Pushing Back Protection

HOW OFFSHORING AND EXTERNALIZATION IMPERIL THE RIGHT TO ASYLUM

CHAPTER 4:
LAYING THE FOUNDATION OF U.S. OFFSHORING: FROM ANGEL ISLAND TO GUANTÁNAMO BAY

NATIONAL IMMIGRANT JUSTICE CENTER | A HEARTLAND ALLIANCE PROGRAM

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CHAPTER 4

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“...This court cannot close its eyes, however, to a possible underlying reason why these plaintiffs have been subjected to intentional ‘national origin’ discrimination. The plaintiffs are part of the first substantial flight of black refugees from a repressive regime to this country. All of the plaintiffs are black.”

— Senior U.S. Federal District Judge James Lawrence King

Though the U.S.’s offshoring policy did not begin until later in the twentieth century, the policy to push migrants to the periphery of U.S. land is not new. Hyper-focused on deterring non-European migration and for a period of time migration from southern and eastern Europe, the United States has long concentrated on pushing maritime arrivals away from its mainland. This goal drove policymakers to expand upon U.S. island quarantine stations at the turn of the century, eventually evolving into militarization of the U.S.-Mexico border, as well as the conversion of leased Cuban land into an indefinite offshore jail for Haitians.

4.1. The Incipient Stage Of U.S. Offshoring: Public Health as Racial Exclusion From Angel Island to the U.S.-Mexico Border

Ellis and Angel Islands became the site of a new experiment in the late 19th century as millions of people migrated from Europe and Asia to the U.S. Part of U.S. territory facing the Atlantic and Pacific oceans, the islands morphed into quarantine detention centers where the U.S. piloted its first offshoring: keeping migrants away from the domestic mainland while they were subjected to intrusive medical screenings. These medical screenings, though ostensibly promoting public health, were in fact a tool for excluding racial minorities from the U.S.
health, were in reality tactics of racial exclusion which aimed to ban migrants who were carrying “loathsome and contagious disease” and to rid the U.S. of other “undesirable” populations.\textsuperscript{244} The percentage of Europeans excluded from the U.S. was much lower than non-Europeans.\textsuperscript{245} In contrast to Ellis Island, Angel Island, which is located in the San Francisco Bay, served as the primary arrival point or official gateway for Chinese and other Asian immigrants.\textsuperscript{246} In fact, the construction for an immigration facility on the West Coast was the direct consequence of two pieces of legislation designed to block or limit Chinese migrants from coming to the U.S. mainland: the Page Act of 1875, and the Chinese Exclusion Act of 1882.\textsuperscript{247}

This experiment ushered in a lasting shift at another periphery for the first half of the 20th century, the U.S.-Mexico border, where Mexican laborers were also subjected to humiliating health screenings and “cleansing” procedures that included being forced to strip, as well the use of gas chambers to fumigate their clothes.\textsuperscript{248} Combined with a new law that created criminal penalties for border crossings (a law used widely to this day and originally championed by a U.S. Senator who proudly defended lynching, segregation, and nativist policies against Mexican laborers),\textsuperscript{249} the U.S. government laid the groundwork for massive push-backs at the southern border. This marked a shift from comparatively fluid movement across the U.S.-Mexico border, emanating from the relatively recent U.S. annexation of large portions of Mexican land. While erecting a new infrastructure of border control, state police and vigilantes terrorized Mexicans they encountered. Lynchings of Mexican migrants from the late 19th century until the first half of the 20th century range between hundreds and several thousands.\textsuperscript{250}

The southern border remains a deadly place for migrants to this day.\textsuperscript{251} But the southern border did not become the primary springboard for push-backs and offshoring until the 2000s. Until then, the U.S. returned to the insular laboratory; Angel Island, it turns out, was the prologue for Guantánamo Bay, a near colonial territory of the United States in Cuba.
4.2. Guantánamo Bay: From a Naval Station to a Detention Center for Asylum Seekers

Guantánamo Bay transformed into a makeshift U.S. detention center for asylum seekers in response to a twofold situation: the exodus of tens of thousands of Haitians fleeing a brutal military dictatorship and increasing panic among policymakers over the HIV/AIDS epidemic in the U.S.—culminating with the Centers for Disease Control and Prevention’s (CDC) designation of Haitians as a high-risk group in 1983 and an immigration ban on individuals living with HIV/AIDS in 1987. In the early 1990s, the U.S. began detaining Haitian asylum seekers intercepted at sea en masse away from the U.S. mainland, even if they were not HIV-positive, veering sharply from the policy formally adopted by the U.S. in the 1950s of not incarcerating migrants.

