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The “Visible Scapegoats” of U.S. Imperialism: HIV Positive Haitian Refugees and Carceral Quarantine at Guantanamo Bay

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In November 1991 the U.S. Coast Guard began transporting thousands of Haitian refugees, who were fleeing the upheaval of their latest and most violent coup d'état, to the U.S. naval base located at Guantánamo Bay, Cuba. Shortly thereafter, the U.S. began testing all of these refugees for the human immunodeficiency virus (HIV) and subsequently segregated all who tested positive into their own ostracized space. Unlike the HIV negative refugees who were either sent back to Haiti or given safe haven in the U.S., these refugees were held by the state in legal limbo. They passed the U.S.'s requirements for asylum, thus preventing the state from returning them to their persecutors in Haiti; however, the state also refused them entry because of their HIV positive status. The U.S. ultimately detained these people indefinitely in a refugee camp that resembled a prison, surrounded by razor wire and armed guards, holding its subjects captive in unsanitary, squalid conditions potentially injurious to their already compromised health.

How and why did these refugees find themselves incarcerated on Guantánamo? What was the U.S. state's logic in sending them there, rather than bringing them to the U.S. for asylum screening? The case of the Haitian refugees held at Guantánamo cannot be understood apart from the history of the U.S.'s specifically anti-Haitian discourse and immigration policy, executed through the "Haitian Program," which suspended these refugees' constitutional rights beginning in 1978. Furthermore, popular and medical discourses falsely linking Haitians and AIDS reinforced and amplified anti-Haitian sentiment during this time when the AIDS crisis was in full swing. These histories and discourses do not stand alone but are intimately bound to the (neo)imperial political and economic relationship established between the U.S. and Haiti, whereby the U.S. has exploited the island's economy and directly supported dictatorial regimes. On the one hand, the U.S.'s neoimperialist relations have helped sustain the widespread poverty and political violence and repression in Haiti that produces its refugees. On the other hand, the U.S. has indirectly facilitated the introduction of HIV and AIDS to Haiti through a tourist economy supported by vastly unequal economic relations between the island nation and North America. With the mass exodus of the early 1990s, the U.S. did not invent new strategies to deal with this crisis but continued its pre-existing policy of singling out and excluding these unwanted refugees.

But why did the state send these refugees to Guantánamo Bay in particular? The refugee camps at Guantánamo actually emerged from a compromise between the state and human rights advocates as an alternative to bringing them within U.S. borders or returning them to certain persecution in Haiti. The U.S. sent the refugees to Guantánamo not because it is spatially located between Haiti and the U.S., but because it inhabits a "liminal national space,"¹ or what I argue is an effectively "stateless space," a space where no state or other legal institution can claim sovereignty or be held accountable for what occurs there. From the perspective of the state, Guantánamo is exempt from the jurisdictions of U.S. American and Cuban legal apparatuses, thus leaving the refugees without the protections of asylum law that they would have at an INS detention center in U.S. territory, for example. As Amy Kaplan cogently argues, the seemingly exceptional nature of Guantánamo as a stateless space must be situated in the history of U.S. imperialism. She states: "Guantánamo lies at the

¹ Amy Kaplan, "Where is Guantánamo?," *American Quarterly* (September 2005): 832.

heart of American Empire,” and “[i]ts legal—or lawless—status has a logic grounded in imperialism, whereby coercive state power has been routinely mobilized beyond the sovereignty of national territory and outside the rule of law.”²

Examining the case of the Haitian refugees detained at Guantánamo reveals a convergence of U.S. imperial acts throughout the 20th and extending into the 21st centuries. The U.S. initially attained Guantánamo Bay from Spain during its occupation following the Spanish-American War in 1898 and formalized its control over this part of Cuba in its “lease” agreement in 1903, extended in 1934 until both parties agree to cancel it. Although Fidel Castro tried to rescind the lease after the Cuban Revolution of 1959, the U.S. Naval station remains fixed at Guantánamo, making it in the eyes of the Cuban state “an illegitimately occupied territory.”³ The U.S.’s seizure and lease of Guantánamo marks only one act in its much broader scheme to transform the entire Caribbean basin “into a [North] American lake from which all trespassers were rigidly barred.”⁴ During this period of imperialist expansion, the U.S. also militarily “intervened” in Haiti more than fifteen times *before* it formally occupied the country from 1915-1934, making it a U.S. dependency.⁵

The U.S. ultimately brought refugees it actively helped create but refused to recognize to a site it has produced as a lawless zone where it can act with impunity; in a sense, the U.S. brought one unintended excess effect of its imperialist project to a consciously intended product of that same empire-building project. Furthermore, we are currently witnessing another thread of U.S. imperialism converging at the space of Guantánamo in its use as a prison camp for supposed “enemy combatants” of the “war on terror.” This thread not only brings us temporally into the post-9/11 21st century, a period during which the U.S. state discusses its imperialist endeavors explicitly, without its former veil of the “spaceless universalization of its values;”⁶ but it also extends our perspective of U.S. Empire beyond the Americas to all parts of the globe where “terrorists” may be found, particularly the Middle East as well as Central, South, and Southeast Asia.

Following Kaplan, Guantánamo cannot be understood apart from its U.S. imperialist history, and the current prison camps do not mark a rupture from U.S. law. The case of the Haitian refugees who inhabited the same space as the “enemy combatants” of Camps X-ray and Delta reveals the historical and legal precedent for repurposing the naval base on Guantánamo as a prison camp. It also exposes how the U.S. state carved out and legally justified this space as a lawless zone. Indeed, the history of the U.S.’s management of the Haitian “boat people” demonstrates its acumen at subverting international and domestic law in blatant disregard for human rights both in the “colony” and within its own borders—drawing on programs of interdiction, forcible repatriation to certain persecution, and indefinite detention, all requiring the suspension of constitutional rights. This paper will situate the case of the Haitian refugees, particularly the HIV positive refugees, in the history of Haiti’s political economy

² Ibid.

³ Ibid., 836.

⁴ Quoted in Paul Farmer, *The Uses of Haiti* (Monroe: Common Courage Press, 2003), 79.

⁵ Ibid., 77.

⁶ David Harvey, *The New Imperialism* (New York: Oxford, 2003), 50.

and its relation to the U.S. It will also examine how discourses that have circulated about Haiti in North America, especially regarding race and contagion, have influenced the state’s immigration policies targeting Haitian refugees. By analyzing the series of legal challenges brought to the federal judiciary in *Haitian Centers Council v. Sale*, this paper seeks to expose the state’s justification for its actions that defy domestic and international law. It is crucial to examine the case of the Haitian refugees incarcerated at Guantánamo, as it illuminates the current, juridically analogous crisis that draws the world’s attention once again to this ostensibly lawless space.

Refugee Production’s Deep Roots

Although the “Haitian Program” does not begin until 1978, the conditions in Haiti that produce its outflow of refugees have deep historical roots, particularly in the colonial and neoimperial relations the U.S. has established with this nation’s economy and state.

From its birth as an independent nation, its largely African slave population having overthrown the brutal French colonial regime in 1804, Haiti was immediately isolated and ostracized by a “frightened white world”⁷ horrified by the Black Republic. Though the U.S. refused to recognize Haiti’s sovereignty until 1862, it nevertheless instituted exploitative economic relations with the new nation, quickly becoming its chief trading partner,⁸ and the U.S.’s military occupation from 1915-1934 firmly consolidated its dominance over the island nation.⁹ The treaty of the occupation, the Convention haitiano-americaine, ceded complete governmental control of Haiti to the occupying force, and the 1918 U.S.-authored Constitution abolished the law that prohibited foreign land ownership, thus allowing North American companies to acquire 266,000 acres and displacing an estimated 50,000 peasants.¹⁰ In other words, the occupation produced a large population of landless, unemployed laborers ripe for North American capitalist exploitation.¹¹ By its end the occupation left Haiti worse off economically than before, with heavy debts owed to the U.S.

