

# Detention to Deportation — Rethinking the Removal of Cambodian Refugees

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*The United States helped to pull Cambodia into the Vietnam War, initially through secret bombings in Cambodia in 1969 and CIA support for a rightist coup in Cambodia in 1970. After the Khmer Rouge genocide of two million of its own people in Cambodia, thousands of survivors fled to refugee camps. Eventually, the United States admitted 145,000 Cambodian refugees. U.S. resettlement policies provided public assistance and job training for low-income jobs. Refugee families, however, were not provided with the tools necessary to raise their children in inner-city environments, where crime was rampant and culture was radically different from where they came. As a result, many of the refugee children, products of their U.S. environment, have turned to crime. Until recently, the United States did not deport refugee criminals to countries like Cuba, Vietnam, Laos, and Cambodia. In March 2002, however, the United States strong-armed Cambodia into signing a repatriation agreement and removed scores of the 1500 potential deportees of Cambodian nationality to a country that most never knew or left as infants. This Article challenges the moral basis for these deportations and asks whether justice is really being served. The removal of Cambodian refugees offers us an opportunity to rethink the entire concept of deportation and demands that we consider other options.*

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## INTRODUCTION

Kim Ho Ma was a happy man on July 9, 1999. After more than two years in state prison and several more months in the custody of immigration authorities, Kim Ho was released by court order. In his own words, "I can work. I pay the taxes. I just want to live the

American life.”<sup>1</sup> Within three years, however, the United States would deport Kim Ho to a country he had left at the age of two, where he would be unable to speak the language and be ill-equipped for a completely foreign environment.

Kim Ho was born in Cambodia in 1977, in the midst of the Khmer Rouge regime’s sinister oppression and genocide.<sup>2</sup> Kim Ho’s mother, eight months pregnant, was sentenced to dig holes in one of Pol Pot’s work camps. The idea was to teach her humility, and when she collapsed from exhaustion, she expected to be killed. Instead, the guards walked away.<sup>3</sup> When Kim Ho was two, his mother carried him through minefields, fleeing the oppression of the Khmer Rouge, first to refugee camps in Thailand and the Philippines, and eventually to the United States at the age of seven.<sup>4</sup>

Kim Ho’s first home in America was a housing project in Seattle, where he and other Cambodian refugees had the misfortune of being resettled in the middle of a new war — one between black and Latino gangs. Both sides taunted Kim Ho and his friends, beating them up for fun. Still affected by the trauma she experienced in Cambodia and preoccupied with two minimum wage jobs, his mother did not understand what was happening to her son. Determined that they would not be pushed around, Kim Ho and his friends formed their own gang.<sup>5</sup>

In 1995, at age seventeen, Kim Ho and two friends ambushed a member of a rival gang; Kim Ho was convicted of first degree manslaughter.<sup>6</sup> With no previous criminal record, Kim Ho was sentenced to thirty-eight months imprisonment. Earning time off for good behavior, Kim Ho served twenty-six months and was released into the custody of immigration officials.<sup>7</sup>

His conviction for an “aggravated felony” led to a removal (or deportation) order.<sup>8</sup> Upon entry of a final order of deportation, the Immigration and Nationality Act (“INA”) directs the Attorney General

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<sup>1</sup> *Morning Edition* (NPR radio broadcast, June 29, 2001).

<sup>2</sup> *See infra* Part IV.

<sup>3</sup> Randall Richard, *Deporting Controversy — No Second Chance: Jailed at 17, He Can Never Return to America*, SACRAMENTO GAZETTE, Oct. 31, 2003, at 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *See* 8 U.S.C. § 1101(a)(43)(F) (2000) (defining certain violent crimes as aggravated felonies); *id.* § 1227(a)(2)(A)(iii) (2000) (providing that aliens convicted of aggravated felonies are deportable).

to deport the individual from the United States within ninety days.<sup>9</sup> The Immigration and Naturalization Service (“INS”) could not effectuate Kim Ho’s deportation to Cambodia within the ninety-day removal period, however, because the United States and Cambodia did not have a repatriation agreement. The ninety-day removal period expired in early 1999, but the INS continued to keep Kim Ho in custody. The INS’s rationale was that, in light of his former gang membership, the nature of his crime, and his planned participation in a prison hunger strike, it was “unable to conclude that Mr. Ma would remain nonviolent and not violate the conditions of release.”<sup>10</sup>

Kim Ho filed a petition for a writ of habeas corpus. A panel of five judges in the Federal District Court for the Western District of Washington, considering Kim Ho’s and about 100 similar cases, issued a joint order holding that the Constitution forbids post-removal-period detention unless there is “a realistic chance that [the] alien will be deported,” thereby permitting classification of the detention as “in aid of deportation.”<sup>11</sup> The district court then held an evidentiary hearing, decided that there was no “realistic chance” that Cambodia, which had no repatriation treaty with the United States at the time, would accept Kim Ho, and ordered him released on July 9, 1999.<sup>12</sup>

Kim Ho’s release was affirmed on review. The Ninth Circuit concluded that the statute did not allow detention for more than a “reasonable time” beyond the ninety-day period authorized for removal.<sup>13</sup> Given the lack of a repatriation agreement with Cambodia, that time had expired upon the passing of the ninety days.<sup>14</sup> In a narrow five to four decision, the Supreme Court also endorsed Kim Ho’s release, ruling that the post-removal-period detention statute implicitly limits an alien’s detention to a period reasonably necessary to bring about that alien’s removal from the United States and does not permit indefinite detention.<sup>15</sup> In the majority’s view, a statute permitting indefinite detention of an alien would raise a serious constitutional problem:

The Fifth Amendment’s Due Process Clause forbids the

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<sup>9</sup> *Id.* § 1231(a)(1)(A) (2000).

<sup>10</sup> Appendix to Petition for Certiorari at 87a, *Kim Ho Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000) (No. 99-35976).

<sup>11</sup> *Binh Phan v. Reno*, 56 F. Supp. 2d 1149, 1156 (W.D. Wash. 1999).

<sup>12</sup> Appendix to Petition for Certiorari at 60a-61a, *Kim Ho Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000) (No. 00-38).

<sup>13</sup> *Kim Ho Ma*, 208 F.3d at 818.

<sup>14</sup> *Id.* at 830-31.

<sup>15</sup> *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

Government to “deprive” any “person. . . of. . . liberty. . . without due process of law.” Freedom from imprisonment — from government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that Clause protects. . . .

The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect. There is no sufficiently strong special justification here for indefinite civil detention — at least as administered under this statute. The statute, says the Government, has two regulatory goals: “ensuring the appearance of aliens at future immigration proceedings” and “preventing danger to the community.” But by definition *the first justification — preventing flight — is weak or nonexistent where removal seems a remote possibility at best.* . . .

The second justification — protecting the community — does not necessarily diminish in force over time. But we have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections. . . . In cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger.<sup>16</sup>

Clearly, an important premise of Kim Ho’s release, from the perspective of lower courts as well as the Supreme Court, was the absence of a realistic chance that he would be deported because no repatriation agreement with Cambodia existed.

That all changed when the Cambodian government signed a repatriation memorandum of understanding in March 2002 to facilitate the return of removable Cambodian refugees. Kim Ho was among the first deported on October 2, 2002. To date, some 126 refugees have been removed,<sup>17</sup> and approximately 1500 other Cambodians await deportation.<sup>18</sup> Shortly after Kim Ho’s deportation, his federal public defender, Jay Stansell, wrote:

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<sup>16</sup> *Id.* at 690-91 (first emphasis added) (citations omitted).

<sup>17</sup> E-mail from Bill Herod, Coordinator, Returnee Assistance Project, Phnom Penh, Cambodia, to Bill Ong Hing, Professor of Law and Asian American Studies, University of California, Davis (Dec. 31, 2004, 22:02:47 PST) (on file with author).

<sup>18</sup> Eric Unmacht, *A Bumpy Road Ahead for U.S. Deportees to Cambodia*, CHRISTIAN SCI. MONITOR, Jan. 21, 2003, at 8.

Kimho Ma was deported to Cambodia with 9 others, landing in Phnom Penh on October 2, 2002.

I cannot write this in “reporter” mode, so I must take a breath and speak from my heart. The situation requires that I comment on the courage and example of this young man, who bore the weight of “The Ma Decision” and the hopes of “lifers” across the country through his three years of release; who sat there in the Supreme Court hearing his precious freedom dismissed as expendable in the face of the government’s “plenary power”; and who, ironically, held throughout the utmost confidence that a cause as just as the lifers would surely turn out in their favor. It did turn out that way, and it was a momentous victory for all of us who worked for the rights of all human beings, regardless of which side of which border they are born on.

And still, throughout this, Kim knew that he would someday be deported, and now he has been.

Over the course of his three years of freedom, Kimho spent a lot of time with me and my family. Beginning in the Spring of this year when rumors were swirling that a repatriation agreement had been signed, Kim and his family became even more of a fixture at our house. We would come home to find him dropped in for a visit, or bags of odd fruit from the Cambodian market at our doorstep with no note. Instead of languishing in detention, as the INS so aggressively sought, Kimho was “allowed back into the community” where, (“oh my!!”), he spent three years celebrating the beauty and wisdom of his parents; where he became closer to all of his siblings and extended family; where he worked, laughed, wrote, and breathed the Seattle air free from iron bars. He became a son and a brother to me and my wife. A big brother to our now 10 and 6 year old boys. A fan at Adam’s baseball games, a wrestling partner for Toby. A gentle friend and kind soul. And he knew that he most certainly was on the top of the Ashcroft wish-list for travel documents.

Turns out that he was. On September 19, 2002, I received a call that the INS was sending Kim a “bag and baggage letter.” I am thinking of getting that ugly document framed. Many of us have seen dozens if not hundreds of these form letters but it is the first time after all these years caring about the lives of non-citizens that I felt what family members for decades must have felt when receiving

that letter. A loved [one] is banished from the United States and will no longer be here in my home. I will frame it as a monument to 130 years of cruelty to immigrants in the United States, and as a reminder of the courage of Kimho and all immigrants who step forward in the struggle for justice.

. . . Ultimately, Kimho and his family, my wife and I, and colleagues at the FPD took Kim to the same INS building from which we had won his release. Mr. Danger-to-the-Community and Mr. Flight-Risk walked right into that building with me. October 2, he was detained, and then deported.<sup>19</sup>

In this Article, I raise questions about the removal of Cambodian refugees who have been convicted of crimes. Is deportation the appropriate response? Given the circumstances that led to the arrival of Cambodian refugees to the United States, the conditions of their resettlement, and the special challenges faced by such refugee families, should we rethink the policy of deporting refugees even though the authority to do so may be clear?

In fact, the deportation of Cambodian refugees provides us with an opportunity to rethink deportation more generally. I argue that the removal process should include an element of compassion and that alternatives to outright deportation should be offered. A rehabilitative approach should be considered, perhaps incorporating probation-type reports, diversion programs, or probation itself, especially where the facts in individual cases cry out for something short of deportation. This approach would understand that problems result from failed relationships — between individuals, between individuals and neighborhoods, and between individuals and institutions — and that seeking to repair those relationships is a means of pursuing justice for our entire society.

#### I. BACKGROUND ON DEPORTING CAMBODIAN REFUGEES

More than eighty years ago, the Supreme Court recognized that deportation “may result. . . in loss of. . . life; or of all that makes life worth living.”<sup>20</sup> Yet, the Court consistently has ruled that “[o]ver no

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<sup>19</sup> E-mail from Jay Stansell, Assistant Federal Public Defender, Seattle, Washington, to Daniel M. Kowalski, Attorney, Austin, Texas (Oct. 18, 2002, 16:02 PST) (on file with author) [hereinafter E-mail from Jay Stansell, Oct. 18, 2002].

<sup>20</sup> *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). In a dissenting opinion about thirty years later, Justice Jackson was more blunt: “[B]ecause of his alienage, [respondent] is about to begin a life sentence of exile from what has become home, of separation from his

conceivable subject is the legislative power of Congress more complete than it is over [the admission of aliens]."<sup>21</sup> Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."<sup>22</sup> The plenary power of Congress to legislate in this area, also, includes the decision to deport noncitizens:

The basis for the deportation of presently undesirable *aliens* resident in the United States is not questioned and requires no reexamination. When legally admitted, they have come at the Nation's invitation, as visitors or permanent residents, to share with us the opportunities and satisfactions of our land. As such visitors and foreign nationals they are entitled in their persons and effects to the protection of our laws. So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what *noncitizens* shall be permitted to remain within our borders.<sup>23</sup>

As "aliens" and "noncitizens," refugees apparently are subject to Congress's plenary power of deportation. Furthermore, as a legal matter, deporting refugees does not appear to violate international refugee standards. The United States is a signatory to the Protocol Relating to the Status of Refugees,<sup>24</sup> thereby acceding to the terms of the 1951 Convention Relating to the Status of Refugees. Article 33 of the 1951 Convention provides:

1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly

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established means of livelihood for himself and his family of American citizens. This is a savage penalty . . . ." *Jordan v. De George*, 341 U.S. 223, 243 (1951).

<sup>21</sup> *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).

<sup>22</sup> *Boutilier v. INS*, 387 U.S. 118, 123 (1967).

<sup>23</sup> *Carlson v. Landon*, 342 U.S. 524, 531 (1952).

<sup>24</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268.



serious crime, constitutes a danger to the community of that country.<sup>25</sup>

Thus, at least under the terms of article 33, a refugee can be “expelled” if the person has been convicted of a “particularly serious crime [and] constitutes a danger to the community.”<sup>26</sup> Federal courts have taken the uniform position that once a refugee has been convicted of a particularly serious crime, the person is automatically (without a separate determination) deemed to be a danger to the community.<sup>27</sup>

While immigration and refugee law does not bar the deportation of refugees, deporting refugees is not common. A primary reason is that many refugees are from nations with whom the United States does not have diplomatic relations. For example, although deportable Cubans have been incarcerated for years, the United States has never deported any because it does not maintain relations with Fidel Castro’s regime. The lack of diplomatic ties with countries like Vietnam and Laos prevents the return of nationals to those countries as well. Until March 2002, the same could be said of Cambodian refugees. That month, however, the circumstances for Cambodian refugees changed, after the United States pressured the Cambodian government into signing a repatriation agreement in secret negotiations.<sup>28</sup> After initially dismissing a request to accept Cambodian citizens who were deportable from the United States, the Cambodian government signed an agreement only after United States officials threatened to limit the number of future visas issued to Cambodian citizens. The agreement included a promise by the United States to pay a mere \$100 to Cambodia to process each individual whom it would send back, with no resettlement assistance.<sup>29</sup> While \$100 seems minimal, Cambodia is the first country to which the United States

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<sup>25</sup> Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 189 U.N.T.S. 137, 176.

<sup>26</sup> The UN Refugee Agency, *Protecting Refugees — Questions & Answers*, at <http://www.unhcr.ch/cgi-bin/texis/vtx/basics> (last visited Nov. 9, 2004). In fact, the United Nations High Commissioner for Refugees website answers this question: “What are the obligations of a refugee?” with the following: “Refugees are required to respect the laws and regulations of their country of asylum.” *Id.*

<sup>27</sup> See, e.g., *Choeum v. INS*, 129 F.3d 29 (1st Cir. 1997); *Kofa v. INS*, 60 F.3d 1084 (4th Cir. 1995); *Garcia v. INS*, 7 F.3d 1320 (7th Cir. 1992); *Dor v. Dist. Dir., INS*, 891 F.2d 997 (2d Cir. 1989).

<sup>28</sup> Chris Decherd, *Home Isn’t Sweet for Cambodians Deported from U.S.; Law Says Noncitizen Criminals Cannot Stay Here*, SEATTLE TIMES, Jan. 14, 2003, at A10.

<sup>29</sup> Richard C. Paddock, *Cambodia’s Black Sheep Return to Fold*, L.A. TIMES, Mar. 28, 2003, at A27; *Cambodia Asks U.S. Not to Flood Country with Felons*, DEUTSCHE PRESSE-AGENTUR, May 21, 2002.

has agreed to provide such a fee.<sup>30</sup>

By summer 2002, the deportations began. Under the agreement, the United States would deport no more than ten Cambodian nationals each month.<sup>31</sup> The third group of ten deportees was flown to Phnom Penh in October and included Kim Ho Ma.<sup>32</sup>

Cambodian refugees in the United States survived unspeakable acts of horror at the hands of Pol Pot's Khmer Rouge regime from 1975 to 1978, when two million people — thirty percent of Cambodia's population — perished during the "killing fields" genocide. Today, however, 1500 of their sons and daughters, most of whom were born in Thai refugee camps or fled Cambodia as infants, face deportation to this land of nightmares after serving sentences for criminal acts committed and after spending nearly their entire lives as United States residents.

The backgrounds of the potential returnees vary. The parents of Touch Rin Svay were among those who fled the Pol Pot horror, ending up in a Thai refugee camp. Touch was born in that camp, and, like thousands of other Cambodians, his family was eventually admitted to the United States as refugees. Growing up in Portland, Maine, Touch joined the Marines. At the age of twenty-two, however, Touch's life took a disastrous turn. He crashed his car while driving drunk, and his own sister, a passenger, was killed. In an awful twist that is one of those "only-in-America" stories of justice, Touch was convicted of manslaughter. The tragedy does not end there. Once Touch completes a term of eighteen months in prison, he will be deported to Cambodia, a land with which he is totally unfamiliar.<sup>33</sup>

Mao So was a one year-old when he left Cambodia in 1979. His grandmother took him across the border to Thailand, and from there, to the United States. Growing up, he always believed that she was his mother. Only when he was about to be deported did she tell him that his real mother was living in Cambodia. When he was fourteen, he began to sell drugs to fellow students at Santa Ana High School. At fifteen, he could make \$500 in a day. He joined a gang and dropped out of school. He worked his way up in the gang until he was handling drug deals throughout the United States. Mao had twenty armed men working for him and sold cocaine, ecstasy, and "anything you can think of."

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<sup>30</sup> *Cambodia Asks U.S. Not to Flood Country with Felons*, *supra* note 29.

<sup>31</sup> See Paddock, *supra* note 29.

<sup>32</sup> Email from Bill Herod, *supra* note 17; Lise Olsen, *Deportee Struggles to Find a New Life in a "Foreign" Land*, SEATTLE POST-INTELLIGENCER, June 30, 2003, at E1.

<sup>33</sup> Seth Mydans, *Dead End for Cambodians Who Grew So American*, N.Y. TIMES, Aug. 9, 2002, at A3.

Eventually, he was caught after he paid cash for an Integra. He pleaded guilty to drug charges and served two and a half years of a five-year sentence. By the time of his arrest, a rival gangster had put a price of \$225,000 on his head. Mao was eventually deported in December 2002.<sup>34</sup>

Kim Ho Ma was a murderer; Mao So a drug dealer. But not all the potential Cambodian refugee deportees are murderers, drug dealers, or gang members. One returnee, Sor Vann, was a thirty-four-year-old construction foreman in Houston who was charged with indecent exposure — for urinating in public.<sup>35</sup> He was placed on six years probation. He was caught urinating in public again just one month before his six-year probation was completed. Although the offense was only a misdemeanor, violating probation was a felony, and he served four years in prison.<sup>36</sup> He has a wife and two young children in Houston, Texas. Before he entered the United States as a refugee, the Khmer Rouge murdered his parents.<sup>37</sup>

Like Kim Ho Ma, Louen Lun, who escaped the killing fields as a baby, committed a crime as a teenager: he fired a gun in a shopping mall as he fled a group of black teens.<sup>38</sup> Charged with second-degree assault, he served eleven months in county jail. For the next six years, he lived as a model American, building a family and maintaining steady employment.<sup>39</sup> Louen decided to apply for citizenship, and after two years he thought that the INS would finally approve his application. When he showed up at the INS office, he was incarcerated and held for deportation because of his prior conviction.<sup>40</sup> Within two weeks of his arrest, Cambodia signed the repatriation agreement, and, in May 2003, the United States deported Louen to Cambodia — twenty-two years after he first arrived in America.<sup>41</sup> For Louen, leaving the United States forever means being separated not only from his mother, but also a wife and two young daughters.<sup>42</sup>

Yuthea Chhoueth grew up in a rough Sacramento neighborhood. At eighteen, his attempt to rob a bank was foiled, but that was enough to

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<sup>34</sup> See Paddock, *supra* note 29.

<sup>35</sup> Mydans, *supra* note 33; Genevieve Roja, *Strangers in a Strange Land*, HYPHEN MAG., Summer 2003, at 35.

<sup>36</sup> Paddock, *supra* note 29.

<sup>37</sup> *Id.*

<sup>38</sup> Deborah Sontag, *In a Homeland Far from Home*, N.Y. TIMES, Nov. 16, 2003, § 6, at 48.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

get him a three-year stint in federal prison.<sup>43</sup> After his release, U.S. immigration authorities required him to check in on a regular basis and to stay out of trouble.<sup>44</sup> More than a dozen years later, Yuthea was caught driving without a license. Ironically, he was traveling to the INS for his routine visit.<sup>45</sup> The problem was that the traffic infraction made him a parole violator, and he had to go back to jail. To make matters worse, the violation made him deportable. Authorities plan to remove Yuthea back to Cambodia — the land he fled as a toddler.<sup>46</sup>

As with many Cambodians, the Khmer Rouge killed Chanphirun Meanowuth Min's entire family after Pol Pot's takeover of Cambodia in 1975.<sup>47</sup> He, too, faces removal from his adopted San Gabriel Valley residence. With two accomplices, Chanphirun Meanowuth was found guilty of defrauding the Medi-Cal program, by selling blood and medical identification cards.<sup>48</sup> His sixteen-month prison sentence and \$25,000 restitution order was enough to render him deportable.<sup>49</sup>

The examples do not end there. Most potential deportees are men who are the primary wage-earners for their families, who have lived in the United States for more than twenty years.<sup>50</sup> Some Cambodian refugees facing removal, however, are women. For example, one woman faces deportation after serving three years in jail for disciplining her children with unlit incense sticks. She is a single mother whose parents have died; the father of her children abandoned the family. Her children, who were born in the United States, will be placed in foster care when she is deported.<sup>51</sup>

Most of the Cambodian deportees/returnees have one thing in common: under United States immigration laws, they are regarded as

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<sup>43</sup> Shonda Swilley, *Deported to Cambodia: A Love Story; A Sac State Student Follows the Man She Loves as He Returns to a Homeland He Doesn't Know*, SACRAMENTO NEWS & REVIEW, Dec. 12, 2002, available at <http://www.newsreview.com/issues/sacto/2002-12-12/news.asp#> (last visited Nov. 2, 2004).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Teresa Watanabe, *Cambodians Fear Possible Deportation*, L.A. TIMES, Feb. 21, 2003, at B1.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Josie Huang, *Cambodians Fear Worst for Deportees*, PORTLAND PRESS HERALD, May 25, 2002, at 1A. One of the early returnees was an eighty-year-old man. Decherd, *supra* note 28.

