



Removing Refugees

U.S. Deportation Policy and The Cambodian-American Community

Spring 2010

Walter Leitner International Human Rights Clinic
Returnee Integration Support Center
Deported Diaspora



Leitner Center
for International Law and Justice
AT FORDHAM LAW SCHOOL, NEW YORK CITY

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Executive Summary

Phirun Phal was born in a Thai refugee camp to Cambodian parents who fled the Khmer Rouge and the horrors of genocide. After three years in the camps, his family arrived as refugees in the United States. They initially settled in Philadelphia, Pennsylvania, before moving to Long Beach, California, to join an emerging Cambodian-American community.

Growing up in Long Beach in the 1980s, Phirun faced violence, discrimination, and an ever-rising crime rate. As an adult, he faced financial hardship and forged a \$900 check to pay his bills. Even though his record only included two minor, non-violent offenses – possession of a small quantity of marijuana and using his brother's ID for a speeding ticket – the forgery charge made Phirun deportable. He received a sixteen-month sentence, but secured an early release for good behavior after only eight months. On the day of his release, Immigration and Customs Enforcement (ICE) seized him and placed him in immigration detention. After a month, he met with a judge for his deportation hearing. Although Phirun told the judge about his childhood in the United States and his five siblings, his story had no effect. As Phirun noted, “They didn’t care – they just care about getting rid of you.” He ultimately spent more than a year in ICE custody, during which time his mother passed away from cancer.

Eventually, ICE placed Phirun on supervised release and told him to check in every few months. He returned to Long Beach and started a new life with his long-term girlfriend. He found a job in construction and at the end of 2008, learned that he would soon become a father. The idea of fatherhood excited Phirun and he planned to be present for the birth of his daughter. In the ninth month of the pregnancy, however, ICE arrested him, claiming that his travel documents were ready. On the day of his daughter's birth, they transferred him to a detention facility in Washington State. Three months later, he was deported to Cambodia. He has never seen his baby girl.¹

Unfortunately, Phirun's story echoes that of many Cambodian-Americans, legal permanent residents (LPRs), and refugees from other immigrant groups. In 1996, the United States introduced two new immigration laws – the Antiterrorism and Effective Death Penalty Act (AEDPA)² and the Illegal Immigration Reform and Immigrant

Responsibility Act (IIRIRA)³ – which eliminated judicial discretion from the removal process and expanded the categories of mandatory deportation. In the years since the passage of the two laws, the United States has deported more than 87,000 LPRs.⁴ The Obama Administration appears to be continuing rigorous enforcement of the laws, encouraging an increase in overall deportations by setting heightened quotas for ICE, including an agency goal of 400,000 deportations for 2009-2010.⁵

The Cambodian-American community provides a valuable lens through which to explore the harsh effects of these laws and continued policies. In 2002, Cambodia signed a repatriation agreement to accept deportees from the United States. After serving time and reentering society, refugees and LPRs suddenly found themselves eligible for deportation. The U.S. separated them from their homes and families and sent them to a country with which they had little or no connection. As of September 2009, the U.S. has returned 212 such refugees to Cambodia.⁶

Although the United States may deport non-citizens to protect its borders, the experience of the Cambodian-American community highlights how the current U.S. system violates basic principles of equity and reasonableness. It may also infringe upon internationally recognized human rights principles, including proportionality, the protection of refugees, the right to health, and the right to family. This Report urges the United States to reconsider its current approach to deportation and recognize the devastating effects of this policy on refugees, LPRs and U.S. citizens.

The Report is divided into five sections. Part I introduces the Cambodian-American community. Part II will examine the current state of U.S. deportation laws and address the 2002 U.S.-Cambodia Repatriation Agreement that initiated the removal of Cambodian-Americans who were legal permanent residents of the United States. It will also demonstrate how U.S. policy conflicts with international refugee law and principles of proportionality. Part III addresses the problems with the deportation process. Based on interviews with those returned to Cambodia, known as “the returnees,” this Report highlights six main issues: (1) the inability of individuals to argue against removal; (2) the use of deportation against non-violent offenders;

1 See generally Interview with Phirun Phal (pseudonym), in Battambang, Cambodia. (Mar. 25, 2010).

2 Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter “AEDPA”].

3 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) [hereinafter “IIRIRA”].

4 INTERNATIONAL HUMAN RIGHTS LAW CLINIC, UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW ET AL., IN THE CHILD'S BEST INTEREST?: THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 5 (Mar. 2005), http://www.law.berkeley.edu/files/Human_Rights_report.pdf [hereinafter “IN THE CHILD'S BEST INTEREST”].

5 Spencer Hsu and Andrew Becker, *ICE Officials Set Quotas to Deport More Illegal Immigrants*, WASH. POST (March 27, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604891.html> [hereinafter *ICE Officials Set Quotas*].

6 Boomer, A Returnee Rapping Destiny, <http://khmerabroad.blogspot.com/2009/09/boomer-returnee-rapping-destiny.html> (September 12, 2009).

(3) the returnees' lack of knowledge about their immigration status; (4) the retroactive application of deportation laws; (5) the removal of individuals with mental illnesses and disabilities and finally; (6) the extensive periods of time spent by individuals in immigration detention. Part IV addresses the aftermath of deportation. It documents the adjustment process for those returned to Cambodia and the problems experienced by individuals with mental illnesses and disabilities. It also examines the two biggest challenges faced by both the returnees and their families in the United States: the struggle to adjust to separation from their loved ones and the economic hardships brought on by removal. Finally, Part V discusses the potential effect of U.S. immigration law on other refugee communities.

This Report represents the culmination of a semester-long project undertaken by the Walter Leitner International Human Rights Clinic at Fordham University School of Law (Leitner Clinic),⁷ in conjunction with the Returnee Integration Support Center (RISC)⁸ and Deported Diaspora.⁹ In March 2010, a team from the Leitner Clinic spent one week conducting fieldwork in Phnom Penh, Battambang, and the surrounding areas with the assistance of RISC staff. The Report compiles information gathered from individual interviews with forty-eight of the returnees currently living in Cambodia. Despite having obtained oral informed consent, the authors of the report respect the privacy interest of interviewees, and pseudonyms have been assigned accordingly.

The Leitner Clinic equips Fordham Law students with the necessary skills to become effective human rights advocates and public interest-minded lawyers through its work in partnership with non-governmental organizations and foreign law schools on projects ranging from legal and policy analysis, fact-finding and report writing, and human rights training and capacity-building. Based in Phnom Penh, RISC is one of the only organizations working with the returnees in Cambodia. It helps new arrivals integrate into Cambodian society and provides assistance with documentation, employment and housing. Founded in 2008 and based in Boston, Massachusetts, Deported Diaspora strives to raise awareness about current U.S. deportation policies through community organizing, education and activism.

With immigration reform recently elevated to the status of a national priority, robust debates continue to take place regarding the terms and scope of such legislation. This discussion has centered largely on issues pertaining to illegal immigration, ignoring and overlooking the plight of legal immigrants living in the U.S. The following recommendations are made with the belief that truly *comprehensive* immigration reform must include provisions to remedy the issues highlighted in this report; issues that plague the Cambodian-American community now, and may plague other refugee communities in the future.

7 See generally Walter Leitner International Human Rights Clinic, <http://leitnercenter.org/programs/WLIHR/> (last visited May 19, 2010).

8 See generally Returnee Integration Support Center (RISC), <http://www.risc cambodia.org/> (last visited May 11, 2010).

9 See generally Deported Diaspora, <http://www.deporteddiaspora.org/> (last visited May 11, 2010).

Recommendations

TO THE PRESIDENT AND THE DEPARTMENT OF STATE:

- Encourage Congress to amend AEDPA and IIRIRA to reflect international human rights norms.
- Scale back the Administration's current enforcement efforts until adequate safeguards, such as discretionary hearings, have been introduced to prevent unwise or unjust deportations.
- Modify the U.S.-Cambodia Repatriation Agreement to exclude deportations of individuals who arrived in the United States as refugees.

TO CONGRESS:

- Amend AEDPA and IIRIRA to:
 - Remove the laws' retroactive effects.
 - Revert to pre-1996 definitions of deportable crimes and ensure that non-violent and misdemeanor offenses do not count towards removability.
 - Reinstate the pre-1996 discretionary rules that allow judges to consider social and humane considerations on behalf of the non-citizen. Factors for discretionary relief include:
 - Evidence of rehabilitation.
 - Contributions to U.S. society (i.e. military service).
 - Length of residency in the United States.
 - Effect of removal on U.S. citizen children and dependents.
- Ensure that those with mental disabilities or mental illnesses receive competency adjudications within the removal process.
 - Allow immigration judges to appoint guardians ad litem for individuals with limited capacity in immigration proceedings.
 - Amend the competency standards for immigration proceedings to reflect similar standards in criminal court.

- Allow immigration judges to consider the availability and quality of necessary health treatments and services in the receiving country.

- Ensure that those properly deported from the United States receive necessary paperwork, including medical and immigration records.
- Amend U.S. immigration laws to reflect international standards and specifically, the ruling of the United Nations High Commissioner for Refugees that adjustment of status does not remove refugee protections under international law.

TO THE DEPARTMENT OF HOMELAND SECURITY AND ITS IMMIGRATION BRANCHES:

- Ensure that United States Citizenship and Immigration Services adjustment officers consistently inform non-citizens of the rights and responsibilities of becoming a legal permanent resident when they complete the status adjustment process.
- Encourage the immigration enforcement divisions to follow statutes and regulations as written, specifically:
 - Ensure custody reviews within 90 days of immigration detention.
 - Encourage immigration enforcement to exercise discretionary authority to leave persons with mental disabilities in their current care situations until the date of their immigration proceedings.
- Ensure that detained immigrants have the ability to maintain attorney-client and family relationships. This could be accomplished by reducing the number of immigration detainees transferred to remote jurisdictions.
- Eliminate numerical quotas or goals for annual deportations.

Part One: The Cambodian-American Community

The United States and Cambodia have a long and complicated history. Throughout the Vietnam War, the U.S. maintained Cambodia as an ally and strategic partner.¹⁰ However, U.S. involvement destabilized Cambodian politics and contributed to the rise of the Khmer Rouge.¹¹ After they took power, the Khmer Rouge began a genocidal campaign that eventually claimed 1.4 to 2.2 million lives.¹² They systematically murdered all government officials and those who were considered disloyal, wealthy, tainted by foreign influence, or educated.¹³ Those left alive were forced into the countryside to work in labor camps where terrible conditions lead to widespread death due to starvation and overwork.¹⁴

When the Khmer Rouge finally fell in 1979, hundreds of thousands of displaced Cambodians sought refuge from the atrocities they experienced.¹⁵ The United States provided a new home for 120,000 of these refugees, dramatically expanding the Cambodian-American community in the late 1970s and early 1980s.¹⁶ In April 1975, fewer than a thousand Cambodians lived in the United States.¹⁷ Refugees who settled in the U.S. arrived in two distinct groups: the 1975-1979 arrivals and the post-1979 arrivals.¹⁸

The first wave of Cambodian immigration occurred in 1975. It primarily included those who were outside of the country when the Cambodian government fell, such as diplomats, military officers, and students.¹⁹ Compared to the second wave of refugees, this group, known within the community as “the 75 people,” had a number of key

advantages.²⁰ For instance, they tended to be educated professionals with some knowledge of English.²¹ It was also a numerically small group that arrived at a time when social aid programs were available for resettlement and adjustment.²² Finally, and perhaps most importantly, “the 75 people” left Cambodia before the genocide and thus did not bear the scars of living under the Khmer Rouge.²³

The second, and much larger, wave occurred after the fall of the Khmer Rouge. The post-1979 arrivals, known within the community as the “after 80 people,” had vastly different backgrounds from their predecessors.²⁴ They were primarily rural agriculturalists with little to no formal education or English language skills.²⁵ Moreover, many had severe psychological and emotional trauma brought on by their experiences under the Khmer Rouge and in the refugee camps along the Thai border.²⁶

Although these later arrivals needed extensive assistance from social services, there was little help to be found from either the existing Cambodian-American community or the U.S. government.²⁷ Due to their limited numbers and resources, the “75 people” could provide only minimal support to later waves of refugees.²⁸ The government also provided less help than it had to the first wave of Cambodian refugees. By the 1980s, the U.S. government had changed its approach to welfare, readjusting its focus towards preventing dependency on government assistance rather than changing the structural conditions affecting dependent communities.²⁹ While “the 75 people” had received

10 See, e.g. LIBRARY OF CONGRESS, COUNTRY STUDIES: CAMBODIA, (2009), <http://lcweb2.loc.gov/frd/cs/khtoc.html> (follow link to “Nonaligned Foreign Policy”); Bill Ong Hing, *Detention to Deportation: Rethinking the Removal of Cambodian Refugees*, 38 U.C. DAVIS L. REV. 891, 938 (2005); Kenton J. Clymer, THE UNITED STATES AND CAMBODIA 1969-2000: A TROUBLED RELATIONSHIP 2 (Routledge Curzon 2004).

11 For instance, the U.S. conducted a secret bombing campaign that devastated the villages in the countryside, resulting in a loss of property and lives. These bombings had such a destructive effect on the Cambodian people that they initially welcomed the Khmer Rouge and their promise of peace. See, e.g. Taylor Owen & Ben Kiernan, *Bombs Over Cambodia, The Walrus* (Canada), (Oct 2006) at 67, available at http://www.yale.edu/cgpp/Walrus_CambodiaBombing_OCT06.pdf; Samantha Power, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 92 (Harper Perennial 2002).