Large numbers of Haitians fled by boat to the United States in 1980—the same year that the U.S. codified non-refoulement in its domestic asylum code, the Refugee Act of 1980. One year later, President Ronald Reagan struck a deal with Haiti’s government to return anyone apprehended at sea who travelled “illegally.” Though Reagan pledged not to return asylum seekers, only 6 out of 21,000 Haitians received asylum hearings over the course of nine years.

While Reagan paid lip-service to the principle of non-refoulement, his successor George H.W. Bush explicitly limited its scope. Beginning in late 1991, the Bush administration re-directed boats toward Guantánamo Bay, stating that the influx of rafts would be overwhelming for the U.S. Coast Guard. By the end of the year, the U.S. Coast Guard “screened-in” approximately 10,500 Haitians who had a credible fear of returning to Haiti and detained them at Guantánamo Bay. Then, in the spring of 1992, President Bush issued an executive order stating that the U.S. obligation not to refoul—i.e., not to return refugees to harm—did not apply to asylum seekers intercepted outside of the U.S. Within eighteen months, the U.S. Coast Guard intercepted more than 34,000 asylum seekers attempting to escape the military regime in Haiti.

When Bill Clinton was elected President, he originally vowed to reverse this policy, but went on to continue intercepting asylum seekers at sea after relabeling it as a “humanitarian mission” to rescue them, and claiming that a lack of space in the U.S. made offshore detention necessary. In reality, asylum seekers were trapped in a legal black hole: forcing asylum seekers to return to Haiti would have violated domestic and international law, yet many were barred from entering the U.S. under the 1987 prohibition on HIV-

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History of U.S. Control of Guantánamo Bay Within the Broader Context of U.S.-Cuba Relations

A number of the “Founders”—including George Washington, James Madison, and Thomas Jefferson—readily professed ambitions of expanding the “American Empire.” Jefferson thought Cuba “the most interesting addition which could ever be made to our system of States,” and told John C. Calhoun in 1820 that the United States “ought, at the first possible opportunity, to take Cuba.” John Quincy Adams, James Monroe’s Secretary of State and his successor in the White House, considered the annexation of Cuba “indispensable to the continuance and integrity of the Union itself.”

This expansionist approach brought the U.S. Senate to advocate for the purchase of Cuba from Spain in the mid-1850s. By the end of the century, the Cuban government struck a deal to lease Guantánamo Bay to the U.S. in exchange for its independence. Fidel Castro’s government viewed the continued U.S. occupation of the Bay as illegal. Though the U.S. acquired “an empire of military bases” across the Caribbean and later colonized the Philippines in the Pacific, Guantánamo Bay was unique in becoming an extension of U.S. border processing—permitting offshore, indefinite detention and interceptions at sea at a ‘safe’ distance from the mainland.
positive foreigners from entering the country. Asylum seekers languished in detention because the U.S. continued to use public health as an immigration tool to repress Haitian asylum seekers.

This led to the mass detention of Haitian asylum seekers in shocking conditions at Guantánamo Bay. The detention center (limited to a maximum of 12,500 persons) reached capacity numerous times between 1991 and 1992. Asylum seekers were housed in tents covered in garbage bags, which barely protected them from the rain, and enclosed by barbed wire fencing. They were forced to eat spoiled and sometimes maggot-filled food in extreme heat. Asylum seekers’ physical and mental health declined significantly, resulting in some suicide attempts.

Medical care was also inadequate, especially for the hundreds of HIV-positive refugees detained. For the tens of thousands of refugees detained at Guantánamo Bay, there were only a handful of medical personnel on site and a small number of hospital beds.

The rest of the world denounced these conditions, which the Doctors of the World called a “disgrace.” Haitians protested their detention conditions and harsh treatment by marching through the detention camp, but were met by military police in riot gear. News outlets across the globe reported refugees protesting in a weeks-long hunger strike.