North American capitalist exploitation of Haiti extends to this day, as Haiti remains a dependent, peripheral state to the U.S. Haiti is the poorest nation in the Western Hemisphere and one of the twenty-five poorest in the world, making it a large exporter of human laborers to wealthier nations, particularly in the Caribbean and North America.¹² In the era of late capitalism, Haiti’s economy shifted when U.S. manufacturers began using the nation for offshore assembly plants, as it provided an environment ripe for greater profits with “its cheap labor force, extensive government repression, and denial of even minimal

⁷ Robert Lawless, *Haiti’s Bad Press: Origins, Development, and Consequences* (Rochester: Schenkman Books, 1992), 56.

⁸ Paul Farmer, *AIDS and Accusation: Haiti and the Geography of Blame* (Berkeley: University of California Press, 1992), 174.

⁹ The U.S. Marines used the recently acquired Guantánamo Bay naval base during its invasion of Haiti.

¹⁰ Farmer, *The Uses of Haiti*, 82.

¹¹ Furthermore, the U.S. occupying force itself reinstated slave labor through the *corvee*—the involuntary drafting of laborers to work in chain gangs—to build Haitian infrastructure, such as roads. The *corvee* eventually led to mass peasant resistance and to the Cacos Insurrection, which the U.S. Marines subdued with violent force. (Farmer, *The Uses OF Haiti*, 83)

¹² Farmer, *AIDS and Accusation*, 184.

labor rights.”¹³ Haiti was so inviting to U.S. capital interests that the president of the Haitian-American Chamber of Commerce exclaimed, “the whole country is a free trade zone!”¹⁴ Haiti quickly became one of the world’s largest assemblers of goods for U.S. consumption, but was saddled with skyrocketing debt, which increased seven times between 1973 and 1980.¹⁵

The transformation of an entire nation into a free trade zone worked in conjunction with the repressive regimes of Francois, “Papa Doc,” Duvalier and his heir, Jean-Claude, “Baby Doc.” Francois Duvalier attained the presidency in 1957 (though his “election” was rife with irregularities) and soon after created the Volunteers for National Security (VSN), also known as the *tontons macoutes*, a personal security force that answered only to him. The VSN spied on the people and “disappeared” persons potentially troublesome to Duvalier, reportedly killing tens of thousands.¹⁶ As refugee analysts Norman and Naomi Zucker point out:

In Haiti...one feared the army, the *tontons macoutes*, the local section chiefs—a network of lawless thugs who owed allegiance directly to the president, who spied on the populace and subsisted on extortion. Haiti was in many ways a police state, not a tightly controlled police state with central lines of authority, such as existed in communist countries, but a state maintained by petty thieves and mercenaries. They ruled not by law, but by absolute terror, wringing tribute from the impoverished populace and enforcing their demands with arbitrary arrests, imprisonment, torture, and killings.¹⁷

It is unsurprising that the first outflow of refugees began during Papa Doc’s regime. Initial waves of middle- and upper-class migrants began leaving their country in the late 1950’s and garnered little attention in the U.S.¹⁸ As Duvalier’s reign continued, more Haitians left their country permanently, overstaying their visas and living as undocumented immigrants in their host countries.¹⁹ The first vessel of “boat people” requesting political asylum in the U.S. arrived in 1963, but the state denied all twenty-five passengers their request, setting an unfortunate precedent for future refugees;²⁰ however, the first significant waves of “boat people” did not begin arriving on North American shores until 1977, after Jean-Claude Duvalier succeeded his father, continuing Papa Doc’s repressive regime and further transforming his country into a free trade zone. Indeed, the U.S. state smoothed the path for the undemocratic passing of political control over Haiti from father to son in exchange for Jean-Claude’s support of “a new economic program guided by the United States, a program featuring private investments from the United States that would be drawn to Haiti by such incentives as no custom taxes, a minimum wage kept

¹³ Quoted in Farmer, *The Uses of Haiti*, 99.

¹⁴ Quoted in Farmer, *The Uses of Haiti*, 188.

¹⁵ *Ibid.*, 100.

¹⁶ *Ibid.*, 92.

¹⁷ Norman L. Zucker and Naomi Flink Zucker, *Desperate Crossings: Seeking Refuge in America* (Armonk: M.E. Sharpe, 1996), 35-36.

¹⁸ *Ibid.*, 35.

¹⁹ *Ibid.*

²⁰ Lawless, 5.

very low, the suppression of labor unions, and the right of American companies to repatriate their profits.”²¹ Under Baby Doc’s rule, Haiti fell further into abject poverty, with the state unleashing a new reign of terror, thereby creating greater numbers of refugees from the most disenfranchised classes.

Although the U.S. refused Haitian “boat people” political asylum, declaring them “economic migrants” rather than bona fide refugees, it provided both indirect and direct support for the violently repressive Duvalier dictatorships. The U.S. funneled tens of millions of dollars to both Duvaliers through avenues such as the U.S. Agency for International Development (USAID), military support, and the CIA pipeline. As state documents from the 1960’s demonstrate, the U.S. was primarily interested in “protecting private American citizens and property interests in Haiti,”²² and “[a] tyrant who would look out for U.S. interests was quite good enough to deserve Washington’s support,” both before, during, and after the Duvalier regimes.²³

U.S. Haitian Refugee Policy and the Suspension of Constitutional Rights

The U.S. has never accepted refugees for primarily humanitarian reasons; instead, whether or not it decides to offer safe haven is essentially a foreign and domestic policy decision. Cold War politics provided the initial driving force behind the wholesale denial of asylum to Haitian refugees; the U.S. considered Haiti a capitalist ally particularly important in the effort to contain Cuba. Thus, while the U.S. carved out a special policy to expedite the entry of Cuban refugees, it also refused to face the fact that Haitian “boat people” did indeed have the “well-founded fear of persecution” that is required to attain asylum according to U.S. law. However, these Cold War politics form only one part of the rationale behind Haitian exclusion. The U.S. nation-state’s perception contradicted the reality of the Haitian refugees. Although relatively few Haitians request political asylum compared to other groups (such as Cuban, Indochinese, and Eastern European refugees), the state has reacted to them as a force that could potentially overwhelm the country. To justify their blanket exclusion of Haitian refugees, the U.S. repeatedly claimed that they were “economic migrants” who had nothing to fear by remaining in or returning to their homeland—an assertion that requires extraordinary, willful blindness to the political and economic violence rampant throughout the country, violence which the U.S. itself has fostered. Following this line of argument, the INS claimed that, upon arriving to the U.S., Haitians are not asylum seekers but illegal aliens.

Despite the U.S.’s blanket rejection of Haitians’ asylum claims, the outflow of refugees continued unabated. Thus, the Haitian Program began in 1978 with the INS and Justice and State Departments collaborating to find a way to drive out Haitians already in South Florida and discouraging future refugees from trying to come to the U.S. This program marked the first of its kind, an anti-asylum policy directed at a particular national population. It operated on three terrains: “detaining Haitian asylum seekers in the United States, denying them due process in the adjudication of their claims, and deterring future asylum seekers from Haiti.”²⁴ Because this policy clearly violated the constitutional

²¹ Ibid., 160.

²² Quoted in Farmer, *The Uses of Haiti*, 93.

²³ Ibid., 94.

²⁴ Zucker and Zucker, 70.

rights of its subjects, the federal judiciary ruled against the government in the class action lawsuit, *Haitian Refugee Center v. Civiletti*, in 1980. The court acknowledged a long pattern of systemic discrimination against Haitian refugees, but in spite of the court’s ruling, this pattern continued unabated. Rather than comply with this judicial decision, the Executive transported refugees to Puerto Rico to process their claims, in other words, to a colonial site where the courts do not have jurisdiction and where the suspension of the refugees’ constitutional rights could be suspended without consequence for the state.

