employing undocumented immigrant workers. They have to treat workers well enough for them to return, while at the same time tempted to exploit their vulnerability. Because of their dependency, these workers are easy to control and exploit, and they rarely resist the poor working and living conditions. Therefore, employers can fully determine the work conditions and pay, and these workers must either accept these conditions or risk going without work in a foreign land.

Political and economic reasons motivate the treatment of these workers and whether or not they are abused. Their labor definitely contributes to farm production and profits, and provides low cost products to Americans. However, instead of passing legislation that would protect these valuable workers, the U.S. government ignores them and leaves them subject to deportation and to potential abuses by employers. This puts them and farm production at risk, thereby jeopardizing the nation's food systems. Due to their powerless status, migrant workers often have no choice but to accept abuses within the industry in order to receive their meager pay. This is especially the case when farm labor is plentiful, as has been the case at different points in time. Although there have been strike efforts on the nation's farms by migrant workers since at least the 1930s, most were not able to get unionized or refused to unionize due to the fear of losing their job to another willing worker. Further, the success of their strikes were low due to the fact that *braceros* were used as strikebreakers in the 1940s and 1950s.

H-2A Workers

The Immigration Reform and Control Act of 1986 created the program commonly referred to as the H-2A program, which allows employers to bring agricultural workers into the country on a temporary, nonimmigrant status. Today the recruitment of H-2A workers is often done by third-parties who often abuse workers by charging prohibited fees and providing inaccurate or insufficient information about jobs. This can include the inflation of wages and benefits. Additionally, some third-party recruiters have no commitment to provide what they list in their recruitment brochures. These workers often work alongside undocumented workers, who like themselves, are subject to abuses. Economic benefits resulting from reliable, low-wage foreign labor provides farm owners with incentives to continue to hire H-2A workers. Unfortunately, because the Department of Labor lacks the ability to ensure protections for H-2A workers, there have been many instances in which third-party recruiters abuse the certification process needed to validate the need for foreign labor. Further, the Department of Labor is seemingly unable to process applications in a timely manner. Farm owners dislike the process, because it is slow. On the flip side of that, however, is the incentive to shift from domestic to foreign workers to have a stable labor force. Sometimes this can result in farm owners adding unnecessary and strenuous requirements in job announcements to discourage the local labor force and thereby construct the appearance of a labor shortage.

Farm labor is very tedious, time consuming and physically intensive. In fact, according to Holley (2001), farm work is constantly ranked as one of the most dangerous occupations within the U.S., second only to mining and construction. True as this may be, however, neither farm owners nor the American government have put sufficient safeguards in place that would guarantee the protection of the farmworkers. For example, "exposure to pesticides is common in the fields, yet little is done to protect farmworkers from those hazards" (Holley, 2001:578).

Some would argue that this guest worker program is akin to slavery, one of America's worst legacies known worldwide.

Continued on page 16

New Faces

Dr. Marcelo E. Siles is a Research Specialist at JSRI. He has extensive experience in higher education as an administrator and as a researcher. His previous posts include Executive Director of International Programs at Old Dominion University, Dean/ Executive Director of International Programs at Northern Michigan University, and as Co-Director of the Social Capital Initiative at Michigan State University. He received his Ph.D. in Agricultural Economics from MSU.

David Solis is an undergraduate student at Michigan State University (MSU) pursing a degree in civil engineering. After graduating, he plans on beginning the Master's program in civil engineering at MSU. He is from the small rural town of Monte Alto, Texas and plans to stay in Michigan to work for the Michigan Department of Transportation. During his free time, he enjoys going to the gym, playing soccer, and spending time with friends.

Olivia Sanchez del Pozo Clarke is a junior at MSU studying biotechnology and biochemistry. She is also pursuing a minor in pharmacology and toxicology. Olivia was born in Malaga, Spain and moved to Norton Shores, Michigan in 2013. In her free time, she enjoys running cross country, skiing, travelling, and going to concerts. After college, her goal is to enroll in a graduate program and study biomedical engineering.

Kourtia Munson is an undergraduate student at Michigan State University majoring in Social Work and taking courses in the pre-med track. She is from Detroit, Michigan and plans to move out of state following graduation to pursue a career in medicine. When not working or studying she is an active member on MSU Urban Dreams Hip-Hop dance team, and she enjoys watching movies on Netflix.

Second Annual UOE Chili Cook-Off

University Outreach and Engagement (UOE) held its 2nd Annual Chili Cook-off on January 20, 2017. Debbie Stoddard and Beth Prince organized the event that brought UOE units together for a friendly cooking competition. Faculty and staff members sampled several chilis and enjoyed desserts while taking advantage of the opportunity to socialize with colleagues from different units. All of the entries were numbered and judged by "consumers" who placed the number of their top selection in a container with the corresponding number. The top three contestants received ribbons, wooden spoons, and, of course, the privilege of bragging rights. For the second year running, the Julian Samora Research Institute's chili entry received the top votes, as its barbeque and brisket style chili was the palate favorite. Other contestants stuck to the traditional style chili while others experimented with lamb and chicken chili recipes. One entry, a runner-up, was infused with beer during the cooking process. The event was a fun-filled gathering that brought social and gastronomic joy to all who participated.

Éxito Educativo: A Pathway for Latina/o Success in Higher Education

After more than a year of planning and program design, the Julian Samora Research Institute (JSRI) launched a pilot version of Éxito Educativo, an after-school, bilingual-bicultural program that brings Latina/o high school students and their parents together to learn about the requirements for high school graduation and the pathways to college. Éxito Educativo provides information on the college application and selection process, as well as on the different sources of financial support available to cover the costs of a college education. The program consists of six biweekly modules, conducted by certified facilitators, with the overall objective of making higher education a possibility that is achievable by all participants. Each module emphasizes a particular area of information that is critical for the successful transition by students from high school to a college or a university.

The Julian Samora Research Institute at Michigan State University partnered with Lansing Public School District, Capital Area College Access Network (CACAN), Lansing Promise, Lansing Community College, and MI ALMA, to pilot Éxito Educativo with a cohort of students and their parents in the Lansing School District. Éxito Educativo is designed to meet the information needs of Spanish-speaking families, whether the students are native- or foreign-born. Facilitators must complete a 16-hour training program to become certified. Two cohorts of facilitators have been certified which included persons from Lansing, Grand Rapids, and Ann Arbor.

Education is an important priority for Latina/o families, even if many are unable to overcome the many obstacles associated with poverty and cultural differences. The educational needs of Latinos are alarming. According to the latest studies by the PEW Research Center, Latinos have one of the highest high school dropout rates (12%) in the country, with the rates being lower for White Americans (5%) and African Americans (7%). At the same time, only 15% of Latinos between the ages of 25 to 29 have obtained a Bachelor's degree or higher. By comparison, 41% of White Americans and 22% of African Americans in the same age group have obtained a Bachelor's degree or higher. Still, 83% of Latino voters in 2016 cited education as one of their top issues of interest in regards to how they would cast their vote.

Éxito Educativo is designed to meet information and knowledge needs and to promote higher educational aspirations and college matriculation rates among Latinas/o students. The program provides participants with interactive sessions in which they learn about the benefits of a college education, the importance of family communication, the importance of financial planning, sources of financial aid, the application for admission cycles, and the structure of the U.S. education system. Communication is key and facilitators establish an inclusive environment that encourages parents to open up and raise important questions that are vital to the educational success of their children.

