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ÉMIGRÉS OF THE KILLING FIELDS: THE DEPORTATION OF CAMBODIAN REFUGEES AS A VIOLATION OF INTERNATIONAL HUMAN RIGHTS

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Abstract: On March 22, 2002, amidst political pressures exerted by the Bush administration, the government of Cambodia was forced into signing a repatriation agreement with the United States that immediately made some 1,600 Cambodian Americans, most of whom were fully acculturated teenagers with virtually no ties to Cambodia, deportable under the Immigration and Nationality Act's aggravated felony provision. This Note addresses the aggravated felony provision as applied to Cambodian refugees and two legal theories that have been developed in order to prevent their deportation. Based on current trends by federal courts to incorporate international legal norms into American jurisprudence, particularly *Beharry v. Reno* and *Maria v. McElroy*, this Note contends that a more serious look at these two legal theories, which rely heavily on international human rights standards, is needed.

INTRODUCTION

Loeun Lun does not remember the date he was born during Pol Pot's genocidal regime in Cambodia; nor does he care to.¹ He doesn't want to remember the period of turmoil and trauma that claimed the lives of over two million Cambodians during the late 1970s. Loeun's life, from the time he was a bony infant in his mother's rucksack on a forced march through rural Cambodia, to his aimless teenage life in

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¹ See Deborah Sontag, *In a Homeland Far from Home*, N.Y. TIMES, Nov. 16, 2003, § 6 (Magazine), at 48.

the crime-ridden housing projects of Tacoma, Washington, has been too chaotic for him to care about such things.² What does matter to him, however, is his family—his beloved wife, Sarom Loun, and daughters, Emilee and Ashley.³

On March 12, 2002, the INS requested that Loecun report in person to the Seattle immigration office.⁴ Believing that the visit was for the purposes of his naturalization process, which he had begun two years ago, Loecun agreed and arrived at the office with his family, where he took a number and patiently waited.⁵ When Loecun's number was finally called, an immigration officer placed Loecun under arrest as Emilee burst into tears.⁶ Loecun comforted Emilee and told her "Daddy would be home soon."⁷

But Daddy wasn't ever coming home. On March 22, 2002, amidst pressures exerted by the Bush administration, Cambodian officials signed an agreement with the United States that allowed for the deportation of Cambodian nationals who had previously broken the law in America.⁸ Under the authority of the Immigration and Nationality Act's (INA) aggravated felony provision, the agreement immediately made some 1,600 former refugees eligible for deportation, the majority of whom were fully Americanized young men whose Cambodian "homeland" was little more than a fuzzy memory.⁹ Among those made newly eligible was Loecun Lun; in 1995, he had pled guilty to an assault he committed as a teenager.¹⁰ His subsequent reformation, however, meant nothing to the government, and in May 2003, he was hand-

² *See id.*

³ *See id.* at 50.

⁴ *See id.*

⁵ *See id.*

⁶ *See* Sontag, *supra* note 1, at 50.

⁷ *See id.*

⁸ *See* Memorandum Between the Government and the United States and the Royal Government of Cambodia for the Establishment and Operation of a United States—Cambodia Joint Commission on Repatriation (Mar. 22, 2002), U.S.-Cambodia Cambodian American National Council, *available at* <http://www.cancweb.org/canc/deportation.html> [hereinafter Repatriation Agreement]; Sontag, *supra* note 1, at 52.

⁹ *See* Immigration and Nationality Act (INA) §§ 101(a)(43), 237(a)(2)(A)(iii), 8 U.S.C. § 1101(a)(43), 1227(a)(2)(A)(iii) (2000); Sontag, *supra* note 1, at 50; *see also* Southeast Asia Resource Action Center's Discussion on U.S.-Cambodia Deportation Agreement, *Talking Points on Cambodian Deportation: Stop Cambodian Deportations*, Cambodian American National Council, *at* <http://www.cancweb.org/canc/deportation.html> (last visited Sept. 28, 2004) (summarizing the current Cambodian deportation situation) [hereinafter SEARAC discussion].

¹⁰ *See* Sontag, *supra* note 1, at 48, 50.

cuffed, shipped back to Phnom Penh on a government jet, and told that he could never return to the United States.¹¹

Loeun's experience, albeit foreign to the small and politically powerless Cambodian community, is a disturbingly familiar one to most lawful permanent residents (LPRs)¹² subject to the aggravated felony provision of the INA, which has been supplemented by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and Antiterrorism and Effective Death Penalty Act (AEDPA).¹³ Under current law, a lawful permanent resident of the United States can be deported peremptorily for such trivial offenses as Driving Under the Influence (DUI), shop-lifting, or a misdemeanor battery.¹⁴ The law neither considers deportation's likely adverse impact on the family of someone like Loeun, nor does it show concern about unconditionally exiling the person to a nation that is remembered only from stories and nightmares.¹⁵ Furthermore, it does not take into account the possibility that the deportable offense was committed long before these deportation laws came into effect.¹⁶ Despite the unfairness of these laws, courts continue to sanction the laws under the plenary power doctrine, an

¹¹ See *id.* at 50.

¹² See 8 U.S.C. § 1101(a)(20) (defining "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed").

¹³ See Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1276-79 (1996); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627-28 (1996). For a descriptive history of the aggravated felony provision, see Melissa Cook, Note, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293 (2003).

¹⁴ See Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 591 (1998); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000); Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. REV. 1696, 1699 (1999); SEARAC discussion, *supra* note 9. For example, Josue Leocal, a Haitian national, was deported under the aggravated felony provision based on his conviction for DUI with serious bodily injury. See Brief for Petitioner at *3-*4, *Leocal v. Ashcroft*, 124 S. Ct. 1405 (2004) (No. 03-583), available at 2004 WL 1070031. As of the date of this publication, the issue of whether a DUI with serious bodily injury qualifies as an aggravated felony is currently under review by the U.S. Supreme Court. *Id.*

¹⁵ See Sontag, *supra* note 1, at 105-06; see also 8 U.S.C. § 1182(h) (barring discretionary relief on compassionate grounds for noncitizens convicted of an aggravated felony); *id.* § 1252(a)(2)(C) (eliminating judicial review of removal orders for aggravated felons).

¹⁶ See 8 U.S.C. § 1101(a)(43).

archaic precedent that gives Congress absolute discretion in setting the rules and regulations that govern U.S. immigration law and policy.¹⁷

Deportation is often equally, if not more detrimental to the life of a noncitizen than the imposition of a criminal sentence—yet courts have steadfastly regarded immigration proceedings as civil proceedings.¹⁸ A deported noncitizen may lose one's family, friends, and livelihood forever.¹⁹ For courts to conclude that it is not punishment for a person to be banished from the country in which one has lived for most of one's life, to be denied the love and presence of one's spouse, children and parents, and to be sent to a country to which one has virtually no ties, is to deny reality.²⁰

Although the severe and unjust laws mandating deportation—now termed “removal”²¹—affect all immigrants who have been convicted of

¹⁷ See *The Chinese Exclusion Case*, 130 U.S. 581, 603–06 (1889); see also *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (acknowledging Congress' plenary power to create immigration law); *Kleindienst v. Mandel*, 408 U.S. 753, 765–66 (1972) (expressing that the Court has sustained without exception Congress' plenary power over immigration law); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (recognizing the Court's long-time approval of the plenary power doctrine).

¹⁸ See *Bridges v. Wixon*, 326 U.S. 135, 164 (1945) (Murphy, J., concurring). The seminal case labeling deportation as a civil rather than a criminal matter is *Fong Yue Ting v. United States*, which states,

The proceeding . . . is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.

149 U.S. 698, 730 (1893). Despite efforts to abrogate this archaic principle, courts have continued to uphold it. See, e.g., *United States v. Yacoubian*, 24 F.3d 1, 10 (9th Cir. 1994) (denying ex post facto challenge to deportation because the provision applies only to criminal laws); *Urbina-Mauricio v. INS*, 989 F.2d 1085, 1089 n.7 (9th Cir. 1993) (dismissing the double jeopardy argument against deportation because the double jeopardy clause applies only to criminal proceedings); *LeTourneur v. INS*, 538 F.2d 1368, 1370 (9th Cir. 1976) (ruling that double jeopardy argument was without merit because deportation is not criminal punishment); *Chabolla-Delgado v. INS*, 384 F.2d 360, 360 (9th Cir. 1967) (finding the Eighth Amendment inapplicable to a deportation proceeding because it is not a criminal proceeding).

¹⁹ *Bridges*, 326 U.S. at 164.

²⁰ *Scheidemann v. INS*, 83 F.3d 1517, 1527 (3d Cir. 1996) (Sarokin, J., concurring).

²¹ See 8 U.S.C. § 1229.

crimes, this Note addresses specifically the impact of the aggravated felony provision on the Cambodian community.²² This Note also presents two current legal theories that rely on international human rights laws, which were developed to prevent the deportation of Cambodian refugees.²³ This Note then examines two recent federal court decisions by Judge Jack Weinstein, *Beharry v. Reno* and *Maria v. McElroy*, which demonstrate that the immigration laws, as applied to Cambodians refugees, violate international human rights law, specifically the U.N. Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees.²⁴ Therefore, in order for U.S. immigration and refugee law to comport with international human rights law, courts must expand the reasoning in *Beharry* and *Maria* and afford stronger consideration to the legal theories posed in this Note.²⁵

Part I provides a historical overview of the roots of injustice in immigration law in America beginning with the *Chinese Exclusion Case*.²⁶ Part I also explains the development of the aggravated felony provision and how it recently came to apply to Cambodian refugees convicted of certain crimes.²⁷ Part II introduces two legal theories, which rely on international human rights law, developed by advocates in response to the deportation of Cambodians, and explains how courts' reluctance to follow international legal norms renders them deficient.²⁸ Part III of this Note applies the reasoning of the *Maria* and *Beharry* decisions to the international human rights violations implicated in current U.S.

²² See *id.* §§ 1101(a)(43), 1227(a)(2)(A)(iii); SEARAC discussion, *supra* note 9.

²³ See *infra* Part II.

²⁴ See Protocol Relating to the Status of Refugees, entered into force Oct. 4, 1967, art. 1.1, art. 1.2, 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 (1966), available at http://www.unhcr.ch/html/menu3/b/o_p_ref.htm (last visited Sept. 28, 2004) [hereinafter Refugee Protocol]; Convention Relating to the Status of Refugees, entered into force April 22, 1954, art. 32, 189 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://www1.umn.edu/humanrts/instrree/v1crs.htm> (last visited Sept. 28, 2004) [hereinafter Refugee Convention]; *Beharry v. Reno*, 183 F. Supp. 2d 584, 604 (E.D.N.Y. 2002), *rev'd on other grounds*, *Beharry v. Ashcroft*, 324 F.3d 51 (2d Cir. 2003); *Maria v. McElroy*, 68 F. Supp. 2d 206, 234 (E.D.N.Y. 1999).

²⁵ See *Beharry*, 183 F. Supp. 2d at 604; *Maria*, 68 F. Supp. 2d at 234.

²⁶ See 130 U.S. 581 (1889).

²⁷ See 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii); *Zadydas v. Davis*, 533 U.S. 678 (2001); Sontag, *supra* note 1, at 52, 106.

²⁸ See Khmer Institute, *Legal Arguments for Cambodians in Deportation Proceedings*, at <http://www.khmerinstitute.org/articles/art11.html> (last visited Sept. 28, 2004) [hereinafter *Legal Arguments*].

immigration policies toward Cambodian Americans.²⁹ Part III contends that the deportation of Cambodian refugees under the Repatriation Agreement violates the Refugee Convention and, furthermore, is inconsistent with current U.S. immigration law under a rationale similar to that employed by Judge Weinstein.³⁰ Therefore, in order to comply with international law regarding the deportation of Cambodian refugees, stronger consideration to these legal theories is warranted.³¹

I. THE AGGRAVATED FELONY PROVISION OF THE IMMIGRATION AND NATIONALITY ACT AND THE DEPORTATION OF CAMBODIAN CRIMINAL NONCITIZENS

Inequality in U.S. immigration law is as old as the law itself. The precedent set forth in the century-old *Chinese Exclusion Case*³² has consequently been used to implement policies that are inhospitable to America's noncitizens—including the aggravated felony provision.³³ The deportation of Cambodian criminal noncitizens is, however, a recent development in U.S. immigration law.³⁴ Prior to the Repatriation Agreement, the United States could not deport Cambodians because Cambodia refused to accept them.³⁵ The agreement's consummation, however, allows the United States to employ the unjust and unnecessarily harsh aggravated felony provision to order the mandatory deportation of a number of Cambodian refugees.³⁶

A. *A Century of Inequity in U.S. Immigration Law and Policy: The Chinese Exclusion Case and the Plenary Power Doctrine*

The roots of juridical unfairness in U.S. immigration law began when Congress, fearing that its anti-Chinese immigration laws were too

²⁹ See generally *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev'd on other grounds*, *Beharry v. Ashcroft*, 324 F.3d 51 (2d Cir. 2003); *Maria v. McElroy*, 68 F. Supp. 2d 206 (E.D.N.Y. 1999).

