HUMAN RIGHTS AND SOCIAL JUSTICE BRIEFING #4:
U.S. Immigration Detention: An Inhumane System Violating Human Rights
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INTRODUCTION

The U.S. immigrant detention system consists of approximately 250 centers, a massive gulag of privately-run prisons sprawled across the United States in remote locations, designed to warehouse unauthorized immigrants between arrest and deportation. Immigrant detention has tripled over the past decade due to increased use of detention as a method of immigration enforcement (Amnesty International 2009). In 2001, approximately 95,000 individuals were detained, compared with 380,000 in 2009 (Kunichoff 2010).

The chief beneficiary of this spectacular growth is the privatized U.S. Prison Industry. In 2011, private prison companies housed nearly half of all immigration detainees. Corrections Corporation of America (CCA) is the largest Immigration and Customs Enforcement (ICE) contractor, operating a total of fourteen ICE-contracted facilities with a total of 14,556 beds. The second largest ICE contractor GEO Group, Inc. (GEO) operates seven facilities with a total of 7,183 beds. In 2011, CCA reported annual revenues of $1.73 billion and GEO $1.6 billion (National Immigration Forum 2012).

Although ICE claims that only immigrants with criminal histories have been deported, 58% of immigrants in detention in 2009 had no criminal convictions (Bacon Immigration Law 2011). During President Obama's first term, 1.4 million immigrants have been deported (Preston 2012), more than under eight years of President George W. Bush (Kunichoff 2010). Interior policing and deportation of unauthorized immigrants by the federal government has almost quadrupled in the past 5 years (Heyman 2010).

THE UNITED STATES: AN IMMIGRANT NATION WITH HISTORICAL AMNESIA

The forgetting of violence in its founding, denial of the insatiable need for immigrant labor and collective repression of racist Nativist discourse in immigration policy are deeply embedded in the immigrant narrative of the United States. In contrast to the national myth of asylum and hospitality, anti-immigrant sentiment has been seminal in the construction of national identity since the 19th century, when "anti-foreign" political parties in New York and other cities of the Eastern seaboard evolved into the Know Nothing Movement of the 1850s, a Nativist society that nurtured xenophobia into an organized political movement (Behdad 2005).

Know Nothings believed in the racial superiority of Anglo-Saxons and feared the influx of "aliens" such as the Irish and Germans in mid-century, and Jews, Poles, Italians and Chinese later in the century, who introduced not only demographic variation but cultural pollution. Know Nothing ideas appealed to Anglo-Americans who sought relief from "alien invasions" by low-skill, low-wage laborers, considered threats to economic and political stability and to the American social fabric, much as Latinos are perceived today. Know Nothing calls for race-based immigration laws shaped policy and defined norms of citizenship in the 19th century (Behdad 2005; Navarro 2009; Ngai 2004).

Know Nothing political ideology was no historical aberration. The National Origins Act of 1921 and the Johnson-Reed Act of 1924 were designed to keep the United States a white nation by establishing a quota system favoring Northern Europe and ranking immigrants according to race and ethnicity (Behdad 2005; Inda 2006; Ngai 2004). All Europe-

ans were assigned quotas on the basis of national origins (ethnicity) at the same time that they were classified as "whites" racially. This double classification not only codified "whiteness" as a new concept but treated Southern and Eastern Europeans as mentally deficient beings not deserving to be "white." Such policies of exclusion speak volumes about the character of a nation.

The Treaty of Guadalupe Hidalgo, signed in 1848, ended the Mexican-American war and annexed the states of California, New Mexico, Arizona, Texas, Nevada, Utah, Colorado and parts of Wyoming. With a relocated U.S.-Mexico border in mind, the 1921 and 1924 immigration laws gave birth officially to the ideas of "illegal immigration" and "deportation" by making entry into the U.S. without authorization a deportable offense for the first time and by creating the Border Patrol in 1925 (Inda 2006; Ngai 2004; Navarro 2009). These laws effectively ended the circular movement of Mexicans who, for generations, had crossed the border freely to labor in mining, agriculture and railroad construction. Since then, not only have Mexicans become iconic "illegal aliens," but the fear of "illegal immigration" and the control of land borders have become national obsessions.