12 Sharp, Bruce, *Counting Hell: The Death Toll of the Khmer Rouge Regime in Cambodia*, <http://www.mekong.net/cambodia/deaths.htm>.

13 David Roberts, *US Intervention in Cambodia From Bombs to Ballots*, COVERT ACTION Q., Fall 1997.

14 Clymer, *supra* note 10, at 161-162.

15 Power, *supra* note 11, at 142.

16 Susan Needham & Karen Quintiliani, *Cambodians in Long Beach, California: The Making of a Community*, 5 JOURNAL OF IMMIGRANT & REFUGEE STUDIES 29, 37 (2007).

17 Sucheng Chan, SURVIVORS: CAMBODIAN REFUGEES IN THE UNITED STATES 81 (2004).

18 Needham & Quintiliani, *supra* note 16, at 37.

19 Chan, *supra* note 17, at 82.

20 Needham & Quintiliani, *supra* note 16, at 37.

21 *Id.*

22 *Id.*

23 *Id.*; see also Chan, *supra* note 17, at 82.

24 *Id.*

25 *Id.* Most of the men had the equivalent of a 4th grade education, while the women had received little to no schooling.

26 Chan, *supra* note 17, at 230-31.

27 Needham & Quintiliani, *supra* note 16, at 38.

28 *Id.*

29 *Id.*

unlimited Refugee Cash Assistance and Refugee Medical Assistance support from the federal government, “the after 80 people” experienced dramatic cutbacks.³⁰

When programs were available through private charities or associations funded by the earlier wave, they were typically overburdened and understaffed.³¹ A community college in Long Beach, California, for example, reported that in the fall of 1981, 275 Cambodians attempted to register for a vocational training course with only 30 seats.³² In many cases, refugee assistance agencies:

often could do little more than pick up refugees at airports and leave them in empty apartments, not returning until days later to see how the frightened and confused newcomers were doing. Because many refugees had never seen a flush toilet, used electricity, cooked on a gas stove, or warmed themselves by a radiator or central heating system, they sat in the dark, went hungry, or shivered in the cold.³³

The economic climate at the time of the refugees’ arrival further exacerbated the situation. The United States experienced a deep recession during the 1980s and jobs were scarce. In many cases, assistance agencies simply could not find employment for the refugees.³⁴

Other Cambodian-Americans experienced problems as a direct result of U.S. resettlement policies. Concerned about the creation of large ethnic communities and the burden placed on states by the influx of refugees, the

government instituted the “Khmer Guided Placement” or “Khmer Cluster Project” in the spring of 1980.³⁵ The program was designed to “scatter” a percentage of the new refugees throughout the country, placing groups of three hundred to a thousand Cambodians in small to mid-sized American cities, like Columbus, Ohio and Portland, Oregon.³⁶ Although the Cluster Project was beneficial for the states in question, it made the transition much more difficult for the refugees themselves. By breaking them into small groups and spreading them around the country, the program isolated the refugees from the rest of the Cambodian community and its associated networks of emotional, physical and economic support.³⁷ As a result, secondary migration was common amongst post-1979 arrivals and by 1987, almost half of the refugees had moved at least once within the U.S.³⁸ Many chose to relocate to the emerging Cambodian enclaves of Long Beach, California, Lowell, Massachusetts and Seattle, Washington.³⁹

Many Cambodian communities were riddled with crime and poverty. Cambodian youths faced discrimination and harassment by other minority groups.⁴⁰ This led to Cambodian youths feeling isolated and in need of a support system.⁴¹ They created their own support system by banding together to protect themselves. Unfortunately tensions between the groups sometimes led to encounters with the police.⁴² These incidents led to charges that carried immigration consequences. What Cambodian youths did not know was that these charges would make them deportable under the new immigration laws and the impending U.S.-Cambodian Repatriation Agreement.

30 *Id.* at 38-39; see also Chan, *supra* note 17, at 105. Today, refugees are only eligible for 8 months of public assistance.

31 *Id.* at 42.

32 *Id.* at 42 -3.

33 Chan, *supra* note 17, at 99.

34 *Id.* at 156.

35 The program was, ultimately, responsible for the resettlement of 30% of the Cambodian refugees. *Id.* at 97-98; Needham & Quintiliani, *supra* note 16, at 38-39.

36 *Id.*; Chan, *supra* note 17, at 97-98.

37 Needham & Quintiliani, *supra* note 16, at 41.

38 *Id.*

39 *Id.* Long Beach, California, was popular because of its proximity to Camp Pendleton, an initial point of disembarkation for many of the refugees, and its warm weather. See Chan, *supra* note 16, at 85. Lowell, Massachusetts, quickly became a hub because of the state’s generous assistance packages and the availability of jobs in the region. See *id.* at 102-105.

40 DORI CAHN & JAY STANSELL, RACE, CULTURE, PSYCHOLOGY & LAW 241-42 (Kimberly Holt Barrett ed., Sage Publications 2005).

41 See e.g. Interview with Dith (pseudonym), in Phnom Penh, Cambodia. (Mar. 22, 2010).

42 Cahn, *supra* note 40.

Part Two: U.S. Deportation Laws and the 2002 Repatriation Agreement

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA)⁴³ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁴⁴ These two amendments expanded the categories of deportation to include minor crimes and non-violent offenses and simultaneously eliminated many forms of ameliorative relief. While Cambodian-Americans were technically eligible for deportation as early as 1996, the United States and Cambodia did not have a repatriation agreement until March 22, 2002.⁴⁵ As a result of this agreement, Cambodian-American legal permanent residents (LPRs) can now be deported notwithstanding their rehabilitation or the best interests of their U.S. citizen families.

This section will explain the legal context of the Cambodian-American removals⁴⁶ and the U.S. Repatriation Agreement with Cambodia. It will then examine the current state of U.S. deportation policies and argue that the laws are punitive rather than regulatory. Finally, it will discuss the international legal ramifications of U.S. immigration laws.

I. 1996 Immigration Amendments and the 2002 Repatriation Agreement

AEDPA and IIRIRA expanded the categories of deportable offenses. Before 1996, the law limited “aggravated felonies” to specific crimes involving violence and a term of imprisonment greater than five years.⁴⁷ After the passage of AEDPA and IIRIRA, so-called “aggravated felonies” became neither “aggravated” nor “felonies.” For example, a LPR is considered an “aggravated felon” if s/he is convicted of:

- possessing more than thirty grams of marijuana;⁴⁸
- any crime of theft where the length of imprisonment is more than one year, regardless of whether the term of imprisonment was suspended;⁴⁹
- any crime of violence for which the length of imprisonment is more than one year, even if the State defines the crime as a misdemeanor.⁵⁰

Initially, these changes did not affect Cambodian-Americans because Cambodia refused to accept deported non-citizens. However after September 11, 2001, commentators speculate that the U.S. threatened to pressure the World Bank to withdraw its assistance to Cambodia if the country failed to accept deportees.⁵¹ Many sources believe that it was this pressure that forced Cambodia to sign the 2002 Repatriation Agreement.⁵²

II. Punitive Effects of the 1996 Laws on Cambodian-Americans

These new laws had harsh consequences, especially for LPRs convicted of “crimes involving moral turpitude.” Traditionally, these crimes include acts of dishonesty or other “morally questionable behaviors.”⁵³ Even though the 1996 amendments did not change the definition of these crimes, they did increase the consequences of conviction. When interpreted, this vague and sweeping definition renders LPRs deportable for minor offenses such as public urination⁵⁴ and riding the subway without a ticket.⁵⁵

AEDPA and IIRIRA eliminated judicial discretion so an LPR who committed a “crime involving moral turpitude”

43 AEDPA, *supra* note 2.

44 IIRIRA, *supra* note 3.

45 David L. Cheng, Note, *Émigrés of the Killing Fields: The Deportation of Cambodian Refugees as a Violation of International Law*, 25 B.C. THIRD WORLD L.J. 221, 235 (2005).

46 This report recognizes the distinctions between removal and deportation. However, it will use them interchangeably throughout the text.

47 IIRIRA, *supra* note 3.

48 8 U.S.C. § 1227 (b) (i) (2009).

49 8 U.S.C. § 1227 (2)(a) (2009); See also, *United States v. Graham*, 169 F.3d 787, 791 (3d Cir. 1999), *cert. denied*, 528 U.S. 845 (1999) (holding that state misdemeanor petit larceny offense is a theft aggravated felony for illegal reentry sentence enhancement purposes); *U.S. v. Pacheco*, 225 F.3d 148 (2d Cir. 2000), *cert. denied*, 533 U.S. 904 (2001) (holding that state misdemeanor offenses with suspended sentences are aggravated felonies for illegal reentry sentence enhancement purposes).

50 *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000) (holding that state misdemeanor sexual battery offense is a crime of violence aggravated felony for removal purposes); *Jaafar v. INS*, 77 F. Supp. 2d 360, 364-65 (W.D.N.Y. 1999) (holding that state misdemeanor petit larceny offense is a theft aggravated felony for removal purposes); *United States v. Christopher*, 239 F.3d 1191 (11th Cir. 2001) (holding that state misdemeanor shoplifting offense is a theft aggravated felony for illegal reentry sentence enhancement purposes).

51 Joe Cochrane, *A Bitter Bon Voyage: America Puts Foreign Criminals on the Fast Track Home*, NEWSWEEK, Aug. 5, 2002, available at <http://www.searac.org/cambrepnews.html>.

52 *Id.*

53 TRAC Immigration, available at <http://trac.syr.edu/immigration/reports/155/> (last visited May 10, 2010).

54 HENRY M. JACKSON SCH. OF INT’L STUDIES, UNIV. OF WASH., REFORMING U.S. POLICY TOWARDS REFUGEES, ASYLUM SEEKERS & FORCED MIGRANTS 84 (2010), https://dlib.lib.washington.edu/dspace/bitstream/handle/1773/15595/TF_SIS495A_2010.pdf?sequence=1.

55 BRYAN LONEGAN, N.J. CIVIL RIGHTS DEF. COMM., 1996 WAS A VERY BAD YEAR, <http://www.nj-civilrights.org/literature/1996%20WAS%20A%20VERY%20BAD%20YEAR.pdf>.

or one of the newly defined “aggravated felonies” was immediately deportable. Before 1996, the judge could consider whether the “facts and circumstances” required the LPR to be deported.⁵⁶ Specifically, the judges could waive deportation on one or more of the following factors:

- social and humane factors, including whether deportation would hurt U.S. family members;⁵⁷
- whether s/he had ties to the country of repatriation;⁵⁸
- criminal rehabilitation;⁵⁹
- good moral character and whether deportation would cause extreme hardship.⁶⁰

Also, Cambodian family members could present evidence that they would suffer extreme difficulties if the U.S. deported their spouse, parent or child.⁶¹ If the judge accepted the application for discretionary relief, then the LPR would not be deported.

The elimination of judicial discretion blurs the distinction between the criminal and immigration systems.⁶² As a direct result of the new immigration laws, Cambodian-Americans are now eligible for two types of punishment: criminal sentencing *and* deportation. Although the U.S. government refuses to view deportation as anything but border regulation, deportation is not just a civil remedy.⁶³ Like criminal punishment, deportation is both retributive⁶⁴ and deterrent⁶⁵ in nature. It is especially punitive when the basis for a non-citizen’s deportation is a conviction

for violating U.S. law.⁶⁶ Furthermore, AEDPA and IIRIRA’s addition of a retroactivity clause makes it impossible for non-citizens to avoid deportation for crimes committed before 1996.⁶⁷

III. Deportation Under International Law: Proportionality and Refugee Protections

The punitive effects of the U.S. deportation laws infringe upon international human rights standards. International law reflects the principle that punishment should be graduated and proportional to the crime in question.⁶⁸ The focus is on avoiding disproportionately severe sentences.⁶⁹ Thus, international human rights law considers deportation to be disproportionate for individuals who commit non-violent or petty crimes.⁷⁰ Unfortunately, despite evidence to the contrary, the United States does not view deportation as “punishment,” and as such does not consider these standards applicable.⁷¹

In addition to implicating proportionality violations, the U.S. deportation laws violate international refugee laws. According to the 1951 Convention Relating to the Status of Refugees (the Convention)⁷² and the 1967 Protocol Relating to the Status of Refugees (the Protocol),⁷³ a refugee is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or,

56 Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938-39 (Jun. 2000).

57 8 U.S.C. § 1182 (h) (1990).

58 *Id.*

59 There was never an irrefutable presumption that a confined or recently convicted alien could never establish either that rehabilitation has occurred or that deportation relief should otherwise be granted. See *id.*

60 8 U.S.C. § 1254(a)(1)(2) (1986).

61 8 U.S.C. § 1182(h) (1990).

62 *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) (holding that “[c]hanges to immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms have expanded the class of deportable offenses and limited judges’ authority to alleviate deportation’s harsh consequences. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important. Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes”).

63 *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (holding that deportation is not a punishment, but merely a return for aliens who do not meet the conditions of their continued residence in the United States).

64 See, HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 37-39 (Stanford University Press 1968).

65 Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1894 (2000).

66 See, e.g. *Schneidemann v. INS*, 83 F.3d 1517, 1527 (3d Cir. 1996) (Sarokin, J. concurring).

67 See Vashti D. Van Wyke, *Retroactivity and Immigrant Crimes Since St. Cyr: Emerging Signs of Judicial Restraint*, 154 U. PENN. L. REV. 741, 742-743 (2006).

68 This is a principle of interpretation that applies to restrictions clauses, common to both the ICCPR and the ICESCR, and is grounded in the jurisprudence of the European Court of Human Rights. See MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 378-79 (Arlington: N.P. Engel, 1993).