³⁰ See Refugee Protocol, *supra* note 24, at art. 1.1, art. 1.2; Refugee Convention, *supra* note 24, at art. 32; *Beharry*, 183 F. Supp. 2d at 604; *Maria*, 68 F. Supp. 2d at 234.

³¹ See Refugee Protocol, *supra* note 24, at art. 1.1, art. 1.2; Refugee Convention, *supra* note 24, at art. 32; *Beharry*, 183 F. Supp. 2d at 604; *Maria*, 68 F. Supp. 2d at 234; *Legal Arguments*, *supra* note 28.

³² See 130 U.S. 581 (1889).

³³ See INA §§ 101(a)(43), 237(a)(2)(A)(iii), 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii) (2000).

³⁴ See *Sontag*, *supra* note 1, at 50; *Legal Arguments*, *supra* note 28.

³⁵ See *Legal Arguments*, *supra* note 28.

³⁶ See *id.*; see also *Sontag*, *supra* note 1, at 50 (estimating 1,600 Cambodian refugees now deportable under the aggravated felony provision).

weak, passed the Chinese Exclusion Act of 1888, which made it unlawful for a Chinese laborer who had once entered the United States legally to reenter if that person had left prior to the Act's passing.³⁷ The Act effectively superceded all conflicting statutes at the time of its passing.³⁸ The question of whether the Chinese Exclusion Act could apply retroactively was challenged in the case of *Chae Chan Ping v. United States*, more notoriously known as the *Chinese Exclusion Case*.³⁹ The petitioner, Chae Chan Ping, was a Chinese laborer residing in San Francisco who had departed for China in 1887 with the intention of returning to the United States.⁴⁰ Before departing, he sought and obtained a certificate of reentry which, under the law existing at the time, would have allowed his return.⁴¹ Soon thereafter, Congress passed the Chinese Exclusion Act, which invalidated Chae Chan Ping's return certificate.⁴² His attempted reentry led instead to his detention.⁴³ Upon review by the U.S. Supreme Court, the Court stated that, as an independent nation, the United States had the inherent authority to maintain the independence and security of its territories.⁴⁴ For the Court to restrict that authority would constitute a diminution of that power.⁴⁵ The Court therefore concluded that, in the exercise of its legislative power, has the complete and unquestionable power to exclude noncitizens from, or prevent their return to, the United States.⁴⁶ Thus, the Chinese Exclu-

³⁷ See *The Chinese Exclusion Case*, 130 U.S. at 599.

³⁸ See *id.*

³⁹ See *id.* at 589.

⁴⁰ See *id.* at 582.

⁴¹ See *id.*

⁴² See *The Chinese Exclusion Case*, 130 U.S. at 582.

⁴³ See *id.*

⁴⁴ See *id.* at 603–04.

⁴⁵ See *id.* at 604.

⁴⁶ See *id.* at 603–04, 611. The Court went even further to write,

It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. . . . If the government . . . considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

Id. at 606. However, the Court also opined that Congress was “restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of *all civilized nations*,” a profound suggestion that Congress’ plenary power was to be bound by the customs which govern all nations. *Id.* at 604 (emphasis added).

sion Act applied retroactively and Chae Chan Ping's certificate of reentry was invalid.⁴⁷

The *Chinese Exclusion Case* established the principal precedent that changes in U.S. immigration law and policy may be applied retroactively.⁴⁸ Chae Chan Ping had intended to return to the United States.⁴⁹ He had secured a certificate entitling his reentry, and done so according to the law at the time.⁵⁰ By its ruling, the Court sanctioned Congress' ability not only to change the law years later, but also to affect the lives and choices of many unsuspecting noncitizens; had Chae Chan Ping known that his certificate would be invalid one year later, it is likely that he would never have left the United States.⁵¹ Likewise, had Loemun Lun known in 1995 that changes in the law seven years later would make him deportable, it is likely that Loemun, instead of choosing to plea bargain, would have opted to go to trial to attempt to avoid a conviction.⁵²

While the *Chinese Exclusion Case* dealt solely with the exclusion of noncitizens, the question of whether Congress' plenary power extended to their deportation was answered by the Court in *Fong Yue Ting v. United States*.⁵³ The case joined three similar cases that all involved Chinese laborers.⁵⁴ Each petitioner was charged with violating section 6 of the Chinese Deportation Act of May 5, 1892.⁵⁵ The provision required all Chinese laborers within the United States to procure a certificate of residency.⁵⁶ Because the petitioners had failed to procure a certificate, the Act mandated their deportation.⁵⁷ Upon review, the Court found section 6 to be constitutional.⁵⁸ It reasoned that, just

⁴⁷ See 130 U.S. at 609 (stating that, "[w]hatever license, therefore, Chinese laborers may have obtained, previous to the act . . . to return to the United States after their departure, is held at the will of the government, revocable at any time *at its [p]leasure*") (emphasis added).

⁴⁸ See *id.* at 603–04.

⁴⁹ See *id.* at 582.

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See Sontag, *supra* note 1, at 106–07.

⁵³ See 149 U.S. 698 (1893).

⁵⁴ See *id.* at 698–703.

⁵⁵ See *id.* at 699.

⁵⁶ See Chinese Deportation Act of May 5, 1892, ch. 60, 27 Stat. 25. Applicants for residency certificates were burdened further by the requirement of an affidavit of at least one credible white witness of good character to attest to the fact of residence and lawful status in the United States. See *id.*

⁵⁷ See *Fong Yue Ting*, 149 U.S. at 699.

⁵⁸ See *id.* at 732. The Court also found the Equal Protection Clause was inapplicable because the statute involved federal law, not state law. See *id.* at 725. However, it is impor-

as Congress had the absolute and unqualified right to exclude non-citizens, it also had the right to deport them.⁵⁹ Thus, the Court upheld the order to deport the petitioners.⁶⁰

What is important to note in these two seminal cases is the extent of the Court's reliance on principles of international law.⁶¹ Indeed, the Court supported its proposition in *Fong Yue Ting* by stating: "It is an *accepted maxim of international law* that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."⁶² This same reliance is found in the *Chinese Exclusion Case*, where the Court stated that the right to exclude foreigners is an inherent right guaranteed by the law of nations.⁶³

The precedents established by the *Chinese Exclusion Case* and *Fong Yue Ting* have endured for over a century, and have justified the implementation of a number of unfair immigration laws, including the derivation and expansion of the aggravated felony provision. What follows is a brief description and history of the provision, tracing its evolution from one paragraph comprising a small number of extremely serious crimes into twenty-one paragraphs enumerating over fifty crimes or general classes of crimes.⁶⁴

B. *The Development of the Aggravated Felony Provision*

In addition to aggravated felonies, a noncitizen is deportable for a number of crimes under the INA.⁶⁵ These include, for example, crimes of moral turpitude carrying a sentence of one year or more and were committed within five years of entry; controlled substance convictions; certain firearms offenses; and crimes of domestic violence and crimes against children.⁶⁶ Of these categories, the aggravated felony provision encompasses the widest range of crimes, from

tant to note that *Fong Yue Ting* was decided before the Court incorporated the Equal Protection Clause into the Fifth Amendment in *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁵⁹ See *Fong Yue Ting*, 149 U.S. at 713.

⁶⁰ See *id.* at 732.

⁶¹ See *id.* at 732; *The Chinese Exclusion Case*, 130 U.S. 581, 603–04 (1889).

⁶² See *Fong Yue Ting*, 149 U.S. at 705 (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)) (emphasis added).

⁶³ See *The Chinese Exclusion Case*, 130 U.S. at 603–04.

⁶⁴ See Richard L. Prinz, *The 1996 Criminal Alien Legislation in 1997: An Overview*, in PRACTICE UNDER IIRAIRA: ONE YEAR LATER 205, 207 (R. Patrick Murphy ed., 1997).

⁶⁵ See INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2000).

⁶⁶ See *id.*

serious offenses such as murder, rape, and sexual abuse of a minor, to offenses that do not even constitute felonies under the criminal law, such as shoplifting and simple battery.⁶⁷

The aggravated felony provision was introduced in the Anti-Drug Abuse Act of 1988 (ADAA), which amended the INA to include aggravated felonies as grounds for deportation.⁶⁸ The ADAA arose out of fears that increasing numbers of drug and weapons-related crimes were being committed by immigrants who were evading deportation.⁶⁹ The ADAA limited the use of the aggravated felony provision to serious crimes, such as murder and drug and weapons trafficking.⁷⁰ Non-citizens deportable under the ADAA aggravated felony provision were additionally subject to expedited removal proceedings.⁷¹

The eventual passage of the Immigration Act of 1990 (IMMACT)⁷² and the Immigration and Nationality Technical Corrections Act of 1994 (INTCA)⁷³ expanded the one-paragraph definition of "aggravated felony." Under both Acts, a person was deportable for committing offenses such as burglary or theft, which carried a sentence of over five years, money laundering, fraud, and tax evasion.⁷⁴ IMMACT also broadened the provision to include both federal and state convictions as well as certain convictions under foreign law.⁷⁵

Following the aggravated felony provision's expansion under IMMACT and INTCA, one commentator remarked that "the future is bleak for the aggravated felon and will probably only worsen."⁷⁶ That

⁶⁷ See *id.* § 1101(a)(43); Morawetz, *supra* note 14, at 1939.

⁶⁸ See Anti-Drug Abuse Act of 1988 (ADAA), Pub. L. No. 100-690, § 7342-49, 102 Stat. 4181, 446973 (1988) (codified as amended in scattered sections of 8 U.S.C.).

⁶⁹ See Cook, *supra* note 13, at 299. See generally 133 CONG. REC. H8961 (daily ed. Oct. 22, 1987) (statement of Rep. Smith of Fla.).

⁷⁰ See ADAA § 7342.

⁷¹ See, e.g., ADAA § 7347 (requiring that deportation proceedings involving "aggravated felons" be completed, where possible, before release from incarceration); *id.* § 7343(a) (prohibiting release of "aggravated felons" on bond following release from incarceration); *id.* § 7347(c) (presumption of deportability for "aggravated felons"); *id.* § 7343(b) (making "aggravated felons" ineligible for voluntary departure); *id.* § 7349(a) (prohibiting "aggravated felons" from reapplying for admission for ten years after deportation).

⁷² See Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (codified as amended at 8 U.S.C. § 1101(a)(43)).

⁷³ See Immigration and Nationality Technical Corrections Act of 1994 (INTCA), Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4320-22 (codified as amended at 8 U.S.C. § 1101(a)(43)).

⁷⁴ See INTCA § 222(a); IMMACT § 501(a)(3).

⁷⁵ See IMMACT § 501(a)(5), (6).

⁷⁶ See Coonan, *supra* note 14, at 597, quoted in Cook, *supra* note 13, at 303.

comment proved prophetic when, in 1996, Congress passed two new immigration laws: the AEDPA⁷⁷ and the IIRIRA,⁷⁸ which not only broadened the reach of the provision, but also attached harsher immigration consequences to those already applicable.⁷⁹

The AEDPA redefined previously designated “aggravated felonies” to reach more noncitizens.⁸⁰ It further added to the aggravated felony roster not only serious offenses,⁸¹ but also numerous less serious offenses.⁸² Likewise, the IIRIRA added a number of crimes to the aggravated felony definition.⁸³ The IIRIRA, however, was far less forgiving than the AEDPA, as it decreased the sentencing threshold on a number of offenses to effectively extend the provision’s reach.⁸⁴ Additionally, the IIRIRA expanded the definition of conviction and the interpretation of “term of imprisonment” and “sentence,” thus increasing the number of noncitizens deportable under the aggravated felony provision.⁸⁵

⁷⁷ AEDPA, Pub. L. No 104–132, 110 Stat. 1214 (1996).

⁷⁸ IIRIRA, Pub. L. No. 104–208, 110 Stat. 3009–546 (1996).

⁷⁹ See Cook, *supra* note 13, at 305.

⁸⁰ See AEDPA § 440(e).

⁸¹ See, e.g., *id.* § 440(e)(8) (including obstruction of justice, perjury and subornation of perjury, bribery of a witness, and failure to appear to answer a felony charge punishable by two or more years).