The Fall 2016 Lansing cohort consisted of seventeen families that attended sessions at Gardner Middle School. Jonathan Rosewood, CACAN, and Dr. Juan Coronado, JSRI, served as the lead program facilitators with support from Dr. Rubén Martinez. Dr. George Peña, the Lansing School District Liaison, represented the district and coordinated IT services and program incentives.

Éxito Educativo is hosting its second Lansing cohort this semester and has extended the program to the Grand Rapids area where it is being piloted at San Juan Diego Academy by a team of certified facilitators from the Grand Rapids area. Nationally, similar programs targeting Latino families are being launched. The educational needs of Latinas/os are evident as the largest ethnic minority group in the country and the most "unconnected" to societal institutions in the U.S. The Julian Samora Research Institute plans to continue bridging the gaps that persist in Latino communities and continue to expand the reach of Éxito Educativo. The aim is to have the program implemented in communities throughout Michigan and the Midwest.

H-2A and Farm Workers in the Nation's Agricultural Fields

Continued from page 13

Though slavery was abolished in 1865, the working conditions many guest workers endure are problematic and the program is seen by some as a form of modern-day slavery. According to Guerra (2004),

> The injustices that persist today in agriculture 'have become ingrained in its very structure because of discrimination and greed, due in large part to the control of agricultural power structures increasingly centered in large corporations.' The greed that motivates these corporations and the agricultural industry in the United States has its roots in slavery… The United States has allowed agricultural employers to exploit farmworkers throughout its history… farmworkers are excluded from many protections that are commonly enjoyed by other workers (p. 185).

To be fair, the United States has worked to provide these workers with basic rights. For example, the Fair Labor Standards Act (FLSA) has been extended to migrant workers to help ensure that they have safe working conditions, but they are exempted from minimum wage and overtime pay. On paper, FLSA coverage looks good as it seemingly allows these workers an opportunity to pursue the "American Dream" while working the fields, but that is not necessarily the case. Employers have been known to pay migrant workers piece rates in which the earnings do not even amount to the minimum hourly wage. Piece rates create a gray area in which a "piece" may benefit employers, such as requiring buckets of blueberries to be filled above the brim.

When some workers become aware that their wages are not what they were promised, they seldom pursue legal action. Granted, these workers often feel powerless and are conscious of their vulnerable status in the country, which may include immigration status, ethnicity, culture, and language. As the U.S. has provided legal measures to protect these workers, whether domestic or H-2A, some employers do not want them to have contact with legal services. This serves to empower the farm owner and further disempowers the worker. Further, farm owners are often members of grower associations and other organizations that support them by lobbying on their behalf.

Unlike domestic workers that are allowed the right to protest or file lawsuits against an employer who abuses them, guest workers, like undocumented workers, are not positioned to do so despite the protections provided them by law. As a result, these workers are often forced to deal silently with abuses and continue to work in order to get paid.

Another aspect of migrant worker abuse comes in the form of visa confiscation by third party recruiters. When a worker is recruited and sent to the States to work, they are required to have a visa and keep it at all times. This, of course, makes good sense as numerous people are deported daily due to not having proper documentation. Having their visas held by another, or having their money held by another coerces guest workers into complying with the demands of whoever has that control. That is, if they were promised to make $11.00 an hour at a farm, but actually get $5.00, workers are not likely to seek outside assistance.

Additionally, these workers may also fear retribution by the labor contractors or the employers, and time away from work equals lack of pay that will further harm their families back home. For example, according to Carr (2010),

> … Many employers exploit the ensuing worker vulnerabilities. For example… twenty guest workers from Thailand claim they paid $11,000 each to recruiters who falsely promised them three years of guaranteed agricultural work at $8.24 per hour. Upon arrival, worker' passports and other documents were confiscated, they were forced to live in squalid conditions without potable water, and they were never paid for significant amounts of work… the employer confiscated plaintiffs' passports… restricted plaintiffs' travel and communication… deprived plaintiffs' emergency medical care… and generally perpetrated a campaign of coercion and fraud designed to keep plaintiffs intimidated

and unable to leave (p. 407).

This is not an isolated incident. In fact, since employers are not subjected to much official oversight, this problem occurs on several farms across the country. Hundreds, maybe thousands, of migrant and H-2A workers are subjected to abuses on a daily basis, and these abuses are seldom reported not only due to language barriers but also because these workers tend to be invisible to the public.

Basically, Americans tend to hold a neoliberal perspective that blames the victims, whether they are H-2A workers who "knew" what they were coming here for or they are undocumented farmworkers, who are blamed for "taking jobs away from Americans." This occurs despite the fact that Americans are not lining up to harvest crops or milk cows. According to Yeoman (2001), "Although the federal government oversees wages and working conditions, farmers often mistreat H-2A workers without fear of being penalized. A six-month investigation of the program by *Mother Jones* reveals widespread complaints that growers have threatened workers at gunpoint, refused them water in the fields, housed them in crumbling rat-infested buildings where sewage bubbles up through the drains, and denied them medical care after exposing them to pesticides" (p. 42).

Except for housing and transportation, H-2A workers have to not only take care of themselves while in in this country (pay for food, pay bills, and send money back home to families, among other costs), but some also pay recruiters in order to come to this country as guest workers. This places these workers in a bind, as they are required to cover all of these costs (some of them prohibited by law) on their meager wages. According to Guerra (2004), "Regularly, workers arrive to find that they will have to provide food and basic necessities for themselves in the first days or weeks of their employment. Many have already used up the money they borrowed to get to the United States to pay recruitment and visa fees and other travel expenses. They are forced to borrow money from the grower, starting a cycle of debt and unlawful deductions from their pay" (p. 205).

In addition, guest workers are forced to navigate a land that is not familiar to them and to deal with people that look down upon them or mistreat them due to language barriers, appearance, and their socioeconomic status, not to mention the pervasive racism that is part of this society. "Like African slaves in early America, H-2A workers from the same family or village in Mexico are usually placed on different farms and are separated by large distances. This exacerbates the workers' lack of connection with the outside world, leaving them dependent on their employer for housing, meals or groceries, or transportation

to banks, to churches, to obtain social or medical services, or to make phone calls to their families in Mexico" (Guerra, 2004:206).

Clearly, the greed that motivated Americans back during slavery to disenfranchise, abuse, and discard black people operates today. Recruiters and farm owners disempower immigrant and H-2A workers while making them dependent in order to benefit from their labor, and then they send them back to their countries of origin. Likewise, Guerra (2004) points out that in order for slave owners to keep their wealth and power, they had to develop a system of physical and psychological control to maintain their labor supply.

Today, the types of controls employers use vary. Workers continue to detail countless horror stories about the abuses they have experienced on farms and in surrounding communities throughout the nation. That is, migrant and H-2A workers face a plethora of abuses and injustices on a daily basis because of the color of their skin and their country of origin. In many instances they are viewed as subhuman. According to Guerra (2004),

> Since H-2A workers do not usually have access to their own transportation, they may have to walk miles from their isolated camp to the nearest convenience store… to take care of necessities. H-2A workers are often assaulted along highways and roads by locals who know that Mexican farmworkers walk with pockets full of money to stores to wire their earnings home to their families in Mexico. H-2A camps have also been the target of break-ins and robberies. Growers, too, rob H-2A workers of their deserved earnings by cheating on work records and 'shaving off' hours (p. 206).

