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Stop "Crimmigration!" Stop Southeast Asian Refugee Deportations!

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STOP "CRIMMIGRATION!" STOP SOUTHEAST ASIAN REFUGEE DEPORTATIONS!

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The Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 in effect criminalize populations of immigrant and refugee status. As a result of these legislative acts, committing a minor criminal offense could affect a person's immigration or refugee status long after they have served time in prison for the offense. For non-citizen immigrants and refugees, the impact of a criminal sentence might not be isolated to the punishment issued by the state, but could also result in having to live in exile or, for refugees, in "double exile." This intersecting of criminal law and immigration law is sometimes referred to as the "crimmigration" system. As the largest resettled community in the United States, Southeast Asian immigrants and refugees are strongly impacted by "crimmigration" practices. Theirs is arguably a case of cruel and unusual punishment, where they are first punished for what they did, and then for who they are. In a sense, it is also a form of double jeopardy in that they are punished twice for one crime, first, by being incarcerated and, second, by being deported.

"Bring my Dad Home." Illustration for the Release the Minnesota 8 campaign by Tori Hong. Source: www.ToriHong.com.

IN ORDER TO BREAK this inhumane link between the criminal justice system and the immigration system, legislators should revise current policies and remove discrepancies in how pertinent criminal categories are defined, end agreements with foreign governments that allow the United States to deport refugees to the country they sought refuge from, and create systems of support for victims of "crimmigration" in their efforts not to be punished twice by being deported.

PROBLEM DESCRIPTION

Many Southeast Asians entered the the United States while fleeing the aftermath of the American War in Viet Nam, Laos, and Cambodia. In light of this legacy, deportations of Southeast Asian immigrants and refugees, in particular, reveal the socio-political complexities of "crimmigration." Legal scholar Julia Stumpf states that the concept of "crimmigration" "illuminate[s] how and why these two areas of law [i.e., criminal law and immigration law] have converged, and why that convergence may be troubling."[1] She also says, "['Crimmigration'] operates

in this new area [of theory and law] to define an ever-expanding group of immigrants and ex-offenders who are denied badges of membership in society."[2] The passing of the AEDPA and the IIRIRA streamlined a process of deportation of permanent residents in the United States, and expanded the intersections of the criminal legal system and the immigration system. Through these laws, offenses categorized as misdemeanors in criminal law, are viewed as felonies for immigration purposes.[3] Specifically, re-categorizing misdemeanors as "aggravated felonies" under immigration law, opened the door for mandatory detentions, deportations, and limiting immigration judges' individual discretion in adjudicating.

The AEDPA and IIRIRA also allow for the retroactive detention and deportation of non-citizens convicted of a crime. These laws retroactively reclassify Southeast Asian refugees and other immigrant groups as aggravated felons. Non-citizens who served time for lesser offenses before 1996, then, can lose their refugee or immigrant status overnight. As a result, there are currently over 17,000 Southeast Asian refugees with final orders of removal in the United States.[4]

Among the impacted communities, Cambodian refugees are the longest-standing refugee population facing deportation from the United States. The deportation of Cambodians with minor criminal records was streamlined in 2002 when the Bush Administration convinced the nation of Cambodia to sign a Memorandum of Understanding (MoU), by which Cambodia agreed to accept deportees from the United States. Prior to 2002, Cambodian non-citizens were subjected to indefinite detention until paperwork with Cambodia could be finalized, as seen in *Kim Ho Ma v. Ashcroft*. Kim Ho Ma was released from federal prison on good behavior on April 1, 1997, after serving a 26-month prison sentence. Upon his release, Ma was detained by the Immigration and Naturalization Service (INS) in order to begin deportation proceedings to Cambodia. In Ma's case file, his lawyers write:

> …the INS has been unable to remove him, and hundreds of others like him, because Cambodia does not have a repatriation agreement with the United States and therefore will not permit Ma's return. The question before us is whether, in light of the absence of such an agreement, the Attorney General has the legal authority to hold Ma, who is now 22, in detention indefinitely, perhaps for the remainder of his life. [*Kim Ho Ma v. Ashcroft*]

Ma's ninth circuit legal case challenged INS practices of indefinite detention all the way to the Supreme Court. At the same time, a similar battle was fought in a fifth circuit court case, *Zadvydas v. Davis*. As a result of this case, the INS practice of indefinite detention was deemed in violation of the 14th Amendment. Since then, immigrant officials must provide documentation within the first 90 days of detainment to show that an individual's deportation is possible. Unfortunately for Ma, after his release in 2001, the MoU between the United States and Cambodia was signed, giving the United States grounds to remove him. He was deported soon thereafter.