⁸² See, e.g., *id.* § 440(e)(1) (adding transmission of wagering information as an aggravated felony); *id.* § 440(e)(2) (adding the transportation for purposes of prostitution as an aggravated felony); *id.* § 440(e)(4) (including falsely making, forging, or counterfeiting, mutilating or altering a passport as an aggravated felony); *id.* § 440(e)(7) (adding the offenses of improper entry or re-entry and misrepresentation or concealment of facts by one previously deported for an “aggravated felony”).

⁸³ See, e.g., IIRIRA, Pub. L. No. 104–208, § 321(a)(1), 110 Stat. 3009–546, 3009–627 (1996) (adding rape and sexual abuse of a minor to the aggravated felony provision).

⁸⁴ See, e.g., *id.* § 321(a)(3) (decreasing sentencing threshold of crimes of violence and theft and burglary offenses from five years to one year); *id.* § 321(a)(4), (10), (11) (lowering from five years to one year the potential term of imprisonment sufficient to make a number of offenses “aggravated felonies,” including RICO offenses; commercial fraud offenses; and obstruction of justice, perjury, subornation of perjury, and bribery of witnesses).

⁸⁵ See *id.* § 322(a). A conviction is found as long as:

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed. . . . Any reference to a term of imprisonment or a sentence . . . is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence.

The AEDPA and IIRIRA also intensified the consequences of being found to be deportable under the aggravated felony provision.⁸⁶ For example, the AEDPA barred judicial review of final deportation orders and eliminated the section 212(c) term of imprisonment threshold from the provision.⁸⁷ Restrictions under the IIRIRA were even more stringent. In addition to adopting AEDPA's legacy of denying judicial review of deportation orders⁸⁸ and discretionary relief to aggravated felons,⁸⁹ all noncitizens deported under the aggravated felony provision were permanently barred from reentering the United States.⁹⁰ The IIRIRA also imposed strict limitations on the eligibility of "aggravated felons" seeking asylum if their aggregate sentences equaled five years or more.⁹¹

In summary, the aggravated felony provision has transformed from a small category limited to the most serious of offenses to a broad and sweeping provision that permits banishment for even the most minor infractions.⁹² Of course, in 1995, Loeun Lun had no reason to think about such things, because the United States had not signed a repatriation agreement with Cambodia.⁹³ The next section looks at the events which led to the Repatriation Agreement.

C. *Indefinite Detention and the Case of Kim Ho Ma*

Before the signing of the Repatriation Agreement, the United States could not deport Cambodian refugees, even under the aggravated felony provision.⁹⁴ Instead, the INS detained certain foreign

⁸⁶ See Cook, *supra* note 13, at 303.

⁸⁷ See AEDPA § 440(a), (d). Before passage of the AEDPA, the aggravated felony provision barred section 212(c) discretionary relief only for those convicted of an aggravated felony and had served a minimum of five years in prison. See INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996). Section 212(c) allowed the Attorney General to waive deportation on grounds of humanitarian concerns. See *id.* With the elimination of the term of imprisonment threshold, the AEDPA effectively barred all lawful permanent residents from applying for relief under section 212(c) of the INA. See AEDPA § 440(d). Section 212(c) discretionary relief was repealed by IIRIRA and replaced by section 212(h), or cancellation of removal. See IIRIRA § 304(a), (b).

⁸⁸ See *id.* § 306(a).

⁸⁹ See *id.* § 348.

⁹⁰ See *id.* § 301(b).

⁹¹ See *id.* § 305(a).

⁹² See Prinz, *supra* note 64, at 207.

⁹³ See Sontag, *supra* note 1, at 106.

⁹⁴ See Thomas Ginsberg, *Refugees Who Do the Crime Do Time, Then Get Sent Back*, PHILA. INQUIRER, Aug. 14, 2002, at B1. Before the signing of the Repatriation Agreement, Cambodia had been one of four countries lacking deportation agreements with the United States. See *id.* The other countries are: Laos, Vietnam, and Cuba. See *id.* Currently, steps are

criminal nationals who were not deportable indefinitely beyond their criminal sentences, until they could be deported; Cambodian refugees convicted of aggravated felonies fell into this category.⁹⁵ This process of indefinite detention and the treatment of Cambodian aggravated felons changed after the U.S. Supreme Court decided the case of *Zadvydas v. Davis*.⁹⁶

Kim Ho Ma arrived in the United States as a Cambodian refugee in 1985.⁹⁷ As a teenager, Ma and three other members of a gang known as the Loko Asian Boyz were involved in the killing of another gang member, for which Ma was convicted of manslaughter in 1996.⁹⁸ After serving two years for his conviction, Ma was released to the INS, who ordered his deportation in light of his conviction of an “aggravated felony.”⁹⁹ Despite the order, however, the INS could not deport him within the ninety-day statutory period authorized for removal¹⁰⁰ because no repatriation agreement existed between the United States and Cambodia.¹⁰¹

Notwithstanding the inability to deport him, Ma remained in indefinite detention pursuant to Section 241(a)(6) of the INA,¹⁰² which provides that certain categories of noncitizens who have been ordered removed—namely, criminal noncitizens—may be detained beyond the ninety-day statutory period.¹⁰³ To justify his continued detention, the INS cited Ma’s violent disposition and his potential to violate the conditions of release, rationalizing these statements by underscoring his former gang membership, the nature of his crime, and his planned

being taken by the United States to secure deportation agreements with Laos and Vietnam. See Kermit Pattison, *Minnesota: Deportee Pact Ignites Wider Fear*, PIONEER PRESS (St. Paul), Aug. 11, 2002, available at <http://www.twincities.com/mld/pioneerpress/3835264.htm>; SEARAC discussion, *supra* note 9.

⁹⁵ See INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) (2000); see also Sontag, *supra* note 1, at 52 (describing Many Uch’s indefinite detention prior to *Zadvydas v. Davis*).

⁹⁶ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

⁹⁷ See App. to Pet. for Cert. at 56a, *Zadvydas* (No. 00–38).

⁹⁸ See *id.*

⁹⁹ See *Zadvydas*, 533 U.S. at 685.

¹⁰⁰ See 8 U.S.C. § 1231(a)(1)(A) (stating that, “[e]xcept as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days . . .”).

¹⁰¹ See *Ma v. Reno*, 208 F.3d 815, 819 (9th Cir. 2000), *vacated and remanded sub nom. Zadvydas*, 533 U.S. at 702.

¹⁰² Section 241(a)(6) of the INA states that any criminal alien “who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period . . .” 8 U.S.C. § 1231(a)(6).

¹⁰³ See *id.*; *Zadvydas*, 533 U.S. at 685–86.

participation in a prison hunger strike.¹⁰⁴ Upon the imposition of an order of indefinite detention, Ma filed a petition for habeas corpus relief in 1999, where a panel of federal trial judges found that Ma's detention violated his constitutional rights.¹⁰⁵ The Ninth Circuit affirmed the decision; later, the U.S. Supreme Court joined Ma's case as a companion case to *Zadvydas v. Davis*.¹⁰⁶

The INS's ability to detain indefinitely Cambodian Americans ended with the Supreme Court's decision in *Zadvydas*.¹⁰⁷ It held that the INA provision permitting indefinite or permanent detention of a noncitizen raised a serious constitutional threat to substantive due process.¹⁰⁸ Subsequently, to avoid constitutional conflict, the Court interpreted the statute to mean that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."¹⁰⁹ In Ma's case, the Court found no reasonable likelihood that he would be removed in the foreseeable future, due to the lack of a repatriation agreement between the United States and Cambodia.¹¹⁰ As a result, the Court vacated Ma's deportation order, and Ma remained free to live in the United States.¹¹¹

At the time of the *Zadvydas* decision, the United States was in the process of securing a repatriation agreement with the Cambodian government.¹¹² Immediately following the Supreme Court decision, however, the Bush administration, allegedly driven by anti-immigrant sentiments after September 11th, redoubled its negotiation efforts to pressure reluctant Southeast Asian countries to take back refugees who had committed crimes in America.¹¹³ Cambodian officials were reluc-

¹⁰⁴ See App. to Pet. for Cert. at 87a–89a, *Zadvydas* (No. 00–38).

¹⁰⁵ See 533 U.S. at 685–86. Ma was ordered released after the panel's decision. See *id.* at 686.

¹⁰⁶ See *id.* at 685.

¹⁰⁷ See *id.* at 702.

¹⁰⁸ See *id.* at 690.

¹⁰⁹ See *id.* at 699. But see *id.* at 706–07 (Kennedy, J., dissenting) (opining the majority's decision to go beyond the plain meaning of Section 241(a)(6) and therefore disregards Congress' intent).

¹¹⁰ See *Zadvydas*, 533 U.S. at 702.

¹¹¹ See *id.*

¹¹² See App. to Pet. for Cert. at 59a, *Zadvydas* (No. 00–38). By April 27, 2000, the United States and officials of the Royal Government of Cambodia had signed a joint statement detailing the principles of a repatriation agreement. See Joint Statement Between the Royal Government of Cambodia and the United States Government, Cambodian American National Council, available at <http://www.cancweb.org/canc/deportation.html> (last visited Sept. 28, 2004).

¹¹³ See, e.g., SEARAC discussion, *supra* note 9 (claiming that the September 11th attacks caused the U.S. government to look more suspiciously on all noncitizens); see also Sontag,

tant to sign an agreement allowing the United States to send back what they saw as young men made into criminals by the American way of life.¹¹⁴ Unconfirmed sources noted that the United States threatened to withhold American visas or stand in the way of international loans to Cambodia in order to expedite negotiation proceedings.¹¹⁵

On March 22, 2002, Cambodia capitulated to U.S. pressures and signed an agreement permitting the return of its nationals.¹¹⁶ Many decried this event.¹¹⁷ To the Cambodian-American community, the Repatriation Agreement felt “like an unanticipated punch in the gut.”¹¹⁸ Cambodian Americans felt that American officials could now break up families like the Khmer Rouge had done in Cambodia over twenty-five years ago.¹¹⁹ As of November 2003, sixty-seven of the 1,600 Cambodian Americans deportable under the Repatriation Agreement have been repatriated.¹²⁰

The real tragedy of the deportation of Cambodian refugees is that the majority of those deported have little or no connection to contemporary Cambodia; everything they know that made their lives worthwhile is in the United States.¹²¹ What little knowledge they do have of Cambodia consist of the nightmares or stories of cruelty and starvation under the Khmer Rouge and the “Killing Fields” massacre of more than two million people.¹²² Many cannot speak Khmer, much less read or write the language.¹²³ Others were born in refugee camps in Thailand, and have never even set foot in Cambodia.¹²⁴ Still others entered the United States as infants.¹²⁵ Most have lived in the United States for most of their lives and are products of an American environment.¹²⁶ Except for lacking U.S. citizenship status, most are best described as simply American.¹²⁷

supra note 1, at 52 (stating the Bush administration, soon after September 11th, doubled its efforts to negotiate repatriation agreements with Cambodia).

¹¹⁴ See Sontag, *supra* note 1, at 52.

¹¹⁵ See *id.*

¹¹⁶ See Repatriation Agreement, *supra* note 8.

¹¹⁷ See Ginsberg, *supra* note 94; Pattison, *supra* note 94; Sontag, *supra* note 1, at 50; *Legal Arguments*, *supra* note 28; SEARAC discussion, *supra* note 9.

¹¹⁸ See Sontag, *supra* note 1, at 106.

¹¹⁹ See *id.* at 50.

¹²⁰ See *id.* at 50, 52.

¹²¹ See Bill Ong Hing, *Deported for Shoplifting?*, WASH. POST, Dec. 29, 2002 at B7.

¹²² See *id.*; Sontag, *supra* note 1, at 105–06.

¹²³ See Hing, *supra* note 121, at B7.

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See *id.*

In addition to returning to a country with which they have little or no connection, many deportees face incarceration by the Cambodian government.¹²⁸ Upon the consummation of the repatriation agreement, Prime Minister of Cambodia Hun Sen declared that the government would lock up every returnee indefinitely.¹²⁹ Although this has not happened, one Cambodian official has stated that the government looks at the deportees with apprehension, seeing them as hardened criminals rather than people of good quality.¹³⁰ Unsurprisingly, when Loeun and ten other deportees arrived in Phnom Penh, they were immediately taken into custody and locked up in a detention center.¹³¹

Had they known about the imminence of a repatriation agreement between the United States and Cambodia, it is likely that many of the Cambodian Americans now facing deportation would have opted for trial rather than a plea bargain.¹³² One commentator notes, "People are often told, 'Why don't you just sign this agreement, they are never going to have [a deportation] agreement with Cambodia—and essentially you will be set free under supervised release.'"¹³³ In effect, the majority of Cambodian Americans facing criminal charges chose plea bargaining over a lengthy legal battle because of the lack of a deportation agreement.¹³⁴ Sokha Sun, a Cambodian refugee living in Tacoma, Washington, was one of those people.¹³⁵ Now 25 years old, he currently faces deportation on aggravated felony grounds for a gun possession conviction he had plea-bargained to in 2001.¹³⁶ It is likely that if a deportation agreement had existed at the time, Sokha would have chosen to go to trial in order to stay in the United States.¹³⁷

¹²⁸ See Sontag, *supra* note 1, at 52.