These injustices are clearly huge problems that have detrimental effects on countless guest workers in America.

Not only do some of these workers have to deal with the psychological impact of the abuses they face at the hands of recruiters, their employers, and hostile community members, they also have to deal with the physical harm that comes with

the work that they perform. If the physical abuse does not come directly from the hands of their employer, it may come from their negligence to provide workers with safe working conditions, including regular exposure to toxic pesticides and other dangerous chemicals. Not only this, but workers also have to labor in the fields for hours on end, with some of them unable to take water breaks. The physical toll this type of work has on a body can be very dangerous and the lack of concern for their health on the part of some employers makes it much worse. There is a clear need to ensure that the protections provided by this program are secured by the Department of Labor. Granted, American families benefit from the work performed by these workers on a daily basis when they enjoy their dinners, but the misery of these workers is not evident or known to them. There must be real changes made with this program in order to eliminate the abuses these workers face daily as guest workers in our country.

Solutions to the Problem

Though these problems have been ongoing and although the United States government has taken measures to protect migrant and H-2A workers, there is much more that can be done to ensure the fair treatment, safety, and pay of these workers. One of the main solutions has to come from the legislature, which must fund the Department of Labor at levels where it can have the necessary personnel to ensure that agricultural employers meet their contractual obligations to H-2A workers, adequately enforce protections, screen employer requests for guest workers, and share data on violators with other agencies. If the United States ensures better enforcement of legal protections for these workers with the guarantee that their voices would be heard and that there would be consequences for their abusers, this would equate to real change within the H-2A program.

Another solution could come from employers who should invest in their workers prior to their arrival to ensure that they have the facilities to provide adequate housing that allows for healthy living conditions. They can also invest in production processes that provide safe working conditions for their workers. The Department of Labor should be vigilant in ensuring that third parties are not exploiting guest workers by charging illegal recruitment fees and forcing these workers into debt bondage. Additionally, employers should do their due diligence before entering into agreements with third party recruiters to ensure that they are not empowering dishonest parties. This would minimize the exploitation of workers, and as employers communicate how important they are to farm operations, workers would feel more empowered to speak up when a third party recruiter commits

injustices. Farmers could also offer amenities to their workers knowing that their well-being translates into more productive workers and more efficient operations.

Another measure that can be taken to address the problem of abuse across American farms is to provide better access to legal assistance to these workers regardless of their immigration status. It has been noted that employers often dissuade workers from seeking legal advice and in some cases employers remove workers' visas to control them. These workers live with a sense of fear as they are in a new country that speaks a different language and operates differently from their own. It is known to workers that if they are viewed as making trouble they could be sent back to their countries of origin without completing their terms of employment. As a result, when workers face abuses, they are not likely to seek resolutions as they know the consequences if they speak up.

Lawyers, legal groups, and legislative advocacy groups can also play major roles in addressing the abuses migrant and H-2A workers face daily. The majority of migrant workers shy away from any contact with legal services for fear that their H-2A or immigration status will be questioned and result in their removal. In order to counter this vulnerability, it is the responsibility of these support groups to make their presence known to migrant workers on farms across the United States. This can come in the forms of camp visits and pamphlets in the native language of the workers that are distributed upon their arrival. These pamphlets should detail their rights and responsibilities as workers and provide agency contact information so that workers can reach out in case of any trouble.

It is important that these groups be strategic in their approaches to address the abuse of these workers. This includes application of the law in support of both H-2A and undocumented workers. Vivian (2005) states that

> "… scholars have suggested the creation of a direct damage claim for violations of the Thirteenth Amendment's prohibition

> on slavery… A claim under the Thirteenth Amendment functions similarly to an ordinary tort claim. Both actions are concerned with the prohibition of undesirable conduct and the desire to compensate an injured person. A constitutional claim for damages under the Thirteenth Amendment is an appropriate action in the case of forced labor because it analogizes an employer's actions to involuntary solitude, debt bondage, or slavery. Therefore, the availability of a constitutional remedy would contain a certain degree of moral significance and would validate the worth and importance of the undocumented worker bringing the claim" (p. 211).

Several other changes must be made in this regard to hold third party recruiters and employers accountable for mistreating and exploiting these workers. It would require members of the legislature to look deep within themselves and create new legislation that protects the human and labor rights of all workers in this country, whether they are temporary or undocumented. The law must be made to hold these parties liable for abuses they perpetrate on vulnerable workers. Legislators should no longer be able to willfully blind themselves to these injustices, and the Department of Labor must be more diligent in enforcing the legal protections afforded to these workers. Legislators must alter their existing views and knowledge on these issues and pass legislation providing punitive measures for those who would violate their contractual obligations to H-2A workers and thereby hold them accountable for the injustices that occur within the program.

There is a huge need to assist migrant farm workers across the country and there is much more that can be done to guarantee the rights of these workers that come to work on farms across the country. Americans must no longer view these workers and the work they perform as mere commodities. In order to truly claim to be the land of the free, legislators and farm employers across the country must be held accountable for the poor treatment and exploitation of guest and migrant agricultural workers. The American government must hold recruiters and employers accountable in accordance with existing policies put in place to protect migrant workers, whether documented or not. Americans must abandon their elitist nationalist ideology that dehumanizes these workers and appreciate the benefits that they and the country have reaped over the past century from their labor. The lives of these workers matter as much as the food they produce, and they must be protected as we seek to achieve a higher civilization.

Endnotes

[1]Barry Lewis is completing the requirements for the Masters of Social Work at MSU, and plans to earn a doctorate degree in Social Work. He is currently a research assistant at JSRI.

References

Carr, E. (2010). Search for a round peg: seeking a remedy for recruitment abuses in U.S. guest worker program. *Columbia Journal of Law and Social Problems*, 43, 399-446.

Guerra, L. (2004). Modern day servitude: a look at the H-2A program's purposes, regulations and realities. *The Vermont Law Review*, 29, 185-214.

Holley, M. (2001). Disadvantaged by design: how the law inhibits agricultural guest workers from enforcing their rights. *Hofstra Labor and Employment Law Journal*, 18, 575-623.

Martin, P., & Teitelbaum, M. (2001). The mirage of Mexican guest workers. *Journal of Foreign Affairs*, 6, 117-131.

Vivian, S.L. (2005). Be our guest: a review of the legal and regulatory history of U.S. immigration policy toward Mexico and recommendations for combating employer exploitation of nonimmigrant and undocumented workers. *Seton Hall Legislative Journal*, 30, 189-215.

Yeoman, B. (2001). Silence in the Fields. *Mother Jones*. Accessible on-line at: http://www.motherjones.com/politics/2001/01/silence-fields.

