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**THE LATEST CHAPTER IN THE SAGA OF A
SPIRITLESS LAW: DETAINING HAITIAN ASYLUM
SEEKERS AS A VIOLATION OF THE SPIRIT AND THE
LETTER OF INTERNATIONAL LAW**

MICHAEL ROWAN*

I. INTRODUCTION

Indifference is always the friend of the enemy . . . The political prisoner in his cell, the hungry children, the homeless refugees—not to respond to their plight, not to relieve their solitude by offering them a spark of hope is to exile them from human memory. And in denying their humanity we betray our own.

- Elie Wiesel¹

What experience and history teach is this—that people and governments never have learned anything from history, or acted on principles deduced from it.

- G.W. Hegel²

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1. Speech, *The Perils of Indifference: Lessons Learned from a Violent Century* (April 12, 1999), <http://www.pbs.org/eliewiesel/resources/millennium.html>.

2. G.W.F. HEGEL, *PHILOSOPHY OF HISTORY* 49 (J. Sibree trans., P.F. Collier and Son rev. ed., 1901) (1837).

Despite what political rhetoric might otherwise suggest,³ the United States has not always been a haven for the oppressed. To illustrate this, one need not look any further than the application of U.S. immigration policy to Haitians. Notwithstanding strong evidence that political oppression within Haiti is one of the principal causes of Haitian migration, the U.S. has nonetheless sought to deter it through two policies: interdiction and detention. This Comment focuses on the latter policy. It contends that, as with interdiction, the U.S. detention policy violates both basic humanitarian norms as well as the plain letter of international law.

Part II of this Comment provides a short overview of Haitian history, emphasizing the human rights abuses that have taken place in Haiti since the U.S. began to interdict and detain Haitian refugees. Part III briefly discusses the humanitarian origins of the Refugee Convention and the U.S. Refugee Act. Part III also explains the U.S. policy of detaining Haitian asylum seekers and demonstrates how their detention runs afoul of basic humanitarian norms. Part IV then assesses this policy from an international law perspective, concluding

3. See, e.g., Terry Coonan, *America Adrift: Refoulement on the High Seas*, 63 U. CIN. L. REV. 1241, 1241 (1995) (“The United States’ commitment to human rights principles and treaties is never so fervent as in election years.”). Prof. Coonan cites three examples to illustrate his point: “Can we doubt that only a Divine Providence placed this land . . . here as a refuge for all those people in the world who yearn to breathe free? Jews and Christians enduring persecution behind the Iron Curtain, the boat people of Southeast Asia, Cuba, and of Haiti” *Text of Reagan’s Speech Accepting the Republicans’ Nomination*, N.Y. TIMES, July 18, 1980, at A8 (quoting Ronald Reagan under whose administration the policies of interdiction and detention as a means to deter migration were first implemented).

America is never wholly herself unless she is engaged in high moral principle. We as a people have such a purpose It is to make kinder the face of the nation and gentler the face of the world Great nations like great men must keep their word. When America says something, America means it, whether a treaty or an agreement or a vow made on marble steps.

Transcript of Bush’s Inaugural Address: ‘Nation Stands Ready to Push On’, N.Y. TIMES, Jan. 21, 1989, at A10 (quoting George Bush’s 1989 inaugural address). Bush’s interdiction policy is discussed in Part III. “I am appalled by the decision of the Bush Administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to political asylum. This process must not stand.” Anthony Lewis, *Abroad at Home: The Two Clintons*, N.Y. TIMES, Feb. 22, 1993, at A17 (quoting Bill Clinton during his 1992 campaign). After the election, Clinton abandoned his emotionally-charged opposition to the Bush policy and implemented a “warmed-over” Bush policy. See Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 CORNELL INT’L L.J. 675, 688 (1993). In a radio address to Haiti in which he announced his plans to continue the policy of interdiction, President-elect Clinton remarked: “I fear that boat departures in the near future would result in further tragic losses of life For this reason, the practice of returning those who flee Haiti will continue, for the time being, after I become President.” *Id.*

that detention of asylum seekers violates a number of international laws. Yet as Part V discusses, under the Eleventh Circuit's decision in *Jeanty v. Bulger*,⁴ breaches of international law and humanitarian norms appear to be irrelevant under U.S. immigration law. Against this background, Part VI concludes this Comment by contending that the U.S. ought to make international law and its corresponding humanitarian norms not merely relevant, but essential to its refugee policy.

II. A HISTORY OF ABUSE

The Refugee Convention⁵ and the Refugee Act define "refugee" to include those persons escaping "persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁶ Thus, a convenient and often-utilized explanation for the U.S.'s harsh Haitian migration policy is that Haitian migrants are not political refugees as defined by the Refugee Convention but are merely economic migrants.⁷ This explanation, however, is simply not supported by Haitian history.

A. *The Bloody Legacy of the Duvaliers*

In 1957, Francois "Papa Doc" Duvalier assumed power in Haiti, marking the beginning of nearly three decades of his, and later his son Jean-Claude's, brutal totalitarian rule. The mood of their regime may have been best captured by a prayer that the elder Duvalier required of all Haitians: "Our Doc, who art in the National Palace, hallowed be thy name, by present and future generations. Thy will be done in Port-au-Prince, as it is in the provinces."⁸ Indeed, the will of the Duvaliers was usually done, often through the efforts of the Haitian secret police, the Tonton Macoutes, who arbitrarily arrested,

4. 204 F. Supp. 2d 1366 (S.D. Fla. 2002), *aff'd* 321 F.3d 1336 (11th Cir. 2003).

5. 1951 Convention Relating to the Status of Refugees, July. 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

6. 8 U.S.C. § 1101(a)(42) (2003).

7. The first President Bush, for instance, defended his policy on Haitian migration as "a fair policy," since the law "does make a distinction between economic refugees and political refugees." Al Kamen, *Bush Defends Policy on Return of Haitians*, WASH. POST, Nov. 21, 1991, at A36.

8. Michael Glover, *Monsters in depth—Michael Glover gets to know Idi Amin, 'Baby Doc' and Bokassa*, FINANCIAL TIMES, Jan. 18, 2003, at 5.

tortured, and killed untold numbers of Haitians.⁹ By 1986, the year in which Jean-Claude Duvalier was removed from power, the Duvalier regime's murder victims alone were estimated to be in the range of thirty to sixty thousand.¹⁰

B. *Aristide: The Fading Promise of Change*

Many saw the election of President Jean-Bertrand Aristide in 1990 as a sign of hope that Haiti might finally function as a free and democratic society.¹¹ Seven months into his term, however, the military ousted Aristide, precipitating a return to repressive government.¹² As a result, thousands of Haitians fled their country to escape persecution.¹³

In 1994, the U.S., backed by the United Nations, intervened to restore the democratically elected Aristide government.¹⁴ Thus far, however, Aristide's return to power has not been the answer to Haiti's problems. To the contrary, the Aristide government and its supporters, the Fanmi Lavalas Party, have not only failed to protect Haitian citizens from rival political factions but have, like earlier regimes, committed their own abuses as well.¹⁵

C. *Haiti's "Deteriorating" Situation*

In September 2001, Amnesty International reported that human rights violations in Haiti were "more serious . . . than at any point since the return of Aristide."¹⁶ The U.S. Department of State

9. See Elizabeth Harris, *Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label*, 9 AM. U.J. INT'L L. & POL'Y 269, 278 (1993).

10. *Id.* at 278 n.61.

11. Women's Commission for Refugee Women & Children, REFUGEE POLICY ADRIFT: THE UNITED STATES AND DOMINICAN REPUBLIC DENY HAITIANS PROTECTION 5 (2003) [hereinafter REFUGEE POLICY ADRIFT]; *A Ray of Hope for Haiti*, THE RECORD, December 20, 1990, at B6 ("With his election, there is finally hope for the hemisphere's poorest, most isolated country, following three terrible decades of dictatorship and three years of failed elections and coups.").

12. REFUGEE POLICY ADRIFT, *supra* note 11, at 5.

13. *Id.*

14. *Id.*

15. *See id.*

16. AMNESTY INTERNATIONAL, HAITI: STEPS FORWARD, STEPS BACK: HUMAN RIGHTS 10 YEARS AFTER THE COUP 1 (Sept. 2001); *see also* AMNESTY INTERNATIONAL, HAITI: TEN YEARS AFTER THE COUP, SOME HUMAN RIGHTS IMPROVEMENTS LOST (Sept. 2001) [hereinafter TEN YEARS AFTER THE COUP], <http://web.amnesty.org/library/index/>

confirmed this assessment in its *2001 Country Reports on Human Rights Practices*, declaring that “[t]he [Haitian] Government continued to commit serious abuses during the year, and its generally poor human rights record worsened.”¹⁷ The State Department documented a range of human rights abuses, including extra-judicial killings by the Haitian National Police (HNP), illegal and arbitrary arrests, and the suppression of various forms of political opposition.¹⁸ Further, as Amnesty International warned in its 2001 report, the failure of the Aristide government to adequately curb its own abuses and restore democratic order in Haiti has since led to “more serious violations of human rights.”¹⁹

In its latest report, issued in March 2003, the State Department described the situation in Haiti as essentially unchanged from its dismal state in 2001.²⁰ The report indicated that the Aristide government and its supporters—including local governments and paramilitary groups—continued to target their political opposition and, in so doing, further destabilized the country:

The Government’s human rights record remained poor, with political and civil officials implicated in serious abuses. There were credible reports of killings by members of the HNP. Police officers used excessive—and sometimes deadly—force in making arrests or controlling demonstrators and were rarely punished for such acts. Attacks on journalists and political dissenters by Fanmi Lavalas [FL] supporters continued²¹

Locally elected officials allied with the FL increasingly exercised unauthorized law enforcement functions. The mayors of Hinche, Maissade, Miragoane, and Petit Goave employed small paramilitary groups to victimize

engamr360032001?open&of=ENG-HTI (last visited on November 25, 2003) (on file with MARGINS: Maryland’s Law Journal on Race, Religion, Gender and Class).