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See *id.* at 98.

¹³² *Id.* at 106–07; Chris McGann, *Refugees with a Record Face Shock—Deportation: A New Agreement Paves the Way for the U.S. to Send Many People Back to Cambodia*, SEATTLE POST-INTELLIGENCER, June 14, 2002, at A1, available at http://seattlepi.nwsource.com/lo-cal/74648_cambodia14.shtml. A conviction is required for a noncitizen to be deported under the aggravated felony provision, which a noncitizen will receive should he or she choose to plea bargain. See INA § 101(a)(48), 8 U.S.C. § 1101(a)(48) (2000).

¹³³ See McGann, *supra* note 132.

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See *id.*

Indeed, these recent events have come as a shock to the 170,000 members of the Cambodian-American community.¹³⁸ Most members, like Sokha Sun and Loenun Lun, are eligible for U.S. citizenship status, but have neglected to file the necessary paperwork.¹³⁹ Since the signing of the agreement, however, a number of advocates have begun to take action to counter its effects.

II. CURRENT LEGAL THEORIES FOR CAMBODIANS IN DEPORTATION PROCEEDINGS

In response to the consummation of the Repatriation Agreement, advocates developed two legal theories to attempt to stop the deportation of Cambodians.¹⁴⁰ The Refugee Waiver Theory argues that a refugee¹⁴¹ retains refugee status even after adjustment to lawful permanent resident (LPR) status¹⁴² pursuant to INA section 209.¹⁴³ This provision entitles a refugee to waive some of the traditional bars to remaining in the United States, including deportation.¹⁴⁴ Second, the U.S. National Theory, a refugee who loses refugee status through adjustment under INA section 209, instead becomes a U.S. national.¹⁴⁵ Thus, the former refugee is not an alien, and is thereby ineligible for deportation.¹⁴⁶

¹³⁸ See Ginsberg, *supra* note 94; Seth Mydans, *Cambodians Forced from U.S., Caught in Limbo: Convicted Immigrants Back in Country They Know Little About*, S.F. CHRON., Aug. 11, 2002, at A16.

¹³⁹ See Mydans, *supra* note 138. A possible explanation why so many Cambodians have not obtained U.S. citizenship is because they—like many in the Southeast Asian refugee community—have little formal education, remain unaware of their rights and responsibilities under American law, and consequently do not understand the protections that only citizenship could offer them and their refugee children. *Cf.* Sontag, *supra* note 1 (explaining the socioeconomic failure of Cambodian refugees in the United States).

¹⁴⁰ See *Legal Arguments*, *supra* note 28. Advocates include the Khmer Institute, the Immigrant Rights Clinic of NYU School of Law, and the Khmer Freedom Project of CAAAV: Organizing Asian Communities. *See id.*

¹⁴¹ See INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2000) (classifying a refugee as a person who is unable to return to one's country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .").

¹⁴² *See id.* § 1101(a)(20).

¹⁴³ *See id.* § 1159(c).

¹⁴⁴ *See id.*

¹⁴⁵ *See id.* § 1101(a)(22).

¹⁴⁶ *See id.* §§ 1101(a)(3), 1227(a) (stating that only aliens are subject to deportation, where an alien is defined as not a citizen or national of the United States).

A. Refugee Waiver Theory

Under the Refugee Waiver Theory, an individual entering¹⁴⁷ the United States as a refugee retains refugee status even after his or her adjustment to LPR status under section 209(a);¹⁴⁸ in effect, the individual holds dual status.¹⁴⁹ Thus, a refugee's status does not end unless specifically terminated by the INS as required by law.¹⁵⁰ This dual status entitles refugees to waive, pursuant to INA § 209(c), some of the traditional bars to remaining in the United States.¹⁵¹ This waiver, however, is usually applied to refugees adjusting their status for the first time, which is generally done one year after their entry.¹⁵² Nevertheless, the language of the INA allows the waiver to be applied to refugees even after adjustment of status.¹⁵³ INA § 209(c) waivers are granted specifically "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."¹⁵⁴

International human rights law concerning refugees' rights supports this contention.¹⁵⁵ The Refugee Act of 1980¹⁵⁶ was meant to conform United States immigration law to the Refugee Convention,¹⁵⁷ with which the United States had earlier agreed to comply by acceding to the Refugee Protocol.¹⁵⁸ Additionally, the U.S. Supreme Court recognized that, with the Refugee Act of 1980, Congress intended to

¹⁴⁷ There are two methods by which an individual noncitizen may be admitted under refugee status. See 8 U.S.C. §§ 1157, 1158, 1231(b)(3). Noncitizens overseas may enter the United States under refugee status pursuant to INA § 207. See *id.* § 1157. Noncitizens already within the United States, however, may adjust their status to a refugee under INA §§ 208 and 241(b)(3). See *id.* §§ 1158, 1231(b)(3). The INA definition of refugee status imposes no temporal limitation. See *id.* § 1101(a)(42)(A).

¹⁴⁸ See *id.* § 1159(a).

¹⁴⁹ See Government's Answering Brief at *9, *Sun v. Ashcroft*, 370 F.3d 932 (9th Cir. 2004) (No. 02-36132), available at 2003 WL 22593676; *Legal Arguments, supra* note 28.

¹⁵⁰ See 8 C.F.R. § 207.9 (2004); *Legal Arguments, supra* note 28.

¹⁵¹ See 8 U.S.C. § 1159(c); *Legal Arguments, supra* note 28.

¹⁵² *Legal Arguments, supra* note 28.

¹⁵³ See 8 U.S.C. § 1159; *Legal Arguments, supra* note 28.

¹⁵⁴ 8 U.S.C. § 1159.

¹⁵⁵ See Refugee Protocol, *supra* note 24; Refugee Convention, *supra* note 24.

¹⁵⁶ See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) [hereinafter Refugee Act].

¹⁵⁷ See Refugee Convention, *supra* note 24. By acceding to the Refugee Protocol on Jan. 31, 1967, the United States became subject to the Refugee Convention. See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 U.S. Treaty]. The Refugee Protocol requires all signatory nations to comply with the substantive conditions of Articles 2 through 34 of the Refugee Convention as they pertain to "refugees" as defined by Article 1.2 of the Protocol. See Refugee Protocol, *supra* note 24, at art. 1.1; *INS v. Stevic*, 467 U.S. 407, 416-17 (1984).

¹⁵⁸ See Refugee Protocol, *supra* note 24, at art. 1.

realign U.S. refugee law to comport with the terms of the Refugee Convention.¹⁵⁹

Article 32 of the Convention declares that “[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.”¹⁶⁰ Thus, absent concerns of national security or public order, a recognized refugee has license to remain in the United States until his refugee status is terminated, regardless of the existence or nature of a criminal record.¹⁶¹ Moreover, the Refugee Convention allows the termination of refugee status in only limited circumstances.¹⁶² For instance, an individual may lose refugee status by acquiring a new nationality, or by voluntarily re-establishing residency in the home country where persecution was previously feared.¹⁶³ Additionally, changes in the country where persecution was feared could lead to termination of refugee status.¹⁶⁴

The INS contends that a refugee’s adjustment to LPR status, automatically terminates refugee status.¹⁶⁵ U.S. courts interpreting the provisions of U.S. refugee law, however, often afford controlling weight to the interpretation of the Refugee Convention provided by the United Nations High Commissioner for Refugees (UNHCR).¹⁶⁶ The

¹⁵⁹ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (stating that “[i]f one thing is clear from the legislative history of the new definition of ‘refugee’, and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the [Refugee Convention], to which the United States acceded in 1968”); *Stevic*, 467 U.S. at 416–17.

¹⁶⁰ Refugee Convention, *supra* note 24, at art. 32.

¹⁶¹ See *id.*; *Legal Arguments*, *supra* note 28.

¹⁶² See Refugee Convention, *supra* note 24, at art. 1(C).

¹⁶³ *Id.* at art. 1(C)(1)–(4).

¹⁶⁴ See *id.* at art. 1(C)(5)–(6); OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEES STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 136 (1992) [hereinafter UNHCR HANDBOOK].

¹⁶⁵ See, e.g., *In re Bahta*, 22 I. & N. Dec. 1381, 1382 n.2 (BIA 2000) (noting that the status of a refugee terminates upon adjustment to LPR status).

¹⁶⁶ See, e.g., *Cardoza-Fonseca*, 480 U.S. at 439 n.22 (1987) (stating that “[t]he Handbook provides significant guidance” in the interpretation of the Convention); U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, THE BASIC LAW MANUAL: U.S. LAW AND INS REFUGEE/ASYLUM ADJUDICATIONS 13 (1994) (finding that “[t]he federal courts and the Board frequently cite the [UNHCR Handbook] with approval. Asylum officers and immigration judges may also do so, to the extent that the [UNHCR Handbook] does not conflict with United States laws or regulations”). *But see* *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427–28 (1999) (opining that, although the [UNHCR] Handbook may be a useful interpretative aid, it is not binding on the Attorney General, the BIA, or United States courts). Indeed, the Handbook itself disclaims such force, explaining that “the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is

UNHCR's interpretation of the Refugee Convention bars the argument that acquisition of LPR status in the country of asylum terminates a person's refugee status.¹⁶⁷ According to the UNHCR Handbook, "the cessation clauses are negative in character and are exhaustively enumerated. They should therefore be interpreted restrictively, and no other reasons may be adduced by way of an analogy to justify the withdrawal of refugee status."¹⁶⁸ Therefore, once determined, refugee status is maintained and the country of asylum is obligated to protect the refugee.¹⁶⁹ In a recent opinion letter, the UNHCR confirmed that an individual's refugee status does not cease or terminate upon acquisition of LPR status in the asylum country.¹⁷⁰

Nor does it necessarily follow that changed conditions in the home country will lead to the cessation of refugee status.¹⁷¹ The UNHCR handbook states:

It is frequently recognized that a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in the view of his past experience, in the mind of the refugee.¹⁷²

This statement is particularly germane to Loeun Lun and other deportable Cambodian refugees, whose most enduring memories of Cambodia consist of their mothers and aunts being tortured and left to die.

The Refugee Waiver theory contends that under 8 C.F.R. § 207.9, the INS must terminate the status of a refugee before commencing removal proceedings.¹⁷³ The regulation provides that termination of refugee status necessitates a determination that the person was not in

incumbent upon the Contracting State in whose territory the refugee finds himself." *Id.* at 427–28 (internal punctuation omitted).

¹⁶⁷ See, e.g., *Cardoza-Fonseca*, 480 U.S. at 439 n.22.

¹⁶⁸ See UNHCR HANDBOOK, *supra* note 164, ¶ 116. The cessation clauses deal with the procedures and criteria by which a person loses refugee status. See *id.* ¶ 111.

¹⁶⁹ See *Legal Arguments*, *supra* note 28.

¹⁷⁰ See *Becoming LPR Does Not Terminate Refugee Status*, UNHCR Says, 80 No. 11 INTERPRETER RELEASES 413, 413 (Mar. 17, 2003).

¹⁷¹ See Petitioner's Reply to INS Habeas Return and Motion to Dismiss at 14 n.14, *Sun v. Coleman* (W.D. Wash. 2002) (No. C02–1311Z).

¹⁷² UNHCR HANDBOOK, *supra* note 164, ¶ 136.

¹⁷³ See 8 C.F.R. § 207.9 (2004); *Legal Arguments*, *supra* note 28.

fact a refugee as defined by the INA.¹⁷⁴ Consequently, INS efforts to deport a refugee without first terminating his or her refugee status as 8 C.F.R. § 207.9 requires would violate the Refugee Convention and the U.S. immigration laws and regulations which implement the Convention's dictates.¹⁷⁵

Professor Robert Pauw, of the Western District of Washington recently tested this theory in the case of *Sun v. Ashcroft*.¹⁷⁶ The petitioner, Sokha Sun, was a 24-year-old Cambodian citizen who had entered the United States in 1979 as a refugee and had adjusted to LPR status four years later.¹⁷⁷ In 2001, immigration officials began deportation proceedings against him because of a conviction for possession of a stolen firearm.¹⁷⁸

Among other assertions, Sun argued that, because his status as a refugee had not been terminated as required by 8 C.F.R. § 207.9, his deportation order violated the Refugee Convention.¹⁷⁹ The government refuted the argument by claiming that Sun's status as a refugee terminated when his status was adjusted to that of an LPR.¹⁸⁰ Ultimately, the Western District of Washington rejected the theory that a person retains refugee status even after adjusting to LPR status.¹⁸¹ In her decision, Magistrate Judge Monica Benton concluded that current immigration statutes supported the automatic termination of Sun's refugee status due to his adjustment to LPR status.¹⁸² Moreover, Judge Benton noted that because "[b]oth respondents and petitioner concede that [Sun] was a valid refugee at the time of his admission," 8

¹⁷⁴ See INA §§ 101(a)(42), 207(c)(4), 8 U.S.C. §§ 1101(a)(42), 1157(c)(4) (2000); 8 C.F.R. § 207.9; *Legal Arguments*, *supra* note 28.