Furthermore, when Ronald Reagan took command of the Presidency, he extended the Haitian Program by adding the element of interdiction. He came to power at time of economic malaise and a perceived decline of respect for law and order, the causes of which were often wrapped up in anti-immigrant discourses.²⁵ Zucker and Zucker observe: “The Reagan administration quickly realized that a nation that controlled its borders was saying to the world that it brooked no violations of its sovereignty, that it would return American jobs to American workers, and that it would not only enforce the immigration laws but protect Americans from lawbreakers.”²⁶ With the help of his appointed Task Force on Immigration and Refugee Policy, Reagan was able to circumvent the *Civiletti* ruling through a legal loophole and carry on the exclusion of Haitian refugees through the denial of due process, detention, and interdiction. The detention element of the program “disappeared” refugees held in detention, as the INS refused to release the names and locations of its prisoners, particularly those prisoners who had legal representation, but sent them to detention centers in far flung areas of the U.S. Nina Glick-Schiller and Georges Fouron have described the detention centers as “concentration camps,”²⁷ where refugees were “subjected to daily abuse, degradation, and intimidation on the part of the camps’ guards.”²⁸ Furthermore, the federal government kept open the Krome Avenue North Detention Center in South Florida, one of the primary sites imprisoning Haitian refugees, despite orders from the local Department of Health to have it closed. The governor of Florida also sued the federal government to close this facility, as it exceeded its maximum capacity by over one thousand inmates.²⁹

Though the denial of due process and incarceration provided effective means of dealing with refugees already within U.S. borders, Reagan’s Task Force decided that interdiction offered the most effective means of preventing further attempts by Haitians to reach U.S. shores and petition for asylum. The U.S. thus entered a bilateral agreement with Haiti, the only one of its kind, that sought to establish a “cooperation program of interdiction” of refugees deemed “illegal” migrants. Interdiction amounts to pre-emptive action, whereby the Coast

²⁵ Nina Glick-Schiller and Georges Fouron state: “Politicians, the unions, and the media identified ‘illegal’ immigrants as the primary cause of urban violence and crime. Immigrants were said to be the cause of the proliferation of illegal drugs in America’s cities. Immigrants were also said to cause higher unemployment and to put a strain on the American economy by using services to which they were not entitled.” Nina Glick-Schiller and Georges Fouron, “‘Everywhere We Go, We are in Danger:’ Ti Manno and the Emergence of a Haitian Transnational Identity,” *American Ethnologist* (May 1990):336-7.

²⁶ Zucker and Zucker, 72.

²⁷ Glick-Schiller and Fouron, 337.

²⁸ *Ibid.*, 343, footnote 8.

²⁹ Lawless, 128.

Guard, along with INS officers, intercepts Haitian vessels in international waters, performs a cursory asylum review onboard, and returns all refugees seen as undeserving of a full asylum hearing within the U.S. Not only does this bilateral agreement break the international, juridical principle of freedom in international waters,³⁰ but it also violates the principle of non-return or non-refoulement, a cornerstone of the United Nations Convention Relating to the Status of Refugees³¹ as well as the federal 1980 Refugee Act.

The Aristide Coup and a New Phase of the Haitian Program

The U.S. has maintained the Haitian Program to deal with the “problem” of “boat people,” who continued to flee Jean-Claude Duvalier’s regime as well as the violent political turmoil that followed his forced departure from the country. It was only in 1991 with the rise of Haiti’s first democratically elected president, Jean-Bertrand Aristide, a priest of the poor who sought to uplift and empower the majority of the population, that the flow of refugees leaving the country dramatically decreased. However, this hopeful time of peace did not last long, as Aristide was quickly overthrown in a military coup d’état in September 1991. This coup was exceptionally violent, requiring the army to use excessive military force to quell opposition from Aristide’s supporters—the vast majority of the Haitian population. Paul Farmer, a medical anthropologist and physician who specializes in infectious diseases and works with AIDS patients in rural Haiti, notes that the coup subjected the Haitian people to “pitiless and often arbitrary repression of perceived opposition” and was particularly harsh in the countryside, which “was the theatre of countless unwitnessed arrests; these were followed by beating, torture and then extortion—cash was required to end any imprisonment.”³² This unique coup thus produced an inordinate number of refugees, more than previous political ruptures, and the administration of George H.W. Bush responded to this crisis by drawing on the state’s pre-existing policy of interdiction and forcible repatriation.³³

International human rights organizations denounced the U.S.’s policy and were able to force a compromise in which interdicted refugees would be brought to the U.S. naval base at Guantánamo Bay, Cuba. The refugees began arriving to Guantánamo in mid-November 1991. Though the military and Coast Guard described their actions in terms of a “humanitarian mission,”³⁴ camp conditions and the treatment of the refugees within the camp speak to the contrary. The refugees lived in tents and airplane hangars infested with vermin, scorpions, and snakes and surrounded by razor wire; furthermore, camp guards and

³⁰ The United Nations Convention of the High Seas states: “The high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty.” Quoted in Thomas David Jones, “The Haitian Refugee Crisis: A Quest for Human Rights,” *Michigan Journal of International Law* 15 (1993-1994): 111.

³¹ The principle of non-refoulement in the U.N. Convention states: “No contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

³² Farmer, *The Uses of Haiti*, 163.

³³ However, the Bush Administration did briefly suspend this policy for the first two weeks following the coup.

³⁴ Paul Farmer, *Pathologies of Power: Health, Human Rights, and the New War on the Poor* (Ewing: University of California Press, 2003), 56.

administrators subjected detainees to abusive treatment. One reported: “I was beaten, handcuffed, and they spat in my face. I was chained, made to sleep on the ground. ... We were treated like animals, like dogs, not like humans.”³⁵ Furthermore, military health care workers subjected the detainees to coerced medical treatments, including Depo Provera birth control injections, without consultation or consent, an act which Farmer notes constitutes a crime of assault.³⁶

These refugees detained at the base had already passed a “credible fear of persecution” standard for asylum onboard Coast Guard cutters, but in March 1992, the INS decided to re-screen these refugees without legal counsel and subsequently return those Haitians who failed this second test to their persecutors. This change by the state incited a legal challenge brought to the federal courts by a coalition of legal and community advocates, including the Haitian Centers Council, the Lowenstein Law Clinic of Yale Law School, and the Center for Constitutional Rights. In *Haitian Centers Council v. McNary* (HCC I),³⁷ the plaintiffs successfully challenged the government on the grounds of the Fifth Amendment right to counsel, on behalf of both the lawyers’ right to meet and represent their clients, and the clients’ rights to obtain legal counsel.³⁸

In May 1992, however, the refugee camp was stretched beyond capacity, holding 12,500 Haitians and with its water, electric, and sewage systems overburdened.³⁹ With the violence in Haiti and expulsion of refugees continuing with no end in sight, the Bush I administration further extended the interdiction program with Executive Order 12,807, also known as the Kennebunkport Order, named after the vacation home from which President Bush issued the order during his Memorial Day holiday. The Kennebunkport Order directed the Coast Guard to immediately and forcibly return all refugees intercepted in international waters to Haiti without any asylum interview or screening process, and once again elicited a legal challenge from the same team that filed the right-to-counsel case only two months ago. Harold Hongju Koh, one of the case’s primary litigators and a professor of international law at Yale, has asserted that the Kennebunkport Order marks the “strongest U.S. assault ever against the non-refoulement⁴⁰ principle”⁴¹ that “converted the Coast Guard into agents of a brutal dictatorship that we have called illegitimate.”⁴² Indeed, uniformed

³⁵ Quoted in Farmer, *Pathologies of Power*, 56.

³⁶ *Ibid.*, 63.

³⁷ *Haitian Centers Council v. McNary*, 969 F.2d 1326 (1992).

³⁸ The court decided that the Fifth Amendment does, in fact, apply at Guantánamo, “since the U.S. has exclusive control over Guantánamo, and given the undisputed applicability of federal criminal laws to incidents that occur there and the apparent familiarity of the governmental personnel at the base with the guarantees of due process, fundamental fairness, and humane treatment that this country purports to afford to all persons.” 113 S. Ct. 2549 (1993).

³⁹ Zucker and Zucker, 110.

⁴⁰ Article 33.1, entitled the “Prohibition of expulsion or return (“refoulement”), of the U.N. Convention Relating to the Status of Refugees states: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

⁴¹ Harold Hongju Koh, “The ‘Haiti Paradigm’ in United States Human Rights Policy,” *Yale Law Journal* 2391 (1993-1994): 2402.

⁴² Harold Hongju Koh, “The Human Face of the Haitian Interdiction Program,” *Virginia Journal of International Law* 33 (1993): 488.