Dreams and Nightmares: Immigration Policy, Youth, and Families

Continued from page 4

The election of Donald Trump to the U.S. Presidency is a reflection of this sentiment as his supporters were enthralled with his plans to build a wall to deter "illegal" immigration from south of the border. Using a nationalist platform that used fear as a driving force while rejecting the constructive changes and the economic contributions of the Latin American immigrants, he was able to mobilize a near-majority popular electorate to support him. Trump, the candidate, presented a very simplistic picture of immigration that cast those who are undocumented as criminals, drug dealers, rapists, and gang bangers. With this perspective, the nightmares of deportation that Zatz and Rodriguez write about are becoming more and more real, and the dreams for citizenship are quickly vanishing. *Dreams and Nightmares: Immigration Policy, Youth, and Families* is great addition to the body of knowledge on the complexities of the nation's immigration problems, and it captures a brief moment in history that, given the recent changes in administrations, can serve as a guide in emphasizing humanitarian and compassionate values in the midst of the current aggressive yet misguided approach to immigration challenges created by the trade policies of the United States.

The Erosion of Due Process in the American Immigration System: Expedited Removal

Continued from page 9

The current implementation of the expedited removal statute has been justified by a supposed mass influx of unauthorized Central Americans into the United States, but this rationale fails to take into account the net number of unauthorized persons within the country. According to the Pew Research Center, the overall undocumented population in the United States has remained stable in recent years because the number of new unauthorized immigrants is about the same as the number who are removed, obtain legal immigration documents, leave, or die (Passel, 2016). Further, the Obama administration is known for its record high number of deportations compared to enforcement statistics of previous administrations. It is reported that, as of June 2016, Obama had formally removed around 2.4 million people from the country. As long as the definition of influx is not clear, it could be used as a justification for an expansion of the expedited removal statue at any time, even if the net unauthorized immigration rates are negative or below zero.

The expedited removal statute provides limited guidance as to when it should apply. Instead, the law provides three specific instances when it should *not apply*. It should not apply: 1) to those who have been admitted or paroled, 2) those continuously present in the United States for a period of two years or longer preceding the determination of inadmissibility (INA Sec. 235 (b) (1) (A) (iii) (II)), and 3) those who have arrived by aircraft at a port of entry and are native or citizens of a country in the Western Hemisphere without full diplomatic relations (INA Sec. 235 (b) (1) (F)). No such country exists. Since the United States announced the reinstatement of diplomatic relationships with Cuba, and the end of the *wet foot-dry foot* policy, unauthorized arriving Cubans are also subject to expedited removal. This means that 235 (b) could potentially apply to anyone who is deemed inadmissible and cannot show uninterrupted physical presence in the U.S. for two years. The law as written gives the government power to put even the most vulnerable people in these proceedings, mandate their detention and deport them without a fair hearing. It is already applied to women and children asylum seekers without restraint. It could potentially include victims of crimes in the United States, human trafficking victims, persons with disabilities, persons with other potential immigration relief, such as pending family or employment petitions, or Special Immigrant Juvenile Status under varying state laws.

The development of the regulations is toward the exclusion of broader classes of foreign-born noncitizens. Initially, INS only applied 235(b) to persons who presented at a port of entry, or "arriving aliens" (Siskin & Wasem, 2005). On November 13, 2002, INS announced that certain foreign-born noncitizens arriving by sea, and not just at a port of entry, were to be placed in expedited removal proceedings unless admitted or paroled (Siskin & Wasem, 2005). Then, in August 2004, the Department of Homeland Security announced the expansion of expedited removal to include noncitizens present in the U.S. without authorization who are encountered by an immigration officer within 100 air miles of the U.S. international land border and who cannot prove that they have been physically present in the United States continuously for the 14-day period immediately preceding the date of encounter (Siskin & Wasem, 2005). The purpose of this expansion was to apply the statute to border patrol areas along the southwestern and northern borders (Siskin & Wasem, 2005). This gradual increase in reach of the expedited removal statute is not a change in the law, but a change in policy. The January 25, 2017 Executive Order on border security and enforcement boosts this change of policy by calling for a plain language reading of 235(b), which could get rid of any regulations that impose geographical and temporal limits on its implementation.

The Initial Inspection by an Immigration (CBP) Officer and Claiming Fear

It is relatively easy to become an immigration officer with the capacity to trigger 235 (b) when a person arrives at the border. Besides qualifications related to criminal, financial and employment history, an applicant must have 3 years of "full-time general experience that demonstrates the ability to meet and deal with people and the ability to learn and apply a body of facts" (U.S. Customs and Border Protection, 2014). In the alternative, "4 years of study in any field leading to a bachelor's degree in an accredited college or university is fully qualifying" (U.S. Customs and Border Protection, 2014). No formal legal education, no previous experience in immigration proceedings, and no training in trauma-informed interviewing are required. Yet, so much power is vested upon a CBP officer to make serious legal determinations at the time of inspection that could deny the rights of vulnerable people seeking refuge at the border. If the person manages to properly articulate an intention to apply for asylum or a fear of persecution at the time of inspection, then they are referred to an asylum officer for a credible fear interview (CFI). But the CBP officer still has the power to trigger expedited removal proceedings, like a glue trap that keeps noncitizens detained until a credible fear is established, or until removal, with

minimal due process rights.

So far, expedited removal undermines due process guarantees in at least two ways. First, it transfers the power to determine whether a person has a well-founded fear of persecution from the immigration court to a much less qualified officer (CLINIC). Second, unless the person affirmatively avails him or herself by making a satisfactory fear claim, they run the risk of getting excluded from the process completely (CLINIC). Heavily persecuted and traumatized persons, children, persons with disabilities or persons with communication barriers, such as rare language speakers or illiterate persons, are much less likely to understand and trust the process enough to affirmatively avail themselves to it.

The Credible Fear Interview

Under INA Sec. 235 (b) (1) (A) a person who claims a fear of return is subsequently interviewed by an asylum officer who evaluates whether or not that person has a credible fear of persecution or torture. Under the same section, credible fear of persecution means that there is a "significant possibility" that the applicant could establish in a full asylum hearing that their race, religion, nationality, membership in a particular social group or political opinion is at least one central reason for the harm suffered (USCIS, 2006). This legal connection is called nexus. This does not mean, however, that a person must present an asylum case at this time. The Credible Fear Interview is simply a screening as to whether there would be a "significant possibility" of prevailing at an asylum hearing. The "significant possibility" standard is fairly low – lower than the "preponderance of the evidence," or the "more likely than not" standard. The officer is the one charged with eliciting testimony and making a determination based on the correct standard (USCIS, 2006).

If no fear of persecution is established, then the asylum officer will determine whether or not the person has a credible fear of torture. Torture is defined by Article 1 of the UN Convention Against Torture (CAT) as

> …any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating him or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (UN General Assembly, 1984).

Photo courtesy of U.S. Immigration and Customs Enforcement (ICE)

The credible fear standard was designed to protect people against removal "under circumstances that would violate Article 3 of the [CAT]" (Federal Register, Vol. 64, No. 8479, 1999). This is critical because this portion of the Convention protects against *refoulement*, or returning a person to a country where they would be at risk of torture, taking into account whether that country presents a pattern of human rights violations (UN General Assembly, 1984).

The 2006 Asylum Officer Basic Training Handbook describes the credible fear process as a net meant to catch "all potential refugees and individuals who would be subject to torture if returned to their country of feared persecution or harm" (USCIS, 2006, p. 11). Quoting from the regulations as articulated on the Federal Register by the Department of Justice, officers are trained to understand the nature of the CFI standard as

> 'a low threshold of proof of potential entitlement to asylum; many aliens who have passed the credible fear standard will not ultimately be granted asylum.' The purpose of the credible fear screening is to ensure access to a full hearing for all individuals who qualify under the standard (USCIS, 2006, p. 11).