¹⁷⁵ See Refugee Act, *supra* note 156; Refugee Protocol, *supra* note 24; Refugee Convention, *supra* note 24; 8 C.F.R. § 207.9; *Legal Arguments*, *supra* note 28.

¹⁷⁶ See Report and Recommendation at 6, *Sun v. Ashcroft* (W.D. Wash. 2002) (No. C02-1311Z).

¹⁷⁷ See INS Habeas Return & Motion to Dismiss at 2, *Sun v. Coleman* (W.D. Wash. 2002) (No. C02-1311Z); see also 8 U.S.C. §§ 1101(a)(20), 1101(a)(42)(A), 1158(c), 1159(a) (defining the status of refugee and lawful permanent resident (LPR) and procedures to attain such status).

¹⁷⁸ See INS Habeas Return & Motion to Dismiss at 2-3, *Sun v. Ashcroft* (No. C02-1311Z). Later, INS cited a previous theft offense committed by Sun as additional grounds for deportation. See *id.* at 3.

¹⁷⁹ See Report and Recommendation at 9, *Sun v. Ashcroft* (No. C02-1311Z).

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *id.* But see Opening Brief of Petitioner at *13-*14, *Sun v. Ashcroft*, 370 F.3d 932 (9th Cir. 2004) (No. 02-36132), available at 2003 WL 22593675 (arguing that under the same immigration statutes, particularly 8 C.F.R. § 223.1(b), a permanent resident may also be identified as a refugee).

C.F.R. § 207.9 did not apply, as the statute only addressed those non-citizens who were “not . . . refugee[s] within the meaning of section 101(a)(42) of the Act at the time of admission.”¹⁸³

B. U.S. National Theory

In contrast, the Khmer Institute’s proposed U.S. National Theory remains untested. The theory, asserts that Cambodians who entered the United States as refugees and admitted lawfully for permanent residence under INA § 209(a) are U.S. nationals and thus not deportable.¹⁸⁴ Only “aliens” as defined by the INA are subject to deportation from the United States.¹⁸⁵ The INA states that an alien is “any person not a citizen or national of the United States.”¹⁸⁶ It defines a U.S. national, however, as a “person who, though not a citizen of the United States, owes permanent allegiance to the United States.”¹⁸⁷ Therefore, refugees such as Loeun Lun would be undeportable if they show that they became U.S. nationals upon adjusting to LPR status.¹⁸⁸

The INS and Department of Justice assert, however, that other than citizens, only individuals born in the U.S. territories can be classified as nationals, and U.S. courts traditionally have agreed.¹⁸⁹

¹⁸³ See Report and Recommendation at 9, *Sun v. Ashcroft* (No. C02–1311Z). The Ninth Circuit Court of Appeals recently issued its opinion in *Sun’s* matter. See *Sun v. Ashcroft*, 370 F.3d 932, 941–43 (9th Cir. 2004). It concluded that, pursuant to INA section 242(d), *Sun’s* failure to raise the Refugee Waiver theory at the administrative INS level, barred him from bringing the argument forth in his *habeas* petition. See *Sun v. Ashcroft*, 370 F.3d at 943; see also INA § 242(d), 8 U.S.C. § 1252(d) (2000) (stating that, “[a] court may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right . . .”). The court, however, made a poignant observation of the lopsided proportionality of *Sun’s* punishment for his deportable transgression, but nonetheless concluded that it was not in their province to pass on the wisdom of the INS’s actions, an echo of the precedents established in the *Chinese Exclusion Case* and *Fong Yue Ting v. United States*. See *Sun v. Ashcroft*, 370 F.3d at 944–45.

¹⁸⁴ See INA §§ 101(a)(22), 209(a), 8 U.S.C. §§ 1101(a)(22), 1159(a) (2000); *Legal Arguments*, *supra* note 28.

¹⁸⁵ See 8 U.S.C. § 1227(a); *Legal Arguments*, *supra* note 28.

¹⁸⁶ 8 U.S.C. § 1101(a)(3).

¹⁸⁷ *Id.* § 1101(a)(22). As this Note will make clear, the United States maintains a narrow definition of a national, stating that, other than citizens, only persons born on U.S. territories can be classified as nationals. See *infra* note 189. However, under international law, specifically the Refugee Convention and Refugee Protocol, a refugee may be classified as a U.S. national upon choosing to permanently resettle in the United States. See Refugee Protocol, *supra* note 24; Refugee Convention, *supra* note 24; *Legal Arguments*, *supra* note 28.

¹⁸⁸ *Legal Arguments*, *supra* note 28.

¹⁸⁹ See, e.g., *Hughes v. Ashcroft*, 255 F.3d 752, 757 (9th Cir. 2001) (stating that only a few exceptions exist for a person born outside the United States to qualify for “national” status); *Oliver v. U.S. Dep’t of Justice*, 517 F.2d 426, 427–28 (2d Cir. 1975) (concluding

They have concluded that, in order for a person born outside the United States to qualify for “national” status, he or she must, at a minimum, demonstrate either birth in a U.S. territory or, in some jurisdictions, apply for U.S. citizenship.¹⁹⁰ As interpreted by the courts, the concept of owing allegiance for nationality purposes is narrowly defined and devoid any emotion or human sentiment; long-term residency and a personal claim or belief that one “owes allegiance” are insufficient.¹⁹¹ A person such as Loeun Lun, despite having lived in the United States since childhood, would in all likelihood be disqualified by the courts for national status.¹⁹² Instead, he or she would be a national of his or her country of birth, simply as a consequence of neglect rather than deliberate purpose.¹⁹³

noncitizen did not qualify for national status, regardless of her emotional allegiance to the United States); *Cabebe v. Acheson*, 183 F.2d 795, 797 (9th Cir. 1950) (opining that U.S. nationality may be acquired through birthplace or by naturalization).

¹⁹⁰ *Hughes*, 255 F.3d at 757. Some jurisdictions have found that a noncitizen could swear permanent allegiance to the United States by completing an application for naturalization. See *Lee v. Ashcroft*, 216 F. Supp. 2d 51, 58–59 (E.D.N.Y. 2002); *Shittu v. Elwood*, 204 F. Supp. 2d 876, 880 (E.D. Pa. 2002); *Hughes*, 255 F.3d at 757; see also *United States v. Morin*, 80 F.3d 124, 126 (4th Cir. 1996) (finding an application for citizenship to be the most compelling evidence of permanent allegiance to the United States short of citizenship itself). But see *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 971 (9th Cir. 2003) (finding that simply completing application for naturalization did not qualify a noncitizen for U.S. national status). However, the existence of an application for naturalization is not conclusive if contradicted by other evidence showing the applicant’s lack of allegiance. See *Shittu*, 204 F. Supp. 2d at 880–81. For example, the Eastern District of Pennsylvania refused to extend the status of national to a permanent resident who had applied for naturalization, but was later convicted of intent to distribute heroin and sentenced to thirty-seven months in prison. See *id.* The court found that the petitioner’s “aggravated felony” conviction sufficiently refuted other evidence of permanent allegiance, stating that the conviction demonstrated that his professed allegiance was no more than a convenient cover for illegal activity. See *id.*

¹⁹¹ See *Oliver*, 517 F.2d at 427–28; see also *United States v. Sotelo*, 109 F.3d 1446, 1448 (9th Cir. 1997) (finding a noncitizen’s subjective belief of allegiance owed to the United States to be an insufficient basis for his national status); *Sierra-Reyes v. INS*, 585 F.2d 762, 764 (5th Cir. 1978) (finding that a noncitizen’s claim to citizenship based on long U.S. residency and absence of allegiance to any other country were inadequate to confer status of national, where the individual had never filed a petition for naturalization); *Carreon-Hernandez v. Levi*, 409 F. Supp. 1208, 1210 (D. Minn. 1976), *aff’d* 543 F.2d 637 (8th Cir. 1976) (finding the petitioner deportable because, although he had lived and worked in the United States for over twenty years, was married to a U.S. citizen, and the parent of a U.S. citizen child, he had never undergone the naturalization process).

¹⁹² See *Oliver*, 517 F.2d at 427–28.

¹⁹³ See, e.g., *id.* (finding a noncitizen’s length of residence and “emotional” allegiance to be insufficient to qualify her for national status, and that she consequently swore allegiance to her birth country, albeit owing to neglect rather than intention).

The definition of national, however, is arguably more expansive than the government's current position. For example, certain individuals deemed nationals have also applied for and been denied citizenship.¹⁹⁴ In the Eastern District of New York, the court ruled that a noncitizen born outside the United States and its territories qualified as a U.S. national.¹⁹⁵ Yuen Shing Lee was a Hong Kong national who had entered the United States as a child, and had lived in the country as an LPR for nearly thirty years.¹⁹⁶ His wife was a U.S. citizen, both of his parents were naturalized citizens, and he had two children.¹⁹⁷ He possessed no ties to Hong Kong.¹⁹⁸

In 1999, Lee was convicted of mail fraud, a crime the INA defined as an aggravated felony, and the INS initiated deportation proceedings in 2000.¹⁹⁹ To defend against his deportation, Lee argued that he not an alien, but a U.S. national, and thus undeportable, as he had not only sworn permanent allegiance to the United States when he filed an application for citizenship in 1998, but had also registered for the Selective Service in 1980.²⁰⁰ The court agreed with Lee's contention, and held that these two acts were objectively sufficient to demonstrate his allegiance to the United States.²⁰¹

This rationale could be broadened to apply to refugees who have resettled permanently in the United States.²⁰² In other words, by choosing to adjust to LPR status, a refugee objectively demonstrates permanent allegiance to the United States.²⁰³ A combination of U.S. immigration and international human rights law pertaining to refugee status provide support for this theory.²⁰⁴ The United States, having acceded to the Refugee Protocol in 1967, has given legal effect to the Refugee Convention, which governs the status and treatment of refugees.²⁰⁵

¹⁹⁴ See *Lee*, 216 F. Supp. 2d at 58–59; *Shittu*, 204 F. Supp. 2d at 880.

¹⁹⁵ See *Lee*, 216 F. Supp. 2d at 58–59.

¹⁹⁶ See *id.* at 53.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See *Lee*, 216 F. Supp. 2d at 57, 58.

²⁰¹ See *id.* at 58. However, the Ninth Circuit Court of Appeals was not persuaded by the Eastern District of New York's opinion, reasoning that *Lee* focused on the commonsense meaning of allegiance to the United States and failed to consider other clues as to the meaning of national of the United States. See *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 972 (9th Cir. 2003).

²⁰² See *Lee*, 216 F. Supp. 2d at 58; Refugee Protocol, *supra* note 24; Refugee Convention, *supra* note 24; *Legal Arguments*, *supra* note 28.

²⁰³ See *Legal Arguments*, *supra* note 28.

²⁰⁴ See *id.*

²⁰⁵ See 1967 U.S. Treaty, *supra* note 157; Refugee Convention, *supra* note 24.

Specifically, under the Refugee Protocol, two models of acceptance and treatment of refugees exist that signatories of the Protocol may employ.²⁰⁶

The first grants temporary residency until a refugee reasserts or safely reacquires his or her former nationality.²⁰⁷ Under this model, a person maintains refugee status and the Protocol's protection until the person either returns voluntarily or re-avails him or herself of the nation's protections.²⁰⁸ The temporary nature of refugee status could lead to the inference that the refugee continues to swear permanent allegiance to the country of origin.²⁰⁹ Thus, an argument under the first model would be unhelpful to a refugee in Loeun's situation.²¹⁰

The second model, which seeks to grant permanent resettlement to refugees, is the core of the U.S. national theory.²¹¹ Under this model, refugee status ceases where a refugee has acquired a new nationality and enjoys the protections of the new country.²¹² Stated otherwise, the refugee's decision to reside permanently in the country of asylum implies the giving of his or her permanent allegiance to the new country of residence.²¹³ Similar to the objective criteria put forth in *Lee v. Ashcroft*, a refugee who adjusts to LPR status under the INA has objectively demonstrated allegiance to the United States.²¹⁴

As aforementioned, precedent and legislative history each support the notion that U.S. immigration law concerning refugees is meant to comport with the Refugee Protocol.²¹⁵ Current U.S. immigration law requires refugees to adjust their status to that of an LPR after one year of residing in the United States.²¹⁶ Furthermore, the Board of Immigration Appeals (BIA), which adjudicates immigration matters for the INS, has found that the moment that a refugee makes the adjustment, the refugee loses his status.²¹⁷ Thus, compliance with the Refugee Protocol, to which the United States is a signatory, indicates that a refugee can be divested of refugee status and the protec-

²⁰⁶ See *Legal Arguments*, *supra* note 28; Refugee Protocol, *supra* note 24.