17. U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2001 2869 (Apr. 2002) [hereinafter 2001 STATE DEP’T REPORT].

18. *See id.*

19. TEN YEARS AFTER THE COUP, *supra* note 16.

20. U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES -2002 (Mar. 2003) [hereinafter 2002 STATE DEP’T REPORT], <http://www.state.gov/g/drl/rls/hrrpt/2002/18335.htm> (last visited November 20, 2003).

21. *Id.*

and control local populations. These groups engaged in torture, property damage, and theft, and were usually better armed than local police. In rural areas, members and agents of CASEC's illegally assumed police functions such as serving warrants, arresting the accused, taking testimony (often for a fee), and seizing private property. Locally elected officials often abused citizens based on perceived political disloyalty²²

Additionally, the strategy of pro-government forces to maintain their power through paramilitary groups—or local “gangs”—has begun to backfire.²³ For example, in August 2002, Amiot Cubain Metayer, an ex-Aristide supporter and leader of the militant gang known as the “Cannibal Army,”²⁴ escaped from prison along with 150 other prisoners.²⁵ At the time of his escape, Metayer was serving a sentence for burning down the homes of Aristide opposition members. Once jailed, however, he withdrew his support for Aristide.²⁶ Following his escape, Metayer joined with other anti-Aristide forces in calling for a nationwide uprising against the Haitian government.²⁷ While their ultimate aim was not realized, protesters occupied the city of Gonaives and successfully resisted the efforts of the government to

22. 2001 STATE DEP'T REPORT, *supra* note 17 at 2872; see generally Matthew Hay Brown, *Hard Times Hinder Haiti: Day by Day Aristide's Opposition Grows Stronger as Foreign Aid Remains Out of Reach*, ORLANDO SENTINEL TRIB., March 9, 2003, at G1 (reporting that “Aristide's supporters have broken up opposition demonstrations, and the government is accused of funding and arming political gangs to rally support and intimidate dissent. The U.S. Committee for Refugees counted more than 150 ‘political murders, suspicious disappearances or deaths, and quasi-political gangland slayings’ in Haiti this past year.”).

23. See generally Letta Tayler, *Critics Blame Aristide for Rise of Guns, Gangs; Haitian leadership fights allegations of ties to armed groups*, NEWSDAY, Sept. 8, 2002, at A18 (reporting that militants who support the government are losing the control they once had).

24. The “Cannibal Army” was a Gonaives-based gang once reputed for its violent attacks on opposition to the Aristide government. David Gonzales, *World Briefing Americas: Haiti: Pro-Aristide Gang Leader Found Dead*, N.Y. TIMES, Sept. 24, 2003, at A10. The gang has since changed its name to the “Army of the Gonaives Resistance.” Raymond Joseph, *Pressure Grows for Change in Haiti*, N.Y. SUN, Oct. 10, 2003, at 6. Metayer was discovered slain on Sept. 22, 2003, giving rise to a new wave of resistance against the Aristide government. See *id.*

25. *Escaped Leader Accuses Haiti Head*, BBC NEWS, August 3, 2002, <http://news.bbc.co.uk/2/hi/americas/2171065.stm>. (last visited on November 25, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

26. Michael Norton, *Police Call for Uprising in Haiti: Police Fire Tear Gas, Live Ammo*, SUN-SENTINEL, Aug. 6, 2002, at 10A.

27. *Id.*

restore order.²⁸ Until his death,²⁹ Metayer remained at large, “a clear indication of the extent to which basic Haitian institutions have weakened.”³⁰

As tensions between rival factions continue to escalate, the threat to average Haitian citizens also appears to be increasing.³¹ The following account suggests that even political neutrality does not necessarily guarantee one’s safety in Haiti:

Andy Philippe wasn’t a rich man or political activist. He was only 20 years old, a hard-working father with little money and a few strong opinions.

That’s why Philippe opened the door when three hooded, heavily armed men in police uniforms arrived at his small house on a Sunday morning this month. Because he wasn’t a gadfly or some well-to-do entrepreneur, Philippe told his two brothers, they didn’t have anything to fear from the police.

And that’s why, when all three were found dead with gunshot wounds to the head hours later, their families and friends were shocked that they had become targets. The dead men weren’t journalists, judges, politicians or intellectuals—the most common targets in Haiti’s political disarray—but ordinary victims in a new wave of violence carried out by what human rights activists describe as police death squads.³²

28. *Id.*

29. Raymond Joseph, *Pressure Grows for Change in Haiti*, N.Y. SUN, Oct. 10, 2003, at 6.

30. Norton, *supra* note 26.

31. See, e.g., Tim Collie, *Murder in Haiti: ‘Zero Tolerance’ Policy Has Meant Bodies Piling Up, The Victims of Summary Executions*, SUN-SENTINEL, Dec. 22, 2002, at 1A; see also Amnesty International, *Haiti Abuse of Human Rights: Political Violence as the 200th Anniversary of Independence Approaches* [hereinafter *Abuse of Human Rights*], <http://web.amnesty.org/library/index/engamr360072003> (describing the predicament of farmers who in merely approaching the police or military are perceived as “assailants”) (last visited October 16, 2003) (on file with MARGINS: Maryland’s Law Journal on Race, Religion, Gender and Class).

32. Collie, *supra* note 31. Whether these men and other death squad victims would qualify within one of the requisite grounds for receiving asylum is unclear. See 8 U.S.C. 1101(a)(42) (2003) (stating that persecution must be “on account of race, religion, nationality, membership in a particular social group, or political opinion,” but it is not clear why the death squad victims were persecuted). Much of the reason that we cannot be certain, however, has to do with a U.S. refugee policy that deters such individuals from ever making their cases for asylum in the first place. See *infra* part III.B-C.

A number of conclusions may thus be drawn regarding Haiti's recent political history. First, based on the reports of the State Department as well as Amnesty International, human rights abuses are prevalent in Haiti. Second, it is likely that the political violence in Haiti will continue to increase. Third, it is more than just "common targets" that bear the brunt of the abuses—ordinary people, in addition to journalists, judges, politicians and intellectuals, are being persecuted. Finally, at best, the Aristide government is either unable or unwilling to stop the atrocities being committed; at worst, it is directly responsible. In either case, Haitians have little prospect for relief within their own country.

D. A Search for "Better (Economic) Opportunities?"

A standard argument for denying refuge to Haitians is that they are economic rather than political refugees.³³ For instance, the State Department describes the migration of Haitians as one in which "[a]n unknown number of undocumented migrants [leave] the country by sea or land to seek better *economic opportunities*."³⁴ This argument is premised on the definition of "refugee" which, in both the Protocol as well the Refugee Act, does not include coverage for those seeking economic refuge.³⁵ In other words, assuming that Haitians are economic migrants, the U.S. is not in violation of its obligation. However, this characterization, unqualified as it is, fails to consider Haiti's recent history. Surely, given the degree of political violence in Haiti, *some* Haitian migrants are escaping political rather than, or at least in addition to, economic oppression. Upon closer examination, moreover, there is some indication that political oppression is not merely *a* factor in Haitian migration but that it is also the most relevant one.

Coast Guard interdiction statistics reveal that, in 1993 and 1994, during the time that Aristide was ousted and a military *junta* ruled Haiti, a relatively large number of Haitians sought refuge in the

33. See Harris, *supra* note 9, at 278 ("The Carter and Reagan Administrations, like the Bush and Clinton Administrations, viewed the Haitian refugees as economic migrants"); 2001 STATE DEP'T REPORT, *supra* note 17, at 2879-80.

34. 2001 STATE DEP'T REPORT, *supra* note 17, at 2879 (emphasis added). Curiously, as the previous section discussed, the State Department proffers this characterization in the very same report in which it describes the human rights situation in Haiti as "poor." *Id.*

35. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

U.S.³⁶ Upon Aristide's return to power, that number dropped significantly.³⁷ Then, after the restored Aristide government proved to be unstable, Haitians again sought to emigrate in greater numbers.³⁸ Notably, throughout this period of political flux, Haiti's per capita income was well below the poverty line including the brief period during which Aristide was restored to power and Haitian migration *declined*.³⁹ Thus, the correlation "between political stability and the number of people trying to leave Haiti" strongly suggests that "economic deprivation has not necessarily been the leading factor causing Haitian migration, as the U.S. government often argues."⁴⁰

Sadly, though, the political violence suffered by repatriated Haitians may be the clearest indicator that Haitian claims of political persecution are genuine. In the case of one woman forcibly returned to Haiti, a pro-Famni Lavalas security force beat her with their rifles until she spit up blood, attacked her brother-in-law in much the same way, and opened gunfire on her mother's restaurant.⁴¹ In another case, the Tonton Macoutes murdered a sixteen-year old girl just one day after her forced return to Haiti.⁴² Stories such as these⁴³ help to

36. REFUGEE POLICY ADRIFT, *supra* note 11, at 9 (In those years, respectively, the Coast Guard interdicted 4270 and 25,302 Haitians). The report does not list figures for 1991-92, the first two years during which Aristide was ousted. *See id.*

37. *Id.* (The Coast Guard only interdicted 909 Haitians in 1995.).