A "full hearing" means that the person will be placed in regular removal proceedings before an immigration judge under Section 240 of the INA. This also means that the person is not subject to mandatory detention, has the opportunity to find an attorney to represent them, gather evidence and testimony in support of their claim and prepare their case in a safe, protected setting. In addition, a person in regular 240 proceedings is also able to present other forms of immigration relief.

If the asylum officer does not follow the guidelines for

a proper credible fear interview, it can lead to the wrongful *refoulement* of vulnerable families. In current practice, credible fear proceedings are often inconsistent, interviews are not sensitive to trauma or are not culturally informed, and so they fail to elicit relevant testimony.[3] For example, it is common to see cases in which a family is separated at the border or they arrive at different times, and mother and father present identical claims in separate credible fear interviews. The father will be found to have a credible fear, be released and placed in regular 240 removal proceedings, whereas the mother and the child will be found not to have a credible fear, *based on the same facts* (Author's Notes, 2016). In this case, mother and child will be subject to mandatory detention and possibly removed even if the father attaches mother and child to his asylum claim because the *only* way out of an expedited removal order is through a positive credible fear finding. In other cases, the officer will outright ignore information that could establish a fear of persecution or torture. For example, even though domestic violence was recognized by the Board of Immigration Appeals (BIA) as a basis for asylum in its ruling in *Matter of ARCG*, officers often fail to recognize the red flags that hint that a person is minimizing her experience as a result of trauma caused by domestic violence. The following excerpt of a CFI is an example:

> Q: Has anyone, including a member of your family, a romantic partner, a friend, a neighbor, a stranger, any person at all, ever harmed you for any reason?
>
> A: The father of my second daughter; we did have problems because he would drink. He hit me a little but it was mostly with words. He was drunk.
>
> Q: And who threatened you? (Transcript from interview dated Nov. 2, 2016).

The interviewing officer here did not follow up with questions about the family violence that the applicant mentioned, failing to elicit the testimony to establish a significant possibility of success in an asylum claim under *Matter of ARCG*. The applicant in this case was found to have no credible fear.

In other instances, mothers from countries where governments are known to acquiesce to grave human rights violations against indigenous people (constituting torture under Article 1 of CAT) reveal their indigenous background to the interviewing officers, but the officer fails to produce information as to whether or not she is at risk on account of her ethnicity. Further, there is a pervasive language barrier in the credible fear process. All interviews are conducted in English, regardless

Photo courtesy of U.S. Immigration and Customs Enforcement (ICE)

of the language ability of the applicant (Author's Notes, 2016). In every case, the applicant is at the mercy of the skills of an interpreter available by phone.

The misnomer of "credible fear" is problematic. Even though the process is called "credible fear interview," credibility is only one of the factors that asylum officers take into account. Most negative credible fear findings are actually the result of a failure to establish a nexus between the harm suffered and one of the five protected grounds for asylum, or the asylum officer applying the wrong standard. In fact, nearly *all* of the negative credible fear interview transcripts reviewed for this report showed the applicant and her testimony to be credible (Author's Notes, 2016). A "negative credible fear finding" is often misinterpreted as the applicant or their testimony found not to be credible. Parties who profit from or otherwise defend the practice of family detention use this attack on the applicant to justify their position, without really understanding the complexities of the credible fear determination process.

The purpose of the credible fear standard is to protect people against removal to a country where they could be tortured, taking into account whether that country presents a pattern that indicates heightened risk of torture. It is a net to catch all potential torture victims even if they are not ultimately eligible for asylum. In this context, the documented violence that women and children face in Northern Triangle countries should be enough to reach a positive credible fear determination. The United Nations High Commissioner for Refugees 2015 report *Women on the Run* concluded that women in El Salvador, Guatemala and Honduras face a staggering degree of violence in the form of extortion, physical and sexual abuse at home and by criminal armed groups, disappearances and murder, in addition to forced recruitment of their children into criminal armed groups (UNHCR, 2015). It also reported that "[t]he increasing reach of criminal armed groups, often amounting to de facto

control over territory and people, has surpassed the capacity for governments in the region to respond" (UNHCR, 2015, p. 48). This conclusion fits squarely under the definition of torture under the convention. Applying the correct (low) standard, any woman and child from El Salvador, Guatemala and Honduras should pass a credible fear interview and be afforded an opportunity to have a full asylum hearing, instead of being sent back to their deaths.

The limited opportunity for review of these procedural failures amounts to due process violations. Even though the statute provides for review of a negative credible fear determination, including "an opportunity for the alien to be heard and questioned" by an Immigration Judge (IJ) within 7 days (INA Sec. 235 (b) (1) (B) (iii) (III)), and the regulation provides that the standard of review must be *de novo*, this is not always the case. Too often the applicant and the attorney have a limited opportunity to participate (speak) during the hearing, or the children are not even allowed to enter the courtroom (Author's Notes, 2016). After the IJ review, the statute provides no additional layer of review. On the contrary, INA Sec. 235 (b) (1) (B) (iii) (I) states that upon a negative credible fear finding, the asylum officer shall order removal *without further hearing or review*, and Sec. 235 (b) (1) (C) states that an expedited removal order is not subject to administrative appeal. These inadequacies in the credible fear evaluation process are at the heart of *Castro v DHS*.

Castro: High Stakes for Due Process

In November 2015, 54 Petitioners filed petitions before the U.S. District Court in Eastern Pennsylvania for habeas relief arguing that the failures of the credible fear process as applied to their cases resulted in erroneous negative determinations, and so their expedited removal orders should be held invalid. INA Sec. 242 (1) (e) (5) provides that judicial review of expedited removal orders is available in habeas corpus proceedings only to determine whether the petitioner is an alien, whether he or she was in fact ordered removed under 235 (b), and whether the petitioner can prove that he or she is admitted as a lawful permanent resident, refugee or was granted asylum. Based on a strict reading of this portion of the Act, the Government argued, and the Court agreed, that it lacked jurisdiction to review Petitioners' claim (*Castro v. United States Dep't of Homeland Sec.*, 2016).

Even though the U.S. District Court Judge Paul S. Diamond opinion conceded that "absent judicial review, the chance of mistake and unfairness increases," the petition was nonetheless denied on grounds that the statute is unambiguous in precluding such kind of review (*Castro v. United States Dep't of Homeland Sec.*, 2016, p. 167). The Court relied strongly on the distinction between exclusion and removal cases, highlighting that the statute (the purpose of which is to exclude) was triggered within minutes to hours of the Petitioners arriving to the United States. Petitioners appealed, but the Third Circuit upheld the lower court's ruling on August 29, 2016, issuing a sweeping opinion that categorized the Petitioners as "recent surreptitious entrants" perpetually unable to invoke the Suspension Clause of the Constitution, despite having been physically present and detained in the United States for a year on average. Because this opinion encompassed not only the Petitioners, but also those similarly situated (persons subject to expedited removal proceedings), the ruling could potentially affect thousands, if not millions of people, considering the potential wide reach of the expedited removal statute.