Haitians fingerprinted, questioned, and photographed the refugees upon their return and assumed that all who tried to escape the country were Aristide supporters and potential subversives.⁴³ When the Coast Guard encountered intransigent refugees who refused to disembark into the hands of their persecutors, it drove those Haitians off its ships with fire hoses.⁴⁴

In *Sale v. Haitian Centers Council* (HCC II),⁴⁵ Koh and his colleagues filed their legal challenge to the Kennebunkport interdiction policy, eventually reaching the Supreme Court in 1993. The Supreme Court ruled in favor of the government, ultimately engaging in logistical gymnastics in order to justify this practice that clearly violates both domestic and international law. Unlike the closed-door meetings where the interdiction program developed, the Court’s decision provides a window into the state’s tortured reasoning for its “uniquely discriminatory”⁴⁶ treatment of Haitian refugees.

The Court stresses the state’s supposedly humanitarian motivations for the interdiction program. Throughout the decision, it repeatedly emphasizes the “unseaworthy, overcrowded, and unsafe” vessels Haitian boat people used to embark on a dangerous journey. To support its claim, the majority cites the Haitian Centers Council, in other words, the party whose overall argument it rejected, stating: “thousands of Haitian refugees ‘have set out in small boats that are often overloaded, unseaworthy, lacking basic safety equipment, and operated by inexperienced persons, braving the hazards of a prolonged journey over high seas in search of safety and freedom.’” The refugees’ advocates call attention to the dangers of the journey in order to stress the unbearable conditions in Haiti and support their argument that the Haitians’ fears of persecution are so great that they are willing to risk everything, even their own lives on the open waters, to escape their homeland in search of a safe haven. The Court, however, twists these same facts—many “boat people” did, indeed, leave their country on boats unfit for the open ocean, and some did drown in their efforts to escape—to justify sending refugees back to the site of their persecution. It also cites the Executive’s press release explaining the purpose of the Kennebunkport Order, which claims that interdicting and returning these refugees to their country “is necessary to protect the lives of the Haitians, whose boats are not equipped for the 600-mile sea journey.” The same press release also states that “[u]nder current circumstances, the safety of Haitians is best assured by remaining in their country.” The Court reiterates the Executive’s claim that the interdiction program is in the interests of Haitians’ safety, even while it admits that “in an uncontested finding of fact, since the military coup ‘hundreds of Haitians have been killed, tortured, detained without warrant, or subjected to violence and the destruction of their property because of their political beliefs.’” The Court does not resolve how imprisoning Haitians in a place ruled by particular and indiscriminate violence is in the refugees’ own interests. It merely claims that “[t]he wisdom of the policy choices made by

⁴³ Zucker and Zucker, 109.

⁴⁴ Koh, “The Human Face,” 488.

⁴⁵ By the time this case reached court, the Clinton Administration had replaced the Bush Administration. The shift in defendant from Gene McNary, Bush’s INS Commissioner, to Chris Sale, who held the same position in Clinton’s cabinet, reflects that shift in the Executive. *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993).

⁴⁶ Koh, “The Haiti Paradigm,” 2402.

Presidents Reagan, Bush, and Clinton is not a matter for our consideration.” By failing to consider the wisdom of White House policy decisions, the Court abdicates its responsibility to check the excesses of the Executive Branch. As Koh later points out, “[n]o assessment of the Haitian crisis would be complete without evaluating the soundness of those policies.”⁴⁷

It seems the Court’s decision hinges on the incompleteness of its analysis. In spite of its claims that the interdiction program is motivated by humanitarian concerns, its introductory statements nevertheless reveal that “national interests” in regard to “illegal immigration” directed the state’s interdiction policy. The Court states:

With both the facilities at Guantánamo and available Coast Guard cutters saturated, and with the number of Haitian emigrants in unseaworthy craft increasing..., the Government could no longer both protect our borders *and* offer the Haitians even a modified screening process. It had to choose between allowing Haitians into the United States for the screening process or repatriating them without giving them any opportunity to establish their qualifications as refugees. ...[T]he first choice not only would have defeated the original purpose of the program (controlling illegal immigration) but would have impeded diplomatic efforts to restore democratic government in Haiti. (Emphasis theirs)

The Court presents a false choice between protecting U.S. borders and protecting Haitians from certain persecution. The U.N. Convention Relating to the Status of Refugees and the 1980 Refugee Act do not require the U.S. to grant asylum to all who request it; it only grants a refugee the right to seek asylum and be protected from return to their persecutors.⁴⁸ In other words the state collapses two distinct, albeit related issues: immigrating to and becoming legal residents of the U.S. and attaining refuge from a context of persecution and the threat of injury or death. Furthermore, through the interdiction program, the Coast Guard was not patrolling the border between international and U.S. national waters to prevent Haitians from reaching our shores. It was traversing international waters close to the border of Haiti and picking up all Haitian vessels it found, whether headed to the U.S. or to other destinations. The interdiction program essentially extended U.S. borders to include the 600 miles separating Haiti from U.S. territory.⁴⁹ The Court also openly acknowledges that the original purpose of the interdiction program was to control “illegal immigration,” “a serious national problem detrimental to the interests of the United States.” The problem interdiction sought to address had much less to do with the safety of Haitian refugees, as the Court repeatedly claims, and much more to do with preventing an “alien invasion” by poor, Black, Creole-speaking “illegal immigrants.”⁵⁰

⁴⁷ *Ibid.*, 2423.

⁴⁸ Janice D. Villiers, “Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the U.S.,” *Brooklyn Law Review* 60 (1994-1995): 872.

⁴⁹ Mae Ngai explores a related expansion of the U.S. border with Mexico, examining the role of the border patrol in its efforts to regulate “illegal immigration” in the mid-twentieth century. See chapter four of *Impossible Subjects: Illegal Aliens and the Making of Modern America*.

⁵⁰ The Court rarely refers to the Haitians as refugees or asylum seekers but repeatedly labels them as “migrants,” “undocumented aliens,” “emigrants,” “passengers,” or at most, “fleeing Haitians.”

Furthermore, the state’s actions contradict the Court’s assertion that providing safe haven to Haitian refugees would impede efforts to reinstate Aristide to his presidency. The U.S. worked to discredit and prevent Aristide’s return—discrediting his character as “a murderer and a psychopath,”⁵¹ and filibustering negotiations for his reinstatement as President until his term was nearly complete.⁵² The CIA had paid informants for political and military information leading up to the coup and trained and funded a secret intelligence unit that included the leader of the coup, Raoul Cedras.⁵³ It also paid the leader of the Front for the Advancement and Progress of Haiti, a paramilitary group that terrorized the people, while he “was doing his best to prevent the return to Haiti of its ousted President.”⁵⁴ Furthermore, the chief of Port-au-Prince police closely linked to the death squads of the coup graduated from the U.S. Army’s School of the Americas.⁵⁵ The U.S. refused to cooperate with human rights investigations of mass murders by the Haitian state, and, as Koh argues, the Kennebunkport Order obliged the Bush Administration to “relax its moral condemnation of human rights violations in Haiti, and undercut the acceptance of human rights standards at home.”⁵⁶

The majority decision, authored by Justice Stevens, legally validated the Kennebunkport Order by misinterpreting the U.N. Convention and the 1980 Refugee Act, using what Koh calls a “three-part technique that led it to sanction precisely the result the treaty was drafted to prevent.”⁵⁷ To distort the clear directive of both international and domestic law, the Court twisted the meanings of “non-return” and “nonrefoulement,” knowingly interpreted these contested words contrary to the laws’ object and purpose,⁵⁸ and drew on what Justice Scalia himself has called “that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction,”⁵⁹ the negotiating history of the U.N. Convention rather than the Convention itself. The lone dissenter to the decision, Justice Blackmun, highlighted the faults of the Court’s ruling: “That Congress would have meant what it said is not remarkable. What is extraordinary is that the Executive, in disregard of the law, would take to the seas to intercept fleeing refugees and force them back to their persecutors, and that the Court would strain to sanction that conduct.” The Supreme Court followed and further strengthened unfortunate precedents for interpreting domestic and international statutes. As Koh asserts: “Haitian Centers Council stands at the crossroads of three recent lines of Supreme Court precedent: cases misconstruing international law, favoring presidential power, and disfavoring aliens and human rights.