38. *Id.* (The number of interdicted Haitians rose to 2,295 in 1996).

39. *See* Elizabeth Mensch, *Silencing the Guns In Haiti*, 47 BUFFALO L. REV. 915, 920 (1999) (reviewing IRWIN STOTZKY, *SILENCING THE GUNS IN HAITI: THE PROMISE OF DELIBERATIVE DEMOCRACY* (1997)) ("Haiti has been, and remains, the poorest country in the Western Hemisphere."); *see also* WORLD BANK GROUP, *CARIBBEAN COUNTRY MANAGEMENT UNIT, HAITI: THE CHALLENGES OF POVERTY REDUCTION VOLUMES I AND II* (Aug.1998), [http://lnweb18.worldbank.org/External/lac/lac.nsf/0/8479e9126e3537f0852567ea000fa239/\\$FILE/Haiti1.doc](http://lnweb18.worldbank.org/External/lac/lac.nsf/0/8479e9126e3537f0852567ea000fa239/$FILE/Haiti1.doc) (last visited Nov. 25, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class) ("Although data are limited, something is known about the characteristics of migrants. Migrants from Haiti to places abroad tend to come from all income groups except the very poorest, who cannot afford to migrate."). *Id.* at 11.

40. REFUGEE POLICY ADRIFT, *supra* note 11, at 14.

41. *Id.* at 29-30.

42. *Id.* at 11.

43. There are, of course, other examples. One article cites examples derived from the interviews of seventeen Haitians who, after being repatriated to Haiti, returned to the United States:

One refugee, Simulus Thomas, reported that, two days after his return, soldiers sought him at his mother's house but left when told that he was not there. Mr. Thomas had initially fled Haiti after his father, active in the Aristide political movement Lavalas, had been shot. Mr. Thomas was later arrested and imprisoned but managed to escape. Other returnees in his cell had been beaten.

....

explain why so many Haitians risk their lives in an effort to reach the U.S. As one Haitian woman explained: "If I hadn't been trying to escape persecution, I never would have gotten on that boat. We spent nine days wet and hungry, and it was a terrible journey, but we had to do it to save our lives."⁴⁴ Such accounts, together with Haiti's recent history of civil strife, stories of severe persecution, and the strong correlation between political instability and migration, cast considerable doubt on the U.S. government's persistent characterization of Haitians as economic migrants.

. . . [T]wo days after a repatriate identified as "Pierre" returned to his home in Haiti: "Soldiers barged his house with bullets, killing Pierre's father within. When the soldiers had arrived, Pierre and his wife had been behind the house and they hid in the brush. After the rampage, a neighbor informed Pierre that, as they were leaving, the soldiers proclaimed that they had come to kill the FNCD delegate who had been returned."

One woman, designated "Michelle" . . . returned home only to be beaten and arrested by a judge and then incarcerated for a week: "The military guards in the prison told Michelle that she would be killed because she had been a member of the FNCD and because she had left Haiti. While in prison, Michelle was beaten by the guards. After one week, she was released from prison, without explanation."

When a third repatriate ("Joseph") reached his home in Haiti: [H]e found that his father and sister had been arrested. According to one of his friends who had witnessed the arrest from afar, Joseph's family had been arrested due to the fact that they were family members of a known Lavalas supporter and repatriate."

A fourth individual ("Henri"):
 "[learned from] close friends that the military was searching for 17 persons in his neighborhood who were targeted as Aristide supporters and as repatriates Three days later, soldiers in a white car came to Henri's house to arrest him. Henri escaped from his house through a back window."

Jean-Pierre Benoît & Lewis A. Kornhauser, *Unsafe Havens*, 59 U. CHI. L. REV. 1421, 1461-63 (1992) (citations omitted). Of course, it seems rather safe to presume that, the more human rights in Haiti deteriorate, the more difficult it is for human rights workers and journalists, as targets of abuse themselves, to document the frequency with which repatriated Haitians are subject to persecution. Thus, the precise scale of abuses suffered by repatriated Haitians is anyone's guess.

44. REFUGEE POLICY ADRIFT, *supra* note 11, at 20. Ironically, the present and previous administrations have been quick to cite the danger involved in the migration from Haiti to the United States as a reason for various policies deterring Haitian migration; implicit in this observation, however, should be some recognition of how dangerous it must be for Haitians to remain in Haiti.

III. U.S. REFUGEE POLICY—LESSONS UNLEARNED

A. The Humanitarian Origins of the Refugee Convention and the 1980 Refugee Act

Notwithstanding the well-established image of the U.S. as “a haven for the oppressed,”⁴⁵ political expediency, rather than humanitarian obligation, has too often been the dominant force driving U.S. immigration policy. At no point was this more apparent than in its response to the Holocaust. As millions of Jews and other “undesirables” were being systematically murdered by the Nazis, the U.S. and its allies refused to alter their rigid immigration policies, leaving those who might have otherwise escaped persecution without refuge.⁴⁶

Following the end of World War II, the formation of the United Nations and its adoption of the Refugee Convention functioned both as a symbol of the world’s humanitarian failures as well as a pledge that the various sins of the Holocaust would never be repeated. Though initially it did not sign the Refugee Convention, the U.S. eventually joined the international community in its humanitarian commitment to provide refuge to the persecuted.

1. The Tragic Lessons of the Evian Conference and the “Voyage of the Damned”

At the Evian Conference in 1938, representatives of thirty-two countries met to discuss Europe’s “refugee problem.”⁴⁷ Hitler encouraged the flight of Jews from Germany and Austria and, to that end, issued the following challenge to purportedly sympathetic nations like the U.S.: “We, on our part, are ready to put all these criminals at

45. Barbara Bedzek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 *Tenn. L. Rev.* 899, 934 n.126 (1995) (“[F]or most of the nation’s history, the image of the United States as a haven for the oppressed has enjoyed considerable political vitality, if not unanimity of view Throughout the nineteenth century, both Republican and Democratic political parties’ platforms invoked the image of the United States as asylum.”).

46. See Esther Rosenfeld, *United States Immigration Policy – A History of Prejudice and Economic Scapegoatism?: Fatal Lessons: United States Immigration Law During the Holocaust*, 1 *U.C. DAVIS J. INT’L L. & POL’Y* 249, 264-65 (1995).

47. United Holocaust Memorial Museum website, Evian Conference [hereinafter Evian Conference], <http://www.ushmm.org/outreach/evian.htm> (last visited July 29, 2003) (on file with MARGINS: Maryland’s Law Journal on Race, Religion, Gender and Class).

[your] disposal . . . for all I care, on luxury ships.”⁴⁸ Ultimately, however, commitment to domestic and foreign policy concerns prevailed over humanitarian principle,⁴⁹ and the U.S. and its “free world” allies declined Hitler’s invitation, opting instead to maintain rigid immigration quotas.⁵⁰

In May 1939, the challenge was posed more directly as nine hundred Jews set sail aboard the *Saint Louis* in search of refuge from Nazi persecution.⁵¹ The passengers attempted to enter Cuba and then the U.S., but in both instances were turned away.⁵² Forced to return to Europe, most of the refugees were eventually murdered in Nazi concentration camps.⁵³ “The Voyage of the Damned,” as it came to be known, symbolized the Holocaust’s moral complexity.⁵⁴ At the same time that Allied nations celebrated their victory over Nazi brutality, they were also faced with the horrifying consequences of their own indifference.⁵⁵

48. World Jewish Congress, Policy Dispatches No. 30, Sixty years since Evian: A lesson in cold indifference that the world cannot forget (July 1998), http://wjc.org.il/publications/policy_dispatches/pub_dis30.html (quoting Adolph Hitler) (last visited November 26, 2003) (on file with MARGINS: Maryland’s Law Journal on Race, Religion, Gender and Class). Hitler prefaced the statement quoted above by saying: ‘I can only hope and expect that the other world, which has such deep sympathy for these criminals, will at least be generous enough to convert this sympathy into practical aid.’ *Id.*

49. See, e.g., Rosenfeld, *supra* note 46, at 256-58 (noting among other things the Roosevelt Administration’s desire to reduce unemployment).

50. See Evian Conference, *supra* note 47; Rosenfeld, *supra* note 46, at 252 n.24 (noting that “[t]he quota limited the number of immigrants from Eastern and Southern Europe to 153,774 a year . . . [that] [t]he number of spaces available to Nazi refugees came to approximately 53,000 . . .” and that “[b]etween 1938 and 1941, about 212,000 refugees might have entered the United States, but only 150,000 were able to do so.”) (citations omitted).

51. See Rosenfeld, *supra* note 46, at 255 n.36.

52. *Id.*

53. United Holocaust Memorial Museum website, Wartime Fate of the Passengers of the “St. Louis”, <http://www.ushmm.org/outreach/evian.htm> (last visited July 29, 2003) (on file with MARGINS: Maryland’s Law Journal on Race, Religion, Gender and Class).

54. See Marylyn Henry, *Voyage of the Damned*, JERUSALEM POST, July 21, 1998, at 17. One holocaust researcher has remarked, for instance, that: “The fate of the 963 [St. Louis passengers] is a microcosm of the Holocaust.” *Id.*

55. See Rosenfeld, *supra* note 46, at 250. The end result is common knowledge to even the most casual student of history: approximately 6 million Jews and “nearly as many other ‘undesirables’ (Gypsies, homosexuals, leftists, Slavs) [were] systematically slaughtered.” THE LIFE MILLENIUM: THE 100 MOST IMPORTANT EVENTS & PEOPLE OF THE PAST 1,000 YEARS 153 (Robert Friedman ed., 1998).