To put this ruling in context, the habeas right that the District and the Third Circuit Courts denied these 54 asylum-seeking women and children is a right that has previously been extended to slaves and to people detained as enemy combatants. In 1839, a group of African Mende men who were purchased as slaves by Spanish merchants in Cuba staged a mutiny aboard the *Amistad* ship, and then led it to U.S shores by accident in an effort to return home (Federal Judicial Center). They were placed under the custody of U.S. authorities pending criminal and property claims (Federal Judicial Center). Through a writ of habeas corpus, the Mende challenged their detention in District Court, urging a determination on the legitimacy of the property claims as slaves of the Spanish merchants (Federal Judicial Center). The case reached the Supreme Court, where the Mende prevailed and secured their freedom (Federal Judicial Center).

More recently, in *Boumediene v. Bush*, the Supreme Court held that noncitizens detained at Guantanamo as enemy combatants have a constitutional right to habeas corpus review by federal civil courts (2008). The Supreme Court relied on established precedent that the habeas corpus statute made no distinction between Americans and noncitizens held in federal custody, and that the detainee's citizenship was not a factor to determine its geographical coverage (*Boumediene v. Bush*, 2008). On the contrary, in *Castro*, the Court is telling refugee families that they have no rights because they were caught by immigration officials before they could accrue those rights, despite them now having been present on United States soil for over a year. About half of the *Castro* Petitioners remain detained at Berks County Residential Center in Leesport, PA. The youngest Petitioner turned 3 years of age in December of 2016, having spent 14 months in immigration custody (Author's Notes, 2016).

The Erosion of Due Process in the American Immigration System: Expedited Removal

Continued from page 9

The current implementation of the expedited removal statute has been justified by a supposed mass influx of unauthorized Central Americans into the United States, but this rationale fails to take into account the net number of unauthorized persons within the country. According to the Pew Research Center, the overall undocumented population in the United States has remained stable in recent years because the number of new unauthorized immigrants is about the same as the number who are removed, obtain legal immigration documents, leave, or die (Passel, 2016). Further, the Obama administration is known for its record high number of deportations compared to enforcement statistics of previous administrations. It is reported that, as of June 2016, Obama had formally removed around 2.4 million people from the country. As long as the definition of influx is not clear, it could be used as a justification for an expansion of the expedited removal statue at any time, even if the net unauthorized immigration rates are negative or below zero.

The expedited removal statute provides limited guidance as to when it should apply. Instead, the law provides three specific instances when it should *not apply*. It should not apply: 1) to those who have been admitted or paroled, 2) those continuously present in the United States for a period of two years or longer preceding the determination of inadmissibility (INA Sec. 235 (b) (1) (A) (iii) (II)), and 3) those who have arrived by aircraft at a port of entry and are native or citizens of a country in the Western Hemisphere without full diplomatic relations (INA Sec. 235 (b) (1) (F)). No such country exists. Since the United States announced the reinstatement of diplomatic relationships with Cuba, and the end of the *wet foot-dry foot* policy, unauthorized arriving Cubans are also subject to expedited removal. This means that 235 (b) could potentially apply to anyone who is deemed inadmissible and cannot show uninterrupted physical presence in the U.S. for two years. The law as written gives the government power to put even the most vulnerable people in these proceedings, mandate their detention and deport them without a fair hearing. It is already applied to women and children asylum seekers without restraint. It could potentially include victims of crimes in the United States, human trafficking victims, persons with disabilities, persons with other potential immigration relief, such as pending family or employment petitions, or Special Immigrant Juvenile Status under varying state laws.

The development of the regulations is toward the exclusion of broader classes of foreign-born noncitizens. Initially, INS only applied 235(b) to persons who presented at a port of entry, or "arriving aliens" (Siskin & Wasem, 2005). On November 13, 2002, INS announced that certain foreign-born noncitizens arriving by sea, and not just at a port of entry, were to be placed in expedited removal proceedings unless admitted or paroled (Siskin & Wasem, 2005). Then, in August 2004, the Department of Homeland Security announced the expansion of expedited removal to include noncitizens present in the U.S. without authorization who are encountered by an immigration officer within 100 air miles of the U.S. international land border and who cannot prove that they have been physically present in the United States continuously for the 14-day period immediately preceding the date of encounter (Siskin & Wasem, 2005). The purpose of this expansion was to apply the statute to border patrol areas along the southwestern and northern borders (Siskin & Wasem, 2005). This gradual increase in reach of the expedited removal statute is not a change in the law, but a change in policy. The January 25, 2017 Executive Order on border security and enforcement boosts this change of policy by calling for a plain language reading of 235(b), which could get rid of any regulations that impose geographical and temporal limits on its implementation.

The Initial Inspection by an Immigration (CBP) Officer and Claiming Fear

It is relatively easy to become an immigration officer with the capacity to trigger 235 (b) when a person arrives at the border. Besides qualifications related to criminal, financial and employment history, an applicant must have 3 years of "full-time general experience that demonstrates the ability to meet and deal with people and the ability to learn and apply a body of facts" (U.S. Customs and Border Protection, 2014). In the alternative, "4 years of study in any field leading to a bachelor's degree in an accredited college or university is fully qualifying" (U.S. Customs and Border Protection, 2014). No formal legal education, no previous experience in immigration proceedings, and no training in trauma-informed interviewing are required. Yet, so much power is vested upon a CBP officer to make serious legal determinations at the time of inspection that could deny the rights of vulnerable people seeking refuge at the border. If the person manages to properly articulate an intention to apply for asylum or a fear of persecution at the time of inspection, then they are referred to an asylum officer for a credible fear interview (CFI). But the CBP officer still has the power to trigger expedited removal proceedings, like a glue trap that keeps noncitizens detained until a credible fear is established, or until removal, with

"comply with all applicable state child welfare laws and regulations and all state and local building, fire, health and safety codes" and "be licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children" (Flores Agreement, 1997; ¶ 19). The licensed program must be at a "home or facility that is non-secure" (Flores Agreement, 1997; ¶ 19). The third custody preference is authorized only where there has been a determination that the minor is charged with or is delinquent because of a violent or serious crime, credible threat, disruptive conduct, is an escape-risk, or for his own safety (Flores Agreement, 1997; ¶ 21). This placement should be in a "State or county juvenile detention facility or a secure INS detention facility, or INS-contracted facility[,]" but still must be in the least restrictive environment (Flores Agreement, 1997; ¶ 21). The fourth custody option is permitted only when release under Paragraph 14 is not immediately possible or placement under Paragraph 19 is not immediately available. (Flores Agreement, 1997; ¶ 12). It permits placement for no more than 3 days in most instances and 5 days in almost any other event, in an INS-detention facility or INS-contracted detention facility.

It is hard to tell where mandatory detention of children in family residential centers fits within these options. In the case of the *Castro* children who have been detained at Berks for a year or longer, it is evident that the government is not making continuous efforts for their release and placement. DHS could easily release the child, enroll the mother in an alternative to the detention program, and secure the best possible placement - with the families in the United States who are waiting for them, willing and able to sponsor and support their legal process. Family detention, even when not prolonged, does not fit the second preference either, as none of the facilities is currently licensed. The third option presupposes that the child is charged with or is delinquent because of a violent or serious crime, credible threat, disruptive conduct, is an escape-risk, or a risk to his own safety. Even if the government successfully argued that newly arrived asylum-seeking children fit into any of those categories, detention should still take place in the least restrictive environment. Residential facilities where children are subject to supervision 24 hours a day, and where they lack adequate access to medical, psychological, education and religious services, food and clothing choices, and sometimes even crayons, cannot be considered the least restrictive. The fourth option does not apply because release under Paragraph 14 is immediately possible.