<sup>51</sup> Stephanie Ho, *Cambodia, U.S. Agree on Deportation of Criminals*, Voice of America, Jan. 2, 2003, available at <http://www.voanews.com> (last visited Nov. 2, 2004).

aggravated felons.<sup>52</sup> As aggravated felons, virtually no deportation relief is available from an immigration judge.<sup>53</sup> Issues of rehabilitation, remorse, family support in the United States, and employment opportunities are irrelevant.

## II. LIMITATIONS OF STATUTORY RELIEF

### A. *Section 212(c) Waivers: The Relief that Was*

Discretionary relief from deportation for longtime lawful permanent residents convicted of serious crimes, even those eventually classified as aggravated felonies, was available from 1976 to 1996. During that time, an immigration judge could consider issues of rehabilitation, remorse, family support in the United States, and employment opportunities for aggravated felons who had entered as refugees or as immigrants, if they had become lawful resident aliens and had resided in the country for at least seven years.

In 1976, the Immigration and Nationality Act (“INA”) did not contain a provision that would have explicitly provided relief to someone like Kim Ho Ma. The language and application of INA § 212(c),<sup>54</sup> however, provided the impetus for an interpretation that benefited many aliens:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraph (30) of subsection (a).

Importantly, the “provisions of paragraphs (1) through (25). . . of subsection (a)” included grounds of exclusion that barred the entry of aliens convicted of serious crimes involving moral turpitude and narcotics offenses.<sup>55</sup> Therefore, under INA § 212(c), a lawful permanent resident who had resided in the United States for seven years could proceed abroad voluntarily and be re-admitted at the discretion of the Attorney General, even if he or she had been convicted of a serious crime that rendered him or her excludable. In essence, INA § 212(c) provided a waiver of exclusion. In practice, the Attorney General could grant the

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<sup>52</sup> See *supra* note 8 and accompanying text.

<sup>53</sup> See *supra* note 8 and accompanying text.

<sup>54</sup> 8 U.S.C. § 1182(c) (repealed 1996).

<sup>55</sup> *Id.* § 1182 (a)(2)(A)(i) (1976).

waiver in exclusion or deportation proceedings, as long as the person had proceeded abroad voluntarily at some point.<sup>56</sup>

The fact that similar lawful permanent residents, convicted of identical crimes, would be treated differently only because one had never left the United States after immigrating and the other happened to leave and return after committing the deportable offense disturbed the Second Circuit in *Francis v. INS*.<sup>57</sup> The latter person would be eligible for the 212(c) waiver, while the former would not under the Board of Immigration Appeals' ("Board") interpretation of the statute. The Second Circuit ruled that the Board's interpretation violated equal protection, and, therefore, held the waiver applicable to any lawful permanent resident who had resided in the country for at least seven years.<sup>58</sup> Soon thereafter, the Board adopted the *Francis* decision.<sup>59</sup> The result was that a lawful permanent resident who had resided in the United States for seven years could apply for and be granted a waiver under INA § 212(c) in deportation proceedings, thereby allowing the person to remain in the United States as a lawful permanent resident. To be granted the waiver, the person had to persuade an immigration judge to exercise favorable discretion.

In *In re Marin*,<sup>60</sup> the Board summarized the major factors for immigration judges to consider in section 212(c) cases, although each case was to be judged "on its own merits."<sup>61</sup> In general, the immigration judge was required to balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on his or her behalf to determine whether granting of relief appeared "in the best interests of this country."<sup>62</sup> The alien had the burden of showing that the positive factors outweighed the negative ones. Favorable factors included such considerations as:

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<sup>56</sup> *In re L*, 1 I. & N. Dec. 1 (B.I.A. 1940).

<sup>57</sup> *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).

<sup>58</sup> *Id.* at 273 (holding that "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time."). In fact, this ruling was consistent with the Board's own interpretation of a similar provision that was part of the statute decades earlier. *In re A*, 2 I. & N. Dec. 459 (B.I.A. 1946), approved by Atty. Gen. (1947) (holding that mere fact that alien had not re-entered country following his conviction was not bar to exercise of discretionary relief in deportation proceeding).

<sup>59</sup> *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976).

<sup>60</sup> *In re Marin* 16 I. & N. Dec. 581 (B.I.A. 1978).

<sup>61</sup> *Id.* at 584.

<sup>62</sup> *Id.*

[F]amily ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character [for example, affidavits from family, friends, and responsible community representatives].<sup>63</sup>

Factors deemed adverse to an alien included:

the nature and underlying circumstances of the exclusion [or deportation] ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country.<sup>64</sup>

Section 212(c) relief was not automatic. For example, in *Ashby v. INS*, the fact that the applicant was convicted of three crimes, committed over a six-year period, which involved the use of force and weapons, and was incarcerated for eight years was critical to the Board's denial, in spite of twenty-seven years of lawful permanent residence.<sup>65</sup> Also, in *Arango-Aradondo v. INS*, the Second Circuit upheld the denial of INA § 212(c) relief when the immigration judge carefully and thoroughly weighed the evidence in the alien's favor (including his drug and alcohol rehabilitation efforts, his longtime residency in the United States, his close family ties, and the hardship he would endure in Colombia given his HIV status and his lack of ties there) against the detrimental evidence (including his sporadic employment record, his failure to file taxes, and, most importantly, his "very lengthy and very severe" criminal record, together with his long involvement in the drug culture).<sup>66</sup>

As the number of negative factors grew in a section 212(c) case, the respondent had to introduce offsetting favorable evidence, often labeled "unusual or outstanding equities." Courts required this heightened showing when an alien was convicted of a serious drug offense, particularly one relating to the trafficking or sale of drugs. For example,

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<sup>63</sup> *Id.* at 584-85.

<sup>64</sup> *Id.* at 584.

<sup>65</sup> *Ashby v. INS*, 961 F.2d 555, 557 (5th Cir. 1992).

<sup>66</sup> *Arango-Aradono v. INS*, 13 F.3d 610, 613 (2d Cir. 1994).

in *Varela-Blanco v. INS*,<sup>67</sup> a conviction of lascivious acts with a child (sexual abuse of an eight-year-old niece) was a serious crime requiring a demonstration of “unusual or outstanding equities” for section 212(c) relief.<sup>68</sup> Although the applicant had resided in the United States for eighteen years, the first ten were in an unlawful status. Therefore, employment during his undocumented status was not considered.<sup>69</sup> Furthermore, the presence of family and considerable evidence of rehabilitation was insufficient.<sup>70</sup>

In *Paredes-Urrestarazu v. INS*,<sup>71</sup> the Ninth Circuit upheld a denial of section 212(c) relief, even though the alien demonstrated unusual and outstanding equities. He entered the United States at age twelve, was married, and had a child and numerous relatives. However, very serious adverse factors, including gang-related armed robberies, general court-martial and dishonorable discharge from the military, false testimony concerning military service, past drug abuse, and an arrest for drug possession (in spite of completing a diversion program), outweighed the equities.<sup>72</sup>

In *Diaz-Resendez v. INS*,<sup>73</sup> however, the Fifth Circuit found that an applicant who had been convicted of possession of twenty-one pounds of marijuana with intent to distribute met the rigorous standards for section 212(c) relief. The applicant was fifty-four years old and had been a continuous lawful resident for thirty-seven years. He had been married to a United States citizen for twenty-nine years, had three children who were fully dependent on him, faced imminent breakup of his marriage if deported, and otherwise had a clean criminal record except for a drunk driving charge that ended his drinking.<sup>74</sup>

In contrast, in *In re Roberts*, the Board denied relief to an applicant convicted of a cocaine sale constituting drug trafficking, who was separated from his wife and four children, did not financially support any of them, had an irregular employment history, and had not paid income tax for some time.<sup>75</sup> Similarly, in *Nunez-Pena v. INS*, the Tenth Circuit found that the applicant’s ten years of residence, family ties in the

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<sup>67</sup> *Varela-Blanco v. INS*, 18 F.3d 584 (8th Cir. 1994).

<sup>68</sup> *Id.* at 586.

<sup>69</sup> *Id.* at 587.

<sup>70</sup> *Id.* at 587-88.

<sup>71</sup> *Paredes-Urrestarazu v. INS*, 36 F.3d 801 (9th Cir. 1994).

<sup>72</sup> *Id.* at 817-21.

<sup>73</sup> *Diaz-Resendez v. INS*, 960 F.2d 493 (5th Cir. 1992).

<sup>74</sup> *Id.* at 497.

<sup>75</sup> *In re Roberts*, 20 I. & N. Dec. 294 (B.I.A. 1991).



United States, progress toward rehabilitation, and record of steady employment did not meet the outstanding equities standard.<sup>76</sup> The applicant, who would be deported to Mexico, had been convicted of a serious heroin offense, had served two years in prison and involved his brother and common-law wife in his drug activity. The court found it relevant that the applicant was fluent in Spanish and that a sibling and his father lived in Mexico. In *Vergara-Molina v. INS*, the Seventh Circuit approved the Board's finding of no unusual and outstanding equities in a case involving an applicant convicted of two controlled substance violations.<sup>77</sup> Evidence of his rehabilitation, steady employment, service to the community as a drug counselor, and good character were considered, but the court would not second-guess the Board.<sup>78</sup>

The necessity of demonstrating unusual or outstanding equities was not triggered exclusively by serious crimes involving controlled substances. A particularly grave offense also demanded such a showing.<sup>79</sup> Additionally, such a showing could be mandated because of a single serious crime, or because of a succession of criminal acts that, together, established a pattern of serious criminal misconduct. A respondent who demonstrated unusual or outstanding equities, as required, did not automatically obtain a favorable exercise of discretion; but absent such equities, relief would not be granted in the exercise of discretion.<sup>80</sup> There were cases in which the adverse considerations were so serious that a favorable exercise of discretion was not warranted even in the face of unusual or outstanding equities.<sup>81</sup> On the other hand, section 212(c) relief could not be categorically denied to drug offenders who served less than five years of incarceration.<sup>82</sup>

Rehabilitation of the respondent was a critical issue in section 212(c) cases. The Board noted that an applicant with a criminal record "ordinarily" would be required to make a showing of rehabilitation before relief would be granted as a matter of discretion. Cases "involving convicted aliens [had to] be evaluated on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of

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<sup>76</sup> *Nunez-Pena v. INS*, 956 F.2d 223 (10th Cir. 1992).

<sup>77</sup> *Vergara-Molina v. INS*, 956 F.2d 682 (7th Cir. 1992).

<sup>78</sup> *Id.* at 685.

<sup>79</sup> *Cordoba-Chavez v. INS*, 946 F.2d 1244, 1249 (9th Cir. 1991); *In re Buscemi*, 19 I. & N. Dec. 628, 633-34 (B.I.A. 1988).

<sup>80</sup> *Akrap v. INS*, 966 F.2d 267, 272-73 (7th Cir. 1992); *In re Roberts*, 20 I. & N. Dec. 294, 302-03 (B.I.A. 1991).

<sup>81</sup> *In re Buscemi*, 19 I. & N. Dec. 628, 635-36 (B.I.A. 1988).

<sup>82</sup> *Yepes-Prado v. INS*, 10 F.3d 1363, 1371 (9th Cir. 1993).

discretion.”<sup>83</sup> In practice, the immigration judge would pay close attention to the testimony or statements from family members, friends, employers, parole or probation officers, counselors in or outside prison, and psychiatrists. The judge would want to discern whether the applicant would engage in criminal activity again and look for evidence that the person’s life had changed to the point that such activity was a thing of the past.<sup>84</sup>

Thus, section 212(c) cases permitted immigration judges to examine the respondent’s crime, prison experience, current living situation, demeanor, attitude, job skills, employment status, family support, friends, social network, and efforts at rehabilitation in deciding whether to exercise favorable discretion. Judges were even able to postpone the case to monitor the respondent’s behavior before rendering a decision.<sup>85</sup>

In 1996, however, Congress enacted legislation that eliminated section 212(c) relief as it had been applied for twenty years. In its place, a cancellation of removal provision was added that precluded even the possibility of relief for many who had been able to at least apply for discretionary relief from an immigration judge under the prior provision.<sup>86</sup> The new provision, INA § 240A(a), permits the Attorney General to “cancel removal” for certain aliens who commit crimes if the alien (1) has been a lawful permanent resident for at least five years, (2) has resided in the United States continuously for seven years after having been admitted in any status, and (3) has not been convicted of any aggravated felony.<sup>87</sup> The no aggravated felony requirement, thus, eliminated relief for many lawful resident aliens who would have been eligible for section 212(c) relief, including many of the Cambodian refugees who are the topic of this Article.

Under INA § 237(a)(2)(A), an alien convicted of an aggravated felony at any time after admission is deportable.<sup>88</sup> An aggravated felony is defined in INA § 101(a)(43) as murder, rape, sexual abuse of a minor, any illicit trafficking in any controlled substance (including drugs, firearms, or destructive devices), money laundering, or any crime of violence (except for purely political offenses) for which the term of imprisonment

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<sup>83</sup> *In re Edwards*, 20 I. & N. Dec. 191, 191 (B.I.A. 1990).

<sup>84</sup> BILL ONG HING, *HANDLING IMMIGRATION CASES* 388 (Wiley Law Publications 2d ed.1995).

<sup>85</sup> See *infra* notes 526-32 and accompanying text.

<sup>86</sup> See Katherine Brady, *Recent Developments in the Immigration Consequences of Crimes*, in *OUR STATE OUR ISSUES: AN OVERVIEW OF IMMIGRATION LAW ISSUES* 129 (Bill Ong Hing ed., 1996).

<sup>87</sup> 8 U.S.C. § 1229(a) (2000).

<sup>88</sup> *Id.* § 1227(a)(2)(A) (2004).

imposed is at least one year. The definition also includes offenses of theft, if the term of imprisonment imposed is at least one year; treason; child pornography; operation of a prostitution business; fraud or deceit in which the loss to the victim or victims exceeds \$10,000; tax evasion in which the loss to the United States government exceeds \$10,000; crimes relating to the Racketeer Influenced and Corrupt Organizations ("RICO") Act, if the term of imprisonment imposed is at least one year; alien smuggling, except in the case of a first offense involving the assisting, abetting, or aiding of the alien's spouse, child, or parent and no other individual; document trafficking, if the term of imprisonment imposed is at least one year; failure to appear to serve a sentence, if the underlying offense is punishable by imprisonment for a term of five years; and bribery, counterfeiting, or forgery for which the term of imprisonment is at least one year. An attempt or conspiracy to commit any of the crimes just mentioned is also included.<sup>89</sup>

### B. Other Relief

Other relief for refugees who become deportable due to one or more criminal convictions is limited. First, reapplying for asylum is problematic because a person convicted of a particularly serious crime who constitutes a danger to the community is ineligible for asylum.<sup>90</sup> Also, under INA § 208(d), added by the Immigration and Nationality Act of 1990, anyone convicted of an aggravated felony is precluded from applying for asylum.<sup>91</sup> In addition, withholding of removal under INA § 241(b)(3)(B)(ii) is not available to those convicted of a particularly

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<sup>89</sup> The breadth of "aggravated felonies" has constantly expanded since the term was introduced in the immigration laws in 1988. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7344(a), 102 Stat. 4181, 4470-71 (1988). The crimes treated as aggravated felonies prior to the 1996 changes in the law can be found at Immigration and Naturalization Act, § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2000). Prior to 1996, the aggravated felony ground for deportation was essentially similar to the other grounds for deportation. For example, drug convictions that constituted aggravated felonies were also independent grounds for deportation under a provision for deporting persons convicted of drug crimes. Similarly, any person who had two crimes involving moral turpitude was deportable, so it did not matter if the crimes were aggravated felonies. See HING, *supra* note 84, at 326-27. In some cases, however, the aggravated felony definition served to authorize deportation for a single crime, where the person would not otherwise have been deportable. For example, a person convicted of a murder committed more than five years after entering the country, who had no other criminal record, would have been deportable only as an aggravated felon. A noncitizen is only deportable by reason of an aggravated felony if the conviction occurred after 1988, which is the year in which the aggravated felony deportation ground was added.

<sup>90</sup> 8 C.F.R. § 208.13(c)(2)(A) (2000).

<sup>91</sup> 8 U.S.C. § 1158(b)(2)(B) (2000).

serious crime.<sup>92</sup> INA § 241(b)(3) provides that an alien who has been convicted of an aggravated felony “for which the alien has been sentenced to an aggregate term of imprisonment of at least five years shall be considered to have committed a particularly serious crime.”<sup>93</sup> Thus, withholding of removal is not readily available.

Some refugees facing deportation for aggravated felony convictions have obtained protection under the Torture Convention.<sup>94</sup> However, the requirements to be eligible for protection are difficult to meet. The Torture Convention is a multilateral United Nations treaty that was designed to prevent torture, and to compensate and protect victims of torture. It defines torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose 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 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>95</sup>

Article 3 of the Torture Convention prohibits the return of any person to a country when there are substantial grounds for believing that he or she would be in danger of being tortured.<sup>96</sup> The torture theory is weak, however, as those who have been deported to Cambodia have not been persecuted or tortured.<sup>97</sup>

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<sup>92</sup> *Id.* § 1231(b)(3)(B)(ii) (2000).

<sup>93</sup> *Id.* § 1231(a)(3)(B) (2000).

<sup>94</sup> Interview with Sally Kinoshita, Staff Attorney, Immigrant Legal Resource Center, in San Francisco, Cal., (June 21, 2003) (on file with author); E-mail from Jay Stansell, Assistant Federal Public Defender, to Bill Ong Hing, Professor of Law and Asian American Studies, University of California, Davis (July 17, 2003, 09:47 PST) (copy on file with author) (referring to success of Theary Seng as expert witness in one case where Cambodian individual asserted Torture Convention claim) [hereinafter E-mail from Jay Stansell, July 17, 2003].

<sup>95</sup> *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, G.A. Res. 39/46, 39 Sess., at art.1(1) (December 10, 1984) available at <http://www.un.org/documents/ga/res/39/a39r046.htm> (last visited Jan. 17, 2005) [hereinafter *Torture Convention*].

<sup>96</sup> *Torture Convention*, *supra* note 95.

<sup>97</sup> E-mail from Jay Stansell, July 17, 2003 *supra* note 94.

Some Cambodian refugees and other immigrants who were convicted of deportable offenses before the 1996 elimination of section 212(c) relief may also be able to benefit from the Supreme Court's ruling in *INS v. Enrico St. Cyr.*<sup>98</sup> The protection that arises from this case, however, may apply only to a narrow group of potential deportees. Under that decision, only individuals whose convictions were obtained through plea agreements that were entered into at a time when section 212(c) was available and its availability was relied upon may seek its relief.<sup>99</sup>

Advocates have tried to develop other defenses to deportation on behalf of Cambodian refugees. One argument, the refugee waiver theory, is that refugees retain their refugee status even after they are lawfully admitted for permanent residence under INA § 209(a), unless their refugee status is specifically terminated by immigration officials. As a refugee, the person can apply for a discretionary waiver under INA § 209(c), 8 U.S.C. § 1159(c), "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."<sup>100</sup> Another argument, that refugees have become United States nationals, is that by becoming a lawful permanent resident under INA § 209(a), the former refugee is no longer an alien and has become a national under a liberal interpretation of United States immigration laws and international laws regarding the status of refugees. As a "national," the person should not be subject to deportation proceedings. Thus far, no court has recognized either of these theories.<sup>101</sup>

While not a form of relief in an actual removal proceeding, if the underlying criminal conviction is overturned or reversed, deportation proceedings will be terminated because the person would no longer be deportable. Similarly, a pardon by the governor of the state of conviction also eliminates the conviction for removal purposes.

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<sup>98</sup> *INS v. St. Cyr.*, 533 U.S. 289 (2001).

<sup>99</sup> *Id.* at 325-26. The deadline for this relief expired April 26, 2005. 8 C.F.R. § 1003.44(h) (2005).

<sup>100</sup> E-mail from Jay Stansell, July 17, 2003 *supra* note 94; *cf.* *Sun v. Ashcroft*, 370 F.3d 932, 935 (9th Cir. 2004). The argument that a refugee cannot be removed until refugee status has been terminated through a separate process has gained some support by the Third Circuit. In *Smirko v. Ashcroft*, 387 F.3d 279 (3rd Cir. 2004), the court of appeals ruled that this argument was a "plausible reading" of the Immigration and Nationality Act that should be addressed by a three-member panel of the Board of Immigration Appeals. *Id.* at 283-97.

<sup>101</sup> E-mail from Jay Stansell, July 17, 2003 *supra* note 94; *cf.* *Sun*, 370 F.3d at 935.

## III. POL POT'S REIGN OF TERROR

## A. Background

Cambodia was drawn into the Vietnam War in 1971 as Vietcong guerrillas and the North Vietnamese Army established base camps and supply routes along the Vietnam-Cambodia border. The United States believed these activities had major military significance. Therefore, President Nixon secretly attacked the bases and routes by land and air without congressional approval for thirteen months in 1969-70.

President Norodom Sihanouk ruled Cambodia since its independence from France and kept the country neutral during most of the Vietnam War.<sup>102</sup> In 1970, however, General Lon Nol took power in a right-wing coup believed to be sponsored by the Central Intelligence Agency ("CIA"). Lon Nol opposed Sihanouk's policy of allowing Viet Cong and North Vietnamese troops to use Cambodian territory. The Lon Nol government escalated military conflict with the Communist guerrillas known as the Khmer Rouge, who were led by Pol Pot.<sup>103</sup> United States involvement in Cambodia delayed the influence of the Khmer Rouge until 1975.

United States forces bombed Cambodia in the early 1970s, dropping over a hundred thousand tons of bombs on the Cambodian countryside.<sup>104</sup> Between 1971 and 1973, the United States' bombings targeted populated areas, displacing many Cambodian citizens.<sup>105</sup> The United States military knew that there inevitably would be civilian

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<sup>102</sup> COLUMBIA ENCYCLOPEDIA (6th ed. 2001), available at <http://www.bartleby.com/65/si/SihanoukN.html>. Sihanouk was educated in Saigon (now Ho Chi Minh City) and Paris. A royal council elected him as King in 1941. During World War II, he was held a virtual prisoner by Japanese occupation forces. After the war, in 1947, he adopted a constitution that made Cambodia a limited monarchy and achieved some autonomy for his country within the French Union by 1949. Following the first elections in 1950, however, Sihanouk dissolved the assembly and ruled by decree. He became prime minister as well as king in 1951 and appointed a cabinet comprised largely of members of the royal family. He campaigned for complete independence, which was finally granted in 1953. *Id.*

In 1955 he abdicated in favor of his father, Norodom Suramarit, but retained the premiership and control of the Popular Socialist Community party, which he had founded. As premier, he took Cambodia out of the French Union. After his father's death in 1960, he again became head of state, although not king. Initially neutral in foreign affairs, he broke diplomatic relations with the United States in 1965 when Cambodians were killed during South Vietnamese and U.S. incursions in the Vietnam War. *Id.*

<sup>103</sup> JEREMY HEIN, FROM VIETNAM, LAOS, AND CAMBODIA: A REFUGEE EXPERIENCE IN THE UNITED STATES 22 (1995).