ARGUMENTS OPPOSING IMMIGRANT DETENTION I: VIOLATING HUMAN RIGHTS

Few are aware that the U.S. immigrant detention system violates human rights, including rights to which all migrants are entitled, such as the right to life; freedom from torture or cruel, inhuman or degrading treatment; the right not to be subject to discrimination; the right to recognition before the law; and the right not to be subject to slavery (Amnesty International 2012). The United States has an obligation to honor these rights because it has ratified many human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The U.S. immigrant detention system also violates the right to *due process*, one such right being the lack of access to legal counsel. Detainees are routinely denied access to legal counsel, legal information, interpretation services and judicial review, as well as the ability to challenge detention and deportation decisions. U.S. Department of Justice statistics show that 84% of immigrants in detention and 58% in deportation proceedings have no legal representation, not even by low-cost or pro-bono lawyers (Amnesty International 2009; Guskin and Wilson 2007).

In addition, every immigrant and asylum seeker, except those detained at the border, has a right to a custody assessment, a detention review and options for release by an immigration judge. In practice, however, an individual immigration officer decides whether or not to release the detainee as well as the conditions of release. This practice amounts to arbitrary detention because it concentrates enormous power in the hands of individual ICE officers and does not conform to international human rights standards (Amnesty International 2009).

Arbitrary arrest and detention is prohibited by Article 9 of the Universal Declaration of Human Rights (UDHR) and Article 9 of the International Covenant on Civil and Political Rights (Amnesty International 2009). Detention is considered arbitrary if it continues beyond the period for which a government can provide justification. Nevertheless, many immigrants in the U.S. spend months, sometimes years languishing in arbitrary detention. Legitimate grounds for detention include verifying identity, protecting national security and preventing a person deemed to be a flight risk from absconding.

"Mandatory detention" is the policy of compulsory incarceration of asylum seekers and immigrants suspected of being "illegal," without custody assessment or detention review, which constitutes arbitrary detention (Amnesty International 2012). Both "legal" and "illegal" immigrants, including people who pose no threat and are not flight risks, have been placed in mandatory detention and de-

portation proceedings, for minor, non-violent crimes committed long ago (Chavez 2008; Zavella 2011). Mandatory detention has also been imposed for non-violent misdemeanors punishable by a one-year jail sentence, including non-deportable offenses. The categories of deportable crimes have also been expanded further (Amnesty International 2009).

Mandatory detention was born when the Clinton Administration passed several laws in 1996 (Chavez 2008; Zavella 2011). The first was the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA 1996), which was intended to be "welfare reform" but impacted "legal" immigrants by severely restricting access to food stamps, Supplemental Social Security Income, aid to the elderly, blind and disabled and by denying access to Medicaid (low income medical care) for 5 years after entry (Chavez 2008). The second was the Anti-Terrorism and Effective Death Penalty Act (ATEDPA 1996), which mandated the detention of both "legal" and "illegal" immigrants and any non-citizens who supported any group deemed "terrorist" by the Attorney General and was retroactive (Zavella 2011).

The third was the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA 1996), which eliminated the right of appeal and judicial review of any wrongful, arbitrary or discretionary decision for both "legal" and "illegal" immigrants and protected immigration authorities from law suits and judicial review of mistakes and biases, effectively nullifying all challenges (Chavez 2008; Kurzban 2008; Zavella 2011). IIRIRA also allowed immigration authorities to imprison any noncitizen, without bond, a process also protected from judicial review (Kunichoff 2010), and permitted unprecedented summary removal at the border, making border officials judge, jury and executioner (Kurzban 2008).

Cases of U.S. citizens being snared in "mandatory detention" and deportation proceedings have been documented in the past 10 years (Amnesty International 2009). A review by one Arizona NGO of more than 8,000 immigration case files revealed that between 2006 through 2008, 82 people held for deportation at two immigration detention centers, some for up to a year, were later freed after immigration judges determined that they were U.S. citizens (Amnesty International 2012). Mandatory detention was also given a legal "booster shot" by earlier laws that wedded immigration laws to anti-drug laws such as the Anti-Drug Abuse Act of 1986 and the Omnibus Anti-Drug Abuse Act of 1988, which abolished administrative review of procedures (Kurzban 2008).