The Obama Administration expanded the "crimmigration" practices set up by the Bush Administration. While President Barack Obama signed a repatriation agreement with Viet Nam in 2008, preventing the deportation of pre-1995 refugees, an unprecedented 3.2 million people were deported under his "felons, not families" deportation policies.[5] Since the election of President Donald Trump in 2016, there have been fewer deportations overall, but a drastic increase of deportations of Cambodians to approximately 200 per year (an increase of 279 percent).[6] The MoU with Viet Nam has also been reinterpreted to include detention and deportation of pre-1995 refugees, a group the agreement originally sought to protect.[7] Thus far, Laos is the only nation among those affected by the American War in Southeast Asia that does not have a formal agreement with regard to deportation. However, as of 2020, the Trump administration is attempting to streamline a deportation process with Laos. Absent an MoU, a "gentlemen's agreement" between Laos and the United States has allowed up to 40 deportations per year (a 300 percent increase).[8] In total, 2,149 Southeast Asians have been deported from the United States since 1998 (1,033 to Cambodia, 879 to Viet Nam, and 219 to Laos).[9] Although the absolute numbers are relatively small, the economic and psychological impact of these deportations is strongly felt within the larger Southeast Asian-American community.

"Crimmigration" practices also have a gendered component in that Southeast Asian women who are at risk of deportation often face compounding forms of violence. Campaigns by advocacy groups Asian Americans Advancing Justice and Survived & Punished to free Cambodian refugee Ny Nourn (#FreeNy!) illustrate this dynamic:

> [When] Ny turned 18, her boyfriend killed the boss at her after-school job in a fit of jealousy. The murder went unsolved for three years until Ny went

to the police. After providing a confession, Ny was arrested and charged with aiding and abetting murder. A judge sentenced Ny to life without the possibility of parole.[10]

Nourn survived a long-term relationship with an abusive partner. The court, however, refused to see her as either a victim or survivor, judging her instead as a criminal, an "aggravated felon."[11] Nourn was fortunate to have the support of a community of organizers who fought alongside her for her freedom. On November 9, 2017, after serving 16 years in prison and 10 months in Immigration and Customs Enforcement (ICE) detention, Nourn was released on bond. For the past three years, Nourn has been a major advocate for survivors, formerly incarcerated people, and people impacted by deportation. She was awarded the 2018 Yuri Kochiyama Fellowship at the Asian Law Caucus, and continues to work as an anti-deportation advocate with the Caucus. Nourn's case highlights how different forms of violence are compounded through "crimmigration" practices. Not only did she endure the physical violence of her abuser, she was made responsible for his violence, sentenced to jail for it, served time, and was then threatened with deportation. Each step added additional trauma to that of being subjected to the original violence of her abuser.

CRITIQUE

The deportation of refugees is a fundamental violation of human rights and constitutional law. International refugee law premises that refugees cannot be forcibly sent back to the country they are fleeing; this is known as "non-refoulement."[12] In addition, many of these deportees were born stateless. They were born in refugee camps, not the nation-states they are "returned" to. As political scientist Khatharya Um writes, "While the idea of 'repatriation' is rooted in the dual concepts of 'return to' one's 'natal source,' these embedded notions are problematized by the fact that most of the young deportees were born in cross-border refugee camps…'return' is, in fact, exile."[13] Their lives are rooted in a refugee identity and legal status, not one of national belonging.

Specifically, the disjunctures within the "crimmigration" system, especially surrounding the term "aggravated felony," highlight the unconstitutionality of the 1996 immigration laws. Many deportees are transferred immediately from prison to ICE detention centers. The aforementioned case of Nourn serves as an example. She was paroled by former California Governor Jerry Brown. As far as the criminal legal system was concerned, then, she had served her time. Yet, instead of being allowed to reenter civil society, she was detained by immigration officials. As a result of the initial crime, the state had the right to revoke Ny's status as Long-term Permanent Resident (LPR), and to label her a criminal alien. Under AEDPA and IIRIRA, serving a criminal sentence constitutes a basis for deportability. Thus, the deportation places the individual in "double jeopardy." The Fifth Amendment of the US Constitution prohibits an individual from being punished for the same crime twice. Arguably, Nourn and other Southeast Asian refugees are punished, first, by incarceration, and then by deportation. Deportation is undeniably a form of punishment in this context.[14] For refugees, who are already in exile from their birth country, deportation becomes an instance of double exile, increasing the cruelty of the punishment.