<sup>104</sup> DAVID P. CHANDLER, A HISTORY OF CAMBODIA 7, 191 (1st ed. 1983).

<sup>105</sup> HEIN, *supra* note 103, at 22-23.

victims in the Cambodian campaign and had extensive experience with refugees in Vietnam and Laos. Given this, a major relief effort aimed at assisting displaced Cambodians would have been in order. From the beginning of hostilities in 1970, however, the United States consistently denied such aid: "According to the United States Ambassador to Cambodia, it has been the policy of the United States to not become involved with the problem of civilian war victims in Cambodia."<sup>106</sup> The rationale was to keep a low profile in the country and to keep the United States' involvement in Cambodia to an absolute minimum.<sup>107</sup>

By 1973, 10,000 Cambodian refugees had received aid in government camps.<sup>108</sup> U.S. officials cited this figure as evidence that Cambodian refugees were able to provide for themselves. By August 1972, however, the war had displaced 700,000 Cambodians, nearly sixty percent of whom were clustered in and around Phnom Penh.<sup>109</sup> Lon Nol requested aid from the United States, and, between 1972 and 1974, the United States provided \$2.5 million to Cambodia.<sup>110</sup>

Led by Pol Pot, the Khmer Rouge ousted Lon Nol in 1975, and the Communist Party of Kampuchia ("CPK") ruled Cambodia until 1979.<sup>111</sup> During its reign in Cambodia, the Khmer Rouge regime committed unspeakable acts of horror, namely genocide, against the people of Cambodia — all in the name of socialism.<sup>112</sup> An estimated two million people, thirty percent of the population, perished in the Khmer Rouge "killing fields."<sup>113</sup> The Khmer Rouge's acts were so atrocious that columnists Jack Anderson and Les Whitten commented in the *Washington Post* on July 21, 1977, "Adolf Hitler at his worst was not as oppressive as the Communist rulers of tiny Cambodia."<sup>114</sup> The CPK also quickly established a reputation for obsessive secrecy. It concealed its existence from outsiders, and did not reveal its agendas or leaders. Pol Pot boasted that Cambodia was "building socialism without a model."<sup>115</sup>

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<sup>106</sup> *Id.* at 23.

<sup>107</sup> *Id.* at 22-23.

<sup>108</sup> *Id.* at 23.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 24.

<sup>111</sup> GENOCIDE IN CAMBODIA, DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY I (Howard J. De Nike et al., eds., 2000) [hereinafter GENOCIDE IN CAMBODIA].

<sup>112</sup> *See id.*

<sup>113</sup> JAMIE FREDERIC METZL, WESTERN RESPONSES TO HUMAN RIGHTS ABUSES IN CAMBODIA, 1975-80, at xiii (1996).

<sup>114</sup> Jack Anderson & Les Whitten, *Brutality of Cambodian Government*, WASH. POST, July 21, 1977, at D15, quoted in METZL, *supra* note 113, at 79.

<sup>115</sup> DAVID P. CHANDLER, A HISTORY OF CAMBODIA 210 (3d ed. 2000).

Not only were all foreigners expelled from the country, shut up in embassy compounds, or shepherded around on guided tours in which they were forbidden to talk to ordinary people, the regime also published little information about itself.<sup>116</sup> These oppressive policies caused the first wave of refugees to flee from Cambodia, which included a number of educated persons who went to Vietnam and Thailand. They subsequently resettled in third countries, mainly in France. The United States received about 6000 Cambodians from this wave.<sup>117</sup> This was the first time that such a large number of Cambodians came to live in the United States.<sup>118</sup>

“When the Khmer Rouge assumed power in April 1975, [it] inherited a devastated country. American bombing during the war had destroyed Cambodia’s economic infrastructure and agricultural productivity.”<sup>119</sup> The Khmer Rouge was faced with a desperate food crisis. In a policy aimed at maximizing agricultural production, the new rulers of Cambodia emptied the cities and forced any able-bodied person to work in the fields. “The Khmer Rouge closed and mined Cambodia’s borders, and the country remained largely isolated until the invasion and occupation by Vietnamese troops in December 1978.”<sup>120</sup> What the world did not know was that major atrocities, an “autogenocide,” were taking place.

The Khmer Rouge’s main goal was to eradicate all things Western in Cambodia.<sup>121</sup> In doing so, the Khmer Rouge instituted radical methods in an effort to reinstitute an agriculturally based society in Cambodia.<sup>122</sup> Initially, the Khmer Rouge focused on executing all military officers of the former government and eventually extended its wrath to clergymen, intellectuals, and various ethnic minorities.<sup>123</sup> The Khmer Rouge believed that purging these populations would lend itself to reduced opposition to the pursuit of instituting an agriculturally based society.<sup>124</sup>

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<sup>116</sup> BEN KIERNAN, *HOW POL POT CAME TO POWER*, at v (1985).

<sup>117</sup> USHA WELARATNA, *BEYOND THE KILLING FIELDS: VOICES OF NINE CAMBODIAN SURVIVORS IN AMERICA* 166 (1993).

<sup>118</sup> *Id.*

<sup>119</sup> GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS, REFUGEES AND AMERICA’S HALF-OPEN DOOR, 1945 TO THE PRESENT* 148 (1986).

<sup>120</sup> *Id.*; see also Rosemary Goudreau, *The Tears of Tum May*, TAMPA TRIB., Sept. 26, 2004, at 1 (Commentary Section).

<sup>121</sup> See GENOCIDE IN CAMBODIA, *supra* note 111, at 3.

<sup>122</sup> See *id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*



B. *Initial Stages of the Khmer Rouge*

Even before the Khmer Rouge came to power in Cambodia, citizens of Phnom Penh, Cambodia's capital city, had endured their fair share of corrupt governments.<sup>125</sup> Phnom Penh had been plagued with social injustice, political corruption, high unemployment rates, and economic exploitation.<sup>126</sup> Accordingly, the Cambodian people were thirsty for a more stable and peaceful government.<sup>127</sup> As a result, the Cambodian people were ripe to accept the Khmer Rouge's socialist revolution and its myriad promises of a Cambodia reborn.<sup>128</sup>

The citizens of Phnom Penh welcomed the arrival of Pol Pot's forces in Phnom Penh with rejoicing applause.<sup>129</sup> Unfortunately, their joy was short-lived, as Pol Pot's troops ordered them to evacuate the city immediately.<sup>130</sup> Much to these Phnom Penhians' dismay, Pol Pot's forces looted their homes and stores and shot at anyone who resisted their orders.<sup>131</sup> The forces cut off the electricity and bombed the city throughout the night.<sup>132</sup> The next day, more of Pol Pot's men emerged and killed unarmed, innocent people who did not evacuate the city quickly enough.<sup>133</sup> Not only did Pol Pot's men destroy lives, but they also succeeded in demolishing the National Library and hospitals.<sup>134</sup> The first days of Pol Pot's arrival ultimately resulted in the murder of more than 500,000 Phnom Penh citizens.<sup>135</sup>

While hundreds of thousands of deaths in Cambodia are attributed to the mass genocide by the Khmer Rouge, many deaths occurred as a result of the poor conditions and lack of medical care in Cambodia.<sup>136</sup> The Khmer Rouge ordered Phnom Penh residents to return to their native villages or directed them to designated areas in the countryside.<sup>137</sup> In the week of April 17, 1975, the Khmer Rouge forced over two million Cambodians to embark on a dreadful journey, through rice fields,

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<sup>125</sup> *Id.* at 287; see also DAVID P. CHANDLER, *THE TRAGEDY OF CAMBODIAN HISTORY* 230 (1991).

<sup>126</sup> GENOCIDE IN CAMBODIA, *supra* note 111, at 287.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 287-88; see also CHANDLER, *supra* note 115, at 230.

<sup>129</sup> GENOCIDE IN CAMBODIA, *supra* note 111, at 288.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 288, 305.

<sup>134</sup> *Id.* at 289.

<sup>135</sup> *Id.* at 288.

<sup>136</sup> *Id.* at 4.

<sup>137</sup> METZL, *supra* note 113, at 17.

forests, and swamps to the countryside, toward an uncertain fate. Only the families of top CPK officials and a few hundred factory workers were allowed to stay behind.<sup>138</sup> This brutal order added several thousand deaths to the approximately 500,000 lives lost in the civil war. Hospital patients were driven from their beds, random executions were committed, and many, including the elderly, small children, pregnant women, and the disabled, were abandoned or died along the way for want of food, medicine, or shelter.<sup>139</sup>

### C. *Life Under the Pol Pot Regime*

Those who actually survived the gruesome trip to the countryside found themselves in worse straits in the countryside villages.<sup>140</sup> In addition to the intolerable physical conditions, those from Phnom Penh were forbidden to express themselves or move about freely.<sup>141</sup> Eventually, Pol Pot even banned eating and cooking at home.<sup>142</sup> Any individual who appeared to deviate even slightly from these coercive rules was deemed suspect immediately.<sup>143</sup> Pol Pot's men often killed such suspects in the middle of the night.<sup>144</sup> Upon concluding that Pol Pot's men had killed her husband, a wife could not mourn for her husband, as such an act would have been considered an act of rebellion against the "Revolution."<sup>145</sup>

Among those most vulnerable to Pol Pot's hostility were intellectuals, or those who even resembled intellectuals.<sup>146</sup> Pol Pot viewed intellectuals as corrupt products of the exploiting class.<sup>147</sup> Individuals who wore glasses for legitimate eyesight problems were plucked out, arrested, and sent to the security service.<sup>148</sup> Pol Pot's utter abhorrence for intellectuals evidenced itself from the beginning. To draw out intellectuals during the evacuation of Phnom Penh, loudspeakers on vehicles rang through the city deceitfully announcing that they needed professors, technicians,

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<sup>138</sup> CHANDLER, *supra* note 115, at 210; GENOCIDE IN CAMBODIA, *supra* note 111, at 290.

<sup>139</sup> CHANDLER, *supra* note 115, at 17, 210.

<sup>140</sup> See, e.g., GENOCIDE IN CAMBODIA, *supra* note 111, at 290-302.

<sup>141</sup> *Id.* at 290.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See *id.* at 289-90.

<sup>147</sup> See *id.* at 297.

<sup>148</sup> *Id.* at 289.

and physicians to help reconstruct the city.<sup>149</sup> Many of those who responded to the call were never seen again.<sup>150</sup> Pol Pot's efforts to eliminate intellectuals, however, did not end in Phnom Penh.<sup>151</sup> Even in the countryside, intellectuals were monitored closely, and the Revolution authorities were free to execute them at whim.<sup>152</sup> Pol Pot's men often tortured intellectuals.<sup>153</sup> For example, in lieu of buffalos and oxen, intellectuals were forced to pull ploughs through the rice paddies.<sup>154</sup>

Unfortunately, the elderly, women, and children did not fare much better than their intellectual countrymen.<sup>155</sup> Given Pol Pot's absolute disregard for human life, the elderly experienced inhumane treatment.<sup>156</sup> They worked under harsh labor conditions although they were physically incapable of doing so.<sup>157</sup> If they fell behind in their work, their already miniscule food rations were taken away altogether.<sup>158</sup> If they complained about their treatment, the local authorities simply beat them.<sup>159</sup> Pol Pot's men mistreated women just as poorly. Pol Pot frowned on women becoming pregnant because he wanted women to help revive the agricultural society.<sup>160</sup> Requests for maternity leave resulted not in sympathy, but in a reduced food ration.<sup>161</sup> Women were often separated from their husbands and were only allowed to see them two or three times a month, if they were not already permanently separated.<sup>162</sup> As for children, Pol Pot forced them to work harder than their elders.<sup>163</sup> These poor children found no solace at night, as their shelter was inadequate and their stomachs were empty.<sup>164</sup>

For those who required medical assistance, the hospitals were hardly places of healing.<sup>165</sup> "Hospitals" were pretextual labels for hellholes of

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<sup>149</sup> *Id.* at 289-90.

<sup>150</sup> *See id.*

<sup>151</sup> *See* METZL, *supra* note 113, at 17.

<sup>152</sup> *See* GENOCIDE IN CAMBODIA, *supra* note 111, at 297.

<sup>153</sup> *See id.* at 298.

<sup>154</sup> *Id.*

<sup>155</sup> *See id.* at 292-93.

<sup>156</sup> *See id.* at 290, 293.

<sup>157</sup> *See id.* at 293.

<sup>158</sup> *See id.*

<sup>159</sup> *See id.*

<sup>160</sup> *Id.* at 292.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*; *see also id.* at 289.

<sup>163</sup> *Id.* at 293.

<sup>164</sup> *See id.*

<sup>165</sup> *See id.* at 294.

execution, especially for the former residents of Phnom Penh.<sup>166</sup> Pol Pot used hospitals to exterminate those physically unfit to perform the work of his agricultural revolution.<sup>167</sup> Pol Pot trained so-called “physicians,” some merely pre-adolescents, for no more than three months.<sup>168</sup> These physicians experimented on those who required medical attention as guinea pigs.<sup>169</sup> Occasionally, Pol Pot’s medical personnel would give these “patients” the proper treatment and medication because they grew weary of their dual function as gravediggers.<sup>170</sup> Perhaps even more appalling was the fact that these patients were not given proper burials according to Khmer tradition.<sup>171</sup>

#### D. Torture and Mass Executions

Intellectuals were prime objects of Pol Pot’s disdain. Pol Pot killed teachers and students, in addition to their families.<sup>172</sup> “Literacy, occupational skills, and symbols of modernity as trivial as eyeglasses became grounds for execution.”<sup>173</sup> In several locations in the Pursat Province, Pol Pot’s men ordered the intellectual victims to step outside their barn prison, one by one, to be killed.<sup>174</sup> They also raped young girls until they passed out, and eventually killed them.<sup>175</sup> In the Siem Reap Province, teachers were burnt to death in furnaces, their remains used as fertilizer.<sup>176</sup> In the Takeo Province, Pol Pot’s forces buried seventy teachers and their families in a pit.<sup>177</sup> Adults were beaten to death with metal bars, and the young children were “taken by their feet and had their heads smashed against a tree trunk.”<sup>178</sup> In the Kampot Province, “all teachers from the Touk Meas district were pushed over a precipice.”<sup>179</sup> At the Tuol Sleng prison in Phnom Penh, victims were electrically tortured, hanged, beaten with various tools, or cut to

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 295.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 296.

<sup>172</sup> *Id.* at 341.

<sup>173</sup> HEIN, *supra* note 103, at 27.

<sup>174</sup> GENOCIDE IN CAMBODIA, *supra* note 111, at 342.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

pieces.<sup>180</sup>

Religious believers had a similarly abysmal plight.<sup>181</sup> For example, Pol Pot's revolutionaries disrespected, tortured, and persecuted more than 100,000 Buddhist monks.<sup>182</sup> They forced the monks to complete backbreaking labor and forbade them from engaging in any religious practices, such as praying or making offerings to the gods.<sup>183</sup> Furthermore, Pol Pot's men destroyed Buddhist literature, Buddha statues, and other Buddhist relics.<sup>184</sup> With regard to Islam believers, Pol Pot's men would serve pork meals to weed them out.<sup>185</sup> They punished and often executed those who refused to eat the pork meals.<sup>186</sup> Pol Pot's revolutionaries apparently exterminated all Christians, including clergymen, in Kampuchea.<sup>187</sup>

As evidenced by his acts against intellectuals, religious followers, the elderly, and the sick, Pol Pot was indeed a master torturer.<sup>188</sup> Perhaps the most infamous site of Pol Pot's torture techniques was the Tuol Sleng extermination camp in Phnom Penh.<sup>189</sup> The Tuol Sleng concentration camp included interrogation rooms fully outfitted with various torture devices such as "electric shock devices, suspension devices on the ceiling, iron bars, choppers, chains, fetters on the beds, etc."<sup>190</sup> In fact, blood stains still remain on the walls and ceilings.<sup>191</sup> At Tuol Sleng, one could find prisoners from all walks of life: peasants, ministers, blue-collar workers, technicians, intellectuals, professors, physicians, engineers, and military personnel.<sup>192</sup> Pol Pot's men required prisoners to sleep on the ground, only in their underwear.<sup>193</sup> They were absolutely forbidden from speaking.<sup>194</sup> Prisoners who inadvertently overturned the makeshift toilet box would be beaten and ordered to clean the remains

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<sup>180</sup> *Id.* at 343.

<sup>181</sup> *See id.* at 360-71.

<sup>182</sup> *Id.* at 362.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 365.

<sup>185</sup> *Id.* at 368.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 370.

<sup>188</sup> *See id.* at 300.

<sup>189</sup> *See id.* at 372.

<sup>190</sup> *Id.* at 300.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 373.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 374.

on the floor with their tongues.<sup>195</sup> During interrogations, the prison's personnel beat the prisoners with branches or electric wire.<sup>196</sup> As the weeks progressed, prison personnel tortured the prisoners more violently if the prisoners continued to deny the charges against them.<sup>197</sup> Electric shock torture, with electric wire connected to the prisoner's foot, tongue, ears, fingers, or penis, was not uncommon.<sup>198</sup> Whether these prisoners confessed or not, their ultimate fate was death.<sup>199</sup>

#### E. After the Fall of the Khmer Rouge

The Vietnamese invasion of Cambodia in 1978 pushed the Khmer Rouge forces into Thailand within a few months. This caused a second influx of refugees, and enabled tens of thousands of Cambodians to flee, although Thailand initially attempted to bar the refugees from entry. This group included urban and professional people who had survived the Pol Pot regime by concealing their backgrounds and large numbers of rural people and Khmer Rouge cadres and soldiers.<sup>200</sup> International pressure eventually persuaded Thailand to take in some 250,000 refugees. Another 250,000 arrived in the mid-1980s. Altogether, about eight percent of Cambodia's population fled to Thailand.<sup>201</sup> Some 60,000 died during their escape.<sup>202</sup>

Before 1978, little news of the terrible suffering of the people of Cambodia reached the West. Information about the destruction of an entire population under Pol Pot's reign of terror, forced marches and forced labor, starvation, disease, and vicious mass murder, was fragmentary. "Only after the Vietnamese invaded Cambodia late in 1978, when tens of thousands of emaciated survivors crossed the border into Thailand and mass graves were discovered did the full horror begin to seep in."<sup>203</sup>

Responding to this, the United States in 1978 and 1979 committed itself first to massive Cambodian aid and then to significant Cambodian resettlement. For the first two years, the United States admitted Cambodian refugees. By 1980, however, Congress grew increasingly

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *See id.* at 375.

<sup>200</sup> WELARATNA, *supra* note 117, at 166.

<sup>201</sup> HEIN, *supra* note 103, at 35.

<sup>202</sup> *Id.*

<sup>203</sup> LOESCHER, *supra* note 119, at 147.

restive as recently-admitted Cambodians began to add to the difficulties of communities with large Indochinese populations. The State Department feared that a short-term rescue effort was being transformed into a long-term immigration program with no visible end. INS officials joined the State Department in their sentiments and argued that the crisis in Cambodia had passed, that the new Refugee Act protected those with only a current fear of persecution, and that many of those seeking to enter the United States in 1980 and 1981 were motivated primarily by the desire to enter America, the land of milk and honey.<sup>204</sup>

Fears of a new Communist regime and famine in 1979 and 1980 led to a staggering third wave of half a million refugees. Several refugee camps were opened during these years. By June of 1980, more than 150,000 Khmer refugees lived in holding centers operated by the United Nations High Commissioner for Refugees ("UNHCR"). Tens of thousands of refugees camped along the Thai border, hoping to be admitted to Thai refugee camps or for word that it was safe to return home.<sup>205</sup> Food, shelter, and medical care were provided, but Thai guards and other inmates harassed and stole from the refugees. Other border camps were caught in the crossfire of Vietnamese factions.<sup>206</sup> Refugees languished in these camps for years. During a 1988 Congressional hearing on Cambodia, Kitty Dukakis described these camps as places where "brutality escalates hopelessness, suicide, child abuse; attitudes and behaviors of a tragic kind have become the norm."<sup>207</sup>

The UNHCR and Thai government effectively closed the holding centers for Cambodians inside Thailand to new arrivals by January 1980, with more than 160,000 refugees in holding centers inside Thailand, about 200,000 straddling the Thai-Cambodian border, and more than 300,000 traveling from the interior of Cambodia to the Thai border to pick up food and medical supplies.<sup>208</sup> The Thai government decided to make a concerted effort to reduce the holding centers' populations and announced a program of voluntary repatriation with UNHCR support in 1980. Nine thousand Cambodian refugees, the majority Khmer Rouge supporters who had used the holding centers as rest centers, were given hasty interviews, taken to the Thai-Cambodian border, and released. The Vietnamese perceived the repatriation as an attempt by the West to return thousands of Khmer Rouge troops to the border to fight inside

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<sup>204</sup> *Id.* at 148.

<sup>205</sup> WELARATNA, *supra* note 117, at 166.

<sup>206</sup> *Id.* at 167.

<sup>207</sup> *Id.* (quoting Kitty Dukakis before 1988 congressional hearing).

<sup>208</sup> LOESCHER & SCANLAN, *supra* note 119, at 163-64.

Cambodia. As a result, Vietnamese troops retaliated by attacking several border camps, driving thousands of refugees across the boundary line into Thailand and causing death and confusion.<sup>209</sup>

The failure of the repatriation efforts convinced the United States Embassy in Bangkok and State Department officials that there was no humane alternative to admitting more Cambodians as refugees. In the mid-1980s, the United States identified some 20,000 individuals, out of the holding center population of 160,000, as having family or employment ties in the United States. These individuals thereby met the government's criteria for admission under the Immigration Act of 1965, which limited the number of immigrants from each country to 20,000.<sup>210</sup> Some scholars and INS officials, however, started questioning whether the creation of a new Cambodian refugee program would serve primarily to encourage economic migration to the United States.<sup>211</sup> As of 1993, 150,000 Khmer refugees had been admitted to the United States, a tribute to strong lobbying efforts of the Citizens' Commission on Indochinese Refugees in 1978.<sup>212</sup>

Between 1975 and 1979, Pol Pot's socialist revolution resulted in millions of Cambodian deaths and approximately half a million refugees.<sup>213</sup> Those lucky, or unlucky, enough to survive this nightmare are psychologically and physically traumatized by their experiences under Pol Pot's regime.<sup>214</sup> Many of these survivors suffer from "'Pol Pot syndrome,' [characterized by] non-specific pains, insomnia, loss of appetite, palpitations and difficulties in breathing."<sup>215</sup> These symptoms have developed from witnessing the Khmer Rouge beating their family members to death.<sup>216</sup> While Pol Pot's rule ended long ago, the after-effects of his brutality remain firmly cemented in the memories of Khmer Rouge survivors.