The net effect of these laws has been to strip all non-citizens of due process rights, of the right to appeal and judicial review and of entitlements (Zavella 2011; Chavez 2008). These laws have also made it virtually impossible for unauthorized immigrants to "become legal" and have accelerated the processes of detention and deportation. Perhaps more importantly, these laws have crossed the once unbridgeable divide between "legal" and "illegal" immigrants and widened the chasm of rights and benefits dividing "citizen" from "non-citizen" (Zavella 2011).

ARGUMENTS OPPOSING IMMIGRANT DETENTION II: INHUMANE TREATMENT IN DETENTION

Principle 24 of the U.N. Body of Principles for All Persons under Any Form of Detention or Imprisonment states that detainees must be provided with access to medical care (Amnesty International 2009). This principle is echoed in ICE detention standards (ibid), which also state that detainees should be allowed at least one hour a day of physical exercise in the open air, weather permitting (ibid). According to a *Human Rights Watch* report, these standards have not been followed, which violates both international and ICE's own standards of detention (Amnesty International 2009; Guskin and Wilson 2007).

In addition, the use of physical restraints, such as shackling, is often excessive. Sometimes attack dogs are used to terrorize detainees and sometimes they are held in solitary confinement (Guskin

and Wilson 2007; Ndaula and Satyal 2008). Some detainees have been subjected to verbal, physical and sometimes sexual abuse while in detention (Amnesty International 2009). Concerns have also been raised about the use of lethal force and tasers against immigrants: at least four fatal shootings and another death involving Customs and Border Patrol (CBP) agents have been reported in the media since June 2010 (Amnesty International 2012).

Worst of all, inmates have died because medical staff and prison guards failed to respond to medical emergencies. The *New York Times* and the *A.C.L.U.* have reported that ICE itself has recorded 107 deaths while in detention since October 2003, based on data obtained through the Freedom of Information Act. A well-known case is that of Joseph Dantica who died while in custody at Krome Detention Center on the outskirts of Miami (Danticat 2008). His death was highly publicized because he was the uncle of prominent Haitian-American novelist, Edwidge Danticat, who published a memoir about the circumstances surrounding his death.

Housing detainees thousands of miles away from families, lawyers and immigration courts must be added to the list of cruel and unusual punishments administered by the U.S. detention system. Telephone contact with the outside world is a major challenge in a system that provides few public phones, although ICE guidelines state that free calls to pro bono lawyers will be provided (Amnesty 2009). Even worse, detainees are often transferred across the country without notifying loved ones or lawyers. The *New York Times* reported that many detainees with legal grounds to contest deportation are routinely transferred to more remote jails without notice (Bernstein 2009).

Human Rights Watch also reported that between 1999 and 2008, mostly since 2006, 1.4 million detainees had been transferred and the rate of transfers was increasing (Semple 2011). Tens of thousands of detainees have been transferred from major cities to remote detention centers in Mississippi, Louisiana and Texas, under the jurisdiction of the Federal Court of Appeals for the Fifth Circuit, which is notorious for rulings against immigrants (Bernstein 2009). Apart from the added expense of phone calls and face-to-face visits with family living far away, long distance separation from legal counsel and any evidence that might support their claims for release, as well as court appointments, is a prescription for failure in immigration court.

ARGUMENTS SUPPORTING IMMIGRANT DETENTION

Today, calls for immigration laws reclaiming the whiteness of the nation are testament to the durability of Know Nothing political ideology across the centuries (Behdad 2005). Nativist discourse conflating immigrants with welfare cheats, terrorists, drug traffickers and criminals ignites the xenophobia that is the foundation of exclusionary policies and practices. Fear of immigrants is often expressed in classic ways: fear of job theft, tax evaders, welfare cheats, fear of economic collapse and erosion of the American way of life (Chavez 2008; Ho and Loucky 2012; Inda 2006; Navarro 2009; Riley 2008).