69 See Rome Statute, art. 78, Jul. 17, 1998, 41 U.N.T.S. 187, available at <http://untreaty.un.org/cod/icc/statute/rome.htm>.

70 HUMAN RIGHTS WATCH, *FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES* 13 (2009), available at <http://www.hrw.org/en/node/82159/section/5> [hereinafter “FORCED APART”].

71 *Fong Yue Ting*, 149 U.S. 698, 707.

72 Convention Relating to the Status of Refugees, entered into force April 22, 1954, art. 1(A), 1189 U.N.T.S. 150, G.A. Res. 429(V), U.N. GAOR, 5th Sess., Supp. No. 20(A/1775) at 122 (1950), available at <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>.

73 Protocol Relating to the Status of Refugees, entered into force Oct. 4, 1967, art. 1.1, 606 U.N.T.S. 267, G.A. Res. 2198 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 (A/6316) at 164, U.N. Doc. A/6586, available at <http://www.unhcr.org/3b73b0d63.html>

owing to such fear, is unwilling to avail himself of the protection of that country.”⁷⁴

The Convention outlines the responsibilities of States towards refugees. The most important of these is the total ban on “*refoulement*,” or expulsion.⁷⁵ Under the Convention, a State is prohibited from returning a refugee to the country from which s/he fled.⁷⁶ The principle of *non-refoulement* has become the cornerstone of international refugee protection and has been embraced by various human rights instruments.⁷⁷

A State may only circumvent the principle of *non-refoulement* in cases of national security. The host country is permitted to expel the refugee solely when a person is found guilty of a “capital crime or a very grave punishable act” and determined to be a danger to society.⁷⁸ However, the drafters of the Refugee Convention never defined what constitutes a particularly serious crime.⁷⁹ International consensus holds that “conviction alone cannot imply that the refugee poses a threat; conviction is an essential precondition, but it is the danger the refugee poses which is decisive.”⁸⁰ As a signatory to the 1967 Refugee Protocol, the United States may not simply convict and deport.

In addition to the national security exception, the protection against *non-refoulement* may cease as a result of individual action by the refugee. The Convention outlines six very limited instances in which a refugee may lose his or her protected status⁸¹ and protection against *refoulement*. The United States immigration system violates the

Convention when it forces an immigrant to give up their refugee protections in order to become an LPR. In fact, U.S. law requires refugees to adjust their status to legal permanent residence after one year of physical presence in the U.S..⁸² Although the United Nations High Commissioner for Refugees (UNHCR) declared this policy illegal, both the Department of Homeland Security (DHS) and the American courts refuse to follow the agency’s mandate.⁸³ Consequently, refugees within the United States are eligible for deportation.

Although current policy is over-inclusive and allows for the deportation of refugees, the United States does not need to adopt this approach. In fact, it has relied on a different strategy in the case of another post-conflict, refugee producing country: Vietnam. The 2008 agreement signed with Vietnam only allows the deportation of those who arrived in the United States after 1995.⁸⁴ This date represents the year that the United States and Vietnam resumed diplomatic relations and exempts the majority of the refugee population from removal.⁸⁵ This time restriction would only allow the U.S. government to deport non-citizens who arrived to America after 1995.⁸⁶ Since most Vietnamese refugees arrived before 1995, this population would be exempted from deportation.⁸⁷ Unfortunately, the U.S.-Cambodia Repatriation Agreement contains no such time restriction. As a result, the Cambodian-Americans, who also fled the horrors of war and entered the U.S. as refugees, are now eligible for removal.

74 See Refugee Convention, *supra* note 72, art. 1(A).

75 See *id.*, art. 33(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.”).

76 *Id.*, art. 33(2).

77 Kees Wouters, International Legal Standards for the Protection from Refoulement, 25 (Intersentia 2009) (International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the European Convention on Human Rights and Fundamental Freedoms (ECHR))

78 *Id.* (“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”); see also HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 15 (2009) (quoting UNHCR).

79 Wouters, *supra* note 77, at 117.

80 *Id.*

81 The Cessation Clauses list the following six situations:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily re-acquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution;

(5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Refugee Convention, *supra* note 72, at art. 1(C).

82 Cheng, *supra* note 45, at 239.

83 *Id.* at 240; See also, *Sun v. Ashcroft*, 370 F. 3d. 932 (9th Cir. 2004).

84 Margie Mason, *Illegal Vietnamese Face US Deportation*, USA TODAY, Jan. 22, 2008, available at http://www.usatoday.com/news/world/2008-01-22-4097509132_x.htm.

85 *Id.*

86 *Frequently Asked Questions About the U.S. and Vietnam Repatriation Agreement*, South East Asia Resource Action Center (Jan. 2008), available at <http://www.searac.org/faq-vietus1-30-08.pdf>

87 My-Thuan Tran and Christopher Goffard, *A jolt in new Vietnam pact*, L.A. TIMES, Jan. 24, 2008, available at <http://articles.latimes.com/2008/jan/24/local/me-vietnamese24>.

For the foregoing reasons, this Report recommends that Congress amend the U.S. deportation laws to reflect international standards. In doing so Congress should consider the ruling of the UNHCR that adjustments of status does not remove refugee protections under international law.

Further, to reflect international human rights norms of proportionality the Report recommends that Congress

reinstate the U.S. pre-1996 standards of discretion and categories of deportable offenses. By doing so, Congress would minimize the chance that the United States would deport individuals for minor or misdemeanor offenses, and would allow judges to balance the severity of the crime with the punitive effects of deportation.

Part Three: Problems with the Removal Process

The United States deported Sothana E., a father of two, in December 2009.⁸⁸ During his removal hearing, he spoke passionately about the family he would leave behind.⁸⁹ He also told the judge of the courage his mother showed when she escaped the Khmer Rouge in 1979.⁹⁰ She carried him more than a hundred miles from Battambang to the Thai border in hopes of starting a new life.⁹¹ Despite Sothana's emotional story, his removal was inevitable.⁹² Under U.S. immigration law, his charge made deportation mandatory.⁹³ When informed that he would return to Cambodia, Sothana said, "You might as well kill me here."⁹⁴

This section will provide a brief overview of the deportation system. It will then discuss the specific problems experienced by Cambodian-Americans returnees during immigration hearings, detention, and removal from the United States, including the inability to argue against removal; the lack of knowledge about immigration status and deportation; the retroactive application of deportation laws; the removal of non-violent offenders; the removal of individuals with mental disabilities or mental illnesses; and extensive periods spent in immigration detention.

I. An Overview of the Removal Process

The U.S. immigration system falls under the supervision of two Executive Departments: the Department of Justice (DOJ) and the Department of Homeland Security. The Immigrations and Customs Enforcement Agency (ICE), a subsidiary of DHS, is responsible for instituting removal proceedings for foreign nationals.⁹⁵ Under its Criminal Alien Program, ICE uses criminal and immigration records to identify "targeted aliens" while they serve their sentences in U.S. federal, state, and municipal jails.⁹⁶ Once the agency locates a deportable individual, it initiates removal proceedings before their anticipated release by placing a "hold" on their records.⁹⁷ Non-citizens rarely learn of these holds before the end of their sentence. On their release date, ICE transfers them directly from prison to immigration detention and schedules their deportation hearing. Non-citizens have limited rights in immigration hearings because the United States does not consider deportation a criminal proceeding.⁹⁸ For example, there is no Sixth Amendment right to counsel. Additionally, few opportunities exist to appeal cases, even where there are demonstrable errors in the proceedings.⁹⁹

88 See generally Interview with Sothana E. (pseudonym), in Phnom Penh, Cambodia. (Mar. 22, 2010).

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 471, 475 (2008).

96 *Id.*

97 *Id.*

98 See, generally, *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Begajewitz v. Adams*, 228 U.S. 585 (1913); *Fong Yue Ting*, 149 U.S. 698. See also Harvard Law Review Association, Notes, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544 (2007) [hereinafter "A Second Chance"].

99 Immigration judges issue oral rulings such that there is no record to contest. After the BIA, an alien may appeal to the U.S. Courts of Appeal or to the United States Supreme Court, but these cases are exceedingly rare. As mentioned earlier, the Supreme Court held in *Padilla* that the Sixth Amendment requires attorneys to advise their clients of the potential immigration consequences of a conviction or guilty plea. *Padilla*, *supra* note 62. This ruling may open a number of pending cases for appeal, but its effect is unlikely to provide relief for those already deported from the United States.

II. Problems Faced by Cambodian-Americans During Removal

In their interviews, Cambodian-American returnees spoke of the problems they faced throughout their removal. For many, this process took several years and included long periods waiting in ICE detention. The returnees expressed six serious complaints:

1. The inability to argue against removal;
2. The lack of knowledge about immigration status and deportation;
3. The retroactive application of deportation laws;
4. The removal of non-violent offenders;
5. The removal of individuals with mental disabilities or mental illnesses; and
6. Extensive periods spent in immigration detention.

A. INABILITY TO ARGUE AGAINST REMOVAL

Dith, a young father from Boston, Massachusetts, arrived in Cambodia in October 2009. In preparing for his deportation hearing, he obtained letters of support from his family and the community at large. Although the judge appeared sympathetic to Dith's story, he could not consider these testimonials.¹⁰⁰ The law required Dith's deportation.

Dith and other returnees expressed anger and frustration at their inability to argue against removal. Several factors prevent non-citizens from making a case against their deportation. First, immigration judges do not have discretion under AEDPA and IIRIRA to consider any mitigating circumstances. Second, judges face significant pressure¹⁰¹ to deport non-citizens regardless of their circumstances.¹⁰² Additionally, enforcement agencies face similar pressure to achieve increased deportations. For instance, I.C.E. officials were recently found to have

established a goal of 400,000 overall deportations to take place in 2010, of which 150,000 were sought to be criminal alien removals.¹⁰³ The use of "quotas" or goals encourages immigration officials and the immigration courts to increase the frequency of arrests and deportations regardless of mitigating circumstances.¹⁰⁴ Third, the tight scheduling of immigration cases and limited resources of the courts often lead to rushed hearings where judges cannot consider all of the relevant facts.¹⁰⁵

Unfortunately, the nature of the current U.S. system means that most non-citizens face all three problems during removal. Scheduling restraints and limited resources meant that Makara K., a U.S. resident of eighteen years, had to attend his immigration hearing by closed-circuit television.¹⁰⁶ Like an estimated 65% of litigants, Makara appeared before the immigration judge without a lawyer.¹⁰⁷ In his hearing, Makara listed all the reasons he needed to stay.¹⁰⁸ He discussed the effect that his deportation would have on his young son.¹⁰⁹ He also talked about his work with a community organization, translating for older immigrants and supervising youth activities.¹¹⁰ None of this mattered – Makara was deported to Cambodia in 2003.¹¹¹

This Report urges the United States Congress to amend AEDPA and IIRIRA so that immigration judges employ discretion during immigration proceedings. Specifically, Congress should restrict the categories of offenses that mandate deportation from the United States to eliminate the deportation of non-violent offenders and refugees. The law should allow immigration judges to consider mitigating factors in favor of the non-citizen, like U.S. citizen children, military service, or contributions to the community. Finally, ICE should eliminate quotas for annual deportations and their use to evaluate agency personnel, as these numbers create incentives for agency officials to disregard any and all mitigating factors.

100 See Interview with Dith (pseudonym), in Phnom Penh, Cambodia. (Mar. 22, 2010).

101 See, e.g., *id.*; Interview with Heng B. (pseudonym), Phnom Penh, Cambodia. (March 22, 2010); Interview with Sothana E. (pseudonym), *supra* note 88.

102 Nina Bernstein, *Disabled Immigrant Detainees Face Deportation*, N.Y. TIMES (March 23, 2010), available at <http://www.nytimes.com/2010/03/30/us/30immig.html>.

103 *Id.*; see also *ICE Officials Set Quotas*, *supra* note 5.

104 *ICE Officials Set Quotas*, *supra* note 5.

105 Bendetto, *supra* note 95, at 492.

106 See, e.g., Interview with Makara K. (pseudonym), in Phnom Penh, Cambodia. (Mar. 22, 2010).

107 Bendetto, *supra* note 95, at 493-494. In *Crisis on the Immigration Bench*, Michele Benedetto notes that "only 11.6% of immigration court proceedings in the 2006 fiscal year were conducted in English. As a result, it can be difficult for immigration judges to identify relevant issues or make 'credibility determinations' to decide whether a litigant is telling the truth. The latter point is arguably the most important: since immigration judges are responsible for the crucial determinations of a litigant's credibility that often decide the case, a litigant's courtroom demeanor can have a substantial impact on the success of his claim." *Id.* at 494.