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<sup>209</sup> *Id.* at 164.

<sup>210</sup> Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965); BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 95-96 (2004).

<sup>211</sup> LOESCHER & SCANLAN, *supra* note 119, at 166.

<sup>212</sup> WELARATNA, *supra* note 117, at 167.

<sup>213</sup> CHANDLER, *supra* note 115, at 236.

<sup>214</sup> *Id.* at 236-37.

<sup>215</sup> LAWYERS COMMITTEE FOR HUMAN RIGHTS, *KAMPUCHEA: AFTER THE WORST, A REPORT ON CURRENT VIOLATIONS OF HUMAN RIGHTS* 5 (1985) (quoting Jon Swain, *Return to the Killing Fields*, *SUNDAY TIMES* (London), May 26, 1985).

<sup>216</sup> *Id.*



## IV. REFUGEES IN THE UNITED STATES

The United States takes considerable pride in its long history of providing refuge to foreign nationals displaced by the ravages of war or persecuted by totalitarian governments. Certain statements and actions unmistakably have been supportive of refugees. From George Washington's 1783 expression of open arms to the "oppressed and persecuted,"<sup>217</sup> to the admission of more than 14,000 Kosovo refugees in 1999,<sup>218</sup> two centuries of similar statements from leaders and citizenry alike have helped to project, even if they did not always accurately reflect, a certain national generosity of spirit.

Refugees and freedom fighters from around the world took such statements at their word. The anti-Mexican government journalist Ricardo Flores Magon fled to the United States, where he worked with the Mexican Liberal Party beginning in 1906 and became one of the fathers of the Mexican Revolution.<sup>219</sup> In January 1911, he and his brother directed the uprising of Baja California and seized the towns of Mexicali and Tijuana.<sup>220</sup> Also, around the turn of the Nineteenth Century, Chinese revolutionary Sun Yat Sen entered the United States and began raising funds for rebellion.<sup>221</sup> In 1885, three Korean political exiles fled to the United States to avoid persecution after an abortive coup.<sup>222</sup> Between 1910 and 1918, 541 Korean refugee students fled Japanese persecution and came to the United States.<sup>223</sup> Indian refugees began arriving in 1908, using the United States as the base from which to lead anti-British activities.<sup>224</sup> Expelled from Palestine in 1915, Polish-born David Ben-Gurion traveled to New York.<sup>225</sup> After World War I, he returned to the Middle East and organized support for the future Jewish nation of Israel.<sup>226</sup> The list of refugees to the United States who gained notoriety includes Albert Einstein, Thomas Mann, Madeleine Albright, Marc

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<sup>217</sup> J.T. FLEXNER, WASHINGTON: THE INDISPENSABLE MAN 176 (1974).

<sup>218</sup> U.S. Committee for Refugees, Refugees Admitted to the United States, By Nationality, FY 1989-2001, at [http://www.refugees.org/world/articles/nationality\\_rr01\\_12.cfm](http://www.refugees.org/world/articles/nationality_rr01_12.cfm) (last visited Nov. 11, 2004).

<sup>219</sup> See David Uhler, *Pride and Principles: Mexican Writer Never Turned his Back on his Anarchist Ideals*, SAN ANTONIO EXPRESS NEWS, Oct. 9, 2001, at 1D.

<sup>220</sup> *Id.*

<sup>221</sup> THE ASIAN IN NORTH AMERICA 49 (Stanford M. Lyman ed., 1977).

<sup>222</sup> WARREN KIM, KOREANS IN AMERICA 3 (1971).

<sup>223</sup> *Id.* at 4, 23.

<sup>224</sup> G. Hess, *The Forgotten Asian Americans: The East Indian Community in the United States*, in COUNTERPOINT: PERSPECTIVES ON ASIAN AMERICA 413, 417 (Emma Gee ed., 1976).

<sup>225</sup> Amos Oz, *David Ben-Gurion*, TIME, Apr. 13, 1998, at 134.

<sup>226</sup> *Id.*

Chagall, and numerous artists, ballet stars, and athletes.<sup>227</sup>

#### A. *Ad Hoc Policies Prior to 1980*

An array of ad hoc congressional acts that superseded the national quota systems have escorted thousands, if not hundreds of thousands, of refugees to the United States. Prominent among these was the Displaced Persons Act of 1948,<sup>228</sup> which enabled 400,000 refugees and displaced persons, most of whom were from Europe, to enter the United States.<sup>229</sup> The 1953 Refugee Relief Act<sup>230</sup> admitted 200,000 refugees including approximately 2800 refugees of the Chinese Revolution.<sup>231</sup> In 1959, thousands of Hungarian "freedom fighters" were permitted to enter the United States as refugees, and were later able to apply for lawful permanent resident status.<sup>232</sup> The United States admitted refugee-escapees from France, Germany, Belgium, Austria, Italy, Greece, and Lebanon under the Act of July 14, 1960.<sup>233</sup> The Act of June 28, 1962 extended the law indefinitely.<sup>234</sup>

Refugee migration to the United States finds its origin in the noble pursuit of humanitarian-oriented foreign policy objectives. Refugee advocates invariably invoke the need to respond compassionately to those in other countries confronted with life-threatening crises. In passing the Displaced Persons Act, Congress explicitly adopted the definitions of the terms "displaced person" and "refugee" set forth in the 1946 Constitution of the International Refugee Organization.<sup>235</sup>

It is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands,

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<sup>227</sup> Jean Patterson, *Einstein Was a Refugee*, AZERBAIJAN INTERNATIONAL (Spring 1997), at [http://www.azer.com/aiweb/categories/magazine/51\\_folder/51\\_articles/51\\_einstein.html](http://www.azer.com/aiweb/categories/magazine/51_folder/51_articles/51_einstein.html) (last visited Sept. 17, 2004).

<sup>228</sup> Pub. L. No. 80-774, 62 Stat. 1009, amended by Act of June 16, 1950, Pub. L. No. 81-555, ch. 262, 64 Stat. 219.

<sup>229</sup> U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY COMMISSIONERS 153-54 (1981).

<sup>230</sup> Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400 (1953), amended by Act of Aug. 31, 1954, Pub. L. No. 83-751, 68 Stat. 1044 (1954).

<sup>231</sup> VICTOR NEE & BRETT DE BARY NEE, *LONGTIME CALIFORNIA: A DOCUMENTARY STUDY OF AN AMERICAN CHINATOWN* 410 (1973).

<sup>232</sup> IMMIGRATION & NATURALIZATION SERV., 1959 ANNUAL REPORT 4 (1959).

<sup>233</sup> Act of July 14, 1960, Pub. L. No. 86-648, 74 Stat. 504 (1960).

<sup>234</sup> IMMIGRATION & NATURALIZATION SERV., 1962 ANNUAL REPORT 4 (1962).

<sup>235</sup> See *INS v. Stevic*, 467 U.S. 407, 415 (1984); *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 52 (1971).

including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas. . . . admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States.<sup>236</sup>

The rhetoric notwithstanding, refugee law and policy have reflected the tension between humanitarian aims and practical domestic and international concerns. These tensions make plain the link between refugee and immigration policy. In the 1930s, for example, the United States turned away thousands of Jews fleeing Nazi persecution, in large part because of powerful restrictionist views against certain ethnic, religious, and racial groups. Congress and United States consular officers consistently resisted Jewish efforts to emigrate and impeded any significant emergency relaxation of limitations on quotas.<sup>237</sup>

The plight of European Jews fleeing Nazi Germany aboard the ship *S.S. St. Louis* in 1939 is a horrific example of how restrictionist views were manifested toward refugees at the time. In a diabolical propaganda ploy in the spring of 1939, the Nazis had allowed this ship, carrying destitute European Jewish refugees, to leave Hamburg bound for Cuba, but had arranged for corrupt Cuban officials to deny them entry even after they had been granted visas.<sup>238</sup> Nazi propaganda minister Joseph Goebbels wanted to prove that no country wanted the Jews.<sup>239</sup> The *St. Louis* was not allowed to discharge any passengers, save twenty-two who were permitted to disembark, and was ordered out of Havana harbor.<sup>240</sup> As the ship sailed north nearing United States territorial waters, the United States Coast Guard warned it away.<sup>241</sup> President

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<sup>236</sup> SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, *supra* note 229, at 154.

<sup>237</sup> *Id.* at 155; HARRY KITANO & ROGER DANIELS, *ASIAN AMERICANS: EMERGING MINORITIES* 13-14 (1988).

<sup>238</sup> See Michael Kernan, *Around the Mall and Beyond: Smithsonian Institution's National Postal Museum*, *SMITHSONIAN*, June 1995, at 18.

<sup>239</sup> See *U.S. Policy Toward Cuba: Hearings Before the Subcomm. on the W. Hemisphere of the House Comm. on Int'l. Relations*, 104th Cong. 91-100 (1995) (statement of Hon. Otto J. Reich, Director, Brock Group and Senior Associate, Center for Strategic and International Studies) [hereinafter Reich's Statement].

<sup>240</sup> See Kernan, *supra* note 238. The *St. Louis* arrived in Cuba from Germany on May 27, 1939. This was three months before the outbreak of the war, and three years before the establishment of the death camps. Other ships had made the same journey, and their passengers disembarked successfully; but on May 5 the Cuban government had issued new regulations requiring a \$500 bond from each approved immigrant. Only twenty-two passengers of the *St. Louis*, however, had fulfilled the requirements before leaving Hamburg on May 13. William J. vanden Heuvel, *America, FDR, and the Holocaust; Franklin D. Roosevelt*, 34 *SOC'Y* 54, 60 (1997).

<sup>241</sup> Kernan, *supra* note 238.

Franklin D. Roosevelt asserted that the United States could not accept any more European refugees because of immigration quotas, as untold thousands had already fled Nazi terror in Central Europe and many had come to the depression-racked United States.<sup>242</sup>

Nearly two months after leaving Hamburg, due to the efforts of U.S. Jewish refugee assistance groups, the ship was allowed to land in Holland.<sup>243</sup> Four nations agreed to accept the refugees: Great Britain, Holland, Belgium, and France.<sup>244</sup> Two months later, the Nazis invaded Poland, and the Second World War began. Before the war was over, the Nazis had killed over 600 of the 937 passengers on the *St. Louis*.<sup>245</sup> When the United States refused the *St. Louis* permission to land, many Americans were embarrassed; after the war, when the country discovered what happened to the refugees, Americans were ashamed.

Although the United States maintained a generally restrictive immigration policy during this era, it did accept an estimated 105,000 refugees from Nazi Germany in the 1930s, including such luminaries as Albert Einstein.<sup>246</sup> Many more, however, primarily Jews, were refused entry and forced to return to Europe and to oblivion. During the war, the Roosevelt Administration accepted fewer than 1000 Jewish refugees from Europe.<sup>247</sup> A 1939 refugee bill would have rescued 20,000 Jewish children from Germany had it not been defeated on the grounds that the children would exceed the German quota.<sup>248</sup>

The Roosevelt Administration's response to Hitler's "final solution" could not have been more indifferent. Initially, the Administration denied evidence of the genocide in Europe.<sup>249</sup> By June 1942, however, reliable reports of the Nazi extermination of Jews were in the hands of the State Department.<sup>250</sup> Even then, after learning from U.S. officials in Switzerland that Nazis were killing 6000 Jews per day at one site in Poland alone, the State Department, in February 1943, instructed the

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<sup>242</sup> James A. Haight, *The Horror and Guilt of the Holocaust*, CHARLESTON GAZETTE & DAILY MAIL, Apr. 22, 1994, at 8A; vanden Heuvel, *supra* note 240.

<sup>243</sup> See Reich's Statement, *supra* note 239, at 96-98.

<sup>244</sup> See Margaret Sheridan & Katherine Seigenthaler, *Nazi Victims Gather to Recall Tragic Voyage*, CHI. TRIB., Apr. 2, 1989, § 1, at 1.

<sup>245</sup> See *id.*

<sup>246</sup> See James Podgers, *The Longest Victory: Fifty Years Later, Profound Changes Spawned by World War II Are Still Shaping American and International Law*, 81 A.B.A. J. 58, 58-60 (1995).

<sup>247</sup> See Frank Kofsky, *Allied Leaders Dismissed Awful Truth*, TAMPA TRIB., May 7, 1995, at 1 (Commentary).

<sup>248</sup> Lawrence H. Fuchs, *Directions for U.S. Immigration Policy: Immigration Policy and the Rule of Law*, 44 U. PITT. L. REV. 433, 434 (1983).

<sup>249</sup> See Kofsky, *supra* note 247.

<sup>250</sup> *Id.*

officials not to transmit any more information of this kind.<sup>251</sup>

When news of Nazi death camps became public in late November 1942, civic and religious groups began urging President Roosevelt to rescue those Jews still alive, but he refused.<sup>252</sup> Some speculate that he resisted because he did not want to bring Jewish refugees to the United States for fear he would lose the votes of anti-Semites and immigration opponents in the 1944 election.<sup>253</sup> Roosevelt also supported the British government, which, under Winston Churchill, bitterly opposed rescuing Jews.<sup>254</sup> The British were afraid that Jewish refugees' potential demand to enter Palestine could precipitate an Arab rebellion.<sup>255</sup>

Policymakers throughout the early 1970s were pleased by their system of refugee policies, laws, and ad hoc decisions, and collectively denied the tension between humanitarian aims and practical political concerns. As they saw it, whenever large numbers of deserving refugees appeared, they could enact new legislation or manipulate existing laws and regulations to thwart admission of refugees. That sort of flexibility in a legal regime was, in their minds, positive. It also allowed them to make policy consistent with their political preference for refugees from Communism.<sup>256</sup>

A closer look at the basic structure of the system and the policies that informed it bears witness to this ideological bias. Consider the 1952 McCarran-Walter Act, which granted the Attorney General discretionary authority to "parole" into the United States any alien for "emergent reasons or for reasons deemed strictly in the public interest."<sup>257</sup> Although the original intent was to apply this parole authority on an individual basis,<sup>258</sup> the 1956 Hungarian refugee crisis led to its expanded use to accommodate those fleeing Communist oppression.<sup>259</sup> The United States also used the parole authority to admit more than 15,000 Chinese who fled mainland China after the 1949 Communist takeover<sup>260</sup> and more than 220,000 Cubans who sought refuge after Fidel Castro's 1959

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 15 (1981).

<sup>257</sup> Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(d)(5) (1956).

<sup>258</sup> Anker & Posner, *supra* note 256, at 15.

<sup>259</sup> *Id.*

<sup>260</sup> ABBA SCHWARTZ, *THE OPEN SOCIETY* 139-40 (1968); *A HISTORY OF THE CHINESE IN CALIFORNIA: A SYLLABUS* 29 (Thomas Chinn et al., eds., 1969).

coup.<sup>261</sup> Following the fall of the Batista government in Cuba on January 1, 1959, anti-Castro Cubans fled to the United States by the thousands, reaching a rate of 1500 per week.<sup>262</sup> They entered in a variety of methods: by common carrier, small boats, commandeered aircraft, and even across land boundaries after getting from Cuba to Mexico.<sup>263</sup> The numbers did not subside readily. In fact, in 1962, the INS inspected 125,800 Cubans to determine their eligibility for parole, up from 62,500 in 1961.<sup>264</sup> On May 23, 1962, President Kennedy directed Congress and his administration to take steps to parole several thousand Chinese from Hong Kong to the United States, in order to alleviate conditions in that colony caused by the influx of persons fleeing from Communist China.<sup>265</sup>

Using the parole authority, the Attorney General also permitted over 400,000 refugees from Southeast Asia to enter between 1975 and 1980.<sup>266</sup> By 1980, 99.7 percent of the more than one million refugees admitted under the parole system were from countries under Communist rule.<sup>267</sup> These figures betray any claim that humanitarian considerations formed the sole basis for refugee policy.

The preference afforded to refugees from Communist countries is also reflected in the 1965 reforms, when Congress created the first permanent statutory basis for the admission of refugees.<sup>268</sup> Incorporating prior refugee language into a seventh preference category, conditional entry was provided for refugees fleeing Communist-dominated areas or the Middle East.<sup>269</sup> Immigration controls were, however, manifest in this category as well. The seventh preference category included a worldwide annual quota of 17,400 entries and a geographic restriction that limited its use through 1977 to countries outside the Western Hemisphere.<sup>270</sup> Until its repeal in 1980, tens of thousands of refugees fleeing China, the Soviet Union, and other Communist societies used the seventh preference to gain entry into the United States.<sup>271</sup>

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<sup>261</sup> IMMIGRATION & NATURALIZATION SERV., 1964 ANNUAL REPORT 4 (1964).

<sup>262</sup> IMMIGRATION & NATURALIZATION SERV., 1962 ANNUAL REPORT 4 (1962).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> Linda W. Gordon, *Southeast Asian Refugee Migration to the United States*, in *PACIFIC BRIDGES* 153, 156 (J.T. Fawcett & B.V. Carino eds., 1987).

<sup>267</sup> David H. Laufman, *Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 *GEO. IMMIGR. L.J.* 495, 504 (1986).

<sup>268</sup> *Id.* at 503.

<sup>269</sup> *Id.*

<sup>270</sup> 8 U.S.C. §§ 1151, 1152(a)(7) (1976).

<sup>271</sup> See IMMIGRATION & NATURALIZATION SERV., 1977 ANNUAL REPORT 45 tbl.7A (1978).

In 1968, shortly after the creation of the seventh preference, the United States agreed to the United Nations Protocol Relating to the Status of Refugees.<sup>272</sup> The protocol obligated compliance with the guidelines established by the United Nations Convention Relating to the Status of Refugees.<sup>273</sup> The ideological and geographic restrictions of the seventh preference, however, were inconsistent with the ideologically neutral protocol. The United States, therefore, attempted to force compliance by using the Attorney General's discretionary parole authority.<sup>274</sup> That authority, however, did not conform to the protocol's principles of neutrality either.

Few complaints about refugee policies and laws were registered on the floors of Congress during most of the 1970s. Some liberal observers did challenge the bias favoring refugees from Communist countries, but mostly only as it affected applications for political asylum filed by individuals who had already gained entry.<sup>275</sup> As for the greater numbers seeking refugee status from abroad, policymakers seemed satisfied with the status quo. Rather than being disingenuous, this attitude was entirely consistent with their sense of humanitarianism.

After 1975, policymakers became less complacent as Asians began entering in increasing numbers under existing guidelines. Fewer than 7000 Chinese benefited before 1965 from the 1953 Refugee Relief Act.<sup>276</sup> Through 1966, about 15,000 were admitted under the parole provision.<sup>277</sup> These low numbers were not perceived as threatening because the seventh preference category restricted Chinese refugees through its annual worldwide limitation of 17,400, which had to be shared with others. Indeed, until Congress repealed the seventh preference in 1980, only 14,000 who fled mainland China were able to take advantage of the seventh preference.<sup>278</sup>

Following the U.S. military withdrawal from Vietnam in April 1975, however, the flow of Asian refugees increased markedly, almost

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<sup>272</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223.

<sup>273</sup> See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

<sup>274</sup> The House Report on the Refugee Act of 1980, H.R. REP. NO. 96-608, at 3-4 (1979).

<sup>275</sup> See Peter Grier, "Yearning to Breathe Free," *Thousands Seek, Few Get Asylum in U.S.*, CHRISTIAN SCI. MONITOR, Oct. 13, 1983, at 1; Robert Pear, *U.S. Aides' Uncertainty on Rules Keeping Thousands in Asia Refugee Camps*, N.Y. TIMES, May 17, 1981, at A1.

<sup>276</sup> See IMMIGRATION & NATURALIZATION SERV., 1966 ANNUAL REPORT 38 tbl.6D (1967).

<sup>277</sup> See *id.* at 61 tbl.14B.

<sup>278</sup> See IMMIGRATION & NATURALIZATION SERV., 1977 ANNUAL REPORT, 10, tbl.7A (1977); IMMIGRATION & NATURALIZATION SERV., 1978 STAT. Y.B., 12 tbl.7A (1979).

overnight.<sup>279</sup> Invoking numerical restrictions in the midst of a controversial and devastating war would have been unacceptable; too many understood such inflexibility as morally treacherous and politically high-priced. Consequently, the Attorney General used the parole authority on several occasions to permit Asians to enter for the first time since the 1965 amendments.<sup>280</sup>

Initially, the United States merely wanted to evacuate fewer than 18,000 American dependents and government employees from Vietnam.<sup>281</sup> Immediately before the fall of Saigon in April 1975, however, former employees and others whose lives were threatened were included. These evacuees included approximately 4000 orphans, 75,000 relatives of American citizens or lawful permanent residents, and 50,000 Vietnamese government officials and employees.<sup>282</sup> Mass confusion permitted many who did not fit into these categories also to be evacuated.<sup>283</sup> Between April and December 1975, the United States thus admitted 130,400 Southeast Asian refugees, 125,000 of whom were Vietnamese.<sup>284</sup>

The exodus did not stop there. By 1978, the United States admitted thousands more under a series of Indochinese Parole Programs authorized by the Attorney General.<sup>285</sup> The number of Southeast Asian refugees swelled to 14,000 per month by the summer of 1979.<sup>286</sup> Following the tightening of Vietnam's grip on Cambodia, several hundred thousand "boat people" and many Cambodian and Laotian refugees entered between 1978 and 1980.<sup>287</sup> In fact, annual arrivals of Southeast Asian refugees had increased almost exponentially: 20,400 in 1978, 80,700 in 1979, and 166,700 in 1980.<sup>288</sup>

In general, the United States poorly coordinated the flow of Southeast Asian refugees. The executive branch repeatedly waited until the

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<sup>279</sup> PAUL J. STRAND & WOODROW JONES, JR., *INDOCHINESE REFUGEES IN AMERICA* 32-34 (1985).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 32.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> R. Gardner et al., *Asian Americans: Growth, Change, and Diversity*, POP. BULL. 40-49 (1985).

<sup>285</sup> See Gordon, *supra* note 266, at 155.

<sup>286</sup> In early 1979, the U.S. had committed itself to accept seven thousand refugees monthly, but the figure doubled by the summer, in response to the desperate conditions in the refugee camps. See Gordon, *supra* note 266, at 155.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*



number of refugees in the countries of “first asylum” (those first reached by refugees) reached crisis proportions before declaring an emergency.<sup>289</sup> Only then would a new parole program be instituted.<sup>290</sup> Attacks on the inconsistent treatment of refugees and calls for a consistent policy became commonplace.<sup>291</sup> Many were uncomfortable with the Attorney General’s considerable unstructured power to admit, hastily, tens of thousands of refugees under the parole mechanism.<sup>292</sup> Others were genuinely concerned with the government’s erratic response to the plight of Southeast Asian refugees.<sup>293</sup> Dissatisfaction with ad hoc admissions provided the impetus for reform and, ultimately, the passage of the 1980 Refugee Act.<sup>294</sup>

The new refugee law was an attempt by Congress to treat refugee and immigration policies as separate and distinct. A major catalyst for the new refugee law was a disturbing anxiety felt by some members of Congress that thousands of Southeast Asians would destabilize many communities.<sup>295</sup> Concerns about controlling immigration have dominated Refugee Act applications ever since.