Following this public outcry, the number of asylum seekers detained at Guantánamo declined. In 1992, approximately 300 Haitians remained, more than 230 of whom were HIV-positive. The U.S. government determined that all 300 asylum seekers were “bona fide” refugees but did not process their asylum cases because of the 1987 HIV ban. A federal court later noted that the U.S. enforced the HIV ban against only Haitian refugees.

At the same time, two court battles ensured that the U.S. government could continue the practice. A federal district court determined that asylum seekers were deprived of due process by being denied the opportunity to speak to their own attorneys and adequate medical care. The court ordered the government to release the refugees to anywhere but Haiti, and the government ultimately transferred many asylum seekers to the U.S. The Clinton administration later settled the case, stripping the decision of any legal precedent.

In Haitian Centers Council v. Sale in 1993, the U.S. Supreme Court determined that neither section 243(h) of the Immigration and Nationality Act nor Article 33 of the 1951 Refugee Convention prohibited the U.S. from intercepting refugees beyond U.S. territory and forcing repatriation. So long as these interceptions did not occur within U.S. territory, the U.S. had carte blanche to refoul asylum seekers.

Emboldened by their win before the Supreme Court, the U.S. government later made clear that Sale empowers them not only to push-back at will on international waters, but to offshore asylum seekers.
As they stated before the Inter-American Commission on Human Rights,

“[Non-refoulement]... is a limited obligation, only relevant with respect to refugees who have reached the territory of a contracting state, and does not apply to persons interdicted on the high seas. In addition, the obligation does not prevent a contracting state from sending a refugee to any place other than the country of persecution.”

Sale helped pave the way for the government to test further the boundaries of international obligations through various iterations of offshoring and externalization regimes.

Months after Sale, the Clinton administration continued re-directing asylum seekers to Guantánamo Bay after then-President Fidel Castro lifted the emigration ban and thousands of Cubans fled to the U.S. Until this point, Cuban refugees were granted asylum in the U.S., but thousands of Cuban asylum seekers were now intercepted and detained. The total detained population at Guantánamo Bay, including Haitian and Cuban refugees, peaked in 1994, when around 12,000 Haitians with credible fear of persecution were detained—the vast majority of whom were eventually denied asylum in the U.S.

By 1994, political pressure mounted for then-President Clinton to wind-down detention at Guantánamo Bay and compel the military regime in Haiti to stop oppressing asylum seekers. Ultimately, the U.S. deported approximately 25,000 Haitians from 1991-94, subjecting them to brutal harm and repression.

The exact human toll of these U.S. policies is unknown. However, the U.S. treatment of Haitians also cemented a new era of offshoring, long after the U.S. committed to non-refoulement under domestic and international law. The U.S. briefly reached agreements with Jamaica and the United Kingdom in the Caribbean and the West Indies to process interdicted Haitians on a boat off the coast of Jamaica and to the Turks and Caicos Islands. Under Operation “Safe Haven,” the U.S.
sought agreements with Honduras, Belize, and Venezuela, signaling a new infrastructure for offshoring asylum seekers far from the U.S. border. 291 Though intercepted in international waters, the U.S. Coast Guard took hundreds of Haitians to these Central and Latin American nations, all but dooming these asylum seekers’ chances to obtain protection. 292 Far from the public eye and judicial scrutiny in domestic courts, the U.S. dubbed these sites “safe havens” to sidestep political fallout while bolstering deterrence practices. 293

This deterrence policy was bipartisan. The Clinton administration employed the same tactics as its predecessors in the Bush administration while offshoring Haitians, warning on the radio that, “Leaving by boat is not the route to freedom.” 294 U.S. border enforcement became much more visible, involved interconnected militarization and policing practices in the Caribbean, discriminated against Black migrants, and forced migrants away from long-standing migration routes into more dangerous routes in their attempts to avoid detention.

Although Operation Safe Haven has since wound down, the U.S. continues to intercept Haitian refugees abroad to be held in detention offshore—though it primarily engages in such interceptions by proxy, externalizing its border enforcement. 295 As of 2020, Panama detained many transcontinental asylum seekers, including 2,000 Haitians in its southern Darien province. 296 Panama’s migration enforcement apparatus receives significant support from the U.S. Department of Homeland Security (DHS). Under the guise of fighting crime and various forms of trafficking, DHS and Panama created a joint migration task force in 2018 to control the flow of migrants traveling from South America to the U.S. 297

The unfettered use of push-backs in maritime interceptions that led to Guantánamo’s first use as a migrant prison camp had another effect: pushing asylum seekers to journey through South America to try and enter the U.S. by land. 298 This, in turn, brought the focus back to the fortification of the southern border, which became the locus of a new era of offshoring.