⁵¹ Farmer, *The Uses of Haiti*, 168.

⁵² Noam Chomsky, “Introduction,” *The Uses of Haiti* (Monroe: Common Courage, 2003), 36.

⁵³ Farmer, *The Uses of Haiti*, 183.

⁵⁴ Quoted in Zucker and Zucker, 117.

⁵⁵ Farmer, *The Uses of Haiti*, 258.

⁵⁶ Koh, “The Haiti Paradigm,” 2403.

⁵⁷ *Ibid.*, 2416.

⁵⁸ The Court even admits that “[t]he drafters of the Convention and the parties to the Protocol—liked the drafters of 243(h)—may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.”

⁵⁹ The initial venue where this case was argued, Second Circuit Court of Appeals, cites Scalia in its decision to rule in favor the refugees. *Haitian Centers Council v. McNary* (969 F.2d 1350); 1992.

Together, these jurisprudential strands wove a noose from which plaintiffs could not escape."⁶⁰

This ruling maintained the policy of interdiction; yet despite these pre-emptive measures of the U.S. state, the political and economic conditions in Haiti never improved, and the country continued to expel masses of refugees. Although the U.S. previously sought to "delay indefinitely"⁶¹ Aristide's return to Haiti, the Clinton Administration eventually threatened a military invasion to reinstate Haiti's democratically elected leader. To justify this potential invasion as a humanitarian action in the best interests of the Haitian populace, Clinton needed only to recount the fact that the de facto government has "conducted a reign of terror, executing children, raping women, killing priests."⁶² However, in the same speech, Clinton reveals a more pressing, U.S.-centered cause for invading Haiti. He states:

As long as Cedras rules, Haitians will continue to seek sanctuary in our nation. ... The American people have already expended almost \$200 million to support them, to maintain the economic embargo, and the prospect of millions more being spent every month for an indefinite period of time looms ahead unless we act. ... Three hundred thousand more Haitians, five percent of their entire population, are hiding in their own country. If we don't act, they could be the next wave of refugees at our door. We will continue to face the threat of a mass exodus of refugees and its constant threat to stability in our region, and control of our borders.⁶³

Clinton focuses here on the continued costs the North American people will be forced to pay unless the state uses its military force in Haiti. Not only will the Haitian Program drain financial resources from the pockets of U.S. taxpayers, but, more urgently, the specter looms of hundreds of thousands of poor, desperate, Black people ready to cross our borders if given the time and opportunity. Clinton describes this potential refugee wave undoubtedly as a threat to the nation, sending the message that unless the U.S. militarily invades Haiti, then Haiti's poorest and most desperate will invade the U.S. Ultimately, the coup leadership agreed to leave Haiti after lengthy negotiations and the imminent threat of military invasion in September 1994.⁶⁴

The potential "alien invasion" Clinton feared was alleviated by his threat of military attack. However, before the U.S. state finally made real efforts to reinstate Aristide, a group of refugees were still languishing in the camps of Guantánamo Bay. And although Koh and his colleagues failed to overturn the interdiction program, they were arguing another case against the state at the same moment, a case that challenged the indefinite detention of the near 300 HIV positive refugees who remained at Guantánamo.

⁶⁰ Koh, "The Haiti Paradigm," 2415.

⁶¹ Chomsky, 35.

⁶² Farmer, *The Uses of Haiti*, 315.

⁶³ Quoted in Zucker and Zucker, 119.

⁶⁴ Farmer, *The Uses of Haiti*, 317.

“Nothing More than an HIV Prison Camp:” Race, Nation, Contagion, and Quarantine/Incarceration

Although the defendants euphemistically refer to its Guantánamo operation as a “humanitarian camp,” the facts disclose that it is nothing more than an HIV prison camp.

—Judge Sterling Johnson, Jr.

To understand how Haitians, in particular, became subjected to indefinite detention in the world’s only HIV prison camp, their case must be situated in what Farmer describes as the “complex symbolic web linking xenophobia, racism, and a surprisingly coherent ‘folk model’ of Haitians to which many North Americans subscribe.”⁶⁵ This symbolic web has been cultivated over an extended period and involves popular cultural, medical, and state discourses that link Haitians not only to AIDS/HIV but also to much broader notions of contagion—health-related and otherwise. Further, it is embedded in longstanding traditions of prejudice against Haiti and its people and anti-Black racism as well as the political and economic ties that the U.S. has fostered with the island nation. All of these discursive threads converge at the HIV refugee camp at Guantánamo.

When AIDS first emerged as a new, mysterious, and lethal disease, medical institutions and researchers found the infection’s appearance in Haitian immigrants in the U.S. and Canada baffling, as these Haitians denied engaging in homosexual sex or using intravenous drugs, two factors that linked other AIDS patients to each other. In March 1983, the Centers for Disease Control (CDC) identified four high-risk groups, including homosexuals, hemophiliacs, heroin-users, and Haitians. While other members of the so-called “4-H Club” were linked to AIDS via the acts of gay male sex and the use of intravenous needles, Haitians constituted the only group whose risk was defined by ethnicity and nation. The CDC’s risk categorization thus implied that Haitians as such were somehow exposed and vulnerable to the disease. At this time when “no microbe had been isolated, risk designation was, in effect, synonymous with carrier status.”⁶⁶ And, as Susan Sontag argues, a risk-group for a disease represents a “neutral sounding bureaucratic category which also revives the archaic idea of a tainted community that illness has judged.”⁶⁷ North American medical institutions not only assumed a connection between Haitians and the disease, but also suggested that AIDS emanated from this island nation, despite responses from Haitian researchers that the disease only recently appeared in their country.⁶⁸

The North American medical establishment, for the first time in the history of modern medicine, tied a pathological condition to a national group. “Researches never made clear whether their conclusions applied to Haitians as an ethnic group or as a nationality,” which raises the question of whether “the notion [was] simply based on the concept that all Haitians are black, and

⁶⁵ *Pathologies of Power*, 66.

⁶⁶ Farmer, *AIDS and Accusation*, 211.

⁶⁷ Quoted in Farmer, *AIDS and Accusation*, 239.

⁶⁸ Lawless notes that Haitian medical researchers were at no point consulted or invited to participate in North American studies (14).

probably racist in its origination?”⁶⁹ The fact that the medical establishment made not only a particular identification between Haiti and AIDS but also misleading parallels between AIDS in Haiti and in sub-Saharan Africa strongly suggest that this medical research was embedded in and influenced by nation- and race-based forms of prejudice. In 1990 the U.S. Food and Drug Administration (FDA) recommended that blood collection agencies refuse blood donations given by immigrants from Haiti and thirty-eight sub-Saharan African nations.⁷⁰ Furthermore, the World Health Organization (WHO) categorizes AIDS in Haiti and sub-Saharan Africa as “Pattern II,” characterized by the relatively minor role homosexual behavior plays in the transmission patterns of the disease.⁷¹ However, Farmer argues that this categorization “obscures an accurate understanding of the Haitian AIDS epidemic” partly because the virus was most likely introduced to the nation through homosexual sexual contact and because this WHO scheme diverts attention from the fact that AIDS in Haiti shares a much closer relationship to the North American epidemic.⁷² As he asserts: “AIDS in Haiti is a tale of ties to the United States, rather than to Africa. ... AIDS in Haiti has far more to do with the pursuit of trade and tourism in a dirt-poor country than with, to cite Alfred Metraux again, ‘dark saturnalia celebrated by blood-maddened, sex-maddened, god-maddened negroes.’”⁷³

The North American medical establishment suggested both that AIDS originated in Haiti and that Haitian immigrants then spread the virus to North America; however, as anthropologist Robert Lawless argues, “[i]f there is anything that AIDS is related to in Haiti, it is the poverty and consequent exploitation of this poverty by North Americans through their encouragement of prostitution in Haiti.”⁷⁴ The theory that AIDS originated in Haiti stems partly from the false assumption that Haiti has been an exceptionally isolated nation, yet, as discussed above, Haiti has been enmeshed in (neo)imperial relations with dominant nations, particularly the U.S., since before it attained sovereignty. And, as Farmer makes clear, HIV “has run along the fault lines of economic structures long in the making.”⁷⁵ The island nation’s place in the world economy has left it open to the exploitation of its people not only as cheap workers for assembly manufacturing, but has also fostered a tourist economy in which people from wealthier nations, particularly in North America, can take advantage of these vastly unequal international economic relations. As Haiti’s economy worsened and poverty became deeper and more widespread, “economic desperation gave the possessors of even modest sums of money access to a sexual-services marketplace unconscionably tilted in their favor.”⁷⁶ Although not all sexual tourism catered to gay travelers and though not all gay sex in the country was prostitution, Haiti became a major destination for North American gay men, with one travel advertisement in *The Advocate* praising it as “a place where all your fantasies come true.”⁷⁷ Furthermore, early cases of

⁶⁹ Lawless, 13.