²⁰⁷ See *Legal Arguments*, *supra* note 28.

²⁰⁸ *Id.*

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ See *id.*

²¹² *Legal Arguments*, *supra* note 28.

²¹³ See *id.*

²¹⁴ See 216 F. Supp. 2d 51, 58–59 (E.D.N.Y. 2002); *Legal Arguments*, *supra* note 28.

²¹⁵ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987); *INS v. Stevic*, 467 U.S. 407, 416–17 (1984).

²¹⁶ See INA § 209(a), 8 U.S.C. § 1159(a) (2000).

²¹⁷ See *In re Bahta*, 22 I. & N. Dec. 1381, 1382 n.2 (BIA 2000).

tions of the Refugee Protocol only if the refugee either returns to the home country or acquires a new nationality.²¹⁸

For two reasons, the latter condition could apply to refugees who are adjusting to LPR status under U.S. law.²¹⁹ First, refugees who permanently resettle in the United States fit the definition of national under INA § 101(a)(22);²²⁰ second, any ambiguity in INA § 101(a)(22) must be resolved to grant national status to prevent conflict with the Protocol.²²¹ Consequently, by insisting that refugees lose their status when they adjust, the only way for U.S. law to be consistent with the Protocol is if those refugees who adjust status to LPR become nationals.²²²

Therefore, consistent with the second model, the United States must grant U.S. national status to refugees who choose permanent resettlement and adjust their status to that of an LPR.²²³ The INS, however, persists in limiting those eligible for national status to individuals born on U.S. territories.²²⁴ By refusing to grant national status to refugees who choose permanent resettlement, the United States refuses to comport with the international obligations to which it has acceded under the Refugee Protocol.²²⁵

Essentially, the two legal theories developed to prevent the deportation of Cambodian refugees posit the idea that the United States' refusal to adhere to the principles advanced by the Refugee Convention and Refugee Protocol contravenes international human rights law.²²⁶ Therefore, the deportation of Cambodian refugees violates international human rights.²²⁷ As the theories suggest, however, the United States can avoid such conflict by construing U.S. immigra-

²¹⁸ See Refugee Protocol, *supra* note 24; *Legal Arguments*, *supra* note 28. One can see that unlike the Refugee Waiver theory, which argues that the refugee retains refugee status, a pleading under the U.S. National theory requires the person to admit that refugee status has been terminated. See *Legal Arguments*, *supra* note 28.

²¹⁹ See *id.*

²²⁰ See 8 U.S.C. § 1101(a)(22) (defining, in part, a "national of the United States" to mean a person who, though not a citizen of the United States, owes permanent allegiance to the United States); *Legal Arguments*, *supra* note 28.

²²¹ *Legal Arguments*, *supra* note 28.

²²² *Id.*

²²³ See *id.*

²²⁴ See *Legal Arguments*, *supra* note 28. Of course, U.S. citizens already possess the status of U.S. nationals. The Ninth Circuit Court of Appeals has agreed with this interpretation. See, e.g., *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 972 (9th Cir. 2003) (maintaining that a U.S. national as defined under the INA is generally either a U.S. citizen or a person born in territories of the United States).

²²⁵ See *Legal Arguments*, *supra* note 28.

²²⁶ See *id.*; Refugee Protocol, *supra* note 24; Refugee Convention, *supra* note 24.

²²⁷ See *Legal Arguments*, *supra* note 28.

tion law differently.²²⁸ Specifically, by focusing on ambiguities within U.S. immigration law, particularly the definition of a U.S. national and the process of refugee status termination, the United States can avoid international human rights violations.²²⁹ Avoidance of conflict with international law might then be gained simply by eliminating these ambiguities.²³⁰ However persuasive these arguments may be, courts are limited in their implementation of them.

C. *Problems with the Current Theories*

Despite their compelling nature, both theories rely in part on the contention that the United States is actually bound by international law with respect to Congress' plenary power to regulate immigration.²³¹ Yet while it is apparent that the harshness that U.S. immigration law imposes on Cambodian refugees violates the Refugee Convention and Refugee Protocol, United States courts have traditionally been notoriously reluctant to incorporate international norms into their interpretation of domestic laws.²³²

In fact, courts have held consistently that Congress has the plenary power to regulate matters concerning immigration and is not bound by international law;²³³ Congress may even legislate contrary to the limits imposed by international law.²³⁴ Indeed, the Supreme Court has held that, notwithstanding Congress' intent to compel compli-

²²⁸ *See id.*

²²⁹ *See id.*

²³⁰ *See id.*

²³¹ *See id.*

²³² *See, e.g.,* Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 417–20 (2000) (suggesting that the restrictive approach employed by U.S. courts may be ending).

²³³ *See, e.g.,* *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (holding that it is an “accepted maxim of international law, that every sovereign nation has the power . . . to forbid the entrance of foreigners”); *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889) (concluding that “the United States, in their relation to foreign countries and their subjects of citizens are one nation, invested with powers which belong to independent nations”).

²³⁴ *See Ma v. Ashcroft*, 257 F.3d 1095, 1114 n.30 (9th Cir. 2001) (stating that “within the domestic legal structure, international law is displaced by a properly enacted statute, provided it be constitutional, even if that statute violates international law”); *Alvarez-Mendez v. Stock*, 941 F.2d 956, 963 (9th Cir. 1991); *United States v. Aguilar*, 883 F.2d 662, 679 (9th Cir. 1989) (holding that “[i]n enacting statutes, Congress is not bound by international law; if it chooses to do so, it may legislate contrary to the limits posed by international law”); *accord Galo-Garcia v. INS*, 86 F.3d 916, 918 (9th Cir. 1996) (finding that since Congress has enacted an extensive legislative scheme for the admission of refugees, customary international law is inapplicable).

ance with the Refugee Convention and Protocol by way of the Refugee Act of 1980, the United States is not bound to follow the interpretations of the Refugee Convention provided by international bodies such as the UNHCR.²³⁵ As the Supreme Court stated in *INS v. Aguirre-Aguirre*: “The [UNHCR] Handbook may be a useful interpretive aid, but it is not binding on the Attorney General, the BIA, or United States courts.”²³⁶

Also problematic is the fact that, although it has neither defined unequivocally a U.S. national nor determined the process by which refugee status is terminated, Congress did not desire for such exceptions to be carved out of the INA.²³⁷ Under the plenary power doctrine, courts defer to Congress in setting U.S. immigration law and policy.²³⁸ In *Perdomo-Padilla v. Ashcroft*, for example, the Ninth Circuit expounded on the INA’s definition of a U.S. national, and found that Congress implicitly intended for the U.S. national status to apply to persons born on territories of the United States.²³⁹

Not all circuits follow the Ninth Circuit’s supposition, however, pointing out that the statute’s definition does not, on its face, limit the status to persons born on U.S. territories.²⁴⁰ In *Lee v. Ashcroft*, the Second Circuit held that a Hong Kong-born noncitizen qualified as a U.S. national, implicitly because Congress did not explicitly express an intention to limit the status to persons born on U.S. territories.²⁴¹

Nevertheless, implementation of either theory carves out an exception in U.S. immigration law that could provide certain rights to thousands of lawful permanent residents to whom Congress had not intended to advance rights to.²⁴² Cambodian refugee advocates will find it difficult to implement these theories in the face of such resistance and limits. However, the recent federal district court decisions of *Beharry* and *Maria*, holding that U.S. courts are legally obligated to

²³⁵ *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427–28 (1999).

²³⁶ *Id.* (internal punctuation omitted).

²³⁷ See *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 966–69 (9th Cir. 2003); Government’s Answering Brief at *16–*19, *Sun v. Ashcroft*, 370 F.3d 932 (9th Cir. 2004) (No. 02–36132), available at 2003 WL 22593676.

²³⁸ See, e.g., *Ekiu*, 142 U.S. at 659; *The Chinese Exclusion Case*, 130 U.S. at 604.

²³⁹ See *Perdomo-Padilla*, 333 F.3d at 969–70.

²⁴⁰ See *Lee v. Ashcroft*, 216 F. Supp. 2d 51, 57–59 (E.D.N.Y. 2002); *Shittu v. Elwood*, 204 F. Supp. 2d 876, 878–80 (E.D. Pa. 2002); *Hughes v. Ashcroft*, 255 F.3d 752, 757 (9th Cir. 2001).

²⁴¹ See *Lee*, 216 F. Supp. 2d at 57–59.

²⁴² See *Perdomo-Padilla*, 333 F.3d at 969–70; Government’s Answering Brief at *16–*19, *Sun v. Ashcroft*, 370 F.3d 932 (9th Cir. 2004) (No. 02–36132), available at 2003 WL 22593676.

follow international legal norms, offer hope and support for the implementation of these legal theories.²⁴³

III. RECENT JUDICIAL DEVELOPMENTS IN THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS ON U.S. IMMIGRATION

The decisions handed down by Judge Jack Weinstein in *Maria v. McElroy* and *Beharry v. Reno* represent a dramatic departure from the longstanding reluctance of courts to incorporate international human rights standards into the interpretation of domestic laws.²⁴⁴ A discussion of the two decisions follows.

A. *The Facts of Maria v. McElroy and Beharry v. Reno*

Maria v. McElroy involved a challenge to a BIA decision that held the petitioner deportable under the IIRIRA's provisions regarding aggravated felons.²⁴⁵ Eddy Maria was a 24-year-old Dominican national who came to the United States at the age of ten as a lawful permanent resident and never resided elsewhere.²⁴⁶ Both his parents and some of his siblings were U.S. citizens.²⁴⁷ In 1996, Maria was convicted of an attempted unarmed robbery in the second degree, making him eligible for deportation under the aggravated felony provision.²⁴⁸ The INS soon began deportation proceedings against him, and in 1997, found Maria deportable under the aggravated felony provision.²⁴⁹ As Maria was ineligible for discretionary relief on the basis of his conviction, he filed a petition for habeas corpus in district court.²⁵⁰

²⁴³ See *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev'd on other grounds*, *Beharry v. Ashcroft*, 324 F.3d 51 (2d Cir. 2003); *Maria v. McElroy*, 68 F. Supp. 2d 206 (E.D.N.Y. 1999).

²⁴⁴ See Sonya Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 259 (2003).

²⁴⁵ 68 F. Supp. 2d at 219.

²⁴⁶ See *id.* at 213.

²⁴⁷ See *id.*

²⁴⁸ See *id.*

²⁴⁹ See *id.* at 215.

²⁵⁰ See *Maria*, 68 F. Supp. 2d at 215. Section 212(h) of the INA allows for a noncitizen to be granted a waiver, on non-drug-related criminal grounds, of exclusion if demonstrated that exclusion "would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son or daughter of such alien." INA § 212(h), 8 U.S.C. § 1182(h) (2000). Prior to the IIRIRA, noncitizens were granted discretionary humanitarian relief under section 212(c). See 8 U.S.C. § 1182(c) (1994 ed.) (repealed 1996). Although section 212(h) is phrased in terms of exclusion, courts have held that denying eligibility for 212(h) relief in deportation proceedings violates the Equal Protection Clause. See, e.g., *Yeung v. INS*, 76 F.3d 337, 340–41 (11th Cir. 1995) (stating that the denial

Although the court denied Maria's request to be declared non-deportable, it found that he was entitled to a section 212(h) humanitarian hearing allowing consideration of his claim to a hardship waiver.²⁵¹ Specifically, the court concluded that it would violate international law preventing interferences with family life if the INS deported Maria without such a hearing.²⁵² The court gave a particularly detailed analysis of certain provisions of the International Covenant on Civil and Political Rights (ICCPR).²⁵³ For example, the court looked at Article 23(1)'s statement that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State" and Article 17's establishment of an individual right against arbitrary or unlawful interference with the family.²⁵⁴ The court subsequently held that deportation proceedings that do not take family separation into account violated Articles 23(1) and 17, and further constituted "cruel, inhuman, and degrading treatment" in violation of Article 7 of the ICCPR.²⁵⁵

The court also examined the use of customary international law with respect to deportation proceedings.²⁵⁶ It found that a number of international treaties prohibited arbitrary expulsion and arbitrary interference with family life.²⁵⁷ The court cited to the Universal Declaration of Human Rights, the American Convention on Human Rights, the European Convention for Protection of Human Rights and Fundamental Freedom, the African Charter on Human and Peoples' Rights, as well as to a number U.S. Supreme Court decisions recognizing a domestic constitutional right to family integrity.²⁵⁸ It held that

of a section 212(c) hearing in deportation proceedings violates the Equal Protection Clause); *see also* Francis v. INS, 532 F.2d 268, 273 (2d Cir. 1976) (finding the restriction of section 212(c) to exclusion proceedings to be unconstitutional). However, noncitizens deportable under the aggravated felony provision are barred from receiving section 212(h) discretionary relief. *See* 8 U.S.C. § 1182(h) (2000).