108 Interview with Makara K. (pseudonym), *supra* note 106.

109 *Id.*

110 *Id.*

111 *Id.*

B. LACK OF KNOWLEDGE ABOUT IMMIGRATION STATUS AND DEPORTATION

Ponleak V. and his family settled in California when he was three years old.¹¹² Like many other Cambodian-American families, they did not appreciate the complexity of U.S. immigration law.¹¹³ To them, “permanent” status meant that they could live in the United States indefinitely. His deportation stunned him.¹¹⁴ He said, “They’re the ones that brought us over here. I didn’t think they could deport us.”¹¹⁵

Ponleak’s confusion was not unique.¹¹⁶ Of the forty-eight returnees interviewed for this report, only three admitted knowing the difference between a legal permanent resident and a U.S. citizen. Many of the returnees arrived in the United States as children and relied on their parents to communicate what it meant to be an LPR. Unfortunately, their parents often lacked the English skills or education to understand the difference themselves, much less explain it to their children. As a result, many of the returnees did not know that they were eligible for deportation until it was too late.¹¹⁷

Older returnees face additional problems. Boran Vatthana was fifty-six at the time of his deportation.¹¹⁸ His limited English meant that he did not understand what happened during his immigration hearing or why he had to sign removal papers.¹¹⁹ Although Vatthana had a translator, he did not comprehend anything except that he was returning to Cambodia.¹²⁰

The majority of immigrants like Vatthana rely on translators to understand the proceedings and to communicate with the court.¹²¹ Errors in translation not only complicate

the hearings but also threaten a litigant’s due process rights where their testimony is improperly paraphrased, opined, or neglected by the translator.¹²² Further, judges sometimes rely on mistranslated portions of testimony or stop trusting witnesses where the translation is inconsistent.¹²³ Differences in dialect or colloquial distinctions in similar languages may have a negative impact on immigrants who speak lesser-known tongues.¹²⁴ Unfortunately, there is currently no tracking mechanism to lodge complaints against particular interpreters so these gross errors continue to occur.¹²⁵

This Report issues two recommendations. First, the United States Citizenship and Immigration Services (USCIS) should ensure that status adjustment officers inform refugees and other immigrants of their obligations once they adjust status to become LPRs. For non-native speakers of English, the word “permanent” implies that LPRs may remain in the United States indefinitely and causes significant confusion. As the agency responsible for status adjustments, USCIS is in the best position to ensure that new LPRs understand the conditions that trigger removal. Second, Congress should revise the laws to ensure that non-citizens in immigration custody have access to lawyers and competent translators. This would enable those non-citizens who could still argue for a stay of deportation the opportunity to present evidence and avoid removal.

C. RETROACTIVE APPLICATION OF DEPORTATION LAWS

Oudom grew up in Houston, Texas.¹²⁶ To this day, he does not understand why he was not informed of the possibility

112 See Interview with Ponleak V. (pseudonym), in Battambang, Cambodia. (Mar. 25, 2010).

113 *Id.*

114 *Id.*

115 *Id.*

116 See, e.g., *id.*; Interview with Pros M. (pseudonym), in Battambang, Cambodia (Mar. 25, 2010); Interview with Kiri S. (pseudonym), in Phnom Penh, Cambodia. (Mar. 23, 2010).

117 After *Padilla v. Kentucky*, *supra* note 62, attorneys must inform clients that their convictions may have immigration consequences. However, this would not have helped many of those interviewed for this report. Of the forty-eight returnees interviewed, seventeen said that either the judge or their counsel mentioned potential immigration consequences at the time of sentencing. After *Padilla*, this advice must come before the non-citizen decides whether or not to stand trial. 130 S. Ct. at 1481-1482.

118 See Interview with Boran Vatthana (pseudonym), in Battambang, Cambodia (Mar. 25, 2010).

119 *Id.*

120 *Id.*

121 APPLESEED, ASSEMBLY LINE INJUSTICE: CHAPTER FIVE. ENHANCING THE ACCURACY OF PROCEEDINGS THROUGH EFFECTIVE TRANSLATION 19 (May 2009), available at <http://www.appleseeds.net/bPublicationsb/FullArchive/ImmigrantRights/tabid/527/Default.aspx>. [hereinafter “APPLESEED”].

122 Benedetto, *supra* note 95, at 502. This is particularly problematic in cases involving refugee groups: cases emerge where Bosnian witnesses are interpreted by Serbians and so on, leading to the potential for conflicts of interest that will always prejudice the witness or removable alien. *Id.*

123 *Id.* at 502-503.

124 Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 HARV. LATINO L. REV. 1, 5 (2004). [hereinafter “*Changing Face of Justice*”].

125 APPLESEED, ASSEMBLY LINE INJUSTICE, *supra* note 121, at 21.

126 Interview with Oudom (pseudonym), in Phnom Penh, Cambodia. (Mar. 23, 2010).

of deportation at the time of his 1991 trial.¹²⁷ Chanthol Y. had a similar experience during his trial in 1995. This was neither the fault of their attorneys nor the judges.¹²⁸ In fact, the law at the time did not require their removal. Once AEDPA and IIRIRA passed, however, Oudom and Chanthol's records mandated deportation from the United States. The 1996 amendments to these laws applied retroactively. Suddenly, any non-citizen convicted of an aggravated felony or a crime involving moral turpitude before 1996 faced mandatory removal.

For many non-citizens, this interpretation means that past actions have new legal consequences. Montha P. arrived in the United States in 1981 and sold used cars in Richmond, VA.¹²⁹ In 1995, his family called the cops to arrest Montha for drug possession.¹³⁰ He says they wanted to teach him a lesson, but they had no way of knowing his possession offense would lead to deportation.¹³¹ One to two months after his release from jail in 2004, the INS came to pick Montha up from his home to deport him to Cambodia.¹³² Like so many non-citizens who committed deportable offenses prior to 1996, Montha did not know of the immigration consequences of his sentence until the Immigration and Naturalization Service came to his house to deport him.¹³³

The American legal tradition contains a strong presumption against retroactive legislation. In the criminal context, the *ex post facto* clause of the U.S. Constitution prohibits statutes punishing conduct that occurred before a law passed.¹³⁴ While not constitutionally prohibited in the civil context, courts dislike retroactive laws because they upset settled expectations and run the risk of injuring unpopular groups.¹³⁵ Although the United States maintains that deportation is not a punishment, this is less persuasive when an individual non-citizen is deported *because* of a criminal conviction.¹³⁶ Accordingly, the Supreme Court held in 2001 that non-citizens whose offenses occurred before 1996 could still apply for a stay of removal after

IIRIRA.¹³⁷ The Court held that removing discretionary relief – waiver, voluntary removal, and the like – for non-citizens whose crimes occurred before the statute impaired a substantive right.¹³⁸ For the Supreme Court, the question was not whether the individual non-citizen would suffer new consequences for past acts but rather if these effects would apply to the class of non-citizens as a whole.¹³⁹ Despite this ruling, lower courts continue to interpret IIRIRA as having retroactive effects.¹⁴⁰ This refusal on the part of lower courts to apply Supreme Court jurisprudence results in the forced removal of non-citizens, such as Oudom, Montha, and Chanthol, even when their full sentences were served before the enactment of AEDPA and IIRIRA.

This Report asks Congress to remove the retroactive provisions of AEDPA and IIRIRA that require the removal of those convicted of deportable offenses before 1996. These provisions are unnecessarily punitive for non-citizens whose sentencing came before the passage of the laws and their amendments.

D. REMOVAL OF NON-VIOLENT OFFENDERS

Many of the returnees in Cambodia committed non-violent, relatively minor offenses that mandated their removal from the United States. Rith arrived in New York State with his five siblings in 1981.¹⁴¹ After his family moved to Stockton, California, Rith taught basic computer programming and took other independent jobs as they came along.¹⁴² In 2002, the United States deported him for buying stolen computer chips.¹⁴³ He says that the judge told him of the immigration consequences at the time of his trial, but he never believed it might actually happen.¹⁴⁴ Rith fought his deportation for a year – until he heard that six other men arrested at the same time had already been deported.¹⁴⁵ He signed a voluntary deportation order and three months later, ICE picked him up for deportation.¹⁴⁶

127 *Id.*

128 *Id.*

129 Interview with Montha P. (pseudonym), in Battambang, Cambodia. (March 25, 2010).

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 U.S. CONST. art. 1 § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”).

135 Van Wyke, *supra* note 66 at 754.

136 *Id.* at 755. See *Scheidemann v. INS*, 83 F.3d 1517, 1527 (3d Cir. 1996)(Sarokin, J. concurring).

137 *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).

138 *Id.* at 325.

139 Van Wyke, *supra* note 67, at 765.

140 *Id.* at 767.

141 Interview with Rith (pseudonym), in Battambang, Cambodia. (Mar. 24, 2010).

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.*

CASE STUDY: JORANI

Jorani lives in a rural village with her uncle and extended family. She was deported in the fall of 2009, for drug possession. As a result, her nine-year-old son in the United States now lives with his grandmother. Although Jorani tries to call as much as she can, she does not have consistent access to a phone and has little money to make long-distance calls. The only connection she has with her child is the handful of pictures she carries with her at all times.

Jorani is having a difficult time adjusting. She feels victimized by her family because they think she's crazy. Speaking of her life in Cambodia, Jorani says, "I am not happy here. I am not whole in my head." She did not eat or sleep when she arrived and has trouble finding feminine hygiene products in the countryside.

As one of only two females returned to Cambodia, Jorani has had a very different experience from some of the other returnees. For instance, she says that she has been assaulted twice near her new home. She says that she is "not done crying yet" and that she needs a real doctor rather than a counselor.

Interview with Jorani (pseudonym), in Battambang, Cambodia. (Mar. 23, 2010).

A recent Human Rights Watch report estimates that 77% of all aliens deported from the United States committed non-violent crimes or no crime at all.¹⁴⁷ If deportation is "preventative," and not "punitive" as the United States claims, the deportation of non-violent offenders seems incongruous. International law suggests that deportation for such minor offenses is disproportionate where it violates the right to family unity or private life, including the right to a country of immigration.¹⁴⁸

The 1996 amendments to the U.S. immigration laws eliminate judicial discretion from deportation proceedings.¹⁴⁹ The deportation of non-citizens for a wider variety of less serious

crimes merges the immigration system with the criminal justice system.¹⁵⁰ So long as deportation does not constitute punishment under domestic law, individual deportees will not find legal support for claims of disproportionate sentencing or treatment under existing norms.¹⁵¹

This Report recommends that Congress return to pre-1996 definitions of deportable offenses. Amending AEDPA and IIRIRA to reduce the number of crimes that trigger mandatory deportation would prevent the removal of nonviolent offenders. In the cases of returnees like Phirun Phal and Jorani, these amendments would prevent the disruption of American families for minor offenses.¹⁵² This would also serve the goals of proportionality and rehabilitation.

E. REMOVAL OF INDIVIDUALS WITH MENTAL DISABILITIES OR MENTAL ILLNESSES

The story of Veha Ma's deportation illustrates the tragic consequences of the current U.S. deportation system for individuals with mental illnesses and disabilities. Veha likes to talk about everything from his upbringing in Stockton, California to his aunt's farm in Battambang.¹⁵³ Although Veha told his lawyer and the immigration judge that he did not understand what was happening, he was forced to sign a deportation order and removed to Cambodia in 2005.¹⁵⁴ To this day, he incorrectly believes that if he stays out of trouble for five years, the United States will allow him to return to his family.¹⁵⁵

RISC intervened in Veha's case a year or so after his return to Cambodia because they heard from other returnees that he was not well.¹⁵⁶ They brought him to Phnom Penh and secured his medication as well as regular appointments with a psychiatrist. He says that his new medication keeps him calm and keeps him from getting upset.¹⁵⁷ Veha appears to be stable, but other returnees have not fared as well. RISC currently houses four "special needs" residents at their facility in Phnom Penh. These

147 FORCED APART, *supra* note 70, at 56 According to Human Rights Watch, many deportable non-citizens have no record or committed crimes such as drug possession or traffic offenses, including driving under the influence. *Id.*

148 Article 17 of the ICCPR provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy ... home or correspondence.... Everyone has the right to the protection of the law against such interference or attacks." This "guarantee[s] that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances." UN Human Rights Committee, General Comment 16, 1988. Further, the committee has stated that the term "home" "is to be understood to indicate the place where a person resides or carries out his usual occupation." *Id.*

149 The amendments eliminated judicial discretion of people with "good moral conduct" and have been living in the U.S. for over seven years. See Morawetz, *supra* note 56, at 1939.

150 *Id.*

151 There is some support for preventing or outlawing the deportation of the HIV-positive foreign nationals on the basis of either immigration offenses or their illness, but this has not been applied to other health issues or forms of disability. See HUMAN RIGHTS WATCH, DISCRIMINATION, DENIAL, AND DEPORTATION: HUMAN RIGHTS ABUSES AFFECTING MIGRANTS LIVING WITH HIV, Deportation and Treatment for HIV-Positive Migrants (June 18, 2009) available at <http://www.hrw.org/en/node/83651/section/6>.

152 See Interview with Phirun Phal (pseudonym), *supra* note 1; Interview with Jorani (pseudonym), in Battambang, Cambodia. (Mar. 23, 2010).

153 Interview with Veha Ma (pseudonym), in Battambang, Cambodia. (Mar. 24, 2010).

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

individuals have a series of mental health issues, including bipolar and psychotic disorders, and cannot function alone in Cambodia. The deportation of Veha and the “special needs” residents of RISC highlights the severe consequences of deportation for non-citizens with mental disabilities or mental illnesses and the difficulty of caring for those individuals once they arrive in Cambodia.

Veha and other persons with mental disabilities and illnesses do not receive adequate protections in the U.S. immigration system. The law technically requires immigration judges to reject the removal of individuals adjudicated mentally incompetent.¹⁵⁸ Unfortunately, without a built-in right to counsel, the system cannot ensure that there is someone to request a competency hearing.¹⁵⁹ Judges’ inconsistent knowledge of competency standards exacerbates this problem.¹⁶⁰ Sometimes, judges confuse mental illness or disability for uncooperative or resistant behavior.¹⁶¹ Others do not have the necessary expertise to make these determinations.¹⁶² As a result, many individuals with mental disabilities are deported immediately.¹⁶³ Where judges do request assistance, the delay causes the non-citizen to languish in confinement while experts assess their capacity.¹⁶⁴ Extended confinement may cause a deterioration of the non-citizen’s condition.¹⁶⁵

The routine deportation of individuals with mental disabilities implicates the rights to life, health and medical care outlined within international human rights law.¹⁶⁶ The International Covenant for Economic, Social, and Cultural Rights (ICESR), for example, “recognizes the right

CASE STUDY: SOPHAT CHANN

During his ICE detention in 2002, Sophat “went crazy” – ICE tried a number of medical combinations to calm him. He was eventually sent to the Federal Missouri Correctional Institutional Hospital, where they diagnosed him and put him “in the hole” for his outbursts. He had no one to talk to and no counseling while he was detained. He experienced frequent isolation, constant drugging, and often found himself on 24-hour lockdown. Sophat says that he was drugged during his immigration hearing and thought that he would get asylum. He was removed to Cambodia in September 2002.