⁷⁰ *Ibid.*, 17.

⁷¹ Farmer, *AIDS and Accusation*, 142.

⁷² *Ibid.*

⁷³ *Ibid.*, 246.

⁷⁴ Lawless, 15.

⁷⁵ Farmer, *AIDS and Accusation*, 9.

⁷⁶ Farmer, *AIDS and Accusation*, 189.

⁷⁷ Quoted in Farmer, *AIDS and Accusation*, 147.

HIV/AIDS in Haiti appeared in Carrefour, a Port-au-Prince suburb "with numerous night clubs, prostitutes, and a reputation for catering to every sexual whim of the tourist."⁷⁸ The fact that a tourist economy partly involving sex tourism existed in Haiti does not mean that this commerce definitively introduced HIV to the island nation; however, it does highlight how the relationship between the U.S. and its neocolony relates to the transnational transmission of the disease.⁷⁹

While medical researchers might not be expected to explore the complex history between the U.S. and Haiti and its relationship to the transnational transmission of HIV, they nevertheless based the research that led them to imply the "Haitian = AIDS carrier" equation on unsubstantiated premises through what Farmer identifies as a "*systematic misreading* of existing epidemiologic and ethnographic data."⁸⁰ As mentioned, responses from Haitian medical researchers refuted North American claims that HIV emanated from their country; furthermore, "the obvious fact that Haiti is part of an island" means that the virus "must cross water and international boundaries to reach Haiti."⁸¹ The FDA also neglected the fact that other nations in the Caribbean actually had higher infection rates and similarly complex transmission patterns as Haiti when it set its policy to refuse blood donations from Haitian immigrants.⁸² Lawless notes that "the faulty reporting of the alleged AIDS-Haitian connection 'is in stark contradiction with the basic principles of scientific methods' and that the risk group classification 'resembles far more a caste systematization than groups arranged in function of their susceptibility to the condition.'"⁸³ Despite evidence to the contrary, how was the North American medical establishment nevertheless able to conclude that Haitians were somehow inherently at risk for HIV/AIDS? As Farmer argues, racist discourses "offered a 'coherence' and discursive tradition of its own," and North American medical researchers were all too ready to pin the inexplicable disease on Haiti's "exotic subculture."⁸⁴

Farmer also asserts that "few countries have been more marked by association with endemic infectious disease than Haiti."⁸⁵ Europeans in the sixteenth century contended that syphilis, another infectious disease transmitted through sexual contact, originated in Haiti and was brought back to Europe by Columbus's crew. And, like the case of HIV/AIDS in the twentieth century, evidence suggests that Columbus's crew, in fact, brought syphilis to Haiti. Farmer also notes the connections made in the early twentieth century between syphilis and Black Americans as a "'notoriously syphilis-soaked race,'"⁸⁶ suggesting that Black bodies are not only infectious and infecting, but also hypersexualized and especially prone to spreading sexually transmitted diseases. Before the emergence of AIDS, in the 1970's and 1980's, North Americans also

⁷⁸ Lawless, 16.

⁷⁹ Farmer notes that the five Caribbean countries with the most AIDS cases were the same countries with the most economic ties to the U.S., with Haiti being almost fully dependent on U.S. exports. *AIDS and Accusation*, 149.

⁸⁰ *AIDS and Accusation*, 2. (His emphasis)

⁸¹ *Ibid.*, 8.

⁸² *Ibid.*, 218.

⁸³ Lawless, 14.

⁸⁴ Farmer, *AIDS and Accusation*, 223.

⁸⁵ *Ibid.*, 237.

⁸⁶ Quoted in Farmer, *AIDS and Accusation*, 237.

identified Haitians with tuberculosis, hepatitis, and typhoid. Beyond discourses of disease and health, the very birth of Haiti as an independent nation became a nightmare for white colonial states exploiting Black slave labor, particularly the United States, a nightmare that ultimately required a “diplomatic quarantine”⁸⁷ to contain the new republic. As Kaplan asserts: “[B]lack Haitian bodies were viewed from the north as bearing the contagion of black rebellion that could ‘infect’ slaves in other countries and colonies.”⁸⁸ Thus, it seems that attributing a necessary link between Haiti, Haitians, and HIV/AIDS fits within a pre-existing discourse of contagion and the island nation with a long, multilayered history.

Both the FDA and the CDC did remove their respective HIV/AIDS risk designations from Haitians as a social category. When the CDC finally removed Haitians from the “4-H Club,” the director of the CDC’s Center for Infectious Diseases stated: “The Haitians were...the only group identified because of who they were rather than what they did.”⁸⁹ It has always caused problems for us. ... It became less and less justifiable to include the Haitians as a pear among all the apples.”⁹⁰ However, because medical researchers are “assumed by the public to have access to privileged knowledge”⁹¹ and because this medical research was supported by the directives of state apparatuses, mainstream media outlets had already uncritically reported the alleged connection between Haitians and AIDS. The “Haitian = AIDS carrier” equation clung to the bodies of Haitians, despite the retractions of the state and the medical establishment. While media outlets did not consider those retractions newsworthy enough to publish widely, a story that did deserve newsworthy status was the debate over Haitian refugees and their detention.

AIDS emerged at the same moment as debates over the “problem” of Haitian “boat people” were becoming prevalent in public and state discourses. Patients in the U.S. began exhibiting symptoms of AIDS in 1978, the same year that President Carter initiated the Haitian Program, and the CDC first reported suggested links between the new disease and Haitians in July 1982,⁹² less than one year after President Reagan brokered the bilateral interdiction agreement with Jean-Claude Duvalier in September 1981. Thus, AIDS erupted as a public health and social crisis at a moment when, as Farmer argues, the state was isolating Haitians as “special targets of a racist and exclusionary attitude pervasive in this country”⁹³ through its immigration and refugee policy. Its emergence in the U.S. began another strain of this official exclusionary attitude embedded in the dual authorities of medical science and the voice of the state. It did not take much effort by the press to connect state policies targeting Haitians along the lines of both immigration and disease/health. In their reporting of the

⁸⁷ Farmer, *The Uses of Haiti*, 66.

⁸⁸ Kaplan, 839.

⁸⁹ The CDC’s classification scheme is problematic not only for Haitians, but for queer people as well. By conflating homosexual sexual acts with homosexual/gay identity, the CDC helped to construct HIV/AIDS as a gay disease. Like its problematic classification of Haitians as a high-risk group, its labeling of “homosexuals” as a discernible category defined by its sexual activity has not only continued to stigmatize queer people as AIDS-carriers, but has also obscured the fact that HIV/AIDS does not discriminate based on sexual, national, or racial identity.

⁹⁰ Quoted in Lawless, 12.

⁹¹ *Ibid.*, 17.

⁹² Farmer, *AIDS and Accusation*, 210.

⁹³ Quoted in Farmer, *AIDS and Accusation*, 214.

Haitian-AIDS connection, mainstream media outlets often resorted to using stereotypes of “disease-ridden” refugees languishing in overloaded small boats or overcrowded, filthy refugee camps. An early AIDS medical researcher working for the CDC chastised the press for sensationalizing the link between AIDS and Haitians: “Some news broadcasts pictured scantily clad black natives dancing frenetically about ritual fires, while other caricatured Haitians with AIDS as illegal aliens interned in detention camps.”⁹⁴ This stereotype of the Haitian as both AIDS carrier and filthy refugee would ultimately converge at the site of Guantánamo.