2. *The World's Response: The Refugee Convention*

Realizing their “passive complicity”⁵⁶ in what was, perhaps, “the greatest and most terrible crime ever committed in the whole history of the world,”⁵⁷ the nations of the world recognized the need to provide refuge to persons fleeing persecution.⁵⁸ Accordingly, in 1951, the United Nations approved the Convention Relating to the Status of Refugees (Refugee Convention).⁵⁹ It provided that no state “shall expel or return a refugee in any manner . . . to the frontiers of territories where his life or freedom would be threatened on account of his race, nationality, membership of a particular social group, or political opinion.”⁶⁰ In short, the Refugee Convention was an essentially humanitarian commitment to ensure that the world would never again be party to another “Voyage of the Damned.”⁶¹

3. *The United States' Slow but Sure Path to Compliance*

The U.S. never ratified the Refugee Convention. In 1968, however, President Lyndon Johnson signed the Refugee Protocol (Protocol), which incorporated the terms of the Refugee Convention.⁶² Then, in 1980, President Jimmy Carter signed the U.S. Refugee Act (Refugee Act), bringing the U.S. into full compliance with both the Refugee Convention and Protocol.⁶³ In signing the Refugee Act, President Carter remarked that it “reflects our long tradition as a haven for people uprooted by persecution and political turmoil. In recent years, the number of refugees has increased greatly. Their suffering touches all and challenges us to help them, often under difficult

56. This phrase has been used to describe the failure of the free world to respond to the Jewish plight. See Victoria Barnett, *Provocative Reconciliation*, 117 THE CHRISTIAN CENTURY 942 (2001).

57. Press Release, Franklin and Eleanor Roosevelt Institute, *America and the Holocaust* (Jan. 6, 2001) (quoting Winston Churchill, who was commenting on the gravity of the Jewish Holocaust), http://www.feri.org/news/news_detail.cfm?QID=826 (last visited July 29, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

58. See Rosenfeld, *supra* note 46, at 250-251.

59. 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter *Refugee Convention*].

60. *Id.* at 176.

61. See Rosenfeld, *supra* note 46, at 264-65.

62. A. Roman Boed, *Past Persecution Standards for Asylum Eligibility in the Seventh Circuit: Bygones are Bygones*, 43 DEPAUL L. REV. 147, 155-56 (1993) (noting that President Lyndon Johnson approved the accession of the United States to the Protocol on October 15, 1968).

63. *Id.* at 156 (noting that “[t]he United States’s statutory definition of a refugee is thus consistent with the definition adopted by the United Nations in the Convention and subsequently in the Protocol”).

circumstances.”⁶⁴ These were not words of political calculation, but rather a clear expression of the U.S.’s *humanitarian* commitment.⁶⁵ Thus, while the U.S.’s accession was long overdue, it eventually became a signatory to both the letter as well as the “innately humanitarian” spirit of the Refugee Convention.⁶⁶

Since enacting the Refugee Act, however, the U.S. has failed to honor its commitment. Instead, the U.S. has only served as a “haven for the oppressed” to the extent that, through its policies of interdiction and detention, it has failed to deter those who would otherwise invoke its protection.

B. Sale v. Haitian Centers Counsel: Precedent for a Spiritless Law

As Part II discussed, political and economic turmoil plagued Haiti for most of its years as an independent nation.⁶⁷ Given its proximity to Haiti as well as its wealth, political stability, and reputation as a haven for the oppressed, the U.S. is an obvious destination point for Haitians seeking refuge. Contrary to its humanitarian obligation, however, the U.S. response has hardly been one of accommodation.⁶⁸

In 1981, President Reagan authorized the interdiction and return of Haitian refugees attempting to enter the U.S. by sea.⁶⁹ To

64. Refugee Act of 1980, Statement on Signing S.B. 643 into Law, 16 WEEKLY COMP. OF PRES. DOCS. 503 (March 18, 1980).

65. See Elwin Griffith, *Problems of Interpretation in Asylum and Withholding of Deportation Proceedings Under the Immigration and Nationality Act*, 18 Loy. L.A. Int'l & Comp. L.J. 255, 268 (1996) (“Although Congress generally legislates with domestic concerns in mind, it is questionable whether the protection of aliens serves only such concerns [T]he statute’s primary purpose is to protect human rights . . .”).

66. One author describes the nature of the Refugee Convention as follows:

Human rights play a large and visible role in international refugee law. In fact, the job description of the United Nations High Commissioner for Refugees explicitly mentions the humanitarian character of the office. It thus follows that the Refugee Convention is itself *innately humanitarian*. After all, the instrument was initially designed to secure the humanitarian objective of relief for the victims of Nazi persecution.

Kenneth Regensburg, *Refugee Law Reconsidered: Reconciling Humanitarian Objectives with the Protectionist Agendas of Western Europe and the United States*, 29 CORNELL INT’L L.J. 225, 256-57 (1996) (citations omitted) (emphasis added).

67. See REFUGEE POLICY ADRIFT, *supra* note 11, at 5; see also *infra* Part II.

68. See *id.* at 10.

69. *Id.* President Reagan’s authorization was given pursuant to a bilateral agreement that established a cooperative program of interdiction and selective return of Haitian migrants and vessels with the Haitian government, then led by Jean-Claude Duvalier. Agreement, Sept. 23, 1981, U.S.-Haiti, 33 UST 3559.

varying degrees, subsequent administrations, including the present one, continue to implement this policy.⁷⁰ Notably, under the Kennebunkport Order,⁷¹ issued by then-President Bush, the U.S. rarely screened interdicted Haitians to determine if they were refugees under international and U.S. law.⁷² In fact, the Kennebunkport Order, issued in 1992, specifically stated that determinations of refugee status were not required.⁷³ In other words, Haitians could be repatriated without any inquiry into whether their claims of persecution were legitimate. Thus, it is quite possible that some of those repatriated were returned to their persecutors as a direct consequence of U.S. immigration policy.

Nonetheless, in *Sale v. Haitian Centers Council*,⁷⁴ the Supreme Court held in an 8-1 decision that interdiction under the Kennebunkport Order was consistent with the Refugee Convention, reasoning that, while the U.S. policy may “violate the spirit” of the Refugee Convention (Article 33), it does not violate the Convention’s express obligations.⁷⁵ Specifically, the Court held that U.S. obligations under the Refugee Convention only arise when persons claim refugee status on American soil.⁷⁶ Thus, so long as the Coast Guard intercepted Haitians on the high seas, the U.S. was not obligated to make refugee status determinations.⁷⁷ The Court reasoned, “a treaty cannot impose unanticipated extraterritorial

70. REFUGEE POLICY ADRIFT, *supra* note 11, at 10, 11-13. See also Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992) [hereinafter Kennebunkport Order]; Susan Martin et al., *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543, 553-54 (1998) (discussing Clinton’s policy on Haitian migration).

71. Kennebunkport Order, *supra* note 70, at 23,134. The order stated:

Neither this order nor any agency guidelines, procedures, instructions, directives, rules or regulations implementing this order shall create or shall be construed to create any right or benefit, substantive, or procedural (including without limitation any right or benefit under the Administrative Procedure Act), legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person. *Nor shall this order be construed to require any procedure to determine whether a person is a refugee.*

Id. (emphasis added)

72. REFUGEE POLICY ADRIFT, *supra* note 11, at 11.

73. *Id.*

74. 509 U.S. 155 (1993).

75. *Id.* at 183.

76. *Id.*

77. *Id.* at 187 (“We do not read that text [Refugee Convention] to apply to aliens interdicted on the high seas”).

obligations on those who ratify it through no more than its general humanitarian intent.”⁷⁸

In a lone dissent, Justice Blackmun emphasized the peculiarity of the U.S. policy and the Court’s decision upholding it:

The refugees attempting to escape from Haiti do not claim a right of admission to this country. They do not even argue that the Government has no right to intercept their boats. They demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse, and death.⁷⁹

Not lost on Blackmun was the haunting parallel of the Haitian plight to the Jewish refugee experience: “the Convention that the Refugee Act embodies was enacted largely in response to the experience of Jewish refugees in Europe during the period of World War II. The tragic consequences of the world’s indifference at that time are well known.”⁸⁰ Thus, under Blackmun’s analysis, the U.S. policy toward Haitians potentially replicated the humanitarian embarrassment that gave birth to the Refugee Convention. Indeed, the policy upheld by the Court would not only have allowed the U.S. in 1939 to resist the entry of Jewish refugees aboard the *Saint Louis*, but would have empowered the Coast Guard to affirmatively intercept the ship and return the passengers to Nazi Germany, regardless of the consequences.⁸¹

78. *Id.* at 183.

79. *Id.* at 208.

80. *Id.* at 207.

81. For its part, the UNHCR also noted the incongruity of the court’s decision with relevant international norms:

[B]locking the flight of refugees and summarily repatriating them to a place where their lives or freedom would be threatened is contrary to the applicable international refugee treaties and to the international principle of “non-return” of refugees. These treaties—1951 Convention and the 1967 Protocol relating to the Status of Refugees— prohibit the involuntary return of refugees “in any manner whatsoever.”