Sopha’s outbursts scared his Cambodian family – they removed him from their family book and cast him out because he was ill. This means that he cannot get identification, go to school, be certified in a trade, or purchase land. Without medical documents, the staff at RISC had to guess what he needed. He was finally diagnosed as a bipolar with manic episodes. Sophat arrived in Cambodia with only thirty days of medication, which ran out while he was in the countryside with his family. After they expelled him, he slept in temples and out on the street and used a combination of Lithium and Thorazine to knock himself unconscious. He now works at KORSANG’s harm reduction program with other returnees and depends on Deprec to stay stable. The pills are expensive – most of his salary from KORSANG goes to securing and paying for the drugs that keep him functioning.

Interview with Sophat Chann (pseudonym), in Phnom Penh, Cambodia. (Mar 22, 2010).

- 158 See *Mohamed v. TeBrake*, 371 F. Supp. 2d 1043, 1046 (D. Minn. 2005) (discussing 8 C.F.R. § 1240.4), *vacated as moot* 470 F.3d 771 (8th Cir. 2006), *amended by* 477 F.3d 522 (8th Cir. 2007); *Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 201 (2d Cir. 2003) (discussing F.R.C.P. 17 (c)).
- 159 Nina Bernstein, *Mentally Ill and in Immigration Limbo*, N.Y. TIMES (May 3, 2009) available at http://www.nytimes.com/2009/05/04/nyregion/04immigrant.html?_r=2&ref=us.
- 160 Many civil immigration courts defer to Federal Rule of Civil Procedure 17(c) concluding that an individual is declared incompetent when evidence from an appropriate court . . . [or] from a mental health professional demonstrates that the party is being or has been treated for mental illness. However, judges rarely know when to apply this standard or how to do so. See *generally* Letter from American Civil Liberties Union et al., to Eric Holder, Attorney General available at, [http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=178&Itemid=\[hereinafter "Letter"\]](http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=178&Itemid=[hereinafter).
- 161 Bernstein, *supra* note 159.
- 162 *Id.*
- 163 The extraordinary number of aliens slated for deportation in the past few years pressured ICE to ramp up its enforcement programs to meet their quotas. They now take many of their deportees into custody through the hospital system, leaving behind their medical records, their doctors, and the medical health professionals who know their routines. The lack of process poses the most serious threat to people with mental disabilities in the immigration system; from apprehension to hearings to detention, the system has few checks in place to ensure the health and safety of those deportable aliens who cannot care for themselves. As an estimated 15 percent of immigration detainees suffer from a mental disorder, the lack of appropriate care and monitoring is both cruel and dangerous. ICE keeps no meaningful statistics on how many of its detainees have mental health conditions and rarely apprehends these persons with their medical records or care documents on hand. Although ICE has discretionary authority to leave the mentally disabled in their usual care arrangements until their hearing dates, it rarely exercises this authority. See Bernstein, *supra* note 159; see also TEXAS APPLESEED, JUSTICE FOR IMMIGRATION’S HIDDEN POPULATION: PROTECTING THE RIGHTS OF PERSONS WITH MENTAL DISABILITIES IN THE IMMIGRATION COURT AND DETENTION SYSTEM 11 (March 2010), available at <http://oppenheimer.mcgill.ca/Justice-for-Immigration-s-Hidden>.
- 164 See, Letter *supra* note 160, at 4 (citing Email exchange with Liz McGrail, Legal Director, Capital Area Immigrants’ Rights Coalition, (Apr. 17, 2009, 19:55 EST) (on file with Liz McGrail).
- 165 APPLESEED, *supra* note 121, at 17. Because the DHS uses outside contractors to secure medical care within its facilities, the system provides no continuity of care for those in need and threatens detainees with mental disabilities with mistreatment, misdiagnosis, and neglect. From a procedural standpoint, the failure to appoint counsel and provide clear competency standards for people with mental disabilities violates the principle of fundamental fairness. See, e.g. *Prichard-Ciriza v. INS*, 978 F.2d 219 (5th Cir. 1992); *United States v. Torres-Sanchez*, 68 F.3d 227 (8th Cir. 1995); *United States v. Proa-Tovar*, 975 F.2d 592, 595 (10th Cir. 1992); *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002); *United States v. Holland*, 876 F.2d 1533, 1537 (11th Cir. 1989). (is the following statement a holding?, also I think this string cite needs semi colons) Even where those detainees with mental disabilities have access to care, they may not have access to licensed providers or adequate translation services. See, e.g. WOMEN’S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, LOCKING UP FAMILY VALUES 23 (2007), available at <http://www.womensrefugeecommission.org/docs/famdeten.pdf>.
- 166 See, e.g. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, U.N. Doc.A/810 (1948) [hereinafter UDHR].

of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹⁶⁷ Enforcement bodies, like the Inter-American Commission on Human Rights, hold that the removal of persons with serious medical needs to countries where they cannot receive treatment violates these articles.¹⁶⁸

This Report recommends that the DHS and the Immigration Branches take necessary precautionary measures when enforcing immigration law against persons with mental disabilities and mental illnesses. Specifically, ICE and the other immigration enforcement branches should exercise their discretionary authority to leave these persons in their current care situations until the date of their deportation hearings. This could help ensure that individuals with special needs continue to receive necessary treatment while awaiting immigration proceedings. In addition, it would reduce the number of persons with mental illnesses and mental disabilities transferred without their medical documentation. This might eliminate dangerous gaps in care and reduce the number of deportees whose health worsens during the immigration process.

This Report urges Congress to reconsider the process available to persons with mental disabilities and mental illnesses in the immigration system. For instance, Congress should standardize the competency standards used by immigration judges. The use of a stricter standard would reduce the number of persons with mental disabilities and mental illnesses deported from the United States by protecting them in immigration courts. If the immigration competency standard looked more like those used in criminal courts, the law could give many deportable non-citizens with mental health issues critical access to counsel and counsel that the civil competency standard cannot guarantee. Furthermore, Congress should require immigration judges to appoint guardians *ad litem* for those individuals deemed incompetent by the court.

The immigration judiciary also requires better training on the diagnosis and management of cases involving mental illness or disability. This Report urges Congress

to require training for immigration judges to address their awareness of deportable non-citizens with mental health issues. Congress should institute diagnostic procedures for ICE and the enforcement branches to separate individuals with mental illnesses and mental disabilities from other non-citizen detainees. ICE should also maintain records of individuals with mental health issues in the immigration system to track their treatment and processing in detention. Congress should also amend AEDPA and IIRIRA to allow immigration judges to consider whether or not deportation will prevent a non-citizen with mental illness or disability from caring for themselves in the country of repatriation. This would reduce the number of individuals with mental illnesses and disabilities deported to countries without adequate care facilities or appropriate medication and would restore humanity to the deportation process.

F. EXTENSIVE PERIODS SPENT IN IMMIGRATION DETENTION

Another problem returnees faced during the removal process was long periods spent in immigration detention. For example, Kim Ho Ma’s scheduled release date came immediately after AEDPA and IIRIRA went into effect. Although the Immigration and Naturalization Service finalized Ma’s removal in 1998, they could not deport him. Unwilling to release him to the community, they placed Ma in indefinite detention. In 1999, Ma petitioned to be released on bond to help his handicapped father.¹⁶⁹ This request was denied and he remained in custody for two and a half years.¹⁷⁰ The INS eventually released Ma by order of the Supreme Court of the United States. Within the decision, the Supreme Court held that the INS could not detain deportable individuals for more than ninety days unless it had immediate plans to remove them.¹⁷¹

Despite the *Ma* decision, prolonged detention continues to occur. Many of those who arrive in Cambodia spent months, or even years, in immigration detention during the deportation process.¹⁷² This often drained them of resources, energy, and will. By the time they were released

167 While the UDHR provides that all people are “free and equal in dignity and rights, it also creates an individual right to a “standard of living adequate for the health and well-being” of oneself and one’s family, including “medical care... and the right to security in the event of... sickness, disability... or other lack of livelihood in circumstances beyond [one’s] control.” UDHR, art. 25, cl. 1, available at <http://www.un.org/en/documents/udhr/>. By signing these instruments, states agree to assume a series of obligations: first, they must “respect the right to health by refraining from direct violations, such as systemic discrimination within the health system; See also, Alicia Ely Yamin, JD, MPH, *The Right to Health Under International Law and Its Relevance to the United States*, 95 AM. J. OF PUBLIC HEALTH 1156, 1157 (2005). Second, these obligations also require states to “protect [the right to health] from interference by third parties” and to “fulfill the right by adopting deliberate measures aimed at achieving universal access to care, as well as to preconditions to health.”

168 See, e.g. HUMAN RIGHTS WATCH, RETURNED TO RISK: DEPORTATION OF HIV-POSITIVE MIGRANTS, Prohibitions on Deportation: The Principle of Non-Refoulement (2009), available at <http://www.hrw.org/en/node/85608/section/4>.

169 *Kim Ho Ma v. Reno*, 208 F.3d 815, 819-820 (2000), *aff’d sub nom. Zadvydas v. Davis*, 533 U.S. 678 (2001).

170 Interview with Kim Ho Ma, in Phnom Penh, Cambodia. (Mar. 22, 2010).

171 *Kim Ho Ma*, 208 F.3d 815.

172 See, e.g., Interview with Darany (pseudonym), in Battambang, Cambodia. (Mar. 25, 2010); Interview with Sovannarith Puth (pseudonym), in Battambang, Cambodia. (Mar. 25, 2010); Interview with Vannak S. (pseudonym), in Battambang, Cambodia. (Mar. 23, 2010); Interview with Vichet You (pseudonym), in Battambang, Cambodia. (Mar. 23, 2010); Interview with Atith Neak (pseudonym), in Phnom Penh, Cambodia. (Mar. 23, 2010); Interview with Yim (pseudonym), in Battambang, Cambodia. (Mar. 24, 2010).

or their deportation orders arrived, many of them signed removal papers out of a desire to end the nightmare.¹⁷³ Few had either the money or the strength to continue fighting their deportation.¹⁷⁴ This exhaustion often carried over to their early days in Cambodia, when they were at their most vulnerable.

This Report encourages ICE to reduce the number of persons held in immigration detention for periods longer than ninety days. To this end, ICE should ensure that detainees receive legally-mandated custody reviews during the ninety day period. As LPRs, many detainees should receive a bond hearing to determine whether they merit a prolonged stay in immigration detention.¹⁷⁵ This would

only be true if ICE could demonstrate that these individuals pose a threat to civil society.¹⁷⁶ By allowing LPRs to return to their homes and families before deportation, the immigration services would ensure that LPRs settle their affairs and save money for removal.¹⁷⁷

Furthermore, where possible, this Report recommends that ICE should refrain from transferring detainees to remote districts away from their families and attorneys. These transfers sever both personal connections and important professional relationships, like that between attorney and client or doctor and patient. ICE should ensure that detainees have access to communication and can maintain these valuable relationships in custody.¹⁷⁸

Part Four: Effects of Deportation

In 2002, Bunreas “Boomer” Pin arrived in Cambodia in one of the first groups of returnees. Born in a Thai refugee camp and raised in California, he had no connection with the country and struggled to adjust. People judged him on account of his clothes and tattoos, labeling him a gangster and “a screw-up.” Although he spoke fluent Khmer, people discriminated against him because of his foreign accent.¹⁷⁹

Back in the United States, his mother had an equally difficult time. Prior to his incarceration, Boomer took care of the family and its expenses. After his departure, his mother struggled to sustain her livelihood. She faced the challenge of providing for both her children in the U.S. and her son in Cambodia. In addition to financial problems, she felt responsible for his early indiscretions and subsequent removal. Although Boomer and his family ultimately came to terms with his departure, he describes the experience as “seven years of bumpy roads.”¹⁸⁰

This section will address the effects of the post-1996 amendments to AEDPA and IIRIRA on both the returnees and their families in the United States. It will first examine the returnees’ adjustment process in Cambodia. It will then discuss the two biggest problems caused by removal:

economic hardships and the break-up of families. Finally, it will address the unique challenges faced by returnees with pre-existing mental illnesses and disabilities.

I. “Phases” of Adjustment

One of the biggest challenges for returnees is coming to terms with their deportation. Jane Lopacka, a mental health professional in Phnom Penh who works with returnees, described new arrivals as “pretty desperate people, very lonely, and traumatized.”¹⁸¹ Although some returnees have family in Cambodia, they generally do not know their relatives before arriving and have difficulty becoming a part of their lives.¹⁸² Others have no family or friends in the country and must make the transition alone.¹⁸³

Throughout the interviews, the returnees continually described the adjustment process in terms of “phases.”¹⁸⁴ At first, the returnees are in denial, unwilling to accept that they are now in Cambodia permanently. Many struggle with depression and post-traumatic stress disorder. Dith

173 See, e.g., Interview with Chanthol Y. (pseudonym), in Phnom Penh, Cambodia. (Mar. 22, 2010); Interview with Rith (pseudonym), *supra* note 141.