### B. *Ideological and Racial Enforcement of the 1980 Refugee Act*

The enactment of the Refugee Act of 1980 was enormously important. The United States became a party to the United Nations Protocol Relating to the Status of Refugees in 1968, and the legislative history of the 1980 Act reveals that it was intended to bring U.S. law in conformity with the protocol.<sup>296</sup> The law eliminated dogmatic language in the prior

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<sup>289</sup> Anker & Posner, *supra* note 256, at 30-31.

<sup>290</sup> *Id.*

<sup>291</sup> See Kathy Sawyer, *Refugee Policy Draws Fire in Hearing*, WASH. POST, May 13, 1980, at A6.

<sup>292</sup> See *Refugee Bill Proposed*, FACTS ON FILE WORLD NEWS DIG., Apr. 27, 1979, at 307 E3, available at LEXIS, Facts on File World News Digest.

<sup>293</sup> Some felt that the parole authority had been misused and were dissatisfied with the inconsistent treatment for refugees that resulted in some being granted parole while others received “indefinite voluntary departure.” See S. REP. NO. 96-256, at 9 (1979). Indefinite or extended voluntary departure was a type of group temporary safe haven that the Attorney General used for certain nationals of particular countries. See *Hotel & Rest. Employees Union Local 25 v. Att’y Gen.*, 804 F.2d 1256 (D.C. Cir. 1986).

<sup>294</sup> See PHILIP G. SCHRAG, *A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA* 26-27 (2000).

<sup>295</sup> See, e.g., *America’s Bold Example*, ECONOMIST, July 21, 1979, at 26; *And There Are Still Boat People*, WASH. POST, Oct. 12, 1980, at C6; Patricia Camp, *Jewish Group Announces National Drive to Resettle Refugees from Indochina*, WASH. POST, Sept. 8, 1979, at B3.

<sup>296</sup> See generally *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (holding that Congress did not intend to restrict eligibility for asylum to refugees proving it is more likely than not

statute that gave special preference to those fleeing from Communist-dominated countries or counties of the Middle East. The new law also established the position of U.S. Coordinator of Refugee Affairs, with the rank of ambassador-at-large.<sup>297</sup> Liberal cosponsors of the legislation, like Senator Ted Kennedy and Congresswoman Elizabeth Holtzman, heralded the legislation as replacing the old approach of using geographic and ideological criteria that was inherently discriminatory.<sup>298</sup> Yet, soon after the passage of the act, the vivid contrast in the treatment of Haitians, who were being turned away from the shores of south Florida, and Cubans, who were being greeted with open arms,<sup>299</sup> reaffirmed that the nation's refugee policy would continue to be used in a selective manner to define the nation from a particular political perspective.

The law provided a framework for processing two related groups of applicants: refugees and asylees. The basic difference is that a refugee must apply for refugee status abroad, and if granted, may then enter the United States.<sup>300</sup> An asylee is generally someone who enters the United States as a nonimmigrant, applies for asylum, and is deemed eligible.<sup>301</sup> Both asylees and refugees must demonstrate a "well-founded fear of persecution" on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>302</sup>

The statute provided that each year the President, after consultation with Congress, would establish the number of refugees that could enter the United States and from which regions of the world refugees could come.<sup>303</sup> The refugee quota for 1980 was 231,700.<sup>304</sup> Of that number, the Carter Administration designated 169,000 openings for Southeast Asia, 33,000 for the Soviet Union, 19,500 for Cuba, and 1000 for the remainder

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they will be persecuted if deported).

<sup>297</sup> See notes 345-51, *infra* and accompanying text. The position was eliminated in 1994. See *Senate Passes Important Immigration Changes in State Dept. Bill*, 71 INTERPRETER RELEASES 277, 278 (1994).

<sup>298</sup> Warren Brown, *Administration Officials Urge Law Change to Widen Diversity of Refugees Admitted*, WASH. POST, Mar. 15, 1979, at A21.

<sup>299</sup> See generally *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982); Malissia Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687 (1993); Dick Kirschten, *Challenging the Rules for Haitians*, NAT'L J., Nov. 27, 1993, at 2842.

<sup>300</sup> 8 U.S.C. § 1157 (1994).

<sup>301</sup> 8 U.S.C. § 1158 (1994).

<sup>302</sup> 8 U.S.C. § 1101(a)(42) (1994).

<sup>303</sup> *Id.* § 1157(a)(1) (1994); *Id.* § 1157(e)(1994).

<sup>304</sup> See IMMIGRATION & NATURALIZATION SERV., 1980 STAT. Y.B. 27 tbl.10 (1981).

of Latin America.<sup>305</sup> By 1986, the Reagan Administration dropped the refugee quota to 67,000, with 45,500 reserved for East Asia.<sup>306</sup> Under the Bush Administration in 1992, the total was increased to 142,000, primarily to accommodate an increase to 61,000 for the former Soviet Union.<sup>307</sup> The number for East Asians remained at 52,000, despite dire circumstances in Asian refugee camps.<sup>308</sup> By 1997, under the Clinton Administration, the total number was down to 78,000, with 10,000 for East Asia and 48,000 for Europe.<sup>309</sup> To qualify, however, a refugee applicant must fall into one of the geographic regions of the world that the President and Congress have designated as areas from which individuals may enter as refugees.<sup>310</sup> These areas generally include Africa, East Asia, Europe, Latin America and the Caribbean, and Near East and South Asia.<sup>311</sup>

Asylum, on the other hand, theoretically can be granted to unlimited numbers and to individuals from any country.<sup>312</sup> In practice, usually no more than 15,000 individuals are granted asylum each year.<sup>313</sup> To say the least, the United States has not reacted warmly toward groups who have reached its borders seeking asylum. When Haitians, El Salvadorans, Guatemalans, and Chinese boat people began arriving in significant numbers, for instance, the various administrations were quick to label them economic rather than political refugees.<sup>314</sup>

### C. Refugee Resettlement Policies and Secondary Migration

Southeast Asians posed a distinctive resettlement problem even for a country with experience in designing refugee plans that date back as far as 1945.<sup>315</sup> They became the largest refugee group ever to enter the

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<sup>305</sup> *Id.*

<sup>306</sup> See IMMIGRATION & NATURALIZATION SERV., 1988 STAT. Y.B. 50 tbl.25 (1989).

<sup>307</sup> See IMMIGRATION & NATURALIZATION SERV., 1992 STAT. Y.B. 72 (1993).

<sup>308</sup> See *Administration Proposes Admitting 144,000 Refugees for This Fiscal Year*, 68 INTERPRETER RELEASES 1290, 1291 (1991).

<sup>309</sup> See IMMIGRATION & NATURALIZATION SERV., 1997 STAT. Y.B. 70 (1998).

<sup>310</sup> See *supra* note 300.

<sup>311</sup> See *supra* note 309.

<sup>312</sup> The asylum provision contains no geographic or country requirement. See 8 U.S.C. § 1158 (2000).

<sup>313</sup> See *supra* note 309, at 85 tbl.27.

<sup>314</sup> See Peter Applebome, *South Texans Fear an Influx of Aliens*, N.Y. TIMES, Dec. 16, 1988, at A22; Maria Puente, *Smuggled Chinese Languish in U.S. Jails*, USA TODAY, Dec. 13, 1993, at 10A; Jane Taylor, *High-Seas Rescue Saves 71 Haitians*, UPI, Jan. 27, 1986, LEXIS, Nexis Library, UPI File.

<sup>315</sup> STRAND & JONES, *supra* note 279, at 32-34.

country so rapidly, and the challenge they presented began early when they came in entirely unanticipated numbers. Policymakers had planned for about 18,000 refugees, but, instead, about 130,000 entered within an eight-month period in 1975.<sup>316</sup> When this first wave triggered widespread opposition and resentful propaganda, it became obvious to bureaucrats and politicians alike that something needed to be done to help minimize the economic and cultural disruptions.<sup>317</sup> On April 18, 1975, President Gerald Ford created a temporary Interagency Task Force ("IATF") to coordinate the activities of twelve federal agencies, including the Department of Health, Education, and Welfare, responsible for resettlement.<sup>318</sup>

From the outset, IATF's temporary character proved problematic. As if to convince itself, and perhaps the President, that a temporary task force could manage the assignment, IATF perceived and treated the refugee problem as though it were temporary.<sup>319</sup> As a result, its policies did not carefully consider the long-term effects on the refugee community. IATF's rush to supervise led to sloppy sponsorship arrangements, some of which broke down almost immediately.<sup>320</sup> Some sponsored refugees served employers looking for cheap labor or subservient workers.<sup>321</sup>

More to the point, the shortsightedness of IATF led to the misguided decision to disperse Vietnamese refugees as widely as possible, rather than to concentrate them in assigned areas.<sup>322</sup> For those who wished to maintain control over the Vietnamese, assigning them to a few central locations seemingly promised to keep them where they could be more easily monitored and manipulated. At the same time, however, it increased opportunities for refugees to communicate with and reinforce each other, perhaps enabling them to form alliances and mobilize.

Dispersal had its own appeal. It might help avoid acute economic stress in host communities, force a more rapid assimilation, and diffuse the potential for solidarity and organization. The logistical problems, however, were considerable. If refugees became restless, for example, it

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<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 46; Robert E. Marsh, *Socioeconomic Status of Indochinese Refugees in the United States: Progress and Problems*, 43 SOC. SECURITY BULL. 11, 12-13 (1980).

<sup>318</sup> STRAND & JONES, *supra* note 279, at 32-34.

<sup>319</sup> W.T. LIU ET AL., *TRANSITION TO NOWHERE: VIETNAMESE REFUGEES IN AMERICA* 162-63 (1979).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> Susan S. Forbes, *Residency Patterns and Secondary Migration of Refugees*, 1 MIGRATION NEWS 3, 6 (1984).

would be more difficult to contain them. Still, by compelling them to disperse and rely upon outsiders, IATF hoped to domesticate the refugees, easing their transition into and their burden on mainstream culture.

Policymakers soon discovered that dispersal was ill-advised and unpopular. Initially, the program produced a settlement pattern mimicking the rest of the population. Refugees were dispersed neatly around the country, with twenty-one percent placed in California.<sup>323</sup> The IATF relocated at least one hundred refugees to every state except Alaska.<sup>324</sup> Relative isolation, however, quickly proved unacceptable to refugees who began moving from their assigned locations in substantial numbers, a practice commonly referred to as "secondary migration."<sup>325</sup>

While many factors contributed to refugees' decision to resettle, secondary migration principally resulted from poor policy decisions based upon superficial analyses. In a new and often hostile land, forced dispersal deprived Southeast Asians of desperately needed familial, cultural, and ethnic support.<sup>326</sup> Their desire to develop these support systems seemed possible only by forming the kinds of ethnic enclaves that dispersal discouraged.<sup>327</sup> So, Vietnamese leaders, particularly the clergy, frequently coordinated ambitious secondary migrations to places like New Orleans, where living together as a community seemed feasible.<sup>328</sup>

Secondary migration resulted, too, from the poorly designed sponsorship program that was part of the dispersal policy. New arrivals were required to have a sponsor before they could leave the refugee processing camps.<sup>329</sup> Voluntary agencies ("VOLAGs") contracted with the federal government to help identify and recruit sponsors for the refugees.<sup>330</sup> VOLAGs found sponsors who agreed to assist families in adjusting to their new surroundings.<sup>331</sup> Nevertheless, unlike previous refugee groups, Southeast Asians had no indigenous community to rely

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<sup>323</sup> REGINALD P. BAKER & DAVID S. NORTH, *THE 1975 REFUGEES: THEIR FIRST FIVE YEARS IN AMERICA* 55-56 (1984); Gordon, *supra* note 266, at 163.

<sup>324</sup> BAKER & NORTH, *supra* note 323, at 55-58.

<sup>325</sup> *Id.*

<sup>326</sup> See generally GAIL PARADISE KELLY, *FROM VIETNAM TO AMERICA: A CHRONICLE OF THE VIETNAMESE IMMIGRATION TO THE UNITED STATES* (1977) (describing Vietnamese refugee resettlement experience in United States).

<sup>327</sup> *Id.* at 201-202.

<sup>328</sup> *Id.* at 202.

<sup>329</sup> STRAND & JONES, *supra* note 279, at 40.

<sup>330</sup> SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 156 (1991).

<sup>331</sup> *Id.*

upon for sponsorship. Instead, their sponsors were mostly U.S. volunteers motivated by humanitarian concerns and located throughout the country.<sup>332</sup> Because individual sponsorship entailed a major financial obligation, only a few could be found.<sup>333</sup> Moreover, because only some sponsors could accommodate the large extended families of Southeast Asians, the families often ended up separated and divided. Perhaps not surprisingly, many reunified soon after passing through the processing centers.<sup>334</sup>

By 1980, forty-five percent of the first wave of Southeast Asian refugees had moved from their assigned locations to a different state, thereby frustrating the dispersal policy's goals of minimizing the impact of refugees on local economies.<sup>335</sup> They became concentrated most heavily in California, Texas, and Louisiana.<sup>336</sup> Urban areas having warm climates and an Asian population were preferred.<sup>337</sup> Thus, by the time the second wave began arriving in 1978, Southeast Asian refugees were no longer as widely dispersed as they had been under the original plan. In addition, the secondary migration of the first wave affected the initial dispersion of the second wave because newcomers were placed near those with whom they had close ties.<sup>338</sup> Housing shortages, perceived job competition, and high welfare dependency, which only fueled hostility and resentment, became associated with many of these resettlement areas.<sup>339</sup>

By the late 1970s, the profile of Southeast Asian refugees changed as more Chinese ethnics began entering Malaysia to avoid mistreatment in Vietnam.<sup>340</sup> Moreover, in the wake of Vietnam's invasion of Cambodia, thousands of Cambodians fled across the Thai border into refugee camps.<sup>341</sup> Both Chinese and Cambodians eventually found their way to the United States, and were joined by Laotians. These new refugees

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<sup>332</sup> LUCY M. COHEN & MARYANN GROSSNICKLE, *IMMIGRANTS AND REFUGEES IN A CHANGING NATION* 72 (1983); DARREL MONTERO, *VIETNAMESE AMERICANS: PATTERNS OF RESETTLEMENT AND SOCIOECONOMIC ADAPTATION IN THE UNITED STATES* 28 (1979).

<sup>333</sup> MONTERO, *supra* note 332, at 28; Marsh, *supra* note 317, at 12-13.

<sup>334</sup> T.T. Nhu, *The Trauma of Exile: Viet-nam Refugees*, 1 C.R. DIG. 59, 60 (1976).

<sup>335</sup> STRAND & JONES, *supra* note 279, at 42.

<sup>336</sup> BAKER & NORTH, *supra* note 323, at 59; Gordon, *supra* note 266, at 165.

<sup>337</sup> The most frequently cited reasons for secondary migration were family reunification, employment considerations, climate, and difficulty with sponsors and the community. STRAND & JONES, *supra* note 279, at 81.

<sup>338</sup> Gordon, *supra* note 266, at 163-64.

<sup>339</sup> *Id.*

<sup>340</sup> STRAND & JONES, *supra* note 279, at 28-31.

<sup>341</sup> HEIN, *supra* note 103, at 24-25; WELARATNA, *supra* note 117, at 166.

arrived in much worse physical and mental condition than their predecessors.<sup>342</sup> They were considerably poorer and less formally educated than those in earlier waves.<sup>343</sup> Experienced observers maintained that they constituted the “largest non[-]white, non[-]Western, non-English-speaking group of people ever to enter the country at one time.”<sup>344</sup> Their influx emphasized the need to overhaul refugee resettlement policy.

In response, the 1980 Refugee Act created the Office of the Coordinator for Refugee Affairs.<sup>345</sup> Charged with organizing a resettlement program and establishing permanent relocation guidelines, it determined that exclusive reliance on voluntary associations and the private sector was inadequate.<sup>346</sup> The Office attempted to standardize resettlement programs through thoughtful planning directed at controlling the social forces driving mass resettlement.<sup>347</sup>

The new administrators revised earlier policies. Though widespread dispersal remained the goal, they used more care in selecting sites.<sup>348</sup> They considered factors such as job opportunities, housing availability, viable voluntary organizations, service providers, and the existence of refugee populations at various sites.<sup>349</sup> Consultation with local officials became standard practice.<sup>350</sup> Although it emphasized social assimilation and avoidance of additional economic pressures on the host communities, the Office’s relatively more studied approach gave greater weight to the refugee communities themselves.<sup>351</sup>

The official policy on ghettoization changed too. Administrators acknowledged that “ethnic coalescence is not only a fact of life, but that it can [provide] a beneficial [support system] as long as clusters are not so large that they overburden local services.”<sup>352</sup> The 1981 Khmer Cluster

<sup>342</sup> LIU ET AL., *supra* note 319, at 86-87; KEITH ST. CARTMAIL, *EXODUS INDOCHINA* 270 (1983).

<sup>343</sup> STRAND & JONES, *supra* note 279, at 78-80.

<sup>344</sup> David Whitman, *Trouble for America’s ‘Model’ Minority*, U.S. NEWS & WORLD REP., Feb. 23, 1987, at 18-19 (quoting Professor Peter Rose of Smith College).

<sup>345</sup> Pub. L. No. 96-212, § 301, 94 Stat. 102, 109 (1980).

<sup>346</sup> STRAND & JONES, *supra* note 279, at 141-42.

<sup>347</sup> *Id.*; Forbes, *supra* note 322, at 21-24.

<sup>348</sup> Forbes, *supra* note 322, at 21-24.

<sup>349</sup> *Id.*; Gordon, *supra* note 266, at 169.

<sup>350</sup> Gordon, *supra* note 266, at 169; Forbes, *supra* note 322, at 21-24.

<sup>351</sup> Jacqueline Desbarats & Linda Holland, *Indochinese Settlement Patterns in Orange County*, 10 AMERASIA J. 23, 24 (1983).

<sup>352</sup> SELECT COMM’N ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS WITH SUPPLEMENTAL VIEWS BY COMMISSIONERS 185 (1981).

Project reflected this change in orientation.<sup>353</sup> When the project began, Cambodian refugees were entering the United States in substantial numbers for the first time.<sup>354</sup> Unlike second wave Vietnamese and some Laotians, they had no relatives drawing them to particular areas.<sup>355</sup> The project placed about 8500 of these so-called "free cases" in clusters of from 300 to 1300 in twelve sites located in ten states chosen for their capacity to absorb refugees.<sup>356</sup>

Despite the project's efforts, secondary migrations continued, especially among Hmong refugees. Sometimes, entire communities relocated in response to suggestions from their leaders.<sup>357</sup> Between 1980 and 1986, for example, 30,000 Hmong migrated to Fresno, in the Central Valley agricultural area of California.<sup>358</sup> In response, the federal government experimented with financial incentives designed to attract refugees to appointed locations.<sup>359</sup> Referred to as "Planned Secondary Resettlement," the program was intended to encourage refugees to move from California to Phoenix, where there were fewer refugees, more jobs, and, perhaps, a more hospitable environment.<sup>360</sup> The program generated little interest.<sup>361</sup>

Bureaucrats and politicians continued to hope that establishing community-based employment and social ties would eventually create patterns of internal migration for refugees who were more dispersed.<sup>362</sup> California, however, remained the most popular destination for new arrivals and secondary migrants.<sup>363</sup> Although the IATF initially placed less than twenty-five percent of the refugee population in California, an estimated forty percent of the Southeast Asian population now resides there.<sup>364</sup> Perhaps because of government influence, secondary migration to California has decreased since 1983, and more Southeast Asians have

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<sup>353</sup> Gordon, *supra* note 266, at 164.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*; U.S. DEP'T OF HEALTH, EDUC., & WELFARE, REFUGEE TASK FORCE, REPORT TO CONGRESS 22 (1977).

<sup>357</sup> Gordon, *supra* note 266, at 165-66.

<sup>358</sup> See generally Katherine Bishop, *Asian Tradition at War with American Laws*, N.Y. TIMES, Feb. 10, 1988, at A18; Spencer Sherman, *When Cultures Collide*, 6 CAL. LAWYER 19, 32-36, 60 (1986).

<sup>359</sup> Dexter Waugh, *Luring Asians off State Welfare Rolls*, S.F. EXAMINER, Dec. 21, 1986, at B-1.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> Gordon, *supra* note 266, at 165-66.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 163-65.



begun moving to Texas, Washington, Massachusetts, and Minnesota.<sup>365</sup>

The development of the Cambodian American community is a direct result of U.S. refugee policy. Only 390 Cambodian immigrants arrived in the United States between 1952 and 1974.<sup>366</sup> After the Khmer Rouge took control of Cambodia in 1975, however, things changed; by 1980, 13,000 Cambodian refugees had arrived in the United States.<sup>367</sup> A year after the Refugee Act of 1980, the United States admitted another 16,000 refugees and 38,000 the next year.<sup>368</sup> The United States admitted more than 145,000 Cambodian refugees between 1975 and 1999, with another 42,000 nonrefugees tallied.<sup>369</sup> The 2000 census reported 206,000 people of Cambodian descent within the United States.<sup>370</sup>

#### V. CRIMINALITY IN THE CAMBODIAN REFUGEE COMMUNITY

Criminality in the Cambodian and other Southeast Asian refugee communities is a serious challenge. In the 1990 census, Southeast Asians made up one and a half percent of California's population.<sup>371</sup> Of the roughly 9000 wards of the California Youth Authority (the state's most incorrigible youth) in 1991, however, four and a half percent were Southeast Asians, who were mostly perpetrators and victims of California's gang wars.<sup>372</sup> Many were young Cambodians. Recent analyses (1991-2000) of juvenile arrests in San Francisco and Alameda (including the city of Oakland) counties in California concluded that Cambodian and Vietnamese youth have "higher arrest and recidivism rates as compared to most other racial and ethnic groups."<sup>373</sup>

What explains the relatively high levels of criminality in the Cambodian refugee community? Criminologists, social scientists, parents, and the offenders themselves offer a variety of explanations. All

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<sup>365</sup> U.S. DEP'T OF HEALTH, EDUCATION, & WELFARE, *supra* note 356, at 91-92.

<sup>366</sup> Dori C. Cahn & Jay W. Stansell, *From Refugee to Deportee: How U.S. Immigration Law Failed the Cambodian Community* 4 (forthcoming 2005).

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* The Southeast Asian Resource Action Center believes that there was an undercount in the Census and that the actual figure for people of Cambodian descent in 2000 was 257,000. *Id.*

<sup>371</sup> TONY WATERS, *CRIME & IMMIGRANT YOUTH*, at ix (1999).