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**Haitian Interdictions in the 21st Century**

Starting in the 1980s and peaking in the early 1990s, the U.S. Coast Guard intercepted tens of thousands of Haitians arriving by boat. Though this practice slowed down after 1994, it did not end. In the past two decades, the U.S. Coast Guard has routinely interdicted at sea more than 1,000 Haitian migrants, and sometimes more than 3,000 Haitian migrants, each year. 299 Between fiscal years 2000 and 2004, sea interdictions rose from 1,113 to 3,229 Haitian migrants, respectively. In the next six years, interdictions at sea remained somewhat steady at a lower rate: the U.S. Coast Guard interdicted an approximate average of 1,500 Haitian migrants annually from fiscal years 2005–2010.

The deadly 2010 earthquake in Haiti and continuing political turmoil resulted in a higher rate of Haitian migrants trying to enter the U.S. in the following decade. 300 Although various reports estimate different numbers of Haitian migrants interdicted each year, 301 data show that the U.S. Coast Guard has consistently interdicted more than 1,000 Haitian migrants annually in the last decade. 302 In 2013, for example, more than 2,100 Haitian migrants were interdicted at sea. 303 Between fiscal years 2017 and 2019, interdictions increased from approximately 1,850 Haitian migrants in 2017 to more than 3,400 in 2019. 304 The trend continues today: 181 Haitian migrants have been interdicted so far from October 2020 to February 2021. 305 Four decades later, this deterrence policy has yet to achieve its intended goals.

Ongoing U.S. Coast Guard interceptions have not resulted in systematic use of Guantánamo Bay’s asylum prison, named the Migrant Operations Center. However, the site remains open for the detention of migrants and held eight Cuban and Haitian asylum seekers as recently as March 2016, in conditions similar to those of their unfortunate predecessors in the early 1990s. 307 Questions remain as to whether it will reopen for the offshoring of asylum seekers—especially as DHS has retained private contractor MVM to service the Migrant Operations Center. 309
Endnotes

246. Yung et al., “Angel Island.”
247. Before the construction of the immigration station on Angel Island in the 1870s, Chinese immigrants were detained in a two-story warehouse at the end of a wharf on the San Francisco waterfront, a warehouse that was criticized for being crowded and unsanitary. See Roger Daniels, “No Lamps Were Lit for Them: Angel Island Immigration Station,” Journal of American Ethnic History 17, no. 1 (Fall 1997): 5, https://www.jstor.org/stable/27502236?seq=1.
250. Monica Muñoz Martinez, The Injustice Never Leaves You: Anti-Mexican Violence in Texas, (Cambridge, Massachusetts: Harvard University Press, 2018): 6-7 (“Historians estimate that between 1848 and 1928 in Texas alone, 232 ethnic Mexicans were lynched by vigilante groups of three or more people. These tabulations only tell part of the story . . . Estimates of the number of dead range from as few as 300 to as many as several thousand.”)
254. “At the end of the Spanish-American War in 1898, the Spanish colonies of Cuba, Puerto Rico, Guam, and the Philippines transitioned to administration by the United States. Of these four territories, only Cuba quickly became an independent republic. As a condition of relinquishing administration, though, the Cuban government agreed to lease three parcels of land to the United States for use as naval or coaling stations. Naval Station Guantánamo Bay, Cuba, was the sole installation established under that agreement. See Jennifer K. Elsea and Daniel H. Else, “Naval Station Guantánamo Bay: History and Legal Issues Regarding Its Lease Agreements,” Congressional Research Service, November 17, 2016, https://fas.org/sgp/crs/natsec/R44137.pdf. Short of annexing Cuba, the U.S. struck a compromise where it continued to assert economic dominance over the newly independent island and took control of Guantánamo Bay. See “Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations,” Lillian Goldman Law Library, February 23, 1903, https://avalon.law.yale.edu/20th_century/dip_cuba002.asp. This agreement followed the Platt Amendment, which stipulated conditions for the withdrawal of U.S. troops from Cuba. This Amendment included a pledge to permit the U.S. to lease land for its naval bases, and reserve the right to intervene in Cuban affairs; in essence, the Platt Amendment “institutionalize[d] the U.S. presence in Cuba.” See Louis A. Pérez Jr., Cuba and the United States: Ties of Singular Intimacy, (Athens and London: University of Georgia Press, 2011), This Amendment was not repealed until 1934, when the U.S. abrogated and replaced the 1903 agreement with a Treaty of Relations, which preserved the lease of Guantánamo, along with two other parcels of Cuban land—though only the Guantánamo naval station was actually built and occupied. The 1934 Treaty granted to the United States “complete jurisdiction and control over” the property so long as it remained occupied.” See
“Agreement Between,” 1903.