174 See, e.g. Interview with Ponleak V. (pseudonym), *supra* note 112.

175 HUMAN RIGHTS WATCH, COSTLY AND UNFAIR: FLAWS IN U.S. IMMIGRATION DETENTION POLICY, (2010), *available at* <http://www.hrw.org/en/node/90220/section/4>.

176 *Id.*

177 *Id.*

178 *Id.*

179 See Interview with Bunreas “Boomer” Pin, in Phnom Penh, Cambodia. (Mar. 23, 2010).

180 *Id.*

181 Telephone Interview with Jane Lopacka, Trauma Specialist (Apr 13, 2010).

182 See, e.g., Interview with Rithisak Pich (Pseudonym), in Phnom Penh, Cambodia. (Mar. 22, 2010).

183 See, e.g., Interview with Oudom (pseudonym), *supra* note 126.

184 See, e.g., Interview with Rithisak Pich (Pseudonym), *supra* note 182.

arrived in October 2009 and is still coming to terms with his situation. He says that most days, he wakes up and “hope[s] it’s just a dream.”¹⁸⁵ Other days, he does not “want to wake up at all.”¹⁸⁶

The acculturation struggles of the returnees often compound the shock of arrival. For the most part, the returnees are completely unfamiliar with their new surroundings. Although Cambodia is supposed to be their home, they are little more than tourists, dependent on maps to find their way around.¹⁸⁷ Furthermore, some arrive with no language skills and simply cannot communicate with other Cambodians. Others may have spoken Khmer in the home, but cannot read or write the language. Even those that are fluent struggle to fit in because their accents identify them as foreigners.¹⁸⁸ They are treated like outsiders, not like fellow Cambodians.

Cambodians also judge the returnees because of their appearance. Residents of Phnom Penh and Battambang typically wear long-sleeved shirts and pants, while many of the returnees continue to dress in the style of inner-city Americans, with baggy shorts and t-shirts. Furthermore, most have obvious tattoos. Within Cambodia, tattoos are exclusive to gang members and the local mafia.¹⁸⁹ A number of returnees complained that because of their tattoos, people assumed that they were “gangstas” and feared them.¹⁹⁰

To cope with the stress of adjustment, many returnees turn to drugs and alcohol. Munny Khlot arrived in 2003 from Long Beach, California. He had no family in Cambodia and struggled to adjust to life in Phnom Penh. He soon found solace in drugs and became a heavy user. As he describes it, “I had nothing to turn to but drugs. I smoked it all.” Eventually, he found escape through his work.¹⁹¹

According to RISC staff, who have worked with large numbers of returnees, many are like Munny. Initially, they rely on drugs and alcohol but ultimately move on from this phase.¹⁹² Some, however, sink deeper and deeper into

addiction and turn to crime to support their habits.¹⁹³ As a result, a number of them have been re-arrested and are currently incarcerated in Cambodia.¹⁹⁴

The returnees described a second “phase” in which they shift their energies from denial to escaping Cambodia. Some want to return to their friends and families in the United States. Others simply want to get out of Cambodia and search for opportunities in neighboring countries.¹⁹⁵

In the final “phase,” the returnees divide. Some accept their life in Cambodia – this may take a few months or a few years. Some never fully adjust, unable to come to terms with their new situation. Since his arrival in 2003, Munny has watched dozens of other returnees struggle to adjust to life in Cambodia. In his experience, “some of the people who come here can’t take it. So they hang themselves.”¹⁹⁶ Since the deportations began in 2002, at least six of the returnees have committed suicide.¹⁹⁷

II. Effects of Deportation

Despite living thousands of miles apart, returnees and their families experience remarkably similar problems. Both sides struggle to adjust to separation from their loved ones and the economic hardships brought on by removal.

A. FAMILIES TORN APART

Dith was raised by a single mother. Growing up in the crime-ridden neighborhood of Long Beach, California, he searched for male role models. Dith now has a four-year-old son of his own. As a result of his deportation, he must watch as his son faces the same challenge that he once did: growing up in the United States without a father.¹⁹⁸ Munny also left behind a child – a teenage daughter. He worries about her and the effect that his absence may have on her life. He says, “As a father-figure, I should be there for her, but I can’t.”¹⁹⁹

For many returnees, the separation from family is the most difficult aspect of deportation. After a lifetime in the United States, the deportees have strong roots and ties

185 Interview with Dith (pseudonym), *supra* note 100.

186 *Id.*

187 See Interview with Oudom (pseudonym), *supra* note 126.

188 See, e.g., Interview with Dith (pseudonym), *supra* note 100.

189 See, e.g., Interview with Sangha M. (pseudonym), in Battambang, Cambodia. (Mar. 25, 2010).

190 See, e.g., Interview with Phalasath E. (pseudonym), in Battambang, Cambodia. (Mar. 25, 2010).

191 See Interview with Munny Khlot (pseudonym), in Phnom Penh, Cambodia. (Mar. 22, 2010).

192 See Telephone Interview with Jane Lopacka, *supra* note 181.

193 *Id.*

194 *Id.*

195 See, e.g., Interview with Dith (pseudonym), *supra* note 100.

196 Interview with Munny Khlot (pseudonym), *supra* note 191.

197 See, e.g., *id.*; see also Interview with Rith, *supra* note 141.

198 See Interview with Dith (pseudonym), *supra* note 100.

199 Interview with Munny Khlot (pseudonym), *supra* note 191.

CASE STUDY: KAMOL SEYHA

Kamol Seyha arrived in Cambodia in 2007. He still struggles to come to terms with his deportation and specifically, the damage that it has caused his family. He says, “Just because we’re immigrants, doesn’t mean we don’t have hearts.”

After being told that he was eligible for deportation, Seyha dutifully checked in with ICE every month for two years. Without warning, immigration officials appeared at his house to arrest him. They did not allow him to pack a suitcase, withdraw money or say goodbye to his two sons, aged thirteen and ten. For Kamol Seyha, his one mistake means that they must now “grow up without a father.”

To this day, he worries that the boys do not understand why he no longer lives in the United States. He wishes that he could tell his sons that he “didn’t leave them because [he] wanted to.” Unfortunately, he is no longer able to communicate with them. Like many other returnees, Seyha’s former partner has remarried in the years since his removal. She subsequently cut off all ties with Seyha and has not given him her new address or phone number.

Although he has adjusted to his new life in Phnom Penh, he misses his two sons. He says, “I paid for what I did. It shouldn’t take me away from those I love.”

Interview with Kamol Seyha (pseudonym), in Phnom Penh, Cambodia. (Mar. 23, 2010).

to their communities. Deportation destroys these relationships. It forces non-citizens to leave their friends, parents, siblings, and spouses. Furthermore, many must abandon their U.S. citizen children. Of the forty-eight returnees interviewed for this report, twenty-five left behind sons or daughters in the United States.

As U.S. law makes it all but impossible for returnees to obtain a tourist visa, most will never see their children again.²⁰⁰ After they leave, their relationship with their sons and daughters depends upon the goodwill of their former partners. If a mother disappears with a child, there is little that the returnee can do to locate them again.²⁰¹

Sangha has not spoken with his twin boys in five years. Prior to his removal, he supported his sons and lived with them and their mother. When the United States deported him in 2002, his ex-girlfriend cut off all contact. His only remaining relative in the area is too old and infirm to search for the twins.²⁰²

Sangha M.’s story highlights a related problem with deportation – the break-up of previously stable families. Of the forty-eight returnees interviewed for the report, twenty were living with their children and partners before their removal. Others supported their parents or siblings. Prior to his conviction, Rithisak Pich helped to take care of his mother and two younger brothers. He regularly set aside money from his paycheck to help with their expenses.²⁰³ After his deportation, his family fell apart. His step-father left and his mother was no longer able to take care of the younger boys. Soon after, the government stepped in and placed his brothers in foster care.²⁰⁴

For those left behind in the United States, the break-up of families often results in severe emotional consequences. A survey conducted in 2004 revealed that 70% of deportees and family members exhibited signs of post-traumatic stress disorder, including hopelessness, despair, sadness and shock.²⁰⁵ When Samlain C. was deported in 2009, his sister broke down and became a heavy drug user. In the words of her mother, she turned to drugs “to replace her pain and broken heart.”²⁰⁶

For adults, one of the biggest challenges is accepting one’s powerlessness to stop the removal. Often, parents will blame themselves and want to protect their children.²⁰⁷ As previously discussed, AEDPA/IIRIRA do not allow family members to speak on behalf of their loved ones or describe the pain brought on by their removal.²⁰⁸

Children struggle emotionally with the loss of their caregiver. When a parent is forcibly removed, children typically fight feelings of abandonment and exhibit signs of anxiety, depression, and fear.²⁰⁹ Problems are particularly severe when the removal was sudden or unexpected.²¹⁰

200 See generally CHRISTINA RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 355 (5th ed. 2009).

201 See, e.g., Interview with Munny Khlout (pseudonym), *supra* note 191.

202 See Interview with Sangha M. (pseudonym), *supra* note 189.

203 See Interview with Rithisak Pich (pseudonym), *supra* note 182.

204 *Id.*

205 Bryan Loney, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 31 N.Y.U. REV. OF L. & SOC. CHANGE 55, 72 (2007).

206 Diary of Samlain C.’s mother (pseudonym) (on file with authors).

207 Interview with Bunreas “Boomer” Pin, *supra* note 179.

208 See generally Morawetz, *supra* note 56, at 1951. Such a restriction sends a clear message that the effects of deportation on the family simply do not matter to the government. This can, in turn, contribute to a deep mistrust of law enforcement and government agencies amongst the remaining family members.

209 THE URBAN INSTITUTE AND NATIONAL COUNCIL OF LA RAZA, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA’S CHILDREN 4 (2007), available at http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf [hereinafter “PAYING THE PRICE”].

210 THE URBAN INSTITUTE, FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT 52 (2010), available at <http://www.urban.org/publications/500149.html> [hereinafter “FACING OUR FUTURE”].

This emotional trauma can lead to behavioral changes. Unable to understand what has happened, some children will act out and direct anger toward the remaining parent.²¹¹ Others will struggle with lost appetites, weight loss, and changes in eating patterns.²¹² Some parents also reported changes in their child's ability to sleep. After the deportation of one or more family members, their children complained about sleeping alone, suffered from nightmares, and began sleepwalking.²¹³

The stress of removal can also hurt a child's development and schooling. Early childhood trauma may affect "the thought process, learning, self-perception, and individual feelings about self and others."²¹⁴ This can manifest itself in the form of depression, aggression, "sleep disturbance, hoarding food, excessive eating, self-stimulation, rocking, or failure to thrive."²¹⁵ Following the deportation of a loved one, young children often stop speaking or refuse to do things for themselves. They may also begin to cling to the remaining parent. Such behavior can impact everything from speech development to toilet training to learning to dress.²¹⁶

The separation of families through deportation, and the emotional and psychological trauma that accompanies the loss, directly implicates international human rights law. International conventions recognize the family as the natural and fundamental unit of society.²¹⁷ They require that State parties take appropriate measures to ensure its unity.²¹⁸ They also establish key protections for the family, including the right to be free from arbitrary or unlawful

interference by the State.²¹⁹ Both the United Nations Human Rights Committee and the Inter-American Commission on Human Rights examined the right to family in relation to deportation policies. The Human Rights Committee held that the deportation of a parent from a citizen child constituted "interference" with the family.²²⁰ It also found that the removal of a non-citizen from a country in which he has close relatives may violate the right to family unity.²²¹

To address the problem of family separation through deportation, this Report recommends that the United States reinstate the pre-1996 discretionary rules, which allowed an LPR to challenge his or her removal before a judge. Specifically, this Report recommends that the discretionary hearings held before 1996 be reintroduced and required prior to each removal. Within such a hearing, the judge would have the opportunity to weigh the crime in question with the effect that the deportation would have on the LPR's family and U.S. citizen children.

B. ECONOMIC HARDSHIPS

The returnees and their families also face financial hardships. For those in Cambodia, the struggle for economic survival is not unique. Although the nation's economy is growing, the country continues to battle poverty and unemployment. Independent estimates suggest that the unemployment rate in the country is close to 85%.²²² More than a third of Cambodia's population lives on less than \$0.45 (USD) a day.²²³ Of these, 90% are located in rural areas, such as Battambang.²²⁴

211 *Id.* at 51.

212 *Id.* at 52.

213 *Id.* at 52.

214 Lonegan, *supra* note 205, at 72.

215 *Id.*

216 FACING OUR FUTURE, *supra* note 210, at 49.

217 See, e.g., ICCPR, *supra* note 77, art. 23(1) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); see also Universal Declaration of Human Rights, G.A. Res. 217(A)(III), U.N. Doc. A/810 at 71 (1948) [hereinafter "UDHR"], art. 16(3) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.")

218 See generally *id.*

219 See ICCPR, *supra* note 77, art. 17 ("[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence."); see also UDHR, *supra* note Error! Bookmark not defined., art. 12 ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.")

220 See *Winata v. Australia*, Comm. No. 930/2000, CCPR/C/72/D/930/2000 (Aug. 16, 2000), available at http://www.bayefsky.com/html/120_australia930.php (finding that "a decision of the State party to deport two parents and to compel the family to choose whether a 13-year old child, who has attained citizenship of the State party after living there 10 years, either remains alone in the State party or accompanies his parents is to be considered 'interference' with the family"); see also *Madafferi v. Australia*, Comm. No. 1011/2001, CCPR/C/81/D/1011/2001 (Aug. 26, 2004), available at <http://www1.umn.edu/humanrts/undocs/html/1011-2001.html> (stating that "there may be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life.")