<sup>372</sup> *Id.* Southeast Asians also made up eight and a half percent of the 1991 incoming freshman class at the University of California, Davis. *Id.*

<sup>373</sup> See THAO LE ET AL., *NOT INVISIBLE: ASIAN PACIFIC ISLANDER JUVENILE ARRESTS IN ALAMEDA COUNTY* 43 (July 2001); THAO LE ET AL., *NOT INVISIBLE: ASIAN PACIFIC ISLANDER JUVENILE ARRESTS IN SAN FRANCISCO COUNTY* 45 (July 2001).

of these explanations seem to flow from refugee status itself.

#### A. *Refugee Camp Environment and Experience*

The experience and environment at refugee camps prior to entering the United States was not positive. Food and simple shelter was provided by a staff that was overwhelmed.<sup>374</sup> Activities were scarce and there was little opportunity to be productive.<sup>375</sup> Men, the traditional “rulers” of the home, had lost control, and as one said: “I watch my children grow up behind barbed wire. . . . We [have been] here two years. And what can I do? What do I do? Nothing.”<sup>376</sup>

Furthermore, refugee camps were breeding grounds for violence and crime. Most refugees were men between eighteen and thirty, with little to do and no means to support families they left behind.<sup>377</sup> Guilt, frustration, and anger often resulted in violence, and then separate confinement by camp officials.<sup>378</sup> In some camps that were “open” to refugees coming and going during the day, drugs and other criminal acts were accessible.<sup>379</sup> Many unaccompanied minors, with no family in the camps, were attracted to gangs or older troublemakers. The environment in many camps reached a point where some refugees had to guard their families and belongings around the clock.<sup>380</sup>

Although most may have been safer in Thai camps compared to the terror of Pol Pot, Cambodian refugees were victimized in other ways. In one infamous event, Thai soldiers pushed 45,000 refugees down an embankment into a Khmer Rouge minefield.<sup>381</sup> Soldiers also exploited and assaulted refugees.<sup>382</sup>

#### B. *Post Traumatic Stress Disorder*

The task of acculturation is enormous for many newcomers, but Cambodians, who are ethnic Khmer, arrived with other challenges.<sup>383</sup> Many parents who survived the trauma of Pol Pot’s autogenocide were

<sup>374</sup> PATRICK DU PHUOC LONG, *THE DREAM SHATTERED, VIETNAMESE GANGS IN AMERICA* 111 (1996).

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> LONG, *supra* note 374, at 111.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> Cahn & Stansell, *supra* note 366, at 3.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.* at 5.

in shock and continue to suffer from post traumatic stress disorder ("PTSD").<sup>384</sup> Some refugees suffered long instances of starvation, which caused long-term mental deterioration.<sup>385</sup> Many children are left unsupervised because their parents experience depression.<sup>386</sup> Even when at home, a parent may remain isolated in a corner, still depressed over the loss of a loved one in Cambodia.<sup>387</sup>

The constant environment of fear and terror in Cambodia resulted in an extremely high rate of PTSD. While all Southeast Asian refugee groups have high rates of mental health illness, Cambodians show the highest levels of problems.<sup>388</sup> In Minnesota, forty-five percent of adult Cambodians suffer from PTSD, and more than eight in ten were symptomatic.<sup>389</sup> Surveys of Cambodians seeking mental health treatment reveal that up to ninety percent suffer from PTSD.<sup>390</sup> These high rates of PTSD are of little wonder, given the loss of loved ones at the hands of the Khmer Rouge. As Dr. Haing Ngor explained, many refugees understandably were traumatized by their own persecution:

It was clear there was a massive mental health problem among Cambodian refugees. I understood it because I had my share of mental problems too. We had all been traumatized by our experiences. We had all lost parents or brothers or children. Many of us had horrible dreams, night after night. We felt isolated and depressed and unable to trust anyone. What made it worse was that we were in a culture totally unlike our own. . . . [I]n 1975 the communists put an end to our way of life. We lost everything — our families, our monks, our villages, our land, all our possessions. Everything. When we came to the United States, we couldn't put our old lives back together. We didn't even have the pieces.<sup>391</sup>

We may better understand the mental health challenges of refugees today. When large numbers of Cambodian refugees entered in the

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<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> Susanna J. Ko, *Examining the Contribution of Ethnic Attitudes, Collective Self-Esteem, and Spirituality to Delinquent Behavioral Outcomes Among Cambodian Adolescents: An Exploratory Study* (2001) (Ph.D dissertation, University of Massachusetts) (on file with author).

<sup>387</sup> One teen spoke with bitterness of his mother, who lost her husband in Cambodia and now spends much time sitting quietly alone. Seth Mydans, *As Cultures Meet, Gang War Paralyzes a City in California*, N.Y. TIMES, May 6, 1991, at A1.

<sup>388</sup> Cahn & Stansell, *supra* 366, at 6.

<sup>389</sup> *Id.* at 5-6.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

1980s, however, the extent of the problem was not understood and mental health services were not readily provided.<sup>392</sup> To complicate matters, many refugees were reluctant to acknowledge depression to professionals or to discuss the past with their own children.<sup>393</sup>

### C. *Disruption of the Family*

Refugee status itself can disturb the conventional family relationships and structures. Individual members negotiate new surroundings without familiar cultural cues.<sup>394</sup> The rates at which different family members adapt may be poles apart, placing strain on relationships and producing discord.<sup>395</sup>

Differences in English-speaking ability between parents and children has exacerbated the problem. Cambodians in the United States speak Khmer at home, and nearly three-quarters have trouble speaking English.<sup>396</sup> As in many newcomer families, parents cannot communicate with teachers and others in the neighborhood, so their children often serve as interpreters. This can be a role reversal challenge to the parents who are accustomed to full respect in the Khmer culture.<sup>397</sup> At the same time, while children adapt to the social settings of the school and neighborhood, many find it difficult to discuss these new surroundings with their parents. This challenge, grounded in differences in English literacy, disrupts the Cambodian family structure, and parents find it hard to enforce family traditions.<sup>398</sup>

### D. *Cultural Challenges to Parental Control*

The new environment into which Cambodian refugees to the United States are thrust could not be more different than from where they came. Their family-oriented, Southeast Asian farming civilization was based on a "highly stratified social order."<sup>399</sup> Gender roles, deference to elders, and respect for parents were understood, and children accepted, without question, that they were permanently indebted to their parents.<sup>400</sup>

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<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> Ko, *supra* note 386, at 24.

<sup>395</sup> *Id.*

<sup>396</sup> Cahn & Stansell, *supra* note 366, at 5.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* at 5.

<sup>399</sup> Ko, *supra* note 386, at 26.

<sup>400</sup> *Id.*

The world of the refugee family essentially has been “turned upside down,” and many adults no longer work.<sup>401</sup> Southeast Asian homes are patriarchal, where the father is not to be challenged, and both parents are to be “respected and obeyed and not questioned.”<sup>402</sup> Once in the United States, the father’s authority is threatened. Dependent on public assistance, the father can lose face and position. The mother’s authority suffers as well. “They don’t have the power of experience anymore. The wisdom that they learned from their experiences doesn’t fit into this culture.”<sup>403</sup> The children are more adept at English, and the parents come to rely on them for everyday tasks, from grocery shopping to bill paying.<sup>404</sup> As the acculturation of the children progresses, the generation and culture gaps between children and parents grow. The urbanized child becomes “Americanized,” in contrast to the “uneducated” refugee parents figuratively living in the rural past.<sup>405</sup> Thrown into this new environment, both children and parents are developing their own sense of culture within the context of U.S. culture.<sup>406</sup>

Cambodian refugee parents face huge challenges to raising their children in the United States. The trauma of fleeing persecution for all and the effects of PTSD on many, along with language challenges and poverty, make it very difficult for the parents to provide guidance for their children.<sup>407</sup> The parents have difficulties assimilating into U.S. life themselves, and concern for the social adjustment of their children takes a back seat.<sup>408</sup>

As with most immigrant and refugee children, Cambodian youngsters acculturate much more quickly than their adult counterparts.<sup>409</sup> As this “differential acculturation” gap grows, greater discord occurs as parents adhere to their native culture and the children gravitate toward the new.<sup>410</sup> Communication between parents and children decreases, and

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<sup>401</sup> Alex Tizon, *A New World of Crime and Gangs — The Lure of the Streets Is Stealing Away the Children of Southeast Asian Refugees*, SEATTLE TIMES, Feb. 8, 1994, at A1.

<sup>402</sup> *Id.* (citing Seattle University professor Lane Gerber, who volunteers at refugee clinic at Harborview Medical Center).

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> See Bill Ong Hing, *Refugee Policy and Cultural Identity: In the Voice of the Hmong and IU Mien Young Adults*, 1 HASTINGS RACE AND POVERTY L.J. 111 (2003); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2002).

<sup>407</sup> Cahn & Stansell, *supra* note 366, at 5.

<sup>408</sup> *Id.*

<sup>409</sup> Ko, *supra* note 386, at 29.

<sup>410</sup> *Id.*

correspondingly, family bonds are weakened.<sup>411</sup> As relationships suffer, the child's self-esteem is challenged.<sup>412</sup> Many Cambodian refugee parents simply do not possess the child-rearing skills necessary to grapple with these new cultural issues.

Conflicts within families are all too familiar. As roles are reversed, children can use their English proficiency as an advantage over their limited-English-speaking parents. In one instance, a young man, who police picked up and drove home for criminal behavior, incredibly told his parents that the police chauffeured him home as a special prize for good performance in school.<sup>413</sup> A young girl's parents rewarded her with \$10 for getting two A's. Her proud mother was in for a surprise, however, when a community worker saw the report card and had to tell her the marks were for gym and art classes.<sup>414</sup> The daughter was actually flunking core subjects.<sup>415</sup> Disagreements or misunderstandings on matters such as American dating customs arise as well.<sup>416</sup>

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<sup>411</sup> *Id.* at 39.

<sup>412</sup> *Id.*

<sup>413</sup> Joyce Riha Linik, *Catching Kids Before They Fall*, Northwest Regional Educational Laboratory, available at [http://www.nwrel.org/nwedu/spring\\_99/text8.html](http://www.nwrel.org/nwedu/spring_99/text8.html) (last visited Jan. 17, 2005).

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* One researcher who has examined crime among Southeast Asian refugees and other immigrants looks at it this way:

[W]aves of youthful crime in immigrant groups emerge out of intergenerational conflict, which, due to the dynamics of migration, can sometimes emerge with unusual suddenness and intensity. Youthful crime emerges, in other words, not out of a particular culture group, but out of the type of parent-child relationship that tends to be created by the process of migration. There are two general principles potentially involved, both of which are related to the relationship between parents and youth:

1. Migrant groups inherently have unusual demographics, which, in turn, pattern social reproduction independent of culture. This happens because migrant groups are never cross sections of the sending [countries], but rather selected groups that emerge out of the dynamics between the sending and receiving countries. These dynamics, particularly in an industrial society like the United States, are also patterned by the socioeconomic situations in which the new social locations will develop.
2. Migration implies the shedding of one set of preexisting social norms in exchange for another. This is never a smooth process, and it inevitably involves misinterpretations and misunderstandings about the bases for normative action on the part of both immigrants and the receiving community.

WATERS, *supra* note 371, at 199-200.

Some children refuse or fail to understand the significance of the post traumatic stress from which their parents suffer. One counselor who sees the family breakdown, sees the problem all the time, as parents withdraw or act out from PTSD.<sup>417</sup> Unfortunately, “[t]heir children think they are wacky,” he laments. “They don’t want to be around them.”<sup>418</sup>

### E. Poverty

Cambodian refugees are poor. They earned \$5120 per person in 1990, compared to \$14,143 for all Americans, and \$18,709 for other Asian Americans.<sup>419</sup> A decade later, there was little improvement, as thirty-seven percent of Cambodian households were making less than \$12,000 a year.<sup>420</sup> Lacking higher-valued human capital skills in the U.S. labor market, many adults had to take on more than one minimum wage job, at the expense of time to supervise their children.<sup>421</sup> Socioeconomic and immigrant status often combine to exacerbate the problem of delinquency as parents work long hours and are thus unavailable to their children.<sup>422</sup> The limited English-speaking ability, financial pressures, and traumatic effect of war on parents add up to serious emotional separation in families. “[R]efugee youth may feel reluctant to burden mothers and fathers with problems that seem unimportant compared with their parent’s need to make a living in a strange country, and to deal with a past filled with suffering that the children only dimly comprehend.”<sup>423</sup>

In places like Chicago, many Cambodian professionals and merchants are able to move out of the inner city, but those who have not been financially successful remain mired in the refugee experience.<sup>424</sup> Many were farmers back home, with little formal education. Therefore, with limited skills, they became dependent on public assistance.<sup>425</sup> Those who did find work usually ended up in minimum-wage factory jobs, struggling to support their families.<sup>426</sup>

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<sup>417</sup> James Willwerth, *From Killing Fields to Mean Streets*, TIME, Nov. 18, 1991, at 103.

<sup>418</sup> *Id.* (citing Buddhist monk Benton Samana).

<sup>419</sup> Cahn & Stansell, *supra* note 366, at 5 (citing Office of Surgeon General, 1999).

<sup>420</sup> *Id.* (citing Khmer Health Advocates, 2002).

<sup>421</sup> *Id.* at 5 (citing Hyman et al., 2000).

<sup>422</sup> Ko, *supra* note 386, at 34.

<sup>423</sup> Cahn & Stansell, *supra* note 366, at 6 (citing Hyman et al., 2000).

<sup>424</sup> Stuart H. Isett, *From Killing Fields to Mean Streets*, WORLD PRESS REV., at 34, reprinted in BANKOK POST (Dec. 1994).

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

### F. Low Income Neighborhoods

Due to refugee status, the resettlement process, and poverty, most Cambodian refugees live in low income neighborhoods.<sup>427</sup> Not surprisingly, the neighborhood environment has a great impact on how children develop, especially when the neighborhood is dangerous.<sup>428</sup> When danger lurks, seeking out a strategy that provides protection is natural.<sup>429</sup> The poverty rate among Southeast Asians is comparable to that of blacks and Latinos, and the rate for Cambodians is the lowest.<sup>430</sup> Some researchers have identified the connection between poverty and delinquency: "socioeconomic status is consequential for violent offending primarily because it affects the cultural contexts encountered by youths (e.g., family and peer contexts) and thus indirectly shapes the learning of cultural definitions about violent delinquency."<sup>431</sup>

Lower-class youth are considered the most likely to hold attitudes that favor delinquency, due to the joint contributions of social stratification and culture.<sup>432</sup> For example, in Chicago, Cambodian youngsters attend Chicago's notoriously violent public schools, where shootings are common and metal detectors serve as "greeters" at school entrances.<sup>433</sup> On the streets, as in the case of Kim Ho Ma, young Cambodians have had to confront a culture of guns and street gangs, and many have opted to assimilate into that culture.<sup>434</sup> In Long Beach, California, many Cambodian children live in the central part of the city and "learn American ways by copying the actions of Latino and black gangs around them."<sup>435</sup>

### G. Poor Academic Performance

Youngsters who get bad grades, who are unenthusiastic about school, and who are truant are more likely to show signs of delinquency.<sup>436</sup>

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<sup>427</sup> Tizon, *supra* note 401.

<sup>428</sup> Ko, *supra* note 386, at 18.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* at 34.

<sup>431</sup> *Id.* at 34-35 (citing K. Heimer, *Socioeconomic Status, Subcultural Definitions and Violent Delinquency in 75 SOCIAL FORCES* 799-833 (1997)).

<sup>432</sup> *Id.* at 34.

<sup>433</sup> Isett, *supra* note 424.

<sup>434</sup> *Id.*

<sup>435</sup> Daryl Kelley, *Families Agonize as Children Go Astray; Culture Shock Hits Asians Hard*, L.A. TIMES, June 27, 1987, Metro, part 2, at 6 (citing Mory Ouk, junior high school principal in Cambodia and immigrant counselor for Long Beach Unified School District).

<sup>436</sup> Ko, *supra* note 386, at 85.



Little formal education was afforded to refugee children while they were in the camps. After arriving in the United States, few were provided with bilingual education or ESL classes in school.<sup>437</sup> Many Cambodian youth simply did not have happy experiences in school or in other social environments because they looked and sounded “foreign.”<sup>438</sup> In addition, parents were clueless as to their children’s experiences.<sup>439</sup> Kim Ho Ma put it this way:

Many of the Asian youths was [sic] looking for a place of acceptance. A lot was [sic] very young, some was [sic] in their early teens, they had no understanding of their culture. Many came from poor living conditions and most was [sic] undereducated. Gangster life was a chance for them to build status in post modern America. . . . I spoke some English but not good enough, so I would get teased at school. Most of us got mocked for being different, taunted for being poor, and battered for being foreign. . . . We saw the gang as a congregation for strength and unity. . . there was no more intimidation at school.<sup>440</sup>

Youngsters from several groups say they join gangs because the routine of school, homework, and family is boring.<sup>441</sup> At refugee camps, Southeast Asian children were fortunate if any formal education was offered, putting them behind for their age when they entered the United States. Little wonder that one Cambodian girl would declare, “I’m lost,” as her mother tried to make ends meet.<sup>442</sup> Many parents in that situation have not learned how to counsel their children.<sup>443</sup>

School officials are not always helpful. Classroom placement level is often determined without adequate consideration of English ability.<sup>444</sup> Many refugee children who may have done well academically in their native country perform poorly here.<sup>445</sup> As they lose their confidence and self-esteem, they start to cut class or even drop out.<sup>446</sup> Some turn to crime.

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<sup>437</sup> Cahn & Stansell, *supra* note 366, at 6.

<sup>438</sup> *Id.* (citing Hyman et al., 2000).

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* at 7 (citing Ma, 2000).

<sup>441</sup> Lena H. Sun, *For Area Cambodians, a Conflict Between Young and Old*, WASH. POST, Feb. 19, 1995, at A01.

<sup>442</sup> LONG, *supra* note 374, at 94.

<sup>443</sup> *Id.*

<sup>444</sup> *Id.* at 95.

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

### H. *The Gang as Family*

The comradery of gangs offers a surrogate family for many Cambodian youngsters.<sup>447</sup> As many children reject their parents' culture, but also do not find themselves as part of the American culture, they may become disillusioned.<sup>448</sup> They search for acceptance and often find a sense of common understanding with their peers who are experiencing similar feelings of ostracism from mainstream and Cambodian culture.<sup>449</sup> Once they find a place where they have a sense of belonging or feel comfortable, they may assume the ethics of their friends, rather than those of their elders.<sup>450</sup> Sometimes those values are not good and can lead to delinquency.<sup>451</sup> For many Cambodian teens, the popularity of gangs is a response to feeling isolated from their families, as well as from their peers of other backgrounds:

The gangs are mostly a way for us to be with other people who can understand, who have the same kind of background. Our families are pretty strict, so maybe some of the kids go wild when they get old enough to get out of the house. . . . Being in a gang was a way to feel that I wasn't so different from other kids in school. I never fit in at all. I think it was because I was so old when I got here [about ten years old]. . . . Maybe because we lived in too many different places — Thailand, Chicago, then Boston, then Providence — it didn't feel like home until I found other Cambodian kids and we just stuck together.<sup>452</sup>

Thus, for many kids, gangs provide a sort of family structure, a place to fit in.<sup>453</sup> The attraction of the "structure" that the gang offers is critical for the members, because they cannot find that in the families who remain traumatized by the killing fields.<sup>454</sup> These gangs are not motivated by economic gain; they come together for social reasons.<sup>455</sup> As one young gang member put it:

[Why did I join a gang?] Everybody looks at us as "other." Our parents don't understand us. So where do we feel like we belong?

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<sup>447</sup> Ko, *supra* note 386, at 37-38.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> Cahn & Stansell, *supra* note 366, at 7 (citing Tithra, in St. Pierre, 1995).

<sup>453</sup> LINIK, *supra* note 413.

<sup>454</sup> Mydans, *supra* note 387.

<sup>455</sup> Sun, *supra* note 441.

With our friends. . . . Parents don't understand us. The world doesn't understand our parents. Everybody else seems to get attention. Nobody pays attention but our friends.<sup>456</sup>

### I. *The Gang as Protection*

Often, young Cambodians cite the need for protection as a reason for joining gangs. For some in Southern California, that may have been a logical step. "You land in a gang neighborhood, it might seem natural to form a militia to defend yourself," explains Steve Valdivia, director of L.A. County's Community Youth Gang Services Project.<sup>457</sup> Street gangs throughout the state mimicked the Latino "cholo" (lowlife) styles.<sup>458</sup> Hassled by the "East Side Longos," Cambodians responded with gangs named "Tiny Rascals" and "Asian Boyz," imitating their enemies.<sup>459</sup> Protection is what motivated seventeen-year-old David Chum to hook up with the Asian Boyz: "On my first day of school I got beat up. I had to go and get an X-ray, and when I went back to school I got beat up again. So I joined a gang."<sup>460</sup> Joining for protection is common, according to social workers.<sup>461</sup> As early as 1981, Cambodian teenagers had formed a gang, the "Black Cambodian Killers," or BCK.<sup>462</sup> One of the first gang members was an uncle of Gino's who helped carry him as an infant during their escape from Cambodia. "I joined the BCK to protect myself and my people," he says. "Others were fighting with us, and we fought back. In 1982, we had 20 people — they were my friends, and we were alone."<sup>463</sup>

## VI. SHOULD REFUGEES BE TREATED DIFFERENTLY?

To immigration officials, the question of whether Cambodian refugees convicted of serious crimes should be treated differently from voluntary immigrants who commit crimes when it comes to deportation is clear: no distinction should be made. According to Sharon Rummery, a spokeswoman for the INS in San Francisco, "These [Cambodians] are people who have been convicted of serious crimes. . . . If you haven't

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<sup>456</sup> LONG, *supra* note 374, at 97.

<sup>457</sup> Willwerth, *supra* note 417.

<sup>458</sup> *Id.*

<sup>459</sup> *Id.*

<sup>460</sup> Mydans, *supra* note 387.

<sup>461</sup> *Id.*

<sup>462</sup> Isett, *supra* note 424.

<sup>463</sup> *Id.*

become a citizen, you are here as a privilege. And, if you commit a crime, you lose that privilege."<sup>464</sup> Conservative commentator Patrick Buchanan agrees; while he would not send anyone back "if Pol Pot were still running Cambodia," anyone who gets a one-year sentence even for a minor crime like shoplifting "ought to go back."<sup>465</sup> U.S. officials defended the agreement with Cambodia as a way to "level the playing field."<sup>466</sup> After all, noncitizens from other countries who are convicted of crimes are routinely required to leave the country.<sup>467</sup>

To others, however, deporting noncitizens who entered after fleeing persecution, who either never lived in the "country of nationality" or left as an infant or toddler, and who may have been convicted of a nonviolent crime raises questions about the legal propriety of such government action. Lawyers who represent both immigrants and refugees do not like the idea of any of their clients being deported. In their views, however, the idea of deporting refugees may be more reprehensible than deporting other immigrants:

In my mind, [deporting refugees is worse] both because they have suffered already at home and because, if deported, there is a higher risk that they will be persecuted again.<sup>468</sup>

[Criminal refugees] paid their "debt to society" by jail time, fines, or whatever. Being deported to their country of persecution could mean death. Must they pay for their crimes with their lives?<sup>469</sup>

[Young refugee] criminal behavior is often rooted in trauma of having been a refugee. . . [W]e are sending them back to where they have no future. . . less than Mexicans, for example. . . [T]heir crimes reflect a failure of our society's effort to successfully integrate them.<sup>470</sup>

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<sup>464</sup> Swilley, *supra* note 43.