²⁵¹ *Maria*, 68 F. Supp. 2d at 236.

²⁵² *Id.* at 234.

²⁵³ *See id.* at 231-33; *see also* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [hereinafter ICCPR]. The United States became a signatory to the ICCPR on September 8, 1992, but under the reservation that the treaty was not to be self-executing. *See Maria*, 68 F. Supp. 2d at 231; *see also* 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992).

²⁵⁴ *Maria*, 68 F. Supp. 2d at 232; *see also* ICCPR, *supra* note 253, at art. 17, 23(1).

²⁵⁵ *See Maria*, 68 F. Supp. 2d at 231-32; *see also* ICCPR, *supra* note 253, at art. 7, 17, 23(1).

²⁵⁶ *See Maria*, 68 F. Supp. 2d at 233-34.

²⁵⁷ *See id.* at 232-33.

²⁵⁸ *See id.*

the denial by the INS of a section 212(h) discretionary relief hearing, which would have allowed for the consideration of the impacts of family separation, made the expulsion and interference with family life “arbitrary” and thus a violation of international law.²⁵⁹ Therefore, the court vacated the deportation decision and ordered that Maria be granted such a hearing.²⁶⁰

Despite vacating the decision, however, the court did not go so far as to invalidate the AEDPA aggravated felony provisions by declaring that they violated international law.²⁶¹ Instead, Judge Weinstein followed the principle of avoidance of conflict with international law by construing the statute narrowly.²⁶² As such, Maria’s case would not have violated international law. Specifically, the court merely clarified a statutory ambiguity as to whether the redefinition of aggravated felonies applied retroactively to crimes committed before its passage.²⁶³ The court determined that in order to avoid a contradiction with international law, the statute was not to be applied retroactively, exempting Maria from its provisions and entitling him to the hardship waiver to which he would have been entitled prior to 1996.²⁶⁴

In Judge Weinstein’s decision in *Beharry v. Reno*, he again applied the principle of avoidance of conflict and narrowly construed the AEDPA aggravated felony provision.²⁶⁵ This time, however, the offense, but not the conviction, occurred prior to the passage of the AEDPA and IIRIRA.²⁶⁶ Don Beharry, a Trinidad national, was admitted into the United States at the age of seven as a lawful permanent resident.²⁶⁷ He had a six-year-old daughter and a sister, both of whom were U.S. citizens.²⁶⁸ In 1996, Beharry was convicted of second-degree robbery for aiding in the alleged theft of \$714 from the cash register of the coffee

²⁵⁹ *Id.* at 234.

²⁶⁰ *See id.* at 236.

²⁶¹ *See* Starr & Brilmeyer, *supra* note 244, at 264.

²⁶² *See Maria*, 68 F. Supp. 2d at 231. For a description of the avoidance of conflict with international law doctrine, see *infra* n. 277.

²⁶³ *See id.*

²⁶⁴ *See id.* One can see how the *Maria* decision seems to carve out an exception to the age-old precedent that changes to U.S. immigration law and policy may be retroactively applied—as first set forth in the *Chinese Exclusion Case*—by considering the implications of international law on U.S. immigration law. *See id.*; *see also supra* text accompanying notes 48–52 (discussing the retroactivity of changes to U.S. immigration law).

²⁶⁵ *See Beharry v. Reno*, 183 F. Supp. 2d 584, 604–05 (E.D.N.Y. 2002), *rev’d on other grounds*, *Beharry v. Ashcroft*, 324 F.3d 51 (2d Cir. 2003).

²⁶⁶ *See id.* at 586–89.

²⁶⁷ *Id.* at 586.

²⁶⁸ *See id.*

shop where he worked.²⁶⁹ While in prison, the INS initiated deportation proceedings against him and the BIA held that his aggravated felony conviction rendered him ineligible for hardship waivers.²⁷⁰

Upon review, the court of the Eastern District of New York overturned the decision.²⁷¹ The court relied on many of the same principles of customary and conventional international law that formed the basis for the *Maria* holding.²⁷² Additionally, the court found that several provisions of the Convention on the Rights of the Child applied, due to the fact that Beharry had a six-year-old daughter.²⁷³ Specifically, the provisions it found applicable were the Preamble's provision for the "protection and assistance" of the family, Article 3, which provided for the protection of the best interests of the child, and Article 7, which protects the child's "right to know and be cared for by his or her parents."²⁷⁴ The court reasoned that although the convention was not ratified by the United States, its prohibitions constituted customary international law because the convention was ratified by every other organized government in the world.²⁷⁵

Despite its findings in the *Beharry* decision, the difficulty presented to Judge Weinstein was that, under United States domestic law, Congress may statutorily overrule all provisions of international law.²⁷⁶ Where domestic and international law inescapably conflict, the last-in-time rule normally applies.²⁷⁷ Here, however, the court determined

²⁶⁹ *Id.*

²⁷⁰ *Beharry*, 183 F. Supp. 2d at 587.

²⁷¹ *See id.* at 605.

²⁷² *See id.* at 595–603.

²⁷³ *See id.* at 596.

²⁷⁴ *Id.*

²⁷⁵ *Beharry*, 183 F. Supp. 2d at 600.

²⁷⁶ *See* *The Paquete Habana*, 175 U.S. 677, 700 (1900).

²⁷⁷ *See Beharry*, 183 F. Supp. 2d at 599 (citing *The Paquete Habana*, 175 U.S. at 700 and RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(a) (1987)). The last-in-time rule, or the *Paquete Habana* principle, allows Congress to override provisions of customary international law. *See* *The Paquete Habana*, 175 U.S. at 700. The rule is meant to interact with the *Charming Betsy* Principle, or the principle that laws are to be read in conformity with international law when possible. *See Beharry*, 183 F. Supp. 2d at 599; *Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). It follows that in order to overrule customary international law, Congress must enact domestic legislation which both postdates the development of a customary international law norm, and which clearly has the intent of repealing that norm. *See, e.g.,* *Maria v. McElroy*, 68 F. Supp. 2d 206, 231 (E.D.N.Y. 1999) (stating that "Congress can be assumed, in the absence of a statement to the contrary, to be legislating in conformity with international law and to be cognizant of this country's global leadership position and the need for it to set an example with respect to human rights obligations"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(a) (stating that "[a]n Act of Congress supercedes an earlier rule of international law or a provision of an inter-

that the two competing notions taken together—that Congress may override international law, but that courts must construe statutes to avoid conflicts—“create[d] a principle of clear statement.”²⁷⁸ Thus, “in order to overrule customary international law, Congress must enact domestic legislation which both postdates the development of a customary international legal norm and which clearly has the intent of repealing that norm.”²⁷⁹ The court stated that this was the best principle by which United States law can conform to its international legal obligations.²⁸⁰ The court further supported its opinion by noting that Congress had not explicitly stated the intent to supercede international law with respect to immigration legislation.²⁸¹ On that basis, Judge Weinstein construed the legislation to be in conformance only if it allowed hardship hearings in cases where family separation may occur and where the underlying crime was committed prior to AEDPA’s enactment that defined the petitioner’s offense as an “aggravated felony.”²⁸² According to the court, this construction of the AEDPA was the “most narrowly targeted way to bring the INA into compliance with international law.”²⁸³

Maria and *Beharry* represent groundbreaking precedents in the realm of immigration and international law; however, some courts have declined to follow the *Beharry* ruling. For example, in facts similar to the situation in *Beharry*, the Northern District of Texas found the *Beharry* court’s reasoning and application of international law, to be unpersuasive.²⁸⁴ Furthermore, while the decisions raised the hopes of many immigration advocates, some commentators view the opinions

national agreement as law of the United States if the purpose of the act to supercede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled”).

²⁷⁸ *Beharry*, 183 F. Supp. 2d at 598–99.

²⁷⁹ *Id.* at 598.

²⁸⁰ *Id.* at 598–99.

²⁸¹ *See id.* at 604.

²⁸² *See id.* at 604–05.

²⁸³ *See Beharry*, 183 F. Supp. 2d at 604.

²⁸⁴ *Guerra v. Ashcroft*, No. CIV.A. 301CV1562H, 2002 WL 1359706, at *3 n.4 (N.D. Tex. June 19, 2002). *Guerra* was a citizen of Mexico and a lawful permanent resident within the United States. *Id.* at *1. He is married to an American citizen. *Id.* In 1998, petitioner pled guilty to a charge of sexual assault of a child under fourteen years of age, an aggravated felony under the INA, and was ordered deported by the INS in 2000. *Id.* The court ruled that the petitioner’s conviction denied him discretionary relief from deportation under the INA. *Id.* at *2–3; *see also* INA § 212(h), 8 U.S.C. § 1182(h) (2000) (“No waiver shall be granted in the case of an alien who has previously been admitted to the United States as an alien legally admitted for permanent residence if . . . since the date of such admission the alien has been convicted of an aggravated felony”).

with skepticism.²⁸⁵ Nevertheless, the underlying rationale of the *Maria* and *Beharry* decisions can still be employed to argue against the deportation of Cambodian refugees under the aggravated felony provision.

B. *The Aftermath of Maria and Beharry: Extending the International Human Rights Argument to Cambodian Refugees*

By enlarging the international human rights argument posited by Judge Weinstein in *Beharry* and *Maria*, further deportation of Cambodian refugees can be prevented.²⁸⁶ This section addresses how the international human rights argument supports implementation of the Khmer Institute's legal theories preventing deportation, and responds to emerging criticisms of the *Beharry* decision.

In reaching his decisions in *Beharry* and *Maria*, Judge Weinstein implemented a limited approach that clarified a specific ambiguity in the AEDPA's retroactive effect on the aggravated felony provision.²⁸⁷ Judge Weinstein noted that, since Congress did not express a clear and explicit intent for the INA to override norms of customary international law, the court should construe the statute to comply with international law in order to avoid constitutional concerns.²⁸⁸

Both the Refugee Waiver and the U.S. National theories argue that the United States is violating international law, particularly the Refugee Convention and the Refugee Protocol.²⁸⁹ The theories suggest that U.S. immigration law can avoid violation by interpreting ambiguities within the INA to be in compliance with international law.²⁹⁰

Unlike the *Beharry* and *Maria* rationale, the Khmer Institute's arguments do not aim to resolve ambiguities in the AEDPA's retroactive effect.²⁹¹ Instead, the Refugee Waiver and U.S. National theories scrutinize the ambiguous definition of national status and uncertain proce-

²⁸⁵ See, e.g., Laura S. Adams, *Divergence and the Dynamic Relationship Between Domestic Immigration Law and International Human Rights*, 51 EMORY L.J. 983, 1000–01 (2002); Starr & Brilmeyer, *supra* note 244, at 265 (concluding the future of the *Beharry* argument is uncertain); Cook, *supra* note 13, at 328 (opining the *Beharry* argument to be limited in its effect on U.S. immigration); Valerie Neal, Note, *Slings and Arrows of Outrageous Fortune: The Deportation of "Aggravated Felons,"* 36 VAND. J. TRANSNAT'L L. 1619, 1646 (2003) (concluding that the potential impact of the *Beharry* rationale is uncertain).

²⁸⁶ See *Beharry*, 183 F. Supp. 2d at 604–05; *Maria v. McElroy*, 68 F. Supp. 2d 206, 231 (E.D.N.Y. 1999).

²⁸⁷ See *Beharry*, 183 F. Supp. 2d at 604–05; *Maria*, 68 F. Supp. 2d at 231.

²⁸⁸ See *Beharry*, 183 F. Supp. 2d at 604–05; see also *Maria*, 68 F. Supp. 2d at 231 (implementing an approach similar to *Beharry*).

²⁸⁹ See *Legal Arguments*, *supra* note 28.