American Society of International Law, UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council* 1215 (1993) (paraphrasing the UNCHR’s amicus curiae brief filed in *Sale*). The UNHCR, like Blackmun, called attention to the broader, “overriding humanitarian purpose” of international asylum law “to protect especially vulnerable individuals from persecution;” the UNHCR labelled the court’s decision “a setback to international refugee law . . . and an unfortunate example.” *Id.*

Under *Sale*, then, the only way refugees are absolutely assured adjudication of their refugee status is to reach American soil without being detected by the U.S. Coast Guard.⁸² It is perhaps of some consolation that present U.S. policy⁸³ exceeds the *Sale* standard by providing that aliens interdicted at sea who claim a “fear of persecution” are entitled to a “credible fear” screening.⁸⁴ This policy, however, is ripe with potential for error. First, aliens who are unacquainted with the nuances of U.S. asylum law might never think, or are too intimidated, to mention their reasons for leaving Haiti.⁸⁵ Second, translators are often unavailable to ascertain whether claims for asylum are actually being made.⁸⁶ Thus, because the U.S. does not adequately screen asylum seekers, it has no way of knowing whether these refugees will be free from persecution if they are repatriated.⁸⁷ Worse yet, the present Bush administration has taken an additional step to deter Haitian migration. This measure focuses on those Haitians who, despite the efforts of the U.S. Coast Guard, reach U.S. soil and thus fall under the protection of international law as interpreted in *Sale*.⁸⁸

82. *Sale*, 509 U.S. at 155.

83. REFUGEE POLICY ADRIFT, *supra* note 11, at 18. For Haitians interdicted on the high seas, moreover, even a positive determination of refugee status does not necessarily lead to asylum in the United States. Instead, the refugee is ordinarily resettled in a third country. This, while preferable to repatriation, may still be a harsh result for those refugees who were hoping to reunite with family members in the United States. *Id.* at 19-20.

84. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, HAITIAN ASYLUM SEEKERS TARGETED BY DETENTION AND INTERDICTION POLICIES (Nov. 6, 2002) [hereinafter ASYLUM SEEKERS TARGETED], www.lchr.org/media/2002_alerts/1106.htm (last visited on Nov. 26, 2003) (on file with MARGINS: Maryland’s Law Journal on Race, Religion, Gender and Class).

85. See Beate Anna Ort, *International and U.S. Obligations Toward Stowaway Asylum Seekers*, 140 U. PA. L. REV. 285, 317 (1991) The article noted that:

[i]n its study of the Haitian interdiction program, the Lawyers Committee for Human Rights found that the shipboard interviews “may not be private; the Haitians may be hungry, are definitely ill-at-ease and have no idea why they are being asked questions.” The shipboard interviews may also have been insufficient because “[m]any refugees will only relate what happened to them to someone with whom they have established a relationship of trust and confidence. . . . [O]nly indirect probing will reveal whether the Haitian fears persecution in Haiti. Such indirect questioning has proven essential in eliciting information from refugees who . . . are unable to express opinions and beliefs for which they have previously been made to suffer.”

Id. (citation omitted).

86. Asylum Seekers Targeted, *supra* note 84.

87. *Id.*

88. *Sale v. Haitian Centers Council*, 509 U.S. 155, 179-188 (1993).

C. U.S. Refugee Policy: Deterring the Persecuted

1. Post IAIRA Asylum Process

In 1996, Congress passed the Illegal Immigration and Immigrant Responsibility Act (IIAIRA)⁸⁹ to establish a framework for processing asylum claims.⁹⁰ Most significantly, IIAIRA instituted a system of expedited removal for all persons who illegally arrive in the U.S., with the exception of Cubans, who have enjoyed exceptional status under U.S. immigration law since 1966.⁹¹

Under IIAIRA, immigration officers have the power to order the removal of aliens without a hearing or any other form of formal review.⁹² However, if an alien claims to fear persecution in her country of origin, an asylum officer screens the alien to determine whether she has a “credible fear” of persecution.⁹³ If the asylum officer determines that the alien does not have a “credible fear,” then the alien can request a review by an immigration judge.⁹⁴ The review, however, must take place within twenty-four hours “whenever possible” and can never take place later than seven days after the asylum officer’s initial determination.⁹⁵ On the other hand, if the asylum officer determines that the alien does have a “credible fear” of persecution, then that alien is entitled to a full hearing before an immigration judge, pursuant to INA section 240.⁹⁶ At this point, an

89. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009, 546 (1996) [hereinafter IIRAIRA].

90. *Id.*; see generally Bo Cooper, *Procedures for Expedited Removal and Asylum Screening Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1501 (1997) (explaining the changes that the IIRAIRA brought to immigration law).

91. See Cuban Readjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified as amended in 8 U.S.C. § 1255); see generally Charles J. Ogletree Jr., *America’s Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755 (2000) (discussing how the IIRAIRA treats Cubans and Haitians differently).

92. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, COMMENTS OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS ON INS NO. 2243-02 NOTICE OF DESIGNATION EXPANSION OF EXPEDITED REMOVAL TO SEA ARRIVALS 6 (2002) [hereinafter LCHR], http://www.lchr.org/asylum/comms_on_INS_1216.pdf (last visited on Nov. 26, 2003) (on file with MARGINS: Maryland’s Law Journal on Race, Religion, Gender and Class); DEP’T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., EXPEDITED REMOVAL, [hereinafter INS] <http://uscis.gov/graphics/shared/lawenfor/bmgmt/inspect/exped.htm> (last visited on Nov. 26, 2003) (on file with MARGINS: Maryland’s Law Journal on Race, Religion, Gender and Class).

93. INS, *supra* note 92.

94. *Id.*

95. *Id.*

96. *Id.*; see Immigration and Nationality Act of 1952 [hereinafter INA], Pub. L. No. 82-414, 66 Stat. 163, 182-89 (codified as amended in scattered sections of 8 U.S.C.).

INS district director has discretion to release the alien pending her asylum hearing.⁹⁷ The alien's ties to the community, the likelihood she will appear for future hearing, her health, and whether she may pose a threat to the community are some of the factors considered in making this determination.⁹⁸ Until recently, asylum-seekers were typically granted parole so that they could await their hearings in the care of family or friends.⁹⁹ This policy, however, was abandoned, first with respect to Haitians and then altogether.¹⁰⁰

2. *Detention Without Parole*

In December 2001, nearly two hundred Haitian refugees landed off the coast of Florida.¹⁰¹ Having reached land, these Haitians were entitled to adjudication of asylum claims under U.S. refugee law.¹⁰² Proceeding under the framework for expedited removal, asylum officers determined that all but two of the Haitians had a "credible fear" of persecution.¹⁰³ Although at the time it was standard for the INS to parole asylum seekers pending their hearings,¹⁰⁴ the INS headquarters instructed its Miami district office not to release any of the Haitians.¹⁰⁵

The INS action quickly became the subject of criticism.¹⁰⁶ First, the Bush administration admitted that one aim of its detention policy was to deter the future migration of Haitians.¹⁰⁷ Like interdiction, refugee advocates viewed this as inconsistent with relevant legal standards and humanitarian norms.¹⁰⁸ Second, by the Bush Administration's own admission, the INS policy singled out Haitians.¹⁰⁹ Finally, groups like the Women's Commission focused on the poor conditions of detention.¹¹⁰

97. INS, *supra* note 92.

98. *Id.*

99. Wendy Young, *INS Policy of Deterrence: Haitian Asylum Seekers in the United States*, REFUGEE REPORTS, Vol. 23 No. 8, at 12, 12, Nov. 2002; *see also* ASYLUM SEEKERS TARGETED, *supra* note 84.

100. REFUGEE POLICY ADRIFT, *supra* note 11, at 31.

101. *Id.* at 20.

102. *Id.*

103. *Id.* at 21.

104. *Id.*

105. *Id.*

106. *See, e.g.*, ASYLUM SEEKERS TARGETED, *supra* note 84.

107. REFUGEE POLICY ADRIFT, *supra* note 11, at 22.

108. *See, e.g.*, REFUGEE POLICY ADRIFT, *supra* note 11, at 3.

109. *See id.* at 27; Press Release, White House Press Conference by the President (Nov. 7 2002) (transcript of press conference) [hereinafter Bush Press Conference], <http://www.whitehouse.gov/news/releases/2002/11/print/20021107-2.html> (last visited Nov.

(a). *Deterring the Welcomed? The Paradox of U.S. Refugee Policy*

Present U.S. refugee policy is a paradox. It offers refuge to the “persecuted” at the same time that it blocks the path of those who seek such refuge.¹¹¹ In many cases, the only way for the “persecuted” to receive the protection of U.S. law is to avoid detection by the very people who enforce the law (i.e., the Coast Guard).¹¹² Furthermore, this system of offering protection to the “persecuted” has become even more bizarre, as INS policy now allows for detention of asylum applicants in an effort to persuade others not to similarly seek refuge in the U.S.¹¹³

This policy has been justified, in part, by pointing to the serious risk that Haitians take in traveling to the U.S. by sea.¹¹⁴ This justification is doubtful, however, considering that the policy has also been applied to Haitians arriving in the U.S. by plane.¹¹⁵ The INS’s official position also clearly states that “[a]ny message that may encourage a mass migration and detract resources from our homeland defense is unacceptable.”¹¹⁶ Statements like these emphasize the interests of the U.S. rather than the safety of the Haitian people. Thus, leaving possible humanitarian justifications aside, the administration is enforcing a policy that essentially says: “Give me your tired, your poor, your huddled masses yearning to breathe free,”¹¹⁷ but know that, if they must come, we will do our very best to stop them; and if they are fortunate enough to escape the detection of law enforcement officials and thereby arrive at our shores, they will be placed in detention centers so that others like them will not be encouraged to come as well.