Photo courtesy of U.S. Immigration and Customs Enforcement (ICE)

Despite the cost, harm and illegality of prolonged detention for children, DHS continues to hold the *Castro* petitioners at Berks for an indefinite period of time.

Conclusion and Recommendations

As it stands today, the expedited removal statute with its mandatory detention requirement as applied to asylum-seeking families is a dangerous tool used to deny protection under international law, domestic asylum law and constitutional due process rights to some of the most vulnerable people in the hemisphere. On July 24, 2015, ICE, under the authority of the U.S. Department of Homeland Security, put together a committee of 14 members, including experts on education, detention management, detention reform, immigration law, family and youth services, trauma-informed services and health to develop recommendations for best practices at family residential centers. This Advisory Committee on Family Residential Centers, or ACFRC, conducted research and held several meetings over the course of a year and, on October 7, 2016, met at the U.S. Immigrations and Customs Enforcement Headquarters to vote on and finalize draft recommendations. The basic conclusion and primary recommendation by the ACFRC is for DHS to stop placing families in expedited removal proceedings, and to avoid detaining them "except for rare cases when necessary following an individualized assessment of the need to detain because of danger or flight risk that cannot be mitigated by conditions of release[,]" and to make every effort to place families in supportive "community based case-management programs . . . so that families may live together within a community" (ACFRC, 2016, pp. 1-2). The Government Accountability Office, the United Nations High Commissioner for Refugees, the American Bar Association, the Inter-American Commission on Human Rights and other advocacy organizations, such as Human Rights First and the American Civil Liberties Union have been critical of family detention under expedited removal since its inception (ACFRC, 2016). Likewise, the United Nations Working Group on Arbitrary Detention conducted a visit at Dilley in late 2016, and

later met with one of the mothers who had been detained for 8 months at Berks who survived a wrongful removal attempt and was later released. The conclusion of their visit and meeting was in agreement with the organizations above and with the U.S. Commission on Civil Rights, the U.S. Commission on Religious Freedom and others, that family detention should be abolished and that families should be allowed an opportunity to apply for asylum (UNWGAD, 2017).

No part of the law requires DHS to place asylum-seeking mothers and children in arbitrary, costly, harmful and unconstitutional expedited removal proceedings. Most importantly, for the sake of upholding the values that actually make America great, we must ensure that no such law is applied to the most vulnerable humans on this side of the world – Central American mothers, children and babies seeking refuge from unrestrained violence. Even if we cannot save them all, the very least we owe them is the core guarantee of due process: a meaningful opportunity to be heard.

Endnotes

[1]Adriana C. Zambrano is a law student in the College of Law, Michigan State University, where she is specializing in immigration law. She is also a legal advocate for families in immigration detention.

[2]Due to the derogatory implications of the word "alien" when describing foreign-born non-citizens, I will only use such term when directly quoting from the source. Otherwise, "foreign-born noncitizen" or simply, "persons" or "people" is the terminology of choice.

[3]These examples are drawn from the review of dozens of credible fear interview transcripts through the author's legal work in family detention cases from June through July 2015, and from June through December 2016.

References

ACFRC. (2016). ICE. DHS Advisory Committee on Family Residential Centers. Retrieved September 30, 2016.

Aronson, L. R. (2015). The Tipping Point: The Failure of Form Over Substance in Addressing the Needs of Unaccompanied Immigrant Children. *Harvard Latino Law Review*, 18, 3.

Boumediene v. Bush, 128 S. Ct. 2229 (U.S. Supreme Court Jun. 12, 2008).

Castro v. United States Dep't of Homeland Sec., 163 F. Supp. 3d 157, 165 (E.D. Pa. 2016).

Castro v. United States Dep't of Homeland Sec., 835 F.3d 422, 450 (3d Cir. Aug. 29, 2016).

Chappell, B. (2016). Donald Trump Says He'll Deport 2-3 Million People Once In Office. Retrieved December 18, 2016, from http://www.npr.org/sections/thetwo-way/2016/11/13/501921177/donald-trump-says-hell-deport-2-3-million-people-once-in-office.

CLINIC. (n.d.). Expedited Removal and Family Detention: Denying Due Process. Catholic Legal Immigration Network: https://cliniclegal.org/sites/default/files/cara/Expedited-Removal-Backgrounder.pdf.

Congressional Budget Office. (2014). *H.R. 15, Border Security, Economic Opportunity, and Immigration Modernization Act*. Retrieved December 10, 2016, from https://www.cbo.gov/publication/45206.

Federal Judicial Center. (n.d.). *Amistad: The Federal Courts and the Challenge to Slavery — Historical Background and Documents A Brief Narrative*. Retrieved December 10, 2016, from History of the Federal Judiciary: http://www.fjc.gov/history/home.nsf/page/tu_amistad_narrative.html.

Flores Agreement, Stipulated Settlement Agreement, Flores v. Reno, No. 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

Flores v. Lynch, 85- CV-04544 (C.D. Cal. Aug. 21, 2015).

Fong Yue Ting v. U.S., 149 U.S. 698 (U.S. Supreme Court 1893).

Krogstad, J. M. (2014). *Americans Split on Deportations as Latinos Press Obama on Issue*. Fact Tank: News in the Numbers. Washington D.C.: Pew Research Center.

Krogstad, J. M. (2016). *U.S. Border Apprehensions of Families and Unaccompanied Children Jump Dramatically*. Fact Tank: News in Numbers. Washington D.C.: Pew Research Center.

NA. (2008). Barack Obama on Immigration. 2012.presidential-candidates.org/Obama/Immigration.php.

NA. (2015). Family Detention in Berks County, Pennsylvania (Rep.). Retrieved December 10, 2016, from http://www.humanrightsfirst.org/sites/default/files/HRF-Family-Det-Penn-rep-final.pdf.

NA. (2016a). BREAKING: Texas court blocks licensing of family detention camps as childcare facilities. Retrieved December 10, 2016, from http://grassrootsleadership.org/releases/2016/12/breaking-texas-court-blocks-licensing-family-detention-camps-childcare-facilities.

NA. (2016b). Facts about family detention. Retrieved December 10, 2016, from http://grassrootsleadership.org/facts-about-family-detention.

NA. (2016c). State won't renew license of Berks County Residential Center. Retrieved December 10, 2016, from http://www.readingeagle.com/news/article/state-wont-renew-license-of-berks-county-residential-

center.

Parker, C. (2014). The (Real) Reason Why the House Won't Pass Comprehensive Immigration Reform. Retrieved December 1, 2016, from https://www.brookings.edu/blog/fixgov/2014/08/04/the-real-reason-why-the-house-wont-pass-comprehensive-immigration-reform/.

Passel, J. S. (2016). *Unauthorized Immigrant Population Stable for Half a Decade*. Fact Tank News in the Numbers. Washington D.C.: Pew Research Center.

RAICES. (2016). *Mass Releases from Family Detention after Texas Court Blocks Childcare Licenses of Family Detention Centers*. Retrieved December 10, 2016, from RAICES: https://www.raicestexas.org/blogs/61.