²⁹⁰ See *id.*

²⁹¹ See *id.*

ture for termination of refugee status.²⁹² Congress has not clearly or unequivocally expressed how to interpret the ambiguities the Khmer Institute highlights.²⁹³ Additionally, as Judge Weinstein articulated, Congress has not expressed explicitly that the INA was meant to override international legal norms or supercede specific international human rights treaties, and thus has not expressed the clear intention that the INA override the provisions of the Refugee Convention and the Refugee Protocol.²⁹⁴ By extending the rationale of Judge Weinstein's decisions, courts can apply his limited approach in *Maria* and *Beharry* to interpret these ambiguities in the INA to comply with the Refugee Convention and the Refugee Protocol.²⁹⁵

There has, however, been widespread criticism of Judge Weinstein's approach.²⁹⁶ Advocates of immigration and international law had high hopes that the *Maria* and *Beharry* decisions would usher in a new era wherein courts would inject international human rights norms into an area where the United States traditionally has been most reluctant to comply with international law.²⁹⁷ Some commentators, however, view the decisions skeptically, asserting that the international human rights argument will likely be overruled.²⁹⁸ Others have expressed uncertainty as to the impact these decisions will have on future judicial interpretations of the INA and its conflicts with international law.²⁹⁹

One exceptionally potent criticism of Judge Weinstein's approach notes that a judicial approach to incorporating international legal norms in the immigration context will have only marginal success, and that advocates should be wary of promoting the application of international law obligations to domestic litigation.³⁰⁰ Instead, the commentator suggests that a more enduring approach is needed, and that it may be better to use the political process to integrate international law into U.S. immigration law.³⁰¹ This proposal avoids the im-

²⁹² See *id.*

²⁹³ See *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967–70 (9th Cir. 2003); Government's Answering Brief at *16–*19, *Sun v. Ashcroft*, 370 F.3d 932 (9th Cir. 2004) (No. 02–36132), available at 2003 WL 22593676.

²⁹⁴ See, e.g., *Beharry*, 183 F. Supp. 2d at 604–05; *Maria*, 68 F. Supp. 2d at 231.

²⁹⁵ See *Beharry*, 183 F. Supp. 2d at 604–05; *Maria*, 68 F. Supp. 2d at 231.

²⁹⁶ See *Adams*, *supra* note 285, at 1000–01; *Starr & Brilmeyer*, *supra* note 244, at 265; *Cook*, *supra* note 13, at 328; *Neal*, *supra* note 285 at 1646.

²⁹⁷ *Adams*, *supra* note 285, at 1000–01; *Neal*, *supra* note 285, at 1646.

²⁹⁸ *Adams*, *supra* note 285, at 998.

²⁹⁹ *Starr & Brilmeyer*, *supra* note 244, at 265; *Neal*, *supra* note 285, at 1646.

³⁰⁰ See *Adams*, *supra* note 285, at 1000.

³⁰¹ See *id.* at 1001.

PLICIT tension of sovereignty and international human rights law that the *Beharry* decision clearly creates.³⁰²

However, sovereignty is at its height in the U.S. immigration context, and arguably the last area in which the United States will consent to be governed by international human rights rules.³⁰³ Therefore, it is highly unlikely that legislative integration of international legal norms into domestic immigration law will occur anytime soon.

Other criticism of Judge Weinstein's approach has come by way of the judiciary, as courts reject the international human rights argument in similar, yet distinguishable situations from *Beharry*.³⁰⁴ For example, in *Gonzalez-Polanco v. INS*, the Southern District of New York refused to apply the *Beharry* argument to the petitioner because he was an unlawful permanent resident convicted of a controlled substance offense.³⁰⁵ In the cases declining to extend this approach, however, only one court refused to follow Judge Weinstein's approach by stating disagreement with the approach.³⁰⁶ The disagreement with the *Beharry* argument, however, was expressed only in dicta and no explanation of its underlying rationale was offered.³⁰⁷

It must be noted that the Second Circuit later reversed *Beharry*, explicitly because the petitioner had not exhausted the administrative remedies available to him.³⁰⁸ However, the court stated that "[n]othing in our decision to reverse on other grounds . . . should be seen as an endorsement of the district court's holding that interpretation of the INA in this case is influenced or controlled by international law."³⁰⁹ Consequently, the Second Circuit agreed that *Beharry's* claim of entitlement to a section 212(h) discretionary hearing would not have been worthless.³¹⁰

In *Beharry*, Judge Weinstein articulates two policy incentives for courts to incorporate international human rights obligations into

³⁰² See *id.* at 996–97.

³⁰³ See *id.* at 997.

³⁰⁴ See *Guerra v. Ashcroft*, No. CIV.A. 301CV1562H, 2002 WL 1359706, at *3 n.4 (N.D. Tex. June 19, 2002). See generally *Alvarez-Garcia v. INS*, 234 F. Supp. 2d 283 (S.D.N.Y. 2002) (distinguishing the petitioner's facts from *Beharry*); *Gonzalez-Polanco v. INS*, No. 02 CIV. 2734(AJP), 2002 WL 1796834, at *8 (S.D.N.Y. Aug. 5, 2002) (finding the *Beharry* decision to be limited to its facts, and therefore not applicable for the petitioner).

³⁰⁵ See *Gonzalez-Polanco*, 2002 WL 1796834, at *8.

³⁰⁶ See *Guerra*, 2002 WL 1359706, at *3 n.4.

³⁰⁷ See *id.*

³⁰⁸ See *Beharry v. Ashcroft*, 329 F.3d 51, 64 (2d Cir. 2003).

³⁰⁹ *Id.* at 63.

³¹⁰ *Id.*

their interpretation of U.S. immigration law.³¹¹ The first is that the United States, as a moral leader of the world seeking to impose international law norms, loses credibility when it fails to adhere to them itself.³¹² The opinion suggests that judicial action is appropriate to prevent placing the United States in an embarrassing political situation in which its laws are in violation of international human rights standards.³¹³

Moreover, Judge Weinstein implies that judicial action may be needed to override an archaic precedent, which, for over a century, has allowed Congress to enact immigration legislation that treats citizens and noncitizens unfairly.³¹⁴ Indeed, the United States and its courts find themselves in an even more awkward situation when it justifies unfair immigration legislation by citing to legal precedent that is itself grounded in international legal norms.³¹⁵ It is therefore contradictory for courts to conclude that they are not bound by international human rights law in the immigration context.³¹⁶

In recent years, a number of legal scholars and judges have expressed the opinion that the United States is beginning to rethink its policy on incorporating international legal norms.³¹⁷ Professor Alexander Aleinikoff highlights the thousands of international agreements to which the United States is a party and, more importantly, conforms to, including multilateral conventions such as the World

³¹¹ See 183 F. Supp. 2d 584, 601–03 (E.D.N.Y. 2002), *rev'd on other grounds*, Beharry v. Ashcroft, 324 F.3d 51 (2d Cir. 2003).

³¹² See *id.* at 601.

³¹³ See *id.*

³¹⁴ See *id.* at 602–03.

³¹⁵ See, e.g., Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); The Chinese Exclusion Case, 130 U.S. 581, 603–04 (1889).

³¹⁶ See Beharry, 183 F. Supp. 2d at 602–03.

³¹⁷ See, e.g., T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91, 107 (2004) (predicting a shift in attitude regarding the incorporation of international law into domestic jurisprudence based on recent trends); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 8–10 (2003) (affirming the Supreme Court's growing attentiveness to legal developments in other parts of the world); Davis, *supra* note 232, at 417–20 (announcing that an end to the Court's restrictive approach to international law is near); accord Brief for Amici Curiae Law Professors in Support of Respondent at 14–20, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03–1027), available at 2004 WL 792207 (arguing that current and past trends in American jurisprudence demonstrate that international human rights law controls the Court's analysis in the respondent's case); Sandra Day O'Connor, *Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC'Y INT'L L. PROC. 348, 352–53 (2002) (asserting the need for American judges to become aware of their responsibilities to respect the law of nations).

Trade Organization Agreement and the Framework Convention on Tobacco Control.³¹⁸

Indeed, international concepts of justice and human rights have recently begun to creep into the dicta of the Supreme Court's decisions.³¹⁹ A leading example is *Lawrence v. Texas*, where the Court declared a Texas statute proscribing intimate, consensual conduct between two adults of the same sex to be unconstitutional.³²⁰ The majority justified the petitioners' right by emphasizing that the right had long been integral to human freedom in many other countries.³²¹ The Court supported its decision by citing the leading 1981 European Court of Human Rights decision, *Dudgeon v. United Kingdom*, and subsequent decisions of that court affirming the protected right of homosexual adults to engage in intimate, consensual conduct.³²² While it may be too soon to accurately predict what these trends portend, at a minimum, they suggest that the United States will continue to confer adequate respect upon the opinions of humankind and the values it shares with the rest of the world.³²³

CONCLUSION

Although for many Cambodian Americans like Loewun Lun and Sokha Sun, their deportations come as a shock to them, it is an occurrence with which they should be familiar.³²⁴ During the late 1970s, the Khmer Rouge displaced and broke families up, subjected Cambodians to acute persecution, and sent many of them to places they had little or no connection to.³²⁵ Now, years later, the United States is doing the same thing.³²⁶

Since the creation of the plenary power doctrine more than a century ago, the doctrine has justified a number of unfair U.S. immigration laws, in particular, the broadening of the aggravated felony

³¹⁸ Aleinikoff, *supra* note 317, at 104.

³¹⁹ See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472, 2481, 2483 (2003) (citing to decisions of the European Court of Human Rights); *Grutter v. Bollinger*, 539 U.S. 306, 342–43 (2003) (Ginsburg, J., concurring) (stating that the majority's decision "accords with the international understanding of the office of affirmative action"); see also *Atkins v. Virginia*, 536 U.S. 304, 316 n. 21 (2002) (discussing the consensus of "the world community").

³²⁰ *Lawrence*, 123 S. Ct. at 2483.

³²¹ See *id.*

³²² *Id.* (citing *Dudgeon v. United Kingdom*, 3 Eur. Ct. H.R. 40, 45 (1981)).

³²³ Ginsburg, *supra* note 317, at 10; see also Aleinikoff, *supra* note 317, at 103–04.

³²⁴ See Sontag, *supra* note 1, at 50.

³²⁵ See *id.*

³²⁶ See *id.*

provision through the AEDPA and IIRIRA. Such matters were of little concern to Cambodian Americans due to the lack of a repatriation agreement. Consequently, refugees like Loecun Lun and Sokha Sun made choices that they probably would not have made had such an agreement existed at the time. However, the recent signing of the Repatriation Agreement allows these cruel laws to be applied to Cambodian Americans. Accordingly, reformed individuals and petty offenders like Loecun and Sokha are among those newly eligible.

Two legal theories presented in this Note rely on international human rights laws and ambiguities within U.S. immigration law to help Cambodians in danger of being deported. Although compelling, the theories are problematic, given that that Congress never intended for exceptions to be drawn out from the ambiguities in immigration law, and that courts are traditionally under no obligation to adhere to international legal standards.

Despite these challenges, there have been two groundbreaking developments from the Eastern District of New York, specifically in *Beharry v. Reno* and *Maria v. McElroy*. Judge Weinstein opined that judicial courts are obligated to comply with international law, and that the current interpretation of the aggravated felony provision was in contravention with international human rights standards. Although he did not invalidate the aggravated felony provision, he utilized a remedy that nevertheless construed the ambiguity in the INA to be in compliance with international law.

Judge Weinstein interpreted an ambiguity of the INA so as to obviate conflict with international human rights law. Likewise, the theories discussed in this Note are akin to Judge Weinstein's approach. Therefore, U.S. courts should consider more seriously the adoption of the theories presented. Although one critic of Judge Weinstein's approach suggests that injecting international human rights norms into the realm of U.S. immigration law should occur through the legislative process instead, given the strong Congressional resistance to such incorporation, it is unlikely that legislative changes to U.S. immigration law will occur anytime soon. Therefore, judicial action is necessary if international legal norms are to be integrated into the U.S. immigration context.

The deportation of Cambodian refugees has caused a stir not only among members of the Cambodian-American community, but also is causing fear among those in the Laotian- and Vietnamese-

American communities.³²⁷ The threat of deportation is increasing as the United States actively seeks to secure repatriation agreements with these Southeast Asian nations.³²⁸ Many in these communities are now afraid that the harsh deportation provisions will reach them in the near future.³²⁹ Therefore, the incorporation of international human rights in the immigration context, exemplified by the *Beharry* and *Maria* decisions, offer hope not only to Cambodian refugees like Loeun Lun and Sokha Sun, but also to those who might soon feel the effects of the aggravated felony provision.

³²⁷ See Pattison, *supra* note 94; SEARAC discussion, *supra* note 9.

³²⁸ See Pattison, *supra* note 94; SEARAC discussion, *supra* note 9.

³²⁹ See Pattison, *supra* note 94.