26, 2003) (on file with MARGINS: Maryland’s Law Journal on Race, Religion, Gender and Class).

110. See REFUGEE POLICY ADRIFT, *supra* note 11 at 22-28.

111. See *supra* Part III.B.

112. *Id.*

113. *U.S. Affirms Uniform Policy for Illegal Immigrants Arriving by Sea*, SAN DIEGO UNION-TRIB., Nov. 9, 2002, at A3.

114. *Id.*

115. REFUGEE POLICY ADRIFT, *supra* note 11, at 22.

116. DEP’T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., STATEMENT: INS ANNOUNCES NOTICE CONCERNING EXPEDITED REMOVAL (Nov. 8, 2002), http://uscis.gov/graphics/publicaffairs/statements/expremnotice_st.htm

(last visited Nov. 26, 2003) (on file with MARGINS: Maryland’s Law Journal on Race, Religion, Gender and Class).

117. Emma Lazarus, “The New Colossus,” 1883. This poem is inscribed on the base of the Statue of Liberty.

(b). *Curing Discrimination in U.S. Refugee Policy:*

You Want Equal Treatment, We'll Give You Equal Treatment

Until recently, another troubling aspect of the U.S. detention policy was its discriminatory application to Haitians.¹¹⁸ As one Haitian detainee complained:

[It was] even more difficult for us, to watch so many other women from other countries come in and quickly get released. I didn't think the United States would treat people differently just because of the place they were born, I thought everyone was equal here. But we were not treated like everyone else, even though we are all human and we all have the same blood. It became clear to us that the only reason we were in jail indefinitely is because we are Haitian.¹¹⁹

Advocates for the detainees echoed this concern and demanded fairer treatment for Haitians.¹²⁰ Following the arrival, and subsequent detention, of a group of Haitian immigrants arriving by boat in 2002, the Bush Administration finally responded to calls for equal treatment.¹²¹

President Bush recognized that "immigration laws ought to be the same for Haitians and everyone else"¹²² This proved to mean, though, that rather than easing the burden on Haitian immigrants, the policy of detention would be extended to all persons seeking asylum except Cubans, who would not be subject to the policy since "we [the United States] don't send people back to Cuba because they . . . [would be] persecuted."¹²³ By this statement, Bush implied that Haitians would not be persecuted if returned, perhaps reflecting the

118. See, e.g., Alice Gomstyn, *US Policy on Haitian Immigrants Assailed*, BOSTON GLOBE, Nov. 1, 2002, at B2.

119. REFUGEE POLICY ADRIFT, *supra* note 11, at 21.

120. See, e.g., ASYLUM SEEKERS TARGETED, *supra* note 84.

121. See Bush Press Conference, *supra* note 109.

122. *Id.*

123. *Id.*; see also Dana Canedy, *Haitian Detainees Being Treated Unfairly, Advocates Assert*, CHI. TRIB., Dec. 18, 2002, at 36 ("[T]he Justice Department has since announced that the Immigration and Naturalization Service will apply the detention policy to all non-Cubans who arrive in the United States illegally by sea and will expedite the deportation process for such migrants").

administration's stance that Haitians are economic migrants rather than political refugees. In any case, the policy for Haitians remained unchanged.¹²⁴ Ironically, the Administration's concession to equal treatment did nothing to benefit Haitians, but instead only harmed other nationalities.¹²⁵ As Representative Alcee Hastings noted: "They're shutting up those of us up who have argued that their policy is discriminatory. But it still is inhumane . . . Rather than include Haitians in a humane policy as existed for everybody but Haitians, now they put everybody under an inhumane policy."¹²⁶

(c). *Detention and its Discontents*

Finally, reports have raised a number of concerns about how Haitian asylum-seekers are being treated during detention.¹²⁷ First, the conditions of detention, in some cases, have been a serious problem. For example, some of the Haitian women who arrived in the U.S. in December 2001 were placed in a maximum-security prison for eight months.¹²⁸ While these women were not placed in the main population, they were treated much as if they were, receiving inedible food, limited access to the outdoors, and inadequate medical care to address critical conditions like diabetes.¹²⁹

Additionally, the integrity of families was not always preserved during their detention.¹³⁰ In some cases, the INS separated family members from one another, including children from their parents.¹³¹ In one such case, the INS separated Jean, a Haitian asylum-seeker, from his wife and son for three months.¹³² After inquiring about his family, authorities informed Jean that his wife and son were at a hotel,¹³³ but failed to inform him of their precise whereabouts.¹³⁴ Summing up both the anguish of being taken away from his family as well as his utter sense of helplessness to do anything about it, Jean remarked "[w]e've lived together for so long, and this is the first time we've been separated. But the government has decided, and we can

124. Canedy, *supra* note 123.

125. *See id.*

126. *U.S. Affirms Uniform Policy for Illegal Immigrants Arriving by Sea*, *supra* note 113.

127. *See, e.g.*, REFUGEE POLICY ADRIFT, *supra* note 11.

128. *Id.* at 22.

129. *Id.*

130. *See id.* at 26-27.

131. *Id.*

132. *Id.* at 26.

133. *Id.*

134. *Id.*

do nothing.”¹³⁵ In another case, the INS separated a Haitian girl from her mother, father, and three brothers.¹³⁶ After two months, she reunited with her mother, but remained separated from her father and siblings.¹³⁷ Eventually, authorities granted asylum to the girl’s father and two of her brothers; nevertheless, the detention facility prevented them from visiting the girl.¹³⁸ While the INS has denied separating family members,¹³⁹ immigrant advocacy groups like the Women’s Commission have documented, through visits to facilities and interviews with detainees, that families are being separated.¹⁴⁰

Additionally, the INS denied Haitian asylum seekers access to attorneys.¹⁴¹ This access is nearly essential to successfully litigating an asylum claim.¹⁴² According to a frequently cited Georgetown University study, an asylum-seeker represented by counsel is four to six times more likely to receive asylum.¹⁴³ Similarly, access to mental health evaluations is extremely important to proving a “fear” of persecution (not to mention critical from a purely mental health perspective).¹⁴⁴

At detention facilities, detainees were unable to consult with their attorneys in private.¹⁴⁵ In one facility, interviews with clients were conducted in a large public visitation area.¹⁴⁶ The INS Miami District also placed other restrictions on attorneys, such as unnecessarily “onerous paperwork”—for example, attorneys had to give 24-hour advance notice every time they wanted to visit a client.¹⁴⁷ In terms of access to mental health professionals, one institution flatly denied access to anyone but its own staff.¹⁴⁸ This was clearly in conflict with even the INS’s own standards: “Psychological examination by a practitioner or expert not associated with the INS or the facility can provide a detainee with information useful in

135. *Id.*

136. *Id.* at 27.

137. *Id.*

138. *Id.*

139. *Id.* at 26.

140. *Id.* at 26-27.

141. *Id.* at 27.

142. *Id.* at 29.

143. *Id.*

144. *Id.* at 23.

145. *Id.* at 24.

146. *Id.*

147. *Id.* at 25.

148. *Id.* at 23.

immigration proceedings Therefore the District Director will generally approve examinations”¹⁴⁹

Even the INS implicitly recognized its failure to provide adequate care to detainees—the women previously held in the maximum-security prison have since been moved to a more hospitable facility.¹⁵⁰ Still, other problems, such as inadequate access to legal counsel persist.¹⁵¹ Additionally, while the INS characterizes its recent decision to move refugees from prisons to other facilities as an alternative to detention, the Women’s Commission pointed out that the new facility was merely “an alternative *form* of detention.”¹⁵²

IV. INS POLICY AS A VIOLATION OF INTERNATIONAL LAW

Apart from its clear breach of humanitarian principles, the INS detention policy also violates a number of international laws. Moreover, as the last section in this part discusses, national security does not provide a valid justification for the policy’s departure from international standards.

A. Article 31 of the Convention Relating to the Status of Refugees: Assessing the Viability of Deterrence as an Objective of Detaining Asylum Seekers

Article 31(1) of the Refugee Convention provides that countries “shall not impose penalties” on refugees “on account of their illegal entry or presence.”¹⁵³ Similarly, Article 31(2) stipulates that countries should not restrict “the movements of . . . refugees” beyond what is necessary.¹⁵⁴ The rationale behind not imposing penalties on refugees because of their illegal status seems clear: for those escaping extreme persecution, the decision to leave one’s country to seek refuge in another is often not a calculated one. Practically speaking, the delays in obtaining requisite immigration documentation could be the difference between life and death, or at least between persecution and refuge. Thus, in ratifying the Refugee Protocol, United Nations

149. *Id.*

150. *Id.*

151. *Id.* at 24.

152. *Id.* at 25.

153. Refugee Convention, *supra* note 6, at 174.

154. *Id.*

members, including the U.S., recognized a need for leniency. Present U.S. policy, however, ignores that need and instead penalizes asylum seekers in contravention of Article 31 of the Refugee Convention.

According to the present administration, one of the aims in its policy of detaining asylum seekers is to deter future asylum seekers, at least those from Haiti.¹⁵⁵ The implication, of course, is that the detention is a negative consequence—otherwise, it cannot function as a deterrent.¹⁵⁶ Thus, detention is a penalty so long as one of its objectives is deterrence of future migration. This conclusion is consistent with the UNHCR¹⁵⁷ Detention Guidelines:

Detention of asylum seekers which is applied . . . as part of a policy to deter future asylum seekers is contrary to the principles of international protection. Under no circumstances should detention be used as a punitive or disciplinary measure for failure to comply with administrative requirements or breach of reception centre or refugee camp or other institutional restrictions.¹⁵⁸

Recently, the UNHCR, relying on Article 31, squarely addressed the legality of deterrence as a justification for detention. It determined that “detention . . . for the purpose of deterrence cannot be justified.”¹⁵⁹

155. See *supra*, Part III.C.2.a.

156. See BLACK'S LAW DICTIONARY 460 (7th ed. 1999) (defining deterrence, in part, as “the prevention of criminal behavior by fear of *punishment*”) (emphasis added).