221 See generally *Aumeeruda-Cziffra v. Mauritius*, U.N. GAOR, Hum.Rts.Comm., 36th Sess., Supp. No. 40, Annex 13, at 134, U.N.Doc A/36/40 (1981), available at <http://www1.umn.edu/humanrts/undocs/session36/9-35.htm>. (Finding "that the exclusion of a person from a country where close members of his family are living can amount to an infringement of the person's right under article 17 of the Covenant, i.e. that no one should be subjected to arbitrary and unlawful interference with his family.")

222 Cambodian Communities Out of Crisis, Facts and Figures about Cambodia (last visited April 30, 2010), <http://www.cambcomm.org.uk/ff.html> (citing The Economic Institute of Cambodia).

223 UNITED NATIONS DEVELOPMENT PROGRAMME, CAMBODIA HUMAN DEVELOPMENT REPORT 2007: EXPANDING CHOICES FOR RURAL CAMBODIA 9 (2007), available at http://hdr.undp.org/en/reports/nationalreports/asiathepacific/cambodia/Cambodia_HDR_2007.pdf [hereinafter "CAMBODIA HUMAN DEVELOPMENT REPORT"]; see also Cambodian Communities Out of Crisis, *supra* note 222.

224 CAMBODIA HUMAN DEVELOPMENT REPORT, *supra* note 223, at 9.

CASE STUDY: VUTHY

Before arriving in Cambodia, Vuthy worked as a full-time manager at Sea World to support his wife, three-year-old son and two-year-old daughter. Both children are United States citizens.

Since his deportation in 2007, his wife has been forced to raise the children alone. To make ends meet, she has taken on additional jobs and shifts. It is still not enough. The family's car was recently impounded, after she failed to make the necessary payments. Without his salary, she is also unable to afford their current home and has been forced to move the family.

Although Vuthy has secured work in Cambodia, he cannot afford to send any money home.

Interview with Vuthy (pseudonym), in Phnom Penh, Cambodia. (Mar. 22, 2010).

Within this environment, returnees face three unique challenges. First, they typically lack marketable skill sets. The Cambodian economy is focused primarily on agriculture, with 76% of the workforce employed with farming, forestry and fishery activities.²²⁵ Most of the returnees, however, grew up in urban areas and do not have any training in this field. Their experiences are with construction and manufacturing.²²⁶ Although they possess a trade, there is simply no demand for that type of work in Cambodia.

If jobs are available, the returnees may not be considered on account of their U.S. criminal record. Once a person realizes that someone has been deported from the United States, they are often unwilling to consider him or her for employment. In Dith's experience, "people here die to go to the U.S. I had the opportunity and I got sent back – so people here don't want to give me a chance."²²⁷ In attempts to avoid discrimination, some returnees have tried to keep their background hidden.²²⁸ However, this option is only available to those without obvious identifying marks, like tattoos.

Additionally, deportees cannot set up their own businesses. Much of the Cambodian economy is grounded in family connections. The returnees, however, generally lack the sort of social support needed to break through the rampant nepotism.²²⁹ Sothana E. was fortunate enough to arrive in Cambodia with sufficient financial assets to start up his own business. Despite this capital, he has struggled to overcome his lack of connections. He said, "There's no life here – I got \$100,000, but I can't start a business because I ain't got no backbone. I open something, they shut me down, they fight me."²³⁰

The shadow of deportation continues for many years. Even established returnees find themselves held back by their deportation. Oudom adjusted to life in Cambodia by working in a harm reduction program. In 2009, the Australian government awarded him a scholarship to travel to Australia and continue his study of these programs. However, the United States would not provide him with the paperwork on his deportation. As a result, Oudom could not obtain an Australian visa and had to reject his scholarship.²³¹

Deportation also has a devastating economic impact on the families and communities left behind. These effects can be grouped into two broad categories: the difficulties associated with the loss of the breadwinner and housing instability.²³²

i. The Loss of the Breadwinner

Under current U.S. immigration policy, most deportees are men and young boys.²³³ These men are often the sole breadwinner for their family, or, at the very least, a significant wage-earner.²³⁴ Of the forty-eight returnees interviewed for this report, eighteen were supporting their family prior to removal.

Unsurprisingly, the loss of this breadwinner can have a disastrous effect on a household's income. According to the 2000 Census, the median income of a non-citizen fulltime worker was \$21,264.²³⁵ The median household income for

225 *Id.* at 16.

226 See, e.g., Interview with Kravann Em (pseudonym), in Battambang, Cambodia. (Mar. 25, 2010).

227 Interview with Dith (pseudonym), *supra* note 100.

228 See, e.g., Interview with Rithisak Pich (pseudonym), *supra* note 182.

229 See Interview with Sothana E. (pseudonym), *supra* note 88.

230 See *id.*

231 See Interview with Oudom (pseudonym), *supra* note 126.

232 Some non-citizens also complained that the deportation of a family member contributed to food insecurity amongst the remaining relatives. Within a study of Guatemalan immigrants, parents and caregivers admitted that they had eaten less or skipped meals for their children in the wake of immigration raids and detention. It can also be difficult for families to rely on donated food. Food banks are, for obvious reasons, not equipped to accommodate cultural diets and some immigrants complained that they were receiving food to which they were unaccustomed. It is unclear, however, to what extent this is applicable to the Cambodian-American community. See generally PAYING THE PRICE, *supra* note 209, at 48.

233 Of the 228 deported Cambodian-Americans, only two are women.

234 Families typically lack a replacement for this removed breadwinner. A study of Guatemalan immigrants in Colorado and Nebraska, for example, found that the remaining parent – typically the mother – was less integrated within American society and culture. Most were unable to drive or lacked an official driver's license. They were also unaccustomed to making financial decisions and often did not have access to the family's bank accounts. See generally ACLU, WORLDS APART: HOW DEPORTING IMMIGRANTS AFTER 9/11 TORE FAMILIES APART AND SHATTERED COMMUNITIES 3, 42-3 (2004), available at <http://www.aclu.org/files/FilesPDFs/worldsapart.pdf> [hereinafter "WORLDS APART"].

235 AYPAL, JUSTICE DETAINED: THE EFFECTS OF DEPORTATION ON IMMIGRANT FAMILIES 7 (2004), available at http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf. The median household income for a "native" family household, in contrast, is \$51,179.

non-citizens was \$32,515.²³⁶ When one removes this average wage-earner from the family income, the household is left with \$11,351 – a number significantly below the 2000 poverty level of \$13,874.²³⁷ Even if a returnee finds work in Cambodia, his or her salary is typically insufficient to make up for this drop.²³⁸ Munny currently works full-time, but compares his position to a “summer job.” He does not make enough to support himself, let alone his family in the United States.²³⁹

After the deportation of a breadwinner, families typically rely on savings to survive. Many immigrants, however, live “paycheck to paycheck” and do not have a significant safety net to fall back upon.²⁴⁰ Deportation of a sibling or spouse also creates a whole new set of expenses for the family. For example, they may now face new travel expenses and the legal costs of defending their loved one.²⁴¹

After deportation, the household may be saddled with the burden of supporting their family member within his or her new country.²⁴² The majority of the returnees interviewed for this Report received financial support from relatives in the United States. In some cases, this was their only source of income.²⁴³

Faced with these new challenges and expenses, the family will usually turn to nearby relatives for assistance.²⁴⁴ People may, for example, limit housing costs by moving in with a sibling or cousin. While this will help the family of the deported person, it places additional economic strain on the relatives, who must now provide for two households.²⁴⁵ Immigrants may also turn to community

groups or religious institutions for help.²⁴⁶ In the case of the Cambodian-American community, however, there are few organizations in place to provide such assistance.²⁴⁷

Finally, legal immigrants can apply to the government for welfare payments, housing assistance and food stamps.²⁴⁸ As a number of commentators have noted, the harsher removal policies have had the ironic effect of making certain immigrants more dependent on the US government and taxpayers than they were prior to deportation.²⁴⁹

ii. Housing Instability

The deportation of a family member can also contribute to significant housing instability. Immigrants often rent their homes and have difficulty paying the bills on time.²⁵⁰ In many cases, the deportation of a spouse or sibling forces the rest of the family to live with relatives or to move to a cheaper, smaller house. This instability has a particularly detrimental effect on the family’s children, who may have to repeatedly change schools and friends.²⁵¹

C. THE IMPACT OF DEPORTATIONS ON THE ECONOMY

In addition to the effects on families, deportation may also have a negative impact on the economy as a whole. While the total cost of AEDPA and IIRIRA removals is unknown, immigration detentions and deportations are a significant expense for the government. It costs approximately \$97 a day to house someone in immigration detention.²⁵² The removal process itself averages \$1000 per immigrant, but can cost as much as \$6000.²⁵³ Given the total number of people affected by the new laws, these deportations represent a significant expense for the United States.

236 *Id.* In comparison, the median income for a “native” fulltime worker is \$32,082.

237 *Id.*

238 *WORLDS APART*, *supra* note 234, at 3.

239 See *generally* Interview with Munny Khlol (pseudonym), *supra* note 191.

240 *PAYING THE PRICE*, *supra* note 209, at 44.

241 Seth Wessler, *Double Punishment*, *COLORLINES*, Oct. 22, 2009 at 5, available at <http://www.colorlines.com/article.php?ID=623>. Detention centers are often located in the south or southwest, potentially thousands of miles from the immigrant’s home. Once a person is actually deported, the family will have to purchase expensive airfare if they want to visit their spouse or sibling in Cambodia.

242 *Id.* at 5. The loss of a breadwinner can also have a damaging economic effect on those family members living in the home country. Communities within El Salvador, for example, have long been reliant upon remittances from relatives abroad. It is unclear, however, to what extent this is applicable to the Cambodian-American community.

243 See, e.g., Interview with Dith (pseudonym), *supra* note 100.

244 *PAYING THE PRICE*, *supra* note Error! Bookmark not defined., at 45. It is important to note that not all immigrants have an extended family network within country to rely upon. See, e.g., Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?* 3 *STAN. J.C.R. & C.L.* 195, 215 (2007).

245 *PAYING THE PRICE*, *supra* note 209, at 44.

246 *Id.* at 46.

247 The organizations include Deported Diaspora and Khmer in Action. They are focused, for the most part, on political advocacy and community education. They cannot provide economic or psychological assistance to the deportees’ families.

248 *PAYING THE PRICE*, *supra* note 209, at 46.

249 See, e.g., Jacqueline Hagan & Scott Phillips, *Border Blunders: The Unanticipated Human and Economic Costs of the U.S. Approach to Immigration Control, 1986-2007* 7 *CRIMINOLOGY AND PUBLIC POLICY* 83, 90 (2008).

250 *PAYING THE PRICE*, *supra* note 209, at 47.

251 *Id.*

252 Mike Nizza, *Estimate for Deporting Illegal Immigrants: \$94 Billion*, *N.Y. TIMES*, Sept. 13, 2007, available at <http://thelede.blogs.nytimes.com/2007/09/13/estimate-for-deporting-illegal-immigrants-94-billion/>.

253 *Id.*; see also Stephanie Czekalinski & Jill Riepenhoff, *Sending Them Back: Stepped-Up Deportation Efforts Present Enforcement Challenges*, *THE COLUMBUS DISPATCH*, Sept. 10, 2008, available at http://www.dispatch.com/live/content/local_news/stories/2008/09/10/IMMIG_4_ART_ART_09-10-08_A1_GJB800F.html.

III. Effects of Deportation on Individuals with Mental Illness and Disabilities

While the adjustment process is difficult for the average returnee, it is exacerbated for those living with pre-existing mental conditions. As addressed previously, U.S. deportation policies allow for the removal of individuals with mental illnesses and disabilities. Of the returnees still in touch with RISC, it is estimated that three suffer from schizophrenia, four from other psychotic disorders, two from bipolar disorder and fifteen from severe depression.²⁵⁴

One of the biggest challenges these individuals face is obtaining access to treatment and medication in Cambodia. According to Jane Lopacka, only 1% of the country's budget is spent on mental health services.²⁵⁵ Furthermore, there are only a few clinics and psychiatrists operating in Cambodia and most are located in the capital, Phnom Penh. Within the rural regions, there is little to no access to mental health services.²⁵⁶

If a returnee is fortunate enough to live within a reasonable distance of a mental health facility, s/he may still be unable to take advantage of its services. Few arrive with their medical records or can identify their individual condition.²⁵⁷ Treatment is, in turn, prohibitively expensive.²⁵⁸ A typical consultation fee in Phnom Penh is \$20 or more.²⁵⁹ While medications are available in the country, they are too costly for the average Cambodian.²⁶⁰ Returnees, like Sophat Chann, must rely on local NGOs to obtain the required drugs.²⁶¹

Without appropriate treatment, returnees with pre-existing mental conditions struggle to survive. In many

cases, the burden of care shifts to their local relatives. The families are, however, rarely in a position to support the returnee, either financially or emotionally. Within Cambodia, heavy stigma attaches to those with mental illnesses and disabilities.²⁶² Mental health services are, in turn, only viewed as necessary for "crazy people."²⁶³

If a family is unable or unwilling to care for a returnee, s/he will often end up living alone or on the streets. Although RISC can provide housing for about three to four individuals with mental illness, it is not a mental health facility. The staff are not trained professionals and as a result, often struggle to care for them. When the returnees have violent outbursts or begin to graffiti the walls, the staff can respond in the only way they know how – with patience and kindness.

This Report issues three recommendations to address the problems experienced by returnees with pre-existing mental illnesses and disabilities. First, the United States must amend AEDPA and IIRIRA to ensure that those with mental disabilities or mental illnesses receive competency adjudications. If an individual is found to be incompetent, deportation proceedings must cease immediately. Second, the United States should require immigration judges to consider the availability, and quality, of health care in the receiving nation before ordering removal. If the LPR has a serious or long-term condition requiring treatment, deportation may be inappropriate. Finally, the United States must ensure that all returnees arrive in the receiving country with the necessary paperwork, including immigration and health records.