<sup>465</sup> Richard, *supra* note 3.

<sup>466</sup> Watanabe, *supra* note 47.

<sup>467</sup> *Id.*

<sup>468</sup> E-mail from Susan Lydon, Executive Director, Immigrant Legal Resource Center, to Bill Ong Hing, Professor of Law and Asian American Studies, University of California, Davis (May 29, 2003, 15:19:31 PST) (on file with author).

<sup>469</sup> E-mail from Barbara Horn, Attorney at Law, to Bill Ong Hing, Professor of Law and Asian American Studies, University of California, Davis (May 28, 2003, 11:37:24 PST) (on file with author).

<sup>470</sup> E-mail from Mark Silverman, Director of Immigration Policy, Immigrant Legal Resource Center, to Bill Ong Hing, Professor of Law and Asian American Studies, University of California, Davis (May 28, 2003, 18:56:12 PST) (on file with author).

Deported former immigrants may be able to make a life for themselves in their home country. Deported former refugees may still be at risk of persecution.<sup>471</sup>

[Compared to many immigrants], the Cambodians [refugees] may not have actually wanted to leave Cambodia but had to because of their pro U.S. views and/or activities. . . [We] owe it to them to stick with them.<sup>472</sup>

A refugee's deportation is [no] more reprehensible than [that of] any other person. However, to be considered a refugee, our government determined that the refugee could not avail themselves of the protection of their home country based on persecution or a well-founded fear of persecution. To deport a person who has met this standard is extremely harsh treatment.<sup>473</sup>

Members of the Cambodian refugee community are outraged:

[Deportation] is unfair to [the] Cambodian community. [Most of the] returnees are young and they [grew] up in [the United States]. This is not a Cambodian problem. It is a failure of the U.S. system. . . . To dump their problems back to Cambodia will not solve the problem. . . . As a Cambodian, I . . . feel very upset. . . .<sup>474</sup>

Recall that Kim Ho Ma's federal public defender, who came to know his client very closely, summed up his view on the deportation of his Cambodian client this way:

On September 19, 2002, I received a call that the INS was sending Kim a "bag and baggage letter. . . ." Many of us have seen dozens if not hundreds of these form letters but it is the first time after all these years caring about the lives of non-citizens that I felt what family members for decades must have felt when receiving that

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<sup>471</sup> E-mail from Jim Mayock, Managing Partner, Elliot & Mayock, LLP, to Bill Ong Hing, Professor of Law and Asian American Studies, University of California, Davis (May 29, 2003, 11:16:00 PST) (on file with author).

<sup>472</sup> E-mail from Eric Cohen, Staff Attorney, Immigrant Legal Resource Center, to Bill Ong Hing, Professor of Law and Asian American Studies, University of California, Davis (May 27, 2003, 16:41:21 PST) (on file with author).

<sup>473</sup> E-mail from Paula Solorio, Attorney at Law, to Bill Ong Hing, Professor of Law and Asian American Studies, University of California, Davis (May 29, 2003, 10:30:04 PST) (on file with author).

<sup>474</sup> E-mail from Meyer Kith, Bilingual Homeownership Project Coordinator, International District Housing Alliance, to Bill Ong Hing, Professor of Law and Asian American Studies, University of California, Davis (Oct. 29, 2003, 11:00:17 PST) (on file with author).

letter. A loved [one] is banished from the United States and will no longer be here in my home.<sup>475</sup>

Should refugees be treated differently when it comes to deportation? In the case of Cambodian refugees, the ongoing effects of the killing fields on the community, the circumstances after arrival, the upheaval in family and culture, the challenges of relocation, the age at entry of most potential returnees, and, ultimately, the failure of the U.S. resettlement program to provide the tools necessary to deal with their new situation certainly distinguish their experience from that of immigrants. Furthermore, the underlying policies of why we admit refugees differ from those that underlie the admission of immigrants. Humanitarianism and sympathy for the persecuted or those facing persecution demand that we welcome refugees into our communities. Is there something about the values that lead us to admit refugees that suggests that we should approach the enforcement of deportation provisions against them differently?

#### A. *The Moral Consideration*

The United States bears a burden of responsibility for the well-being of Cambodian refugees. Placing total blame on the United States for drawing Cambodia into the Vietnam War and the Southeast Asian conflict may be simplistic, but the Nixon Administration's secret bombings along the Vietnam-Cambodian border and the CIA-sponsored overthrow of the Sihanouk government that led to the escalation of military conflict with the Khmer Rouge are uncontroverted.<sup>476</sup> No one could have predicted the ensuing autogenocide perpetrated by the ruthless Pol Pot. Once the killing fields began, however, the consequent refugee flow was no surprise. Given the trauma that Cambodian refugees have endured, depression and other symptoms of post traumatic stress disorder that would pervade much of the new community could be anticipated.

The environment in which many Cambodian refugees have landed is a challenging one. The vast majority begin as public assistance recipients, who remain mired in poverty or low-wage employment.<sup>477</sup> U.S. resettlement efforts have led to tough inner-city living environments for many, where the refugees are surrounded by urban crime and gang

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<sup>475</sup> E-mail from Jay Stansell, Oct. 18, 2002 *supra* note 19.

<sup>476</sup> See *supra* notes 79-82 and accompanying text.

<sup>477</sup> See *supra* notes 362-65 and accompanying text.

activity. The resulting socioeconomic conditions for these Cambodian refugees explain much of the criminal activity that has created the pool of potential deportees.

In spite of what was and remains readily apparent, U.S. resettlement efforts have not provided refugee parents and communities with adequate tools or resources to address the challenges of parenting, guidance, and mentoring that youngsters need in a radically different cultural environment. Old country approaches and mechanisms fail or cannot be adapted, especially given the emotional, social, and financial challenges to the parents. During the acculturation process, the initial needs of refugees, as well as immigrants, are generally addressed. For example, obtaining adequate housing and transportation is challenging, but most refugees are able to meet those needs.<sup>478</sup> While basic survival needs of refugees are addressed during the first period of acculturation, long-term issues are not. Almost three-fourths of refugees report difficulties with family relationships, while eighty-three percent face mental health challenges.<sup>479</sup>

The U.S. Office of Refugee Resettlement has provided little funding to programs that meet these long-term parenting or support needs that would address the conditions that lead to criminality. The main purpose of the refugee resettlement program is to help refugees become employed and self-sufficient as soon as possible after their arrival in the United States.<sup>480</sup> Typically, the Office helps to establish programs for job development, and microenterprise development. For example, the Office provided funding for one Hmong self-sufficiency project to set up employment strategies aimed at reducing welfare dependency through increased employment.<sup>481</sup> Another organization, the Cambodian Network Council, received funds for its network of fifty-eight grassroots organizations to build leadership among women and youth, and for strengthening coalition work.<sup>482</sup> Again, however, the main thrust of the resettlement program is about employment, not general social adjustment.<sup>483</sup>

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<sup>478</sup> DORA LODWICK, COLO. TRUST, SUPPORTING IMMIGRANT AND REFUGEE FAMILIES INITIATIVE OUTCOME EVALUATION FEASIBILITY STUDY 9 (2002).

<sup>479</sup> *Id.*

<sup>480</sup> REFUGEE RESETTLEMENT PROGRAM, OFFICE OF REFUGEE RESETTLEMENT, ADMINISTRATION FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERV., 1992 ANNUAL REPORT TO CONGRESS 63 (1993), available at <http://www.acf.dhhs.gov/programs/orr/reporting/index.htm> (last visited Nov. 22, 2004).

<sup>481</sup> *Id.* at 37, 41.

<sup>482</sup> *Id.* at 42.

<sup>483</sup> The vision from the director of the Office of Refugee Resettlement in 1993 is

In spite of U.S. culpability and the failure of its resettlement process, the response to Cambodian criminality is, essentially, “one strike and you’re out.” The result recalls Sir Thomas More’s criticism of the English justice system of the 1500s, especially the law that subjected thieves to the death penalty, when he wrote:

For if you suffer your people to be ill educated, and their manners to be corrupted from their infancy, and then punish them for those crimes to which their first education disposed of them, what else is to be concluded from this, but that you first made thieves and then punish them?<sup>484</sup>

In essence, the refugee resettlement process has set up Cambodian refugees to fail, and part of that failure is manifested in the relatively high incidence of criminality in the community. On a legalistic level, one could argue that as a party to the 1968 Protocol on Refugees, and, thus, the 1951 Convention on Refugees, surely the United States must act in good faith to meet its responsibilities toward refugees.<sup>485</sup> Furthermore, its resettlement process, which provides minimal long-term adjustment tools to refugee families, is evidence of bad faith. Morally, however, there is a bigger concern — one that forces us to rethink the entire concept of deportation.

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illustrative:

The first year in this country defines a refugee’s future experience; attaining employment as soon as possible following arrival in the U.S. is the best way to achieve stable, ongoing attachment to the labor force, to improve English language proficiency, and to gain familiarity with American customs and values. The strength of the family and the dignity of the parent role model within the family hinge upon a family’s economic independence from public assistance. The growth and development of refugee communities, as well as communities as a whole, depend upon individual and family productivity.

REFUGEE RESETTLEMENT PROGRAM, OFFICE OF REFUGEE RESETTLEMENT, ADMINISTRATION FOR CHILDREN & FAMILIES, U.S. DEPT’ OF HEALTH & HUMAN SERV., 1993 ANNUAL REPORT TO CONGRESS 67-68 (1993), *available at* <http://www.acf.dhhs.gov/programs/orr/reporting/index.htm> (last visited Nov. 22, 2004). One Office of Refugee Resettlement funded-program that does provide some assistance for parenting issues with a goal of decreasing the number of refugee youth joining gangs is the Outreach to New Americans program of the National Crime Prevention Council. *See* POWERFUL PARTNERSHIPS, at vi, 5 (1998).

<sup>484</sup> THOMAS MORE, UTOPIA (1516), *available at* <http://theosophy.org/tlodocs/teachers/ThomasMore.htm> (last visited Nov. 18, 2004).

<sup>485</sup> The United States is not a party to the Vienna Convention, but accepts many of its provisions on the grounds that they simply codify customary international law. Surely that is the case with the treaty provision that states: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679, 690 (1969) *available at* <http://www.un.org/law/ilc/texts/treaties.htm> (last visited Jan. 17, 2005).



What might it mean to argue that refugees should not be deported when the United States has been involved in creating the conditions that led to their becoming refugees? As immigration attorney Eric Cohen noted, many Cambodians “may not have actually wanted to leave Cambodia but had to because of their pro U.S. views and/or activities.”<sup>486</sup> Professor Leti Volpp has noted:

If this were considered in the question of removal of refugees, separate from the question of past and potential future suffering, it would suggest a more expansive vision of how we understand the relationship between states. Traditional international law presumes separate sovereigns with separate interests, but we see here with the bombing of Cambodia and an incredible history of U.S. intervention beyond its borders.

Refugee and asylum law is constructed upon this idea of separate sovereigns — you are persecuted in country X and admitted into country Y. Now country Y is trying to deport you back to country X because of some bad act. But, if country Y helped to create the conditions in country X, could we not argue that there is something especially perverse about country Y now removing you?

We have embedded deeply into our thinking about nation and immigration the idea of host and guest. The guest has a temporary license to be present; it’s a privilege [that] can be revoked at any time. The ideology of refugee and asylum law generally is rooted in the idea of a host and the ethic of hospitality for those seeking sanctuary.

[In the case of] Cambodian refugees . . . the migrant seeking sanctuary has, in fact, been forced to wander because of the actions of that very host, who should then be acting not out of an ethic of hospitality or sympathy, but out of an ethic of responsibility.<sup>487</sup>

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<sup>486</sup> E-mail from Eric Cohen, *supra* note 472.

<sup>487</sup> Comments by Professor Leti Volpp in response to Professor Bill Ong Hing, faculty presentation, American University Washington College of Law, Oct. 10, 2003 (on file with author). I believe it is even more perverse when what led to the bad acts in country Y were exacerbated or not addressed by the actions or inactions of country Y.

That responsibility should include a long-term vision of adjustment. Without a long-term view toward adjustment, the U.S. resettlement program has failed in its responsibility — a responsibility that included helping Cambodians assimilate. The United States played a critical role in creating the circumstances that led to Cambodians fleeing to the United States. As such, the United States has a responsibility to care for those who sought refuge and safety from a persecuting government. Cambodian refugees were involuntary migrants who were forced to leave their homeland. Their concern was survival. Having escaped horrific conditions in their country, they settled in a completely alien environment, facing poverty and cultural barriers while suffering from post traumatic stress. Having barely survived the killing fields, the United States has become the second battleground for the survival of many Cambodian families. Given little institutional support, the families essentially were left to fend for themselves in a strange new land.

Even when criminality and its causes have become apparent, the resettlement program has failed, again, by not addressing the root causes and providing nothing in terms of intervention to at least break the cycle for the next group or generation of refugees. In fact, the actions of the federal government take on a shadier character as the government continued to place refugees where they were least likely to get help. Instead, the “solution” to the criminal problem is left to the deportation process. The policy of deporting these refugees is tantamount to ignoring the needs of those parents and families who paid for U.S. foreign policy decisions with their blood and their sanity. If we welcome a group of refugees coming from the most horrendous of situations, our responsibility is to ensure that they receive the assistance that they need to find their place here. If they or their children cannot succeed at that, then we have failed, and we must be responsible.

Cambodian refugees would not have had a reason to be refugees but for U.S. policy. Cambodian refugees suffer post traumatic stress, mental deterioration, and social challenges as a result of U.S. policy. That these refugees were placed in a community that did not provide any long-term resources is the fault of U.S. policy. The reasons why many refugees join gangs have resulted from U.S. resettlement policies. Now, because these refugees are not model citizens, they are punished through the deportation process. In the process, the United States is not held accountable for any of its own actions.

### B. Rethinking Deportation

The removal of Cambodian refugees who have committed crimes challenges us to rethink the purpose of deportation. On the one hand, you have the sentiment reflected in the statement of federal immigration official spokesperson Sharon Rummery: "If you haven't become a citizen, you are here as a privilege. And, if you commit a crime, you lose that privilege," and "[t]hese are people who have been convicted of serious crimes."<sup>488</sup> Former Senator Spencer Abraham also expressed frustration with the way immigration judges were exercising discretion to award relief from deportation to those convicted of aggravated felonies prior to 1996.<sup>489</sup> This hard line is reflected by a chief author of the 1996 reforms, Congressman Lamar Smith: "In 1996, Congress intended that all non-citizens who committed serious crimes should be deported. We should not give criminals who are not U.S. citizens more opportunities to further terrorize our communities."<sup>490</sup>

On the other hand, Cambodian refugee leaders like Meyer Kith argue: "[Deportation] is unfair to [the] Cambodian community. [Most of the] returnees are young and they [grew] up in [the United States]. This is not a Cambodian problem. It is a failure of the U.S. system. . . . To dump their problems back to Cambodia will not solve the problem."<sup>491</sup> Immigration attorney Mark Silverman similarly points out: "[Young refugee] criminal behavior is often rooted in trauma of having been a refugee. . . [We] are sending them back to where they have no future. . . . [Their] crimes reflect a failure of our society's effort to successfully integrate them."<sup>492</sup> Another immigration attorney, Eric Cohen, notes: "[Compared to many immigrants], the Cambodians [refugees] may not have actually wanted to leave Cambodia but had to because of their pro U.S. views and/or activities. . . [We] owe it to them to stick with them."<sup>493</sup>

Irrespective of whether deportation or removal is punishment for the purpose of invoking the Eighth Amendment's cruel and unusual punishment prohibition<sup>494</sup> or for invoking aspects of procedural due

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<sup>488</sup> Swilley, *supra* note 43.

<sup>489</sup> Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 157 (1998).

<sup>490</sup> Richard, *supra* note 3.

<sup>491</sup> E-mail from Meyer Kith, *supra* note 474.

<sup>492</sup> E-mail from Mark Silverman, *supra* note 470.

<sup>493</sup> E-mail from Eric Cohen, *supra* note 472.

<sup>494</sup> Courts have consistently rejected assertions that deportation constitutes cruel and unusual punishment under the Eighth Amendment, on the grounds that deportation is civil, rather than criminal, in nature. *See, e.g.*, *Bassett v. INS*, 581 F.2d 1385 (10th Cir. 1978); *Santelises v. INS*, 491 F.2d 1254 (2d Cir. 1974); *Chabolla Delgado v. INS*, 384 F.2d 360 (9th

process that attach to criminal proceedings,<sup>495</sup> we know that deportation results in banishment, the loss of “all that makes life worth living.”<sup>496</sup> Removal is a “life sentence of exile from what has become home.”<sup>497</sup> After 1996, the current statute provides no realistic relief for long-term lawful residents or refugees who have committed aggravated felonies.

The tension between the Rummery/Abraham/Smith view that those who commit crimes must be deported and the Kith/Silverman/Cohen perspective that removal is unjust because the U.S. system has failed is a debate about whether justice is served. The concern about being too soft on immigrants who have committed serious criminal offenses, which led to the termination of section 212(c) relief for aggravated felons, is a manifestation of the reformers’ sense of making sure that justice is served.<sup>498</sup> Of course, justice is a concept that can be pondered through a range of meanings and definitions. An “antiseptic” construction of justice would emphasize “objectivity, impartiality, and the fair application of rules,” while a “passionate” construction would emphasize “love, compassion and the vindication of the weak.”<sup>499</sup> But, shouldn’t justice combine both objective and compassionate qualities?

The “icon” of criminal justice, the statue of *Justitia*, symbolizes the antiseptic vision of justice.<sup>500</sup> Blindfolded, armed with sword and balancing her scales, she symbolizes “neutrality” and “impartiality.”<sup>501</sup> One could argue that, in theory, this antiseptic vision requires that the state and the judge “must always act rationally” and never “show mercy,” because being merciful is not rational, as it allows individuals to

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Cir. 1967). In one instance, a federal district court held that the deportation of a young man, based upon the sale of three marijuana cigarettes to a former roommate, violated the Eight Amendment. However, the Seventh Circuit Court of Appeals quickly overturned that decision. See *Lieggi v. INS*, 389 F. Supp. 12, 20-21 (N.D. Ill. 1975), *rev’d*, 529 F.2d 530 (7th Cir. 1976).

<sup>495</sup> See Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 337-45 (2000).

<sup>496</sup> *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

<sup>497</sup> *Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting).

<sup>498</sup> Congressman Lamar Smith, one of the critics of the old section 212(c) relief, acknowledged that deportation should not always result. He suggested that immigration officials exercise prosecutorial discretion, that they not seek deportation in hardship cases, and that agents identify hardship aliens who should not be deported. See Anthony Lewis, *Cases that Cry Out*, N.Y. TIMES, Mar. 18, 2000, at A15.

<sup>499</sup> Jonathan Burnside, *Tension and Tradition in the Pursuit of Justice*, in RELATIONAL JUSTICE: REPAIRING THE BREACH 42, 42-43 (Jonathan Burnside & Nicola Baker eds., 1994).

<sup>500</sup> *Id.* at 43.

<sup>501</sup> *Id.*

be “specially treated.”<sup>502</sup> Uniformity is the goal of this antiseptic vision of justice.<sup>503</sup>

Mandatory minimum federal sentencing guidelines and three strikes legislation are examples of this antiseptic uniformity. Strict formulas and sentencing grids are employed in the interest of “consistency.”<sup>504</sup> The focus is on process, rather than on the meaning of the final results.<sup>505</sup>

An approach that joins the antiseptic vision with elements of compassion and understanding is essential. We need aspects of both approaches to achieve a sense of “social well-being.”<sup>506</sup> Certainly, our aim is for the state to behave rationally and to be accountable for its actions toward the people over whom it has power.<sup>507</sup> Taking into account the individual features of particular cases and responding accordingly, however, is an important quality of a civil society. Great Britain’s move to eliminate its mandatory life sentence for murder is a good example: a wide range of cases had been included in the common-law definition of murder, from “mercy killings,” to abused wives who were provoked, to premeditated murder.<sup>508</sup> Greater flexibility and discretion were needed to respond to this variance.<sup>509</sup>

The criticism of mandatory sentencing in the United States is also centered on its “tendency to negate the value of individualized justice.”<sup>510</sup> These sentencing schemes take discretion out of the hands of trial judges, who would otherwise be able to assess defendants face-to-face; instead, the legislature makes a blanket decision.<sup>511</sup> The problem is that the legislature’s judgment simply cannot differentiate between defendants who continue to pose a threat and those who might not.<sup>512</sup> To make matters worse, that legislative judgment likely is skewed by a “few highly publicized offenses” or outrage of crime in general.<sup>513</sup> In effect, an across-the-board regime of “majoritarian oppression” is established

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<sup>502</sup> *Id.* at 44.

<sup>503</sup> *Id.*

<sup>504</sup> *Id.*

<sup>505</sup> Jonathan Burnside, *Tension and Tradition in the Pursuit of Justice*, in *RELATIONAL JUSTICE: REPAIRING THE BREACH* 42, 42-43 (Jonathan Burnside & Nicola Baker eds., 1994).

<sup>506</sup> *Id.*

<sup>507</sup> *Id.*

<sup>508</sup> *Id.*

<sup>509</sup> *Id.*

<sup>510</sup> Kristin K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 *COLUM. L. REV.* 1232, 1239 (1995).

<sup>511</sup> *Id.* at 1240.