157. United Nations High Commissioner for Human Rights.

158. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON DETENTION FOR ASYLUM SEEKERS ¶ 3 [hereinafter DETENTION GUIDELINES], <http://www.rcmvs.org/investigacion/asylum.htm> (last visited Nov. 10, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

159. *Id.*

*B. Article 3 of the Convention Relating to the Status of Refugees*¹⁶⁰

Article 3 of the Refugee Convention states that countries *shall* apply the Convention “without discrimination as to race, religion or country of origin.”¹⁶¹ As noted earlier,¹⁶² the U.S. policy of detaining asylum-seekers initially focused on Haitians. Thus, prior to expanding its policy to cover other nationalities, the policy plainly violated Article 3.¹⁶³ By recognizing the policy’s unfairness,¹⁶⁴ the Bush Administration conceded as much and sought to cure this Article 3 problem.¹⁶⁵ The revised policy, however, does not entirely do so. Rather, at least two problems remain.

First, Haitians arguably remain the target of the policy. In changing its policy to accommodate allegations of discrimination,¹⁶⁶ the Bush Administration had two options: it could have abandoned the policy altogether or expanded it to become more uniformly harsh. In choosing the latter option, the administration may have failed to cure the discrimination problem. As Cheryl Little explained, “Our government is changing the rules so they can justify their discriminatory treatment of Haitians.”¹⁶⁷ Indeed, absent some compelling rationale to the contrary, a reasonable interpretation of the Administration’s policy shift may be that it was simply willing to sacrifice the welfare of other nationalities to preserve its application to Haitians. In other words, the focus of the policy remains the Haitian people; the change in policy was merely an attempt to deflect criticism. Under this view, the policy fails to shed its discriminatory animus.¹⁶⁸

160. Refugee Convention, *supra* note 5, at 156.

161. *Id.*

162. *See supra* Part III.C.

163. *See supra*, Part III.C.2.(b).

164. *See* Bush Press Conference, *supra* note 109.

165. *See supra* Part III.C.

166. *Id.*

167. Jacqueline Charles & Andrea Elliot, *Justice Department to Apply Swifter Deportation Rules to All Illegal Immigrants*, MIAMI HERALD, Nov. 9, 2002.

168. This would be akin to the following scenario: State X has a voting law requiring only Blacks to pass literacy tests because it wants to deter them from voting. State X’s major newspaper runs a story criticizing the law for its discriminatory application. State X, under pressure from various civil rights groups, confesses to the discriminatory nature of the law, but rather than removing it, it imposes the law on everyone in the state. In essence, the state never undoes the action that resulted from its discriminatory animus and thus every indication is that the animus itself remains. (This, of course, would be especially true if the literacy requirement had a disproportionate impact on Blacks, even after the requirement was imposed on everyone. Likewise, given Haiti’s proximity to the United States and the substantial

A second and more obvious problem is the continued exceptional status of Cubans.¹⁶⁹ Presently, Cubans, unlike Haitians and now other nationalities, are not presumptively detained pending their asylum hearings but can be paroled.¹⁷⁰ So long as this distinction is maintained, Article 3 discrimination will continue under current U.S. immigration policy.

C. Article 9 of the International Covenant on Civil and Political Rights¹⁷¹: The Right to Be Free From Arbitrary Arrest or Detention

The Universal Declaration on Human Rights¹⁷² provides that “everyone has the right to life, liberty and security of person” and, accordingly, that “no one shall be subjected to arbitrary arrest, detention, or exile.”¹⁷³ These rights were codified in the International Covenant on Civil and Political Rights (ICCPR), which states more specifically that: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”¹⁷⁴

Having ratified the ICCPR in 1992,¹⁷⁵ the U.S. is obligated to provide asylum-seekers some degree of process before detaining them. Presently, however, that is not taking place. Instead, under its current policy, the INS orders detention, which is not subject to review by either the judiciary or an outside administrative body.¹⁷⁶ Rather, in contravention of the ICCPR, asylum-seekers can be detained for months or even years without any way to challenge the arbitrary nature of their detention.¹⁷⁷

incentives for Haitians to migrate, disproportionality in U.S. asylum policy, even after being expanded to include all asylum seekers, is likely.).

169. See Cuban Refugees: Adjustment of Status, Pub. L. 89-732, 80 Stat 1161 (1966) (codified as amended in 8 U.S.C. § 1255); see also Part III.C.

170. See Cuban Refugees: Adjustment of Status, Pub. L. 89-732, 80 Stat 1161 (1966) (codified as amended in 8 U.S.C. § 1255).

171. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

172. GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

173. *Id.*

174. ICCPR, *supra* note 171, at 54.

175. ICCPR, *supra* note 171.

176. (“Notwithstanding any other provision of law, no court shall have jurisdiction to review – (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title”; see also *infra* Part V.

177. See Canedy, *supra* note 123.

*D. Convention on the Rights of the Child*¹⁷⁸

With the exception of Somalia, the U.S. is presently the only country that has not signed the Convention on the Rights of the Child.¹⁷⁹ Given the world's consensus on this particular convention, it is worth noting that some of its provisions have bearing here. For instance, Article 9 of the Convention provides that states "shall ensure that a child not be separated from his or her parents against their will except when competent authorities, subject to judicial review, determine that . . . [it] is in the best interests of the child."¹⁸⁰ Relying on the Women's Commission report, Part III of this Comment demonstrated that such determinations are not always being made; rather, Haitian children are being separated from their families for extended periods of time without regard to their "best interests."¹⁸¹

E. National Security as a Justification for the INS Detention Policy

The Justice Department contends that the detention of asylum seekers is necessary to deter "surges in illegal migration by sea," because such surges "threaten national security by diverting valuable United States Coast Guard and other resources from counter-terrorism and homeland security responsibilities."¹⁸² According to guidelines issued by the UNHCR, national security is an acceptable reason to detain asylum seekers.¹⁸³ However, the U.S.'s use of national security as a justification for detaining Haitian asylum seekers is "both disingenuous and troubling."¹⁸⁴

First, the White House itself recognized, in the October 2002 arrival of Haitian refugees, that the very reason the Coast Guard failed to intercept their boat was because the Haitians *did not* pose a national security risk.¹⁸⁵ Second, the duties of the Coast Guard are not limited

178. Convention on the Rights of the Child, U.N. GAOR, 44th Sess., 61st mtg., U.N. Doc. A/RES/44/25 (1990).

179. Joyce Neu, *Final Days Showdown at the U.N.*, SAN DIEGO TRIB., March 16, 2003, at G1.

180. Convention on the Rights of the Child *supra* note 178, at art. 9.

181. *See supra* Part III.C.2.(c).

182. Notice Designating Aliens Subject to Expedited Removal under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002).

183. *See* DETENTION GUIDELINES, *supra* note 158.

184. LCHR, *supra* note 92, at 8.

185. *Id.*

to national security. A major component of the Coast Guard's mission is "search and rescue."¹⁸⁶ Other components include "protection of natural resources" and "maritime mobility," which like "search and rescue," are distinct from the Coast Guard's "homeland security" duties.¹⁸⁷ Thus, the Coast Guard is not neglecting its duties in tending to Haitian refugees. Rather, these operations are a critical part of its explicit duties.

While the UNHCR indicated that detention is acceptable if it is necessary for national security, it did not endorse detention as a means to deter asylum seekers.¹⁸⁸ The UNHCR clearly explained that using detention as a means of deterrence is "contrary to the principles of international protection."¹⁸⁹ Thus, detention for national security purposes should be limited to those instances where officials have a legitimate concern about the threat that an individual asylum seeker might pose because, for instance, the government has reasonable suspicions or insufficient information about the asylum seeker.¹⁹⁰ In the wake of 9/11, the relevance of immigration to national security should not be underestimated. On the other hand, security ought not to come at the expense of our most basic humanitarian obligations.¹⁹¹

V. *JEANTY V. BULGER*: THE SEEMING IRRELEVANCE OF INTERNATIONAL LAW

The relevance of international law to U.S. immigration policy depends on the willingness of the INS and other government agencies to abide by it and, in the event of breach, of the courts to provide redress. Measured accordingly, *Jeanty v. Bulger*¹⁹² clearly rendered international law irrelevant.

186. For a list of U.S. Coast Guard missions see <http://www.uscg.mil/USCG.shtm> (last visited July 29, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

187. *Id.*

188. DETENTION GUIDELINES, *supra* note 158.

189. *Id.*

190. *Id.*

191. For additional example of the government's questionable invocation of national security following 9/11, see George Larder, Jr., *More Illegal Immigrants Can Be Held; Ashcroft's Ruling Cites National Security Issues*, WASH. POST, Apr. 25, 2003, at A6 (discussing Ashcroft's rationale that for indefinite detention of Haitians that Haiti has become a transit point for terrorists).