Siskin, A., & Wasem, R. E. (2005). *Immigration Policy on Expedited Removal of Aliens*. Washington, DC: Congressional Research Service.

Slack, M. (2013). President Obama's Four Part Plan for Comprehensive Immigration Reform. Retrieved December 10, 2016, from: https://www.whitehouse.gov/blog/2013/01/29/president-obamas-four-part-plan-comprehensive-immigration-reform.

U.S. Customs and Border Protection. (2014). *CBP Officer Frequently Asked Questions (FAQ) Qualifications and Other Requirements*. Retrieved October 31, 2016, from: https://www.cbp.gov/sites/default/files/documents/CBPO%20Qualifications%20and%20Other%20Requirements%20.pdf.

UN General Assembly. (1984). *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. Refworld. Retrieved December 10, 2016, from: http://www.refworld.org/docid/3ae6b3a94.html.

UNHCR. (2015). *Women on the Run: First-hand Accounts of Refugees fleeing El Salvador, Guatemala, Honduras and Mexico*. UNHCR - The UN Refugee Agency. Retrieved December 10, 2016, from http://www.unhcr.org/en-us/about-us/background/56fc31864/women-on-the-run-full-report.html.

UNWGAD. (2016). *Working Group on Arbitrary Detention: Preliminary Findings from its visit to the United States of America*. Retrieved Feb. 7, 2017, from: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20746&LangID=E#sthash.v2e09KsW.dpuf.

USCIS. (2006). *Asylum Officer Basic Training Course - Credible Fear*. US Citizenship and Immigration Services - RAIO - Asylum Division. Retrieved Dec. 10, 2016, from: https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Credible-Fear-31aug10.pdf.

Wasem, R. E., Lake, J., Seghetti, L., Monke, J., & Vina, S. (2004). *Border Security: Inspections Practices, Policies, and Issues*. Washington DC: Congressional Research Service.

They Leave their Kidneys in the Fields: Illness, Injury, and Illegality among U.S. Farmworkers

Continued from page 5

The historic exclusion of migrant men from employment medical benefits and social assistance programs such as Medicaid allows their disease to progress undiagnosed. The federal disability insurance only provides support when the disease is already irreversible. Sarah makes it quite clear that while our food production system demands migrant farmworkers to "leave their kidneys on the fields," our health care system offers them limited support.

Farmworkers as a group experience death from heat stroke at higher rates than workers in other out-door occupations. In many states, farmworkers do not have the benefit of regulations protecting them against heat stress. Meaningful efforts to address heat illness among migrant farmworkers should consider not only occupational safety, but also the web of immigration, labor, health care, and food safety policies that constrain farmworkers' health. According to Sarah, until the legacy of such policies is rectified, farmworkers will continue to be exceptional workers whose exceptional vulnerability is manifest in health outcomes such as hypertension and kidney failures.

> "Farmworkers as a group experience death from heat stroke at higher rates than workers in other out-door occupations."

In *They Leave their Kidneys in the Fields*, Sarah suggests policy changes to improve farmworkers' health. They include ending the exclusion of agricultural workers from standard labor protections; granting undocumented migrants legal status as a first step; using state legislation to mitigate labor abuses associated with subcontracting; using state and local health care programs to help undocumented migrants because they cannot receive federally subsidized health care; and including worker-safety provisions in food-safety branding mechanisms. Overall, this a must-read book that is exceptionally well written with great details of the lives and experiences of migrant farmworkers, as well as their vulnerability to heat stroke, hypertension, kidney disease, and death.

YES, I/WE WANT TO SUPPORT JSRI

PLEASE SUBMIT FORM WITH YOUR GIFT.

O I/We support the JSRI Enrichment Fund (AB 9921)

O I/We Support the Julian Samora Endowed Scholarship Fund (AB 9920)

O I/We support the P. Lea Martinez Endowed Scholarship Fund (AB 9923)

O I/We support the JSRI Scholarship Fund (AB 9922)

Amount of Gift/Pledge: $_____

MY/OUR TOTAL GIFT WILL BE PAID AS INDICATED:

O A check payable to Michigan State University
Enclosed in my first payment of: $_____

O A credit card charge to: (check one)

O Mastercard O Visa O Discover O American Express

Card Number: ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

Expiration Date: _____

Name on Card:_____

O A pledge of the following duration:_____
(maximum of five years)

SEND ME/US PLEDGE REMINDERS:

(check one)

O Annually O Quarterly O Semi-annually

Beginning: Month ____Year _____

O This is a joint gift with my spouse Spouse's Name:_____

O Matching Company Gift: _____

MSU FACULTY/STAFF ONLY

O Deduct my pledge in equal monthly installments

O 12 Months O 24 Months O 36 Months

O Deduct my gift in one lump sum from my paycheck in the month of:

_____

ZPID_____
(Required for Payroll Deduction)

Pay Group: O Salary O Labor O Grad

PERSONAL INFORMATION

NEXO

Name:_____

Address: _____

City/State/Zip: _____

Telephone: Office ( ) _____-_____

Home ( ) _____-_____

Email: _____

PLEASE MAKE CHECKS PAYABLE TO:
MICHIGAN STATE UNIVERSITY

PLEASE NOTE FUND NAME OR ALLOCATION CODE IN THE MEMO LINE AND RETURN TO:

Julian Samora Research Institute
Michigan State University
219 S. Harrison Rd, Room 93
East Lansing, MI 48824

Thank You!
¡Gracias!

Or make your gift on-line at: **www.givingto.msu.edu**

GIFTS TO JSRI

PLEASE CONSIDER MAKING A GIFT TO THE JULIAN SAMORA RESEARCH INSTITUTE

Through your support you can enhance JSRI's research, symposia, and cultural and scholarship activities.

Each gift enhances JSRI's capacity to promote research on Latino communities in Michigan, the Midwest and across the nation and to disseminate and contribute to the application of the findings.

YOUR GIFT CAN BE DESIGNATED FOR:

- The **JSRI Enrichment Fund**, which supports research projects, student research assistantships,and public forums on critical Latino issues;
- The **Julian Samora Endowed Scholarship Fund,** which supports two awards annually to undergraduate and graduate students with research and teaching interests on Latino issues;
- The **P. Lea Martinez Endowed Scholarship Fund**, which supports students studying health issues among Latinos;
- The **JSRI Scholarship Fund**, which supports students with short-term financial needs;
- Or any combination thereof.

INDIVIDUAL COMMITMENT LEVELS

- Platino Circle ~ $5,000 or more
  (payable over two years)
- Padrinos/Madrinas Circle ~ $2,500 to $4,999
  (payable over two years)
- Amigo/Amiga Circle ~ $1,000 to $2,499
- Aficionado/Aficionada ~ $100 to $999

CORPORATE COMMITMENT LEVELS

- Platino Circle ~ $10,000
- Padrinos/Madrinas Circle ~ $7,500
- Amigos/Amigas Circle ~ $5,000
- Aficionados/Aficionadas Circle ~ $2,500

If you need additional information on giving to JSRI, including planned giving, please contact:

Rubén Martinez, Ph.D.
Julian Samora Research Institute
Ph. (517) 432-1317 • Fax (517) 432-2221
Email: jsamorai@msu.edu
Webpage: www.jsri.msu.edu

MICHIGAN STATE UNIVERSITY | University Outreach and Engagement
Julian Samora Research Institute