As AIDS activists and advocates have highlighted, although the AIDS crisis was becoming increasingly urgent, the state under President Reagan’s leadership remained strikingly silent on the issue, refusing to address issues of treatment, prevention, or social compassion towards AIDS patients. However, the state did respond to the crisis, with legislators introducing “enormous numbers of bills regarding HIV, most of them punitive, restrictive, and directed at infected persons” soon after the disease was recognized.⁹⁵ In 1987 the Senate unanimously passed into law a bill that combined the anti-AIDS and anti-immigrant sentiments that extended throughout the nation. This bill demanded that immigrants be tested for and found free of HIV before entering the nation’s borders; it was essentially a ban on HIV positive immigrants. This bill again passed through Congress in 1993 by a landslide vote in the Senate, withstanding a proposal recommended by public health officials to remove it from the law. These state bans on HIV positive immigrants did not stray from the wishes of legislators’ constituents but reflected the prevailing attitudes of the public. The public health officials who proposed the removal of the HIV immigration ban received 40,000 letters opposing the recommendation during a thirty-day public comment period.⁹⁶

The HIV refugee camp at Guantánamo emerges from this nexus in which discourses regarding xenophobic fears of foreigners in general and fears of HIV/AIDS converge with specifically anti-Haitian discourses that identify Haitians as “contagion” and as “boat people” undeserving of our sympathy or respect. As mentioned above, the Haitian Centers Council legal coalition filed another federal case against the state, contesting the suspension of constitutional rights of nearly 300 HIV positive Haitian refugees who continued to languish in Guantánamo with no end to their detention in sight. *Haitian Centers Council v. Sale* (HCC III)⁹⁷ covered the major issues raised by the refugees’ detention, issues which currently draw renewed attention to Guantánamo. These issues include the detainees’ First Amendment rights to counsel; Fifth Amendment due process rights, particularly regarding medical care, arbitrary punishment, and indefinite detention; and rights to be free from the state’s abuse of discretionary power. The state, then as now, claimed that Cuba has “ultimate sovereignty” over the space of Guantánamo Bay, despite the fact that the U.S. has “complete jurisdiction and control” over the naval base that occupies that space; therefore, in the eyes of the state, neither the Constitution nor international treaties, such as the U.N. Convention Relating to the Status of Refugees, holds sway at

⁹⁴ Quoted in Farmer, *AIDS and Accusation*, 221.

⁹⁵ Farmer, *Pathologies of Power*, 59.

⁹⁶ *Ibid.*, 67.

⁹⁷ *Haitian Centers Council v. Sale*, 823 F. Supp 1028 (1993).

Guantánamo. The Government’s line of reasoning concluded that its management of Haitian refugees did not break the law, because the law was effectively absent; the refugees were essentially left without rights or legal protections at this space where no state or other institution could be held accountable for their treatment.

Judge Sterling Johnson of the U.S. District Court ruled against all the Government’s claims, ordering the release of all the refugees to anywhere but Haiti and enjoining the state’s actions as violating the Constitution. While the Supreme Court’s decision in the HCC II challenge to the Kennebunkport Order provides insight into how the state manipulated the language of the law in order to defy it, Judge Johnson’s ruling exposes these legal maneuvers and fulfills the Court’s role in checking the excesses of Executive power. Judge Johnson makes clear his perspective on the case, as he condemns the conditions of the refugees’ confinement, his vivid descriptions revealing his sentiments regarding the state’s disregard for their dignity, health, and welfare. He states:

[The] HIV+ Haitians remaining at Guantánamo live in camps surrounded by razor barbed wire. They tie plastic bags to the sides of the building to keep the rain out. They sleep on cots and hang sheets to create some semblance of privacy. They are guarded by the military and are not permitted to leave the camp, except under military escort. The Haitian detainees have been subjected to predawn military sweeps as they sleep by as many as 400 soldiers in full riot gear. They are confined like prisoners and are subject to detention in the brig without a hearing for camp rule infractions.

Judge Johnson provides a rich description of the circumstances the refugees had to manage on a daily basis. Not only were the shelters insufficient for the long term detention their inhabitants had to endure, but the detainees were also forced to eat food infested with maggots (or not eat), and the inadequate sanitation created increased health risks for their already compromised bodies. They had no available means of protesting these conditions; one peaceful demonstration they held resulted in the “predawn military sweep” Johnson mentions. As one detainee testifies, the camp administrators instructed them to deal with their conditions as they were, “[b]ecause you’ve got no choice.”⁹⁸

Judge Johnson’s decision has clear implications for the state’s continued claim that Guantánamo occupies an exceptional space outside the jurisdiction of any state and therefore also exempt from international agreements that either the U.S. or Cuba may have entered. He asserts that because the Guantánamo naval base is under the “complete control and jurisdiction of the United States government,” the constitutional protections of both the First and Fifth Amendments apply to the Haitian refugees detained there. On the first claim of the First Amendment right to counsel, Johnson ruled that “the government exercises complete control over all means of delivering communications;” as gatekeepers to the Haitian detainees, the state refused access to the Haitians’ legal counsel because of the INS’s concern that “lawyers would only stress the positive element of an applicant’s case and deemphasize the negative aspects” of their asylum claims. Beyond transparently displaying its intent to exclude as

⁹⁸ Quoted in Farmer, *Pathologies of Power*, 61.

many of the detainees from the U.S. as possible, the state, as Johnson notes, barred the lawyers of Haitian Centers Council solely because of the “viewpoint of the message they seek to convey to the Haitians, in violation of the First Amendment.”

In regards to the multiple Fifth Amendment claims of this case, Johnson similarly ruled that U.S. criminal and civil laws apply at the Guantánamo naval base, noting that “courts have protected the fundamental constitutional rights of noncitizens in other territories subject to exclusive U.S. jurisdiction and control.” Johnson further compares the situation of the Haitian detainees, who already passed a “credible fear of return” standard for asylum, to persons petitioning for asylum from within U.S. borders: “This showing [of a credible fear of return] exceeds that of an unscreened asylum applicant in the United States whose interest in applying for asylum is constitutionally protected.” Johnson thus implies that Guantánamo, though technically outside U.S. borders, is juridically equivalent to U.S. territory.

As he details the different layers of the Haitian refugees’ Fifth Amendment claims, he exposes the specific ways in which the state regarded these people as undeserving of their rights as political subjects. Military administrators and doctors, as well as the Department of Health and Human Services expressed grave concern to the INS about the medically unsafe conditions of the camp, which the Government admitted did not have adequate medical facilities or personnel to manage the health of so many HIV positive patients.⁹⁹ Yet, despite these health risks that the camp posed to its inhabitants, the INS repeatedly rejected the military’s requests that the sickest detainees be medically evacuated to the U.S. for treatment, fearing that once they passed through U.S. borders, they could invoke their constitutional rights and make stronger claims for asylum. Duane “Duke” Austin, an INS spokesperson, told the Associated Press: “We have no policy allowing people with AIDS to come enter the United States for treatment. ... They’re going to die anyways, aren’t they?”¹⁰⁰ Johnson not only declares the state’s actions as “constituting deliberate indifference to the Haitians’ medical needs in violation of their due process rights,” but also reproaches the state: “It is outrageous, callous, and reprehensible that defendant INS finds no value in providing adequate medical care even when a patient’s illness is fatal.”

Equally callous is the fact that the Haitian refugees’ incarceration had no discernible end. At the time of litigation, the INS had not yet decided when it would rule on the refugees’ individual claims or when it would make parole determinations. Furthermore, Johnson notes that “Haitians were told that they could be at Guantánamo for ten to twenty years or possibly until a cure for AIDS is found.” It is unsurprising that given the indeterminacy of their imprisonment, many refugees fell into a state of despair. Yolande Jean, who suffered persecution and torture as a democracy activist in Haiti, wrote a letter to her family, which stated: “Don’t count on me anymore, because I have lost in the struggle for life. Thus, there is nothing left of me. Take care of my children, so

⁹⁹ The ruling notes that there were only two medical doctors to administer to the refugees; only one specialized in infectious diseases.