192. 204 F.Supp. 2d 1366 (S.D. Fla. 2002), *aff'd*, 321 F.3d 1336 (11th Cir. 2003) ("After a thorough review of the record and the parties' briefs and after the benefit of oral argument,

In *Jeanty*, four Haitian detainees, who arrived in the U.S. by boat in December 2001 and were detained pursuant to INS policy, brought suit on behalf of themselves and all detained Haitian aliens in the District Court for the Southern District of Florida.¹⁹³ The detainees requested that the government, among other things, grant their immediate release and cease using race or nationality as a factor in adjudicating requests filed by Haitian asylum seekers.¹⁹⁴ The court, in rejecting the Haitian detainees' claims, deferred to the executive's authority to determine U.S. refugee policy:

Paramount within our democratic values is the separation of powers among the three co-equal branches of government. The law teaches us that the power to control a nation's borders is so fundamental to its sovereignty that we must abide by the lawfully enacted policy decisions made by the Legislative and Executive branches In immigration matters, neither individuals nor the Court can substitute their policy perspectives for the judgments made by Executive officials, based upon facially legitimate and bona fide reasons . . .¹⁹⁵

The court made brief mention of international law, but only to demonstrate its apparent irrelevance. The court first addressed the UNHCR advisory opinion,¹⁹⁶ which the Petitioners cited as support for their contention that detention of asylum seekers as a means of deterrence is inconsistent with the U.S.'s obligations under the 1967 Refugee Protocol.¹⁹⁷ No doubt anticipating the argument that the Protocol was not self-executing,¹⁹⁸ the detainees refrained from alleging a cause of action under international law.¹⁹⁹ Accordingly, the court declined to address the substance of the UNHCR opinion.²⁰⁰

we affirm based upon the district court's well-reasoned order of May 17, 2002, within which each of these issues is comprehensively resolved.”).

193. *Id.* at 1372.

194. *Id.* Plaintiffs relied primarily on *Jean v. Nelson*, 472 U.S. 846 (1985), arguing that it required “the INS to make parole determinations in a non-discriminatory manner without treating Haitians different than other nationalities.” *Jeanty*, 204 F. Supp. 2d at 1373.

195. *Jeanty*, 204 F.Supp. 2d at 1383-84.

196. *Id.* at 1370 n. 5.

197. *Id.*

198. *Id.* at 1370, 1370 n.5.

199. *Id.* at 1370.

200. *Id.* at 1370 n.5.

In addition, the court addressed the argument submitted in an Amicus Curiae brief by the Lawyer's Committee for Human Rights,²⁰¹ that the INS detention policy violates the ICCPR.²⁰² Again, the court relied on the fact that no allegation was made to invoke the ICCPR or any other international law and that the ICCPR, like the Refugee Protocol, was previously deemed non-self-executing.²⁰³

Presently, then, while U.S. refugee policy appears to be in conflict with international law, this is of little consequence as long as courts continue to defer so readily to the executive branch on immigration matters. As it stands, asylum seekers and their advocates may need to, as the *Jeanty* court recommended, direct their "cry for freedom . . . to those representatives of the political branches responsible for enacting immigration laws and policies."²⁰⁴ However, given the largely non-majoritarian nature of refugee policy, especially as it relates to Haitians,²⁰⁵ coupled with the

deference the executive branch now enjoys following September 11th, one wonders whether the Haitians' "cry" will resound any louder than that of the Jews a half-century ago.

VI. CONCLUSION: "TO THE BROODING SPIRIT OF THE LAW"²⁰⁶

Legal analysis often depends more on the "extraordinary plasticity of legal rhetoric,"²⁰⁷ the ability to use legal reasoning to manipulate or justify pre-determined ends, than deeper moral

201. *Id.* at 1371 n.6.

202. *Id.*

203. *Id.*

204. *Id.* at 1368.

205. As opposed to, for instance, refugee policy as it relates to Cubans. See Kathie Klarreich, *Detention of Haitian Refugees Stirs Debate*, CHRISTIAN SCIENCE MONITOR, Nov. 4, 2002, at 2 (quoting Cheryl Little, executive director of the Florida Immigrant Advocacy Center: 'Why aren't Haitians entitled to the same rights as others...[i]s it because they aren't from a Communist country but a poor black one? And that Haitians in the United States don't have any political clout?'). Little's reference is a rather obvious one.

206. P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 130 (1987) (quoting Chief Justice Hughes who concluded the above quote as follows: "to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting judge believes the court has been betrayed"). This author hopes that the words of Justice Hughes will one day ring true for the dissent of Justice Blackmun in *Salé*; see *supra* Part III.B.

207. Richard A. Posner, *Courting Evil*, NEW REPUBLIC, June 17, 1991, at 42.

judgments.²⁰⁸ This point is well-illustrated by the Supreme Court's decision in *Sale*. In that case, the Court claimed that, while its decision might have been inconsistent with the "spirit" of human rights, it was constrained by the plain language of the law.²⁰⁹ Of course, as Justice Blackmun's dissent implies, the Court merely chose one of two competing interpretations, the principal difference being that one focused, in part, on the "spirit" of the law while the other did not.²¹⁰

Express international legal obligations clearly prohibit a policy of detaining asylum seekers for the purpose of deterring others from seeking asylum. In the often uncertain and fungible world of international law, however, what seems "clear" to one court or commentator frequently represents only one of numerous competing perspectives. There are, of course, articles written on the very subject addressed in this Comment that take precisely the opposite view of this author.²¹¹ In accepting the "better view" of one author or court over that of another, one cannot avoid referencing some higher principle, whether that principle is economic efficiency, national sovereignty, constitutional principles,²¹² or human rights. This Comment has taken an approach quite like that of Justice Blackmun in *Sale* by looking to what the law should be, given its broader purposes.

In many cases, a detached approach to the law may be the best approach. By its very terms, however, this cannot be the case in human rights law. After all, it was a profoundly *human* tragedy that gave rise to the law of human rights generally and refugee law in particular.²¹³ By recognizing certain human rights obligations,

208. *Id.* (Posner describes the "extraordinary plasticity of legal rhetoric" as that "which enables a judge to find a plausible form of words to clothe virtually any decision, however barbarous").

209. *Sale v. Haitian Centers Council*, 509 U.S. 155, 183 (1993).

210. This is a relatively generous evaluation of the Majority's decision in *Sale*. One author, for example, characterized the decision as one in which "the Court . . . might justifiably be accused of engaging in judicial activism of the conservative mode." Thomas David Jones, *Sale v. Haitian Centers Council, Inc.* 113 S. Ct. 2549, 88 AM. J. INT'L L. 105, 122 (Keith Highet & George Kahale, III eds., 1994).

211. See, e.g., Matthew A. Pingeton, *United States Immigration Policy: Detaining Cuban Refugees Taken from the Sea*, 8 J. TRANSNAT'L L. & POL'Y 329 (1999) (examining the history of U.S. immigration policy regarding Cubans and the implementation of asylum procedures for Cubans and other refugees).

212. For example, the executive branch often makes the claim that it has plenary power over enforcement of U.S. immigration law. For discussion of this position, see Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); see also *supra* Part III.C.

213. See *supra* Part III.A.

countries implicitly made a promise not to repeat the mistakes that contributed to the murder of eleven million people. Those mistakes were predicated, in part, on detached judgment in which countries like the U.S. looked more to the economic and political ramifications of their actions rather than the moral ramifications of inaction.²¹⁴

A half-century later, the U.S. has yet to learn this historical lesson. The denial of refuge to Haitians fleeing persecution is, as it was with Jewish refugees, rooted in political and economic factors—the rights of Haitians as human beings have become a secondary matter. Indeed, the plight of Haitians was never genuinely at issue; the U.S. government recognized, on more than one occasion, the considerable extent of their suffering.²¹⁵ Instead, the real question is whether the U.S. is committed to doing much about it. Increasingly, it appears that it is not.

Under its detention policy, the present administration does not merely seek to hedge its obligations to provide asylum; it now seeks to deter Haitians and possibly other groups from ever seeking asylum in the first place. In addition to interdiction, this is now done primarily through detaining Haitian asylum-seekers. Simply stated, the U.S. is enforcing a policy that detains asylum seekers in the hope that others who are experiencing persecution will think twice before seeking refuge in the U.S. At the very least, such a policy undermines the “spirit” of the Refugee Convention and is an affront to what has long been this country’s pledge: “Give me your tired, your poor, your huddled masses yearning to breathe free.”

An administration that, at least in its rhetoric, has become increasingly concerned with matters of human rights²¹⁶ and

214. *Id.*

215. *See* Part II.C.

216. Invoking the same UNHCR whose guidance regarding detention of refugees his administration has effectively ignored, Bush, in making his case for action against Iraq, stated that:

Last year, the United Nations Commission on Human Rights found that Iraq continues to commit extremely grave violations of human rights and that the regime’s repression is all pervasive. Tens of thousands of political opponents and ordinary citizens have been subjected to arbitrary arrest and imprisonment, summary execution, and torture by beating, burning, electric shock, starvation, mutilation and rape. Wives are tortured in front of their husbands; children in the presence of their parents; and all of these horrors are concealed from the world by the apparatus of a totalitarian State.

U.N. GAOR, 57th Sess., 2d plen. mtg. at 6-7, U.N. Doc. A/57/PV.2 (2002) (address by President George W. Bush). Later, Bush stated as one of his goals an Iraqi “government based on respect for human rights . . .” *Id.*

international law,²¹⁷ should reverse its present course before the “intelligence of a future day” reminds us yet again how tragic the results of our indifference can be.

217. On the importance of international law, Bush said: “All the world now faces a test and the United Nations a difficult and defining moment. Are Security Council resolutions to be honored and enforced or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?” *Id.* at 8. As to the “purpose” of the United Nations’ “founding,” see *supra* Part III.