<sup>512</sup> *Id.*

<sup>513</sup> *Id.* at 1240-41.

where some are appropriately punished at the expense of others who are overly punished.<sup>514</sup>

As the argument goes, more discretionary, indeterminate sentencing is preferred because:

the judiciary is in a superior position to the legislature to act as sentencer because its proximity to the offender allows for the "carefully individualized, retrospective evaluation of the offense and the offender" that is necessary to achieve equity in sentencing. Furthermore, where the judge has sentencing discretion, she can act as a check on possible legislative excesses in fixing penalties.<sup>515</sup>

So *Justicia*, as a symbol of justice, is insufficient. Justice is not simply about meeting the elements of procedural due process.<sup>516</sup> Although, arguably, Cambodian refugees are not even given due process because they are effectively foreclosed from introducing evidence of their rehabilitation. Justice is about wanting to live in strong and meaningful relationships and, as the ancient Greeks put it, "to bring order into our cities and create a bond of friendship of union."<sup>517</sup> In the case of Cambodians, we committed to bringing refugees into our American family. As part of that process, if they become caught up in the justice system, that system ought to be designed in a way that continues the actualization of their incorporation into society rather than giving up on them. The challenge is to become more committed in our investigation of how to best bring them into our family, indeed "to maintain a dialectic between antiseptic and passionate constructions of justice."<sup>518</sup>

Given what Cambodian refugee families have been through, the relationship between the individuals facing deportation and their families and new communities should be given greater attention. Justice should not be approached as simply a "cold virtue" that calls for

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<sup>514</sup> *Id.*

<sup>515</sup> *Id.* at 1241. Many of those who support the move toward a more predictable, determinate system, including the United States Sentencing Commission, have nevertheless assailed mandatory sentences as too inflexible to distinguish between offenders and thereby achieve just punishment. See U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 2634 (1991), available at [http://www.ussc.gov/r\\_congress/MANMIN.pdf](http://www.ussc.gov/r_congress/MANMIN.pdf) (last visited Nov. 22, 2004) (criticizing mandatory sentences as inflexible and overinclusive and maintaining that guided sentencing system can achieve same goals with more just results).

<sup>516</sup> Burnside, *supra* note 499, at 45.

<sup>517</sup> *Id.*

<sup>518</sup> *Id.*

"dispassionate judgment."<sup>519</sup> Rather, "doing justice" is very much about building and strengthening relationships between individuals and their communities, which connotes the "language of emotion, care, [and] affective ties."<sup>520</sup>

Make no mistake. In the context of deportable refugees, the more passionate view of justice could lead to an approach that emphasizes mutual responsibility between the state and the individual, rather than simply the right of the individual refugee to remain free from monitoring by immigration officials. This is a rejection of a concept of liberalism that has come to rely on a belief in "freedom of the individual from arbitrary external authority," where the individual is the "source of his or her own moral values" — a concept that has "shaped the Western world over the past several hundred years."<sup>521</sup> For refugee adjustment in the United States, liberalism's focus on the individual, at the expense of relationships that can nurture human well-being, is misplaced. Describing liberalism as a system that promotes a view that "people do not need other people," where "all they need is a system of rules that will constitute procedures for resolving disputes as they pursue their various interests," may be an overstatement.<sup>522</sup> Liberal visions of justice, however, definitely have a strong bias toward individualist values.<sup>523</sup>

The weakness of the liberal approach, especially in the refugee context, is its emphasis on the individual's autonomy "at the expense of the communal relationships."<sup>524</sup> The family and community, however, traditionally are big parts of Cambodian culture as well as what we aspire American society to reflect. People need more than a system of rules. We need a tradition of "historical bonding and sense of continuity" as part of our approach to justice.<sup>525</sup> That requires a community-oriented approach. Community building and the tools for fostering relationships in a radically different culture have been missing from the refugee resettlement process for many refugees. Presenting alternatives to deportation offers one method to begin providing the ability to reconnect.

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<sup>519</sup> Anthony Bottoms, *Avoiding Injustice, Promoting Legitimacy and Relationships*, in *RELATIONAL JUSTICE: REPAIRING THE BREACH* 53, 53 (Jonathan Burnside & Nicola Baker eds., 1994).

<sup>520</sup> *Id.*

<sup>521</sup> Burnside, *supra* note 499, at 47.

<sup>522</sup> *Id.* at 47.

<sup>523</sup> *Id.*

<sup>524</sup> *Id.* at 48.

<sup>525</sup> *Id.* at 48-50.

### C. Alternatives to Deportation

In order to implement a more passionate removal process, space should be provided, at the very least, for the voice of the respondent and his or her family and community to be heard. The reinstatement of section 212(c)-type relief is a starting place.<sup>526</sup> In this way, the immigration judge, who is in a good position to assess the individual facts, can consider evidence of rehabilitation, remorse, family support, and prospects for the future.<sup>527</sup> In fact, international law may require a refugee's opportunity to be heard on these matters.<sup>528</sup>

Those who supported eliminating section 212(c) relief for aggravated felons in 1996 were frustrated with the way in which immigration judges

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<sup>526</sup> An argument might be made that the starting point in the context of Cambodian refugees is to altogether bar deportation of anyone who entered the United States as an infant or young child. One proposal for a "Youth Bar" to removal is the following:

As a matter of public policy, any individual who fled their homeland for fear of persecution while under the age of six and was later admitted to the United States as a refugee or parolee or who was granted asylum shall be insulated from deportation proceedings. The reasoning behind the youth bar is that for all intents and purposes, such individuals no longer have attachments to their homelands. Their subsequent behavior and lifestyles purely are the product of refugee experiences and life in the United States.

Bill Ong Hing, Legislative Proposals for a CARE Act (July 21, 2003) (on file with author).

<sup>527</sup> See *supra* notes 46-70 and accompanying text.

<sup>528</sup> At the outset, I noted that article 33 of the 1951 Convention on Refugees provides that a refugee can be expelled if convicted of a particularly serious crime. See *supra* notes 24-25 and accompanying text. However, article 13 of the International Covenant on Civil and Political Rights provides:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Int'l Covenant on Civil & Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (emphasis added).

The United States' ratification of the ICCPR in the 1990s was subject to many reservations and understandings attached by the Senate. Article 13 is one provision that is non-self-executing. Unfortunately, if a U.S. court follows the Senate's lead (unclear as a matter of law whether it must or whether the Senate is simply expressing a "persuasive opinion"), that article has no independent, internal effect. E-mail from Diane Marie Amann, Professor of Law, University of California, Davis, to Bill Ong Hing, Professor of Law and Asian American Studies, University of California, Davis (Oct. 21, 2003, 15:18:52 PST) (on file with author).



exercised discretionary relief.<sup>529</sup> “The per se bar for some felons can be seen as a legislative attempt to control the exercise of discretion by saying that no circumstances could justify relief from deportation when the crime is one classified as an ‘aggravated felony.’”<sup>530</sup> Much of that concern was overblown. In fact, obtaining section 212(c) relief was not automatic.<sup>531</sup> Furthermore, immigration judges who granted section 212(c) relief routinely warned respondents that if they recidivated, favorable discretion on behalf of the respondent would not be forthcoming. Yet, the concern that opponents of section 212(c) relief had that immigration judges were too lenient, should make us wonder if some other options ought to be available to immigration judges. Under the pre-1996 framework, the judge handling the case of a long term resident (at least seven years) who was convicted of an aggravated felony had two choices: to deport or to grant section 212(c) relief.<sup>532</sup> In either scenario, the respondent had no further contact with government

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<sup>529</sup> Morawetz, *supra* note 489, at 110-11 (citing *Mojica v. Reno*, 970 F. Supp. 120, 178 (E.D.N.Y. 1997)).

<sup>530</sup> *Id.* at 157.

<sup>531</sup> See *supra* notes 46-70 and accompanying text.

<sup>532</sup> When I handled section 212(c) cases, both as a legal services attorney and in conjunction with law school clinical programs, occasionally judges who were not happy with these two extreme options would create an in-between option. They would do so by taking some evidence at an initial hearing, and then later continuing the matter for several months (sometimes for more than a year) until eventually holding a final hearing. That way, the judge created an informal probationary period, during which time he could get a sense of how the respondent would behave. The experience of other immigration attorneys was similar:

The award of a [212(c)] waiver depended not only on the nature of the criminal conduct, but also on the immigrant’s life after committing the crime. Like a parole board, the immigration judge would look at whether the individual had genuinely rehabilitated. As in the case of an inmate who will face a parole board, the immigrant could conform his or her conduct to the expectations of the reviewing body. But unlike in the parole board context, where reviews take place during the course of a sentence, the waiver of deportation process could also serve as a forum for considering the long term record of those persons against whom deportation proceedings were initiated years after they had committed their crimes and served any criminal sentences. This waiver process protected the interests of the immigrant who may have built a life of work, family, and community based on the understanding that his or her past conviction would not lead to deportation. It also protected the interests of all of those whose lives were intertwined with that of the immigrant, including family members, employers, and the employees of immigrants who operated businesses. In practice, approximately half of the long time permanent residents who sought relief from deportation were granted such relief.

Morawetz, *supra* note 489, at 110-11 (citing *Mojica v. Reno*, 970 F. Supp. 120, 178 (E.D.N.Y. 1997)) (citation omitted).

officials after the order was enforced. One wonders whether something short of deportation could be created that would address concerns raised by the proponents and opponents of deportation.

Given the special situation faced by groups such as Cambodian refugees, a system that adopts a rehabilitative approach to justice might be most appropriate. A relationship-building theme ought to be central to that approach, because refugee children need assistance with relationship-building with family and with community.<sup>533</sup> What some term as relational justice<sup>534</sup> — with the goal of avoiding injustice and promoting legitimacy and good relationships — makes a good deal of sense as a set of guiding principles for the removal process. This set of principles is capable of being translated into practice. Experts in relational justice may approach criminal justice from diverse backgrounds and philosophies. They share an understanding, however, that problems result from relationships that have failed, “between individuals, between individuals and institutions, and between individuals and communities,” and that societal justice is all about repairing those relationships.<sup>535</sup>

A relational or restorative approach is premised on the goal of rehabilitating the individual, sometimes using group therapy, counseling, and even job training.<sup>536</sup> Studies have demonstrated that although socioeconomic factors such as poverty may lead to crime, families, schools, and “informal social bonds” could play important roles in changing individual paths:

Consistent with a sociological theory of adult development and informal social control, . . . we found that job stability and marital attachment in adulthood were significantly related to changes in adult crime — the stronger the adult ties to work and family, the less crime and deviance occurred. . . . Despite differences in early childhood experiences, adult social bonds to work and family had similar consequences for the life trajectories of the 500 [identified juvenile] delinquents and 500 controls [i.e., non-delinquents in adolescence]. In fact, the parameter estimates of informal social control were at times nearly identical across the two groups.<sup>537</sup>

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<sup>533</sup> See *supra* notes 326-74 and accompanying text (discussing why youth turn to crime in Cambodian community).

<sup>534</sup> See Burnside, *supra* note 499, at 42.

<sup>535</sup> David Faulkner, *Relational Justice: A Dynamic for Reform*, in *RELATIONAL JUSTICE: REPAIRING THE BREACH* 159,159 (Jonathan Burnside & Nicola Baker eds., 1994).

<sup>536</sup> Bottoms, *supra* note 519, at 54 (internal citations omitted).

<sup>537</sup> *Id.* at 63 (internal citations omitted).

Focusing on restoring relationships is apparently time well spent in terms of reducing recidivism.

In contrast to the incapacitation view of justice as simply an “instrument of social control for protecting the innocent from the guilty,” relational justice is premised on a belief that individuals are capable of change:

to improve if they are given guidance, help and encouragement; to be damaged if they are abused or humiliated. It emphasizes respect for human dignity and personal identity. It looks more toward putting things right for the future and to make things whole than to punishing the past (although the latter may sometime be part of the former).<sup>538</sup>

This philosophy seems quite relevant in the deportation context, where the respondent has already served and completed a sentence for the criminal offense. The deportation setting is all about the future. That is where guidance and encouragement to become reincorporated into the community makes so much sense.

Relational justice recognizes that conventional criminal justice institutions (i.e., courts, police, probation departments, community agencies), who, hopefully, would understand the approach, are not solely responsible. “Informal networks,” including family, friends, neighbors, employers, and perhaps even victims, must step up to make the process work.<sup>539</sup>

Proponents of relational justice point to an additional set of values that needs to be engrained in the system if it is to work properly:

[A]ll those involved in the criminal justice process should treat people with whom they come into contact — in whatever situation or capacity — with courtesy, dignity and respect. This may seem obvious, but it is all too easily overlooked in practice. It requires people to be prepared to stop and listen, to answer questions and hear arguments or complaints, and to give reasons for decisions. . . . It seeks to preserve a sense of being valued as a human being, and of some hope for the future, even if the person has done something dreadfully wrong. . . . It tries to respond not only to situations as they present themselves, but also to look for unspoken signs that a person may need an explanation or reassurance, and to remember

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<sup>538</sup> Faulkner, *supra* note 535, at 160-61.

<sup>539</sup> *Id.* at 162.

those who may be worrying unnoticed or unseen.<sup>540</sup>

The current removal process for Cambodian refugees contains none of these components or values. Relief is altogether foreclosed for aggravated felons. Information on their lives, their families, their community, and their rehabilitation are deemed irrelevant. The INA has made deportation part of the criminal justice process.

While a rehabilitative approach to deportable refugees should inspire new, creative options, the criminal justice system provides some examples that might be considered. Some options are available prior to trial, while others may be considered after a finding of guilt. Consider the use of probation office reports and recommendations, pretrial diversion programs, group therapy, anger management, drug rehabilitation programs, and community service options. Some jurisdictions have adopted restorative justice or relational justice programs that have an underlying premise that may be particularly appropriate to consider as an alternative to the deportation of refugees. If one assumes that a refugee-receiving country bears some responsibility to assist in the adjustment of refugees to their new culture, then a program that responds to criminal behavior in a manner that seeks to repair damage to the community and/or to encourage the respondent to take responsibility for his/her actions on the road to rehabilitation is worthy of consideration.

Consider youth courts in Great Britain as an example of a program that has features worthy of emulating. The outcome in particular cases can range from dismissal to incarceration, or from a fine to a penalty that is more "community based" for those under eighteen.<sup>541</sup> Prior to sentencing, a probation officer or social worker prepares a report that includes information on the offense, the circumstances, and the youth's social background, with an eye toward preparing a plan of action in which the youth and the youth's family are included.<sup>542</sup> The option of performing community service has met with great success, especially when the offender sees how appreciative beneficiaries of the service are; the offenders regard the experience as "worthwhile" and "meaningful."<sup>543</sup> Older offenders have been placed in groups that focus on developing interpersonal and problem-solving skills that have also

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<sup>540</sup> *Id.* at 162-63.

<sup>541</sup> John Harding, *Youth Crime: A Relational Perspective*, in *RELATIONAL JUSTICE: REPAIRING THE BREACH* 104, 104-13 (Jonathan Burnside & Nicola Baker eds., 1994).

<sup>542</sup> *Id.*

<sup>543</sup> *Id.*

reduced recidivism.<sup>544</sup> In addition, an approach that involves family interventions seems particularly appropriate for the challenges that Cambodian refugee families face in their new American environment. Parents are taught supervision and negotiation strategies with the intent of developing “behavioral contracts” with their children.<sup>545</sup> The interventions have been promising, as children’s behaviors have been modified and the family system made more stable.<sup>546</sup>

Even the probation officer or department entity that is such a critical part of the criminal justice system, offers ideas to consider. Probation is a post-conviction process that serves as an alternative to incarceration. It has as its fundamental *raison d’être*: the reformation of the defendant in the society in which he or she must eventually live. The defendant is released under the supervision of a probation officer and is subject to reasonable court-imposed conditions.<sup>547</sup> Probation officer reports are critical to the process: “A probation report is a written account of the probation officer’s investigations, findings, and recommendations regarding the defendant’s fitness for probation. The purpose of this report is to assist the sentencing judge in determining an appropriate disposition of the defendant’s case after conviction.”<sup>548</sup>

Besides information on the basic facts of the case and crime, the report can include information on prior criminal conduct, the defendant’s social history, family, education, employment, income, military service, medical and psychological history, an evaluation of factors relating to the disposition, recommendations, and a reasoned discussion of aggravating and mitigating factors affecting sentence length or whether imprisonment is even necessary.<sup>549</sup> The use of probation-type reports may even satisfy the harshest enforcement supporters. Congressman Lamar Smith, one of the critics of the old section 212(c) relief, acknowledged that deportation should not always result. He suggested that immigration officials exercise prosecutorial discretion and not seek deportation in hardship cases. Furthermore, he suggested that agents should identify hardship aliens who would not be deported.<sup>550</sup>

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<sup>544</sup> *Id.*

<sup>545</sup> *Id.*

<sup>546</sup> *Id.*

<sup>547</sup> David. H. Melnick, Comment, *Probation in California: Penal Code Section 1203*, 50 CAL. L. REV. 651, 652-53 (1962).

<sup>548</sup> 5 CAL. CRIM. DEF. PRAC.: SENTENCING AND PROB., POSTTRIAL REMEDIES § 90.03[3](1)-(11) (2004).

<sup>549</sup> *Id.*

<sup>550</sup> See Lewis, *supra* note 498.

In diversion programs, criminal cases are “diverted” out of the criminal justice system. In such programs, courts generally require offenders to participate in a treatment or rehabilitation program in lieu of being incarcerated. Criminal charges are dropped upon successful completion of diversion programs, relieving offenders from being stigmatized with a criminal conviction. Either the prosecution or defense counsel may offer diversion to offenders. Defense counsel may wait until a defendant’s first court appearance and ask the judge to order an “evaluation for diversion.” Those referred to diversion meet with a probation officer who conducts an investigation and prepares a report regarding the suitability for diversion. The recommendation may specify the type of program most suitable for the offender.

Requiring offenders to perform community service is another alternative. Here, courts assign offenders to work, uncompensated, for non-profit organizations or for governmental organizations instead of serving jail time. Requiring community service holds offenders accountable by making them repay society and encourages a more positive connection with the community. Local community service coordinators or probation officers administer community service orders. The orders often involve work in community centers. Community service is usually imposed in conjunction with other forms of punishment, such as probation, fine, or restitution.

In another option, courts order offenders out of their homes for a fixed term and place them in group living arrangements, such as a residential treatment facility. Under this scheme, clinical and counseling staff provide regular mentoring, counseling, and treatment for drug abuse to offenders. Clients receive treatment for substance addiction and alcoholism. The program may offer one-on-one counseling, group therapy, educational lectures, relapse prevention groups, and individualized treatment. The goal is for residents to learn to become self-sufficient, contributing members of society.

The idea behind many of these options is not simply that imprisonment may not be appropriate, but that rehabilitation is a real possibility. In the same vein, analogous options in the immigration enforcement context ought to recognize that rehabilitation is not only a possibility, but ought to be promoted given the background and circumstances of groups like Cambodian refugees. Beyond the benefits to the individual, the family, the community, and the entire society stand to gain from a constructive rehabilitative approach. In contrast, the destructive forces of deportation wreak havoc on all the parties and their relationships.

## CONCLUSION

These two Cambodian refugees stand to be deported:

Bonset Soun:

Bonset Soun was a toddler in 1975 when the Khmer Rouge, wielding hoes and axes, hacked his father, brother, and two sisters to death and dumped their bodies in a mass grave. They tossed Soun in as well and, because he was unconscious, left him for dead. Miraculously, his mother, Paon Phum, had escaped the fury of the Cambodian communists and was able to save him. Not long afterward, Soun again had a brush with death when the Khmer Rouge butchered his sister before his very eyes.

Soun and his mother fled to Thailand on foot. After they spent some time in a refugee camp, the United States granted mother and son political refugee status. The two were able to get to California safely.

Then, fifteen years after he was rescued from the killing fields of Cambodia, Bonset Soun himself became a killer. In 1990 he gunned down the Cambodian manager of a video store in San Jose, California, when the shopkeeper refused to hand over money. Found guilty of attempted robbery and first-degree murder, Soun was sentenced in 1992 to life in prison with no possibility of parole. Violence had begotten violence, and Paon Phum lost her only remaining son to the eye of an American dust storm.<sup>551</sup>

Soy Pheng:

In her native Cambodia, Soy Pheng planted rice and raised her seven children until the genocidal Khmer Rouge regime took her oldest daughter and forced the rest of her family into a labor camp. Two of her other children starved to death in the camp. When the regime fell in 1979, the family escaped into Thailand. . . .

[Her daughter], now 15, regularly runs away from their Silver Spring home. She hangs out with local Cambodian youth gangs, who sometimes steal cars and get in mob fights. The gangs have signs and colors and nicknames. She wears baggy jeans and oversize tops. She dyes her black hair red, the in color among those

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<sup>551</sup> LONG, *supra* note 374, at 3-4.

in her gang.<sup>552</sup>

Immigrants who commit crimes are deported from the United States everyday. Immigrants from Mexico, the Philippines, Europe, Africa, and the Middle East constantly run the risk of removal for committing aggravated felonies or even more minor offenses. Like Cambodian refugees, generally they, too, have already served their criminal sentences before being deported. The relentless efforts to deport criminals epitomized by the radical changes to the removal grounds and forms of relief in 1996 were stepped up even more after September 11, 2001.

Should there be a different policy when it comes to removal of refugees? Perhaps. Until recently, the deportation of refugees has not been such a common occurrence.<sup>553</sup> The removal of Cambodians, however, challenges us to rethink the entire concept of deportation as applied to refugees and immigrants alike. Is removal really the just outcome in this and other situations, or should other options be considered? What might those other options be? Deportation is not simply about removing the individual respondent. The fiscal and emotional price is felt by all of us, but especially the deportee's family, as the resulting need for social services and the cycle of poverty and criminality are continued.

Sadly, many Cambodian families who survived the killing fields of the Khmer Rouge, have lost the battle to survive in America. The battle was lopsided; they were given no tools to adjust after being uprooted by a genocide with which the United States is all too familiar and all too connected. The heartbreak is evident, when you realize that Soy Pheng navigated roads studded with land mines as she clutched her then three-month-old daughter in her arms during her escape to Thailand.<sup>554</sup> The tragedy is clear in the words of Bonset Soun, following his conviction: "If my life gonna end, I don't care, you know. Go ahead, end. 'Cause I

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<sup>552</sup> Sun, *supra* note 441.

<sup>553</sup> Since 1997, approximately 200 Somalians, many of whom were refugees, have been deported to Somalia. *Ali v. Ashcroft*, 213 F.R.D. 390, 396 (W.D. Wash. 2003). The Eighth Circuit had upheld the removal of Somalian refugees. *Jama v. INS*, 329 F.3d 630, 632 (8th Cir. 2003). The Ninth Circuit ruled, however, that such deportations should stop because there is no functioning government in Somalia. *Ali v. Ashcroft*, 346 F.3d 873, 876 (9th Cir. 2003). See generally Eric Jeffrey Ong Hing, Comment, *Deportation into Chaos: The Questionable Removal of Somali Refugees*, 38 U.C. DAVIS L. REV. 309 (2004). In a 5-4 decision, the Supreme Court recently affirmed the Eighth Circuit's position, ruling that under the circumstances, acceptance of the deportee by a functioning government is unnecessary. *Jama v. Immigration & Customs Enforcement*, 125 S. Ct. 694 (2005).

<sup>554</sup> Sun, *supra* note 441.



feel like nothing for me in this world, you know?''',<sup>555</sup>

Rethinking deportation and developing reasonable alternatives is a challenge we must address urgently. In our hearts, we know that removal is not always appropriate, especially when our country bears culpability for creating the problem. In our souls, we know that when we repatriate Cambodian refugees, we further destroy a family at a time when the family needs, more than ever before, to be whole.

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<sup>555</sup> LONG, *supra* note 374, at 84.

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