254 Email from Kloeung Aun, Director of RISC, to Erin Miles, student, Walter Leitner International Human Rights Clinic (Apr. 27, 2010) (on file with the authors).

255 Telephone Interview with Jane Lopacka, *supra* note 181.

256 *Id.*

257 See, e.g. Interview with Sophat Chann (pseudonym), in Phnom Penh, Cambodia. (Mar. 23, 2010).

258 Telephone Interview with Jane Lopacka, *supra* note 181.

259 *Id.*

260 *Id.*; see also Interview with Lena (pseudonym), in Phnom Penh, Cambodia. (Mar. 26, 2010).

261 Telephone Interview with Jane Lopacka, *supra* note 181; see also Interview with Sophat Chann (pseudonym), *supra* note 257.

262 Telephone Interview with Jane Lopacka, *supra* note 181.

263 *Id.*

Part Five: Ramifications for Other Communities

Until this point, this Report has specifically examined the effects of AEDPA and IIRIRA on the Cambodian-American community. However, the distinguishing characteristics of their experience – the residual effects of violence, the assimilation difficulties, and their failure to understand their immigration status – are not unique to this community. Such experiences are nearly universal among the tens of thousands of refugees admitted to the United States each year.²⁶⁴ This section will examine the wide-ranging effects of U.S. immigration policies on refugee communities by highlighting the experiences of two recently admitted populations, the Somali and Sudanese people. If the U.S. deportation laws are not reformed, then many refugee communities, not just the Cambodian-Americans will be affected.

I. Residual Effects of Violence

When they arrived in the United States, Cambodian refugees had an extremely high rate of Post Traumatic Stress Disorder (PTSD) and major depression.²⁶⁵ The problems were particularly acute amongst women and adolescents.²⁶⁶ A 2005 survey in Long Beach, California, found that 62% of Cambodians struggled with PTSD and 51% with major depression.²⁶⁷ The prevalence of PTSD and major depression had a direct impact on people's resettlement experience. They often limited a person's ability

to take care of him or herself and to maintain a job.²⁶⁸ Furthermore, the transition process itself often served to re-traumatize the refugees.²⁶⁹ Those placed in poor or inner-city neighborhoods, for example, encountered new states of conflict, surrounded by crime and gang warfare.²⁷⁰

Similarly, the Sudanese and Somali communities suffer from the residual effects of violence. According to a study by the University of Minnesota Medical School, 80% of Somali males presented psychoses.²⁷¹ The experts explained that these episodes were largely related to their war trauma, malnutrition and head injuries.²⁷² Alternatively, many of the Somali female patients studied showed depressive tendencies and PTSD.²⁷³ The Sudanese "Lost Boys" are also badly traumatized. These individuals witnessed the destruction of their villages by government-sponsored militias.²⁷⁴ They escaped the violence by walking to Ethiopia and eventually immigrated to the United States.²⁷⁵ When the "Lost Boys" arrived in the U.S., an estimated 80 to 90 percent suffered from PTSD.²⁷⁶ Like segments of the Cambodian-American community, many of the "Lost Boys" transition to America exacerbated their already fragile emotional state. Many of the "Lost Boys" were separated from each other and placed in group and foster homes, often resulting in feelings of isolation and loneliness.²⁷⁷ According to experts, these tendencies may result in depression, domestic violence, and even death.²⁷⁸

264 74,602 individuals were admitted to the United States as refugees in 2009. Daniel C. Martin, Department of Homeland Security Office of Immigration Statistics (OIS), *Annual Flow Report: Refugees and Asylees: 2009*, http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2009.pdf.

265 CHAN, *supra* note 17, at 231 - 32.

266 *Id.* at 232.

267 Grant N. Marshall et al., *Rates and Correlates of Seeking Mental Health Services Among Cambodian Refugees*, 96 AMERICAN JOURNAL OF PUBLIC HEALTH (2006), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1586149/#__secid475410.

268 *Id.* at 231.

269 *Id.* at 234.

270 *Id.*

271 Kroll J. Yusuf et al., *Psychoses, PTSD, and depression in Somali refugees in Minnesota*, (Mar. 11, 2010), <http://www.ncbi.nlm.nih.gov/pubmed/20354676>.

272 *Id.*

273 *Id.*

274 *Id.*

275 *Id.*

276 Lindsey Collom, *Stress Issues Still Plague 'Lost Boys'*, THE ARIZ. REPUBLIC, Apr. 7, 2008, available at <http://www.azcentral.com/news/articles/2008/04/07/20080407lostboys0407.html>.

277 "Lost Boys of Sudan" have emotional problems, available at <http://www.bmj.com/cgi/content/full/330/7504/1350-a>

278 Collom, *supra* note 276.

II. Economic and Acculturation Difficulties

The Cambodian-American community faced both economic and cultural difficulties. Twenty years later, the Sudanese-American and Somali-American communities face many of the same challenges.

A. ECONOMIC STRUGGLES

Lacking both English skills and basic vocational training, Cambodian-Americans had difficulties achieving economic independence. Evidence suggests that the Sudanese and Somali communities are experiencing similar hardship. Like the Cambodian-Americans, they lacked transferable skills and had difficulty securing employment.²⁷⁹ As a result, approximately 33% of Sudanese²⁸⁰ and 46.3% of Somali families are below the poverty line.²⁸¹

B. ACCULTURATION

Many Cambodian-Americans found it difficult to adjust to U.S. culture. When they first settled in the U.S., these refugees experienced a clash between traditional Cambodian culture and the American way of life.²⁸² Moreover, refugee children tended to assimilate more quickly than their parents.²⁸³ In many families, the different rates of acculturation bred division and rebellion.²⁸⁴ As parents clung to traditional notions of age and gender hierarchy,

adolescents strove to be “normal” American teenagers.²⁸⁵ In certain poorer neighborhoods, like Long Beach, this rebellion contributed to the development of Cambodian gangs.²⁸⁶ Gang membership offered some young refugees a surrogate family and a sense of belonging.²⁸⁷ This activity is responsible for a significant percentage of the deportable offenses committed by Cambodian teens.²⁸⁸

The Somali and Sudanese communities also find it challenging to acculturate in America. For example, many Somalis faced discrimination and find it difficult to observe their traditional religious practices.²⁸⁹ Many in these communities also have trouble communicating due to accented English,²⁹⁰ which may lead to a sense of isolation from the rest of the population.²⁹¹ It is possible that this sense of “isolation and powerlessness” may contribute to depression and violent outbursts.²⁹² In the worst-case scenario, these outbursts may lead to trouble with the law.²⁹³ Given the requirement that refugees adjust status to become LPRs, such challenges could result in deportation.²⁹⁴

III. Failure to Understand Immigration Status

Sudanese and Somali youth arrived to the U.S. at young ages.²⁹⁵ The Cambodian-American experience shows that these youth may not understand the implications of their

279 Alliance for African Assistance, *Resettlement Programs* (May 11, 2010) available at http://www.alliance-for-africa.org/New%20Website/23%20new%20resettlement__program.htm.

280 U.S. Census Bureau. Profile of Selected Demographic and Social Characteristic: People born in Sudan, 2000, available at <http://www.census.gov/population/cen2000/stp-159/STP-159-sudan.pdf>.

281 U.S. Census Bureau. Profile of Selected Demographic and Social Characteristic: People born in Somalia, 2000, available at <http://www.census.gov/population/cen2000/stp-159/STP-159-somalia.pdf>.

282 Cahn, *supra* note 40.

283 *Id.*

284 *Id.*

285 *Id.* at 241-42, 19, 20, As one boy explained, “My Mom tells me, you know, Cambodian tradition, this and that. I always tell them that’s in Cambodia, this is America. I do what I got to do.”

286 *Id.* at 218. Gangs also developed as a response to the violence faced by Cambodian refugees within poorer neighborhoods.

287 Gary Kar-Chuen Chow, Note, *Exiled Once Again: Consequences of the Congressional Expansion of Deportable Offenses in the Southeast Asian Community*, 12 *ASIAN L.J.* 103, 120 (2005).

288 *Id.*

289 *Tension over Somali Refugees in Maine*, *VAIL DAILY*, available at, <http://www.vaildaily.com/article/20070511/NATIONAL02/70511021>(explaining that a Somali refugee committed suicide after neighbors in his town taunted him while he prayed at the local mosque).

290 Martin Masumbuko Muhindi & Kiganzi Nyakato, *Integration of Sudanese “Lost Boys” in Boston, Massachusetts USA, 2002*, 18 (2002) (unpublished paper, Mellon-MIT Program), available at <http://web.mit.edu/cis/www/migration/pubs/Mahindi.pdf>.

291 *Id.*

292 H. Edward Ransford, *Isolation, Powerlessness, and Violence: A Study of Attitudes and Participation in the Watts Riot*, 73 *AMERICAN JOURNAL OF SOCIOLOGY* 581-591 (1968).

293 Tim Townsend, *Somali Refugee has a Big Dream*, *ST. LOUIS POST-DISPATCH*, Feb. 24, 2010, <http://www.stltoday.com/stltoday/news/stories.nsf/religion/story/C187677C2E4C6F9D862576D4000FE715?OpenDocument>.

294 Jim Douglas, *UPS Driver Shot*, *WFAA-TV*, Jul. 28, 2009, http://www.txcn.com/sharedcontent/dws/news/localnews/tv/stories/wfaa090727_wz_upstab.81e7adb4.html (discussing a Sudanese Refugee killing a local UPS driver. The Sudanese refugee appeared to suffer from mental health issues and depression).

295 See Townsend, *supra* note 293; See generally MARK BIXLER, *THE LOST BOYS OF SUDAN* (Univ. of Georgia Press 2005).

immigration status, and may not perceive their native country as being sufficiently stable to permit their return.²⁹⁶

Many of the Cambodian deportees did not realize that they could be deported. In fact, only three of the forty-eight interviewees understood their LPR status to mean that they were deportable, and could not stay in America “permanently.” Although refugee resettlement programs have improved since the 1980s, they still do not provide adequate information regarding immigration status.²⁹⁷ As a result, it is possible that the Sudanese and Somali populations may also fail to understand the difference between LPR status and U.S. citizenship.

Even if they do recognize the implications of their status, they still may not believe that their country will accept them. Many Cambodians signed voluntary deportation orders assuming that their native land would never stabilize to the point where it would accept deportees.²⁹⁸ Because the Somali and Sudanese refugees left war-torn

countries, they may also believe that they will never be able to repatriate. As a result, they may sign voluntary deportation orders, like the Cambodian refugees before them. If the political climate changes, and a repatriation agreement is signed, then these highly traumatized refugees could also find themselves deported.

The U.S. has recognized the need to protect refugees from all over the world, as displayed by an increase in the annual ceiling for refugees admitted to the U.S. through the resettlement program, from 70,000 for the years 2002 until 2007, to 80,000 in 2008 and 2009.²⁹⁹ However, after admitting such refugee populations, the U.S. must ensure their protection and equal opportunity under the law, even in the event that such individuals are charged with or convicted of a crime. The challenges experienced by the Cambodian-American community will surely be replicated if reforms are not made, resulting in further instances of fractured communities and families.

Conclusion

Like any community in the U.S., refugees may come into contact with the criminal justice system. Due to unique experiences characterized by hardship, such individuals require special considerations. Instead, refugees are met with overly expansive categories for deportation established by AEDPA and IIRIRA. In the Cambodian-American community, the effects of these laws led to the separation of families, the deportation of non-violent offenders and the mentally ill, and the disruption of an entire community. In order to prevent the repetition of these injustices against other refugee populations, the United States must reform AEDPA and IIRIRA to reflect

the pre-1996 categories of deportable offenses and to reintroduce judicial discretion in the removal process. By doing so, the United States will align its deportation policies with international principles of proportionality and *non-refoulement*, as well as limit the devastating effects of the current policies on individuals with mental disabilities. A viable and propitious opportunity to advance such reforms exists in the current political environment, in which comprehensive immigration reform exists as a national focus. In short, U.S. deportation policy must change before it fails another community of refugees.

Acknowledgments

This report is a collaborative project of the Walter Leitner International Human Rights Clinic of the Leitner Center for International Law and Justice at Fordham Law School (FLS), the Returnee Integration and Support Center (RISC), and Deported Diaspora. It was written primarily by FLS J.D. Candidates Amelia Canter '10, Xiomara Ferrera '11, Erin Miles '11, and Catherine Parnell '10 under the direction of Clinic Director and Professor Chi Mgbako and project co-supervisor Zaid Hydari (Dean's Fellow 2009-2010, FLS '09). Additional editorial assistance was provided by

Dimple Rana, co-founder, co-director, and lead organizer of Deported Diaspora, and Sandy Wright, co-founder and co-director of Deported Diaspora. Fieldwork for the report was conducted in Cambodia in March 2010 and would not have been possible without the assistance of the RISC staff, including Executive Director Kloeung Aun and Liaison Officer & Case Manager Keo Sarith. The authors and editors thank all returnees who shared their personal stories of hardship.

296 See e.g. Interview with Dith (pseudonym), *supra* note 100.

297 OFFICE OF REFUGEE RESETTLEMENT, REFUGEE ASSISTANCE, <http://www.acf.hhs.gov/programs/orr/about/divisions.htm> (last checked May 10, 2010).

298 See, e.g., Interview with Rith (pseudonym), *supra* note 141.

299 *Annual Flow Report: Refugees and Asylees: 2009*, *supra* note 264.

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