¹⁰⁰ Quoted in Richard Cole, “‘HIV Concentration Camp’ Remains Despite Complaints by Feds, Military” *Associated Press* (12 December 1992). Judge Johnson quotes “They’re going to die anyway.”

they have the strength to continue my struggle, because it is our duty. ... Life is no longer worth living to me. Hill and Jeff, you no longer have a mother.”¹⁰¹

Haitian Centers Council confronts the issue at the heart of the state’s treatment of Haitian refugees, reaching beyond questions particular to the HIV positive refugees of this case, by contending with the Executive’s use of power beyond the law. Although this case does not question the legality of the interdiction policy, it does challenge the state’s use of excessive use of executive authority—here, in the form of refugee parole authority, usually employed to admit refugees of mass exoduses. During the proceedings, the INS acknowledged that their review process for Haitian refugees constituted an “extra-statutory” “third thing” not authorized by the law (Immigration and Nationality Act), as screened-in Haitians are neither brought to the U.S. nor granted asylum. Unlike his fellow judges in the Supreme Court, Johnson refuses to accept the Executive’s use of parole power to circumvent the law, “precisely the artifice Congress sought to forbid,” stating, “the parole authority cannot be ‘employed to facilitate a continuing deprivation of [detainees’] constitutional rights.’”

Furthermore, in regard to the refugees caught between the asylum/refugee law that prohibits their repatriation and the anti-HIV immigration law that forbids their entry to the U.S., the Executive abused its authority in continuing their detention because of their HIV positive status. Because immigration law is strictly separate from refugee law, the state’s invocation of the anti-HIV immigration ban to refuse entry to the Haitian detainees constituted an abuse of power. As Johnson observes, unlike other refugees, Haitians were subjected to compulsory medical screening and HIV testing, “which are not done and are not relevant to asylum determinations.” Further, the state had yet to enforce the HIV ban on any other group. Johnson states the obvious:

Haitians remain in detention solely because they are Haitian and have tested HIV positive. ... Where HIV positive detainees have been held for nearly two years in prison camp conditions likely to further compromise their health, where each year other individuals carrying the HIV virus are allowed to enter the United States, and where the admission of the Haitians is unlikely to affect the spread of AIDS in this country, the Government’s continued imprisonment of the Screened In Plaintiffs serves no purpose other than to punish them for being sick.

Declaring the Government’s actions towards the HIV positive Haitian refugees illegal, Judge Johnson ordered the immediate release of all the detainees, leading to the closure of the world’s only HIV prison camp. Although one AIDS housing activist in New York City, a major destination for the paroled detainees, believes that the conditions of the camp and the refugees’ continued detention led to “a huge number of unnecessarily early deaths,”¹⁰² the release of 300 people who for years saw little hope of living beyond the camp’s barbed wire marked a major victory for refugee rights.

¹⁰¹ Quoted in Farmer, *Pathologies of Power*, 65-66.

¹⁰² Quoted in Lizzy Ratner, “The Legacy of Guantánamo,” *The Nation* (16 July 2003).

This ruling enunciated due process norms that would set a precedent for analogous cases to follow, asserting that “aliens—even those held outside the United States—have due process rights.”¹⁰³ Yet, the Justice Department, unsurprisingly, found Judge Johnson’s “very expansive view of the rights of aliens” “difficult to live with.”¹⁰⁴ The Clinton Administration and the Haitian Centers Council legal team ultimately agreed to settle the case; the Haitians’ lawyers allowed Johnson’s orders (but not his opinions) to be vacated as long as the state fully complied with those orders and dismissed pursuit of an appeal, which would have risked further detention and possible repatriation of the refugees.¹⁰⁵ This deal meant that Judge Johnson’s decision had no binding force as a legal precedent. Shortly after the *Haitian Centers Council* decisions were finalized, Koh held an optimistic perspective; even though the U.S. had contravened international and domestic law on several fronts, it could not “insulate [itself] forever from complying with international law if [it] regularly participates, as all nations must, in transnational legal interactions.”¹⁰⁶ However, the HCC II decision maintaining the legality of the interdiction program and the legal evacuation of Judge Johnson’s decision gave the state the freedom to continue to break the law in regards to its treatment of Haitian refugees. Although the surviving refugees affected by Johnson’s decision now live among the people of the U.S., the INS continues to imprison more recently arrived Haitian refugees in its detention centers in Florida and Pennsylvania.¹⁰⁷

More importantly, the vacating of Judge Johnson’s ruling retained “maximum flexibility for the White House when it came to Guantánamo. [Clinton’s advisors] were confident that they ‘would do the right thing’ on the military base, but they did not want to be bound by law to do so.”¹⁰⁸ Though the Clinton Administration wanted to keep Guantánamo’s status legally indeterminate in anticipation of future refugee crises, this site has clearly been put to use for even more disgraceful purposes. Judge Johnson unambiguously described the implications that would arise from the suspension of constitutional rights at a site “under the complete jurisdiction and control of the United States.” For example he states: “If the Due Process Clause does not apply to the detainees at Guantánamo, Defendants would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin.” As the current use of Guantánamo makes clear, Judge Johnson was uncannily prescient in his description of the brutal, excessive power the state could wield if given the latitude.

In her readings of the legal challenges to the detentions of foreign and citizen “enemy combatants,” Kaplan makes the powerful argument that the Supreme Court is not only “legitimizing a second-tier legal structure that can extend the government’s penal regime”¹⁰⁹ but is also eroding distinctions

¹⁰³ Koh, “The Haiti Paradigm,” 2402.

¹⁰⁴ Quoted in Farmer, *Pathologies of Power*, 66.

¹⁰⁵ Koh, “The Haiti Paradigm,” 2397, footnote 32.

¹⁰⁶ *Ibid.*, 2406.

¹⁰⁷ Ratner.

¹⁰⁸ Brandt Goldstein, “Guantánamo: Land without Law,” (*Open Democracy*),

<http://www.opendemocracy.net/debates/article.jsp?id=6&debateId=28&articleId=2854> (accessed 23 January 2006).

¹⁰⁹ Kaplan, 851.

between citizens and aliens in a way that “moves both citizens and noncitizens further toward the lowest possible rung of diminished liberties.”¹¹⁰ She concludes that the state’s use and interpretation of Guantánamo does not restrict its abuse of power in defiance of the law to this one site; instead, as the temporally and spatially indeterminate “war on terror” continues, Guantánamo, indeed, seems to be everywhere, spreading to the “four corners of the earth.”¹¹¹

Kaplan further demonstrates that Guantánamo’s exceptional status does not mark a recent rupture in the United State’s usual adherence to and respect for the law, but emerges from its long imperial history. I believe that the history of the Haitian refugees that I have tried to develop here demonstrates that this imperial history is not limited to the sites of formal and informal U.S. colonization, but is deeply situated within our national borders. The Haitian Program, even before its expansion to include the policy of interdiction, demonstrates that the U.S. can and will suspend and violate the constitutional protections of certain persons seen as exceptional to the law, protections such as the right to fair adjudication of asylum claims and the right to counsel. While Guantánamo is by no means the only “juridically empty space”¹¹² used by the U.S., it has become one of the most powerful symbols of our state’s disregard of legal norms and values, signifying perpetual imprisonment, torture, and imperial racism.¹¹³ Guantánamo provides a lens through which we can examine how a space constructed as legally ambiguous structures the subjectivities of the people forcibly brought there. Through this lens we are witnessing a connection developing between feared “enemy combatants” and feared, “disease-ridden” refugees through the consolidation of the global subjectivity of the stateless person—a person who has been deprived of the state as the guarantor of her rights, yet subjected to the tyranny of absolute state control over her body and life.

¹¹⁰ Ibid., 853.

¹¹¹ Ibid., 854.

¹¹² Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*. Translated by Daniel Heller-Roazen. (Stanford UP: Stanford, 1998), 38.

¹¹³ Indeed, Michael Ratner claims that interrogators threaten Iraqi prisoners with sending them to Guantánamo because “everyone understood that there was little or no chance of ever getting out.” Michael Ratner and Ellen Ray, *Guantánamo: What the World Should Know* (White River Junction, VT: Chelsea Green Publishing Co., 2004), 39.