RECOMMENDATIONS

In order to end "crimmigration," the United States needs to stop detaining and deporting refugees. In addition, the state needs to address the larger sociopolitical issues that underlie the "crimmigration" system by adopting abolitionist policies that dismantle ICE and the prison system. To abolish ICE without abolishing prisons ignores the broader dynamics of "crimmigration." The prison-industrial-complex is inherently anti-Black, as evidenced by the disproportionate incarceration and harsher sentencing of Black people compared to other racial groups. Calls to abolish ICE without also abolishing the prison industry, then, are inherently anti-Black. Ignoring these connections obfuscates how conceptualizations of illegality are predicated on ideologies of Black criminality. Prison abolition is not just about eliminating prisons, but involves building a world in which life is valued. Funds currently used to control and incarcerate need to be redirected to provide direct support to immigrant and refugee communities, in order to change the material conditions of their lives. Policies that support access to healthcare, housing, and food are critical both for the reentry of formerly incarcerated people, as well as for newly resettled refugees. For refugees, it is also critical to provide culturally competent programs and professionals to support these initiatives. We must move away from the current "prison nation"—that is, from structures of control that criminalize, dehumanize, and punish—towards structures of care.[15]

Grassroots community organizers have already led the charge to **end the expansion of immigration detention centers and to close existing prisons and detention facilities.** This

entails closing both private and public detention centers. Within all levels of government (federal, state, and local), policy makers have the opportunity to stop investing in the carceral system. In 2020, after an intensive grassroots campaign, Washington, Maryland, and California have all passed statewide legislation to curtail the federal expansion of immigrant detention centers. State lawmakers play a critical role in challenging the expansion of the prison system. Practical steps for state policymakers to take include:

End the collaboration between the Department of Corrections (DOC) and ICE in order to fracture the prison-deportation pipeline. The DOC has no legal obligation to report incarcerated individuals to immigration officials. Collaborating with ICE and allowing ICE to enter corrections facilities to interview and detain people is a choice. Direct transfers of incarcerated people from the DOC to ICE can be stopped by insisting that the DOC refuse to collaborate. In California, community organizers have pressured Governor Gavin Newsom to get #ICEoutofCaliforniaPrisons. Although Governor Newsom has been praised for sanctuary-esque policies, they fail to give reprieve to incarcerated immigrants. The Governor, however, has the power to order ICE and the DOC to stop working together.

On the federal level, the following recommendations would seek to amend the 1996 immigration laws:

1) **Abolish the term "aggravated felon" from immigration law.** By abolishing the legal terms "aggravated felon" and "aggravated felony" on a federal level, non-citizens who have served a sentence would not automatically be considered for deportation by immigration officials.

2) **End practices of mandatory detention as required in the AEDPA.**

3) **Give immigration judges the right to make deportation decisions at their discretion.** This could decrease the number of deportations, because judges would have the authority to make individual rulings based on context.

On December 10, 2019, Congress introduced the New Way Forward Act (H.R.5383). The bill would "remove mandatory detention requirements for certain aliens, such as asylum seekers with a credible fear of persecution," which would directly impact the Southeast Asian community. The bill seeks to amend the 1996 immigrant laws, end private detention centers, and sever ICE's relationship with local law enforcement. This is a positive step towards preventing "crimmigration" practices and should be supported. Additional policy changes that could provide more focused relief to the Southeast Asian community include:

1) **Renegotiating MoUs:** The State Department must rewrite the MoUs between Cambodia and the United States, and Viet Nam and the United States. Rewriting the MoUs could provide a legal route to halt deportations. In addition, policymakers in Congress and the Department of State must prevent the United States from signing other one-sided MoUs that would formalize deportation proceedings with other nations like Laos.

2) **Passing policies that relieve the burden of legal expenses post-conviction:** Many refugees in the "crimmigrant" system take plea deals because they lack funds to pay for criminal defense attorneys, and because they hope to exit the criminal legal system as quickly as possible (i.e., pressured into plea deals to avoid longer sentences). Legislators should pass policies that would provide funds and legal support for immigrants to relitigate their original convictions, as many are typically not informed of how their original criminal conviction will affect their immigrant status (*Padilla v. Kentucky*). In addition, prosecutors must factor in the damage of sentencing on immigration status and help stop ICE from flagging immigrants.[16]

3) **Creating "Right to Return" and "Right to Reunite" programs:** Deportees are barred from legally entering the United States, and as a result, friends and families are separated. Ultimately, deportees should have a means to reunite and return to their communities in the United States.

If you are a directly impacted Southeast Asian immigrant or refugee in need of assistance, please visit: searaids.org.

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roots formations such as ReleaseMN8, Freedom Inc., and the Southeast Asian Freedom Network (SEAFN).

NOTES

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