Research shows that these fears are more imagined than real. Nonetheless, they are cultivated by right-leaning politicians, journalists and "pundits," who enlist support for the detention and deportation of approximately 11 million unauthorized immigrants, as well as the militarization of borders and an end to immigration. This culture of fear also convinces many that unauthorized immigrants deserve to be imprisoned without any rights whatsoever because they have chosen, of their own free will, to break the law by crossing the border without authorization (Heyman 2010). The result is skyrocketing rates of immigrant detention and huge profits for the privatized prison industry.

Immigrant detention is also buttressed by the widespread belief that unauthorized immigrants are criminals. However, residing in the U.S. without authorization is NOT a crime (felony), it is a civil offense (misdemeanor) because U.S. immigration law is administrative law, not criminal law (Amnesty 2009; Martinez 2009; Riley 2008). Detention and

deportation are *civil processes* rather than *criminal prosecutions*. Nevertheless, *civil* policing systems are empowered to deprive immigrants, by law, of fundamental rights and basic procedural fairness guaranteed to ordinary criminals, such as a lawyer or a day in court or both.

The Know Nothing fear of the link between immigration, poverty and crime is echoed in the contemporary belief that Mexicans are criminals by nature. This popular myth serves to justify harsh federal policies such as the 287(g) Program, which recruits local police to identify, process and detain unauthorized immigrants during routine policing. The Secure Communities Program outsources the work of identifying, apprehending and removing dangerous criminal aliens through the use of extensive data sharing and strong collaboration between federal, state, county and local agencies. Most draconian of all is Operation Streamline, a "zero tolerance" border enforcement program that conducts criminal prosecution of all undocumented border crossers without benefit of prosecutorial discretion.

Additional policies hostile to immigrants include Arizona's 2010 immigration law, SB1070, which made it a state misdemeanor for any immigrant to be in Arizona without documents of legal residence and required local police to determine the immigration status of any arrested individual, if there was "reasonable suspicion" of "illegal" immigration status, whether or not immigration status was relevant to the arrest (Heyman 2010). In response to legal challenges, most aspects of SB1070 were nullified by the U.S. Supreme Court in its June 2012 ruling, but it upheld the "show me your papers" clause.

Emulating Arizona, Alabama passed HB56 in 2011, which conscripted not only local police, but schools, landlords and employers in the service of immigration enforcement and denied public benefits to the undocumented. To date, the Alabama law is the most draconian, designed to induce unauthorized immigrants to "self-deport" voluntarily by making life unbearable. States such as Georgia, South Carolina, Utah and Indiana have also emulated Arizona by passing "copy-cat" immigration laws.

CONCLUSIONS

More humane detention guidelines do exist, but they are not enforced and non-compliance is not punished Applied anthropologists could help detainees by holding ICE accountable for its inhumane practices. For example, compliance with the "Morton Memo" of March 2011, to deport only immigrants with criminal convictions, could reduce the heartbreak of fractured immigrant families. The population of detainees could also be reduced dramatically by legalizing the undocumented, whose only crime is working to support their families, even though the private prison industry would oppose such proposals because they would interfere with profit making. In the final analysis, immigrant detention will persist as long as national borders endure. Notwithstanding, detention need not be inhumane.

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These issue briefings are commissioned by the SfAA's Human Rights and Social Justice Committee in an effort to educate our members, our students, and the general public on timely matters relating to social justice or human rights. It is the hope that policymakers, media, and the general public will come to appreciate an anthropological perspective on contemporary issues.

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RESOURCE WEBSITES:

Border Network for Human Rights - http://www.bnhr.org/
Department of Homeland Security - http://www.dhs.gov/
Migration Policy Institute - http://www.migrationpolicy.org/
National Immigration Forum - http://www.immigrationforum.org/
Immigration Policy Center - http://www.immigrationpolicy.org/
Pew Hispanic Institute - http://www.pewhispanic.org/

287g and Secure Communities Program
http://www.ice.gov/287g/
http://www.immigrationforum.org/images/uploads/Secure_Communities.pdf

Texts of S.B 1070 and HB56
http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf
http://latindispatch.com/2011/06/09/text-of-alabama-immigration-law-hb-56/

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