255. Elsea et al., “Naval Station.”; Anthony Boadle, “Castro: Cuba not cashing US Guantanamo rent checks,” Reuters, August 17, 2007, https://www.reuters.com/article/idUSN17200921. Cuba refused to cash monthly $4,085 rent payments the U.S. delivered. Although diplomatic relations between U.S. and Cuba were nearly non-existent, the Cuban government cut off water to the naval station in 1964; the U.S. has had to supply its own water and electrical power in the decades that followed.


258. A. Naomi Paik, Testimony and Redress in U.S. Prison Camps since World War II, (Chapel Hill: University of North Carolina Press, 2016), 95, 101 (“In March 1983, the CDC identified what it referred to as the “4-H Club” of high-risk groups—homosexuals, hemophiliacs, heroin users, and Haitians… The designation of Haitians as a member of the 4-H Club marked the first time in the history of modern medicine that a pathological condition was tied to a national group. The CDC’s categorization, along with articles in popular and medical journals, thus implied that Haitians as such were somehow contagious carriers of the disease.”); HRC Admin, “After 22 Years, HIV Travel and Immigration Ban Lifted,” Human Rights Campaign (HRC), January 4, 2010, https://www.hrc.org/press-releases/after-22-years-hiv-travel-and-immigration-ban-lifted (HIV ban imposed in 1987 lifted in 2009).


260. Leng May Ma v. Barber, 357 U.S. 185, 190 (1958) (referring to this new policy as reflecting the “humane qualities of an enlightened civilization”).


279. Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1048 (E.D.N.Y. 1993) (“Haitians remain in detention solely because they are Haitian and have tested HIV-positive. The Government has admitted that the ban on the admission of aliens with communicable diseases has not been strictly enforced against every person seeking entry. Each year many “non-immigrants” enter the United States, are legally entitled to remain for years, and are not subject to HIV testing. To date, the Government has only enforced the ban against Haitians.”)


282. Sevcenko et al., “Gitmo’s Original Sin.”


285. Loyd et al., Boats, Borders, and Bases, 147-74; “Haitians and GTMO.”

286. Loyd et al., Boats, Borders, and Bases, 147-74.


288. Loyd et al., Boats, Borders, and Bases, 147-74.


290. The agreement with Jamaica lasted mere weeks, while the Turks and

291. Loyd et al., Boats, Borders, and Bases, 27 ("As the numbers of Haitians and Cubans held at Guantánamo exceeded 40,000, the United States opened camps for Cubans on its military base in Panama and built additional “safe haven” sites in other countries in the Caribbean.")

292. Bill Frelick, “Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection,” Cornell International Law Journal 26, no. 3, (1993): 686, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1324&context=cljl ("Conditions for the 250 Haitians in Honduras were harsh. Honduras is not a signatory to the United Nations Refugee Convention and Protocol, and has a deplorable record with respect to Salvadoran refugees who were kept as virtual prisoners in closed camps during the 1980s. There are well-substantiated reports of abuse of refugees by Honduran military personnel. The Haitians were held in a school building surrounded by barbed wire and guarded by soldiers. Within a short period of time, nearly all of the Haitians in Honduras “voluntarily” repatriated.")

293. Loyd et al., Boats, Borders, and Bases, 150-151 ("The use of GTMO was the first in a series of legal geographical maneuvers that would create tiers of asylum-seeking on boats and bases across the Caribbean, restricting access among those distanced through detention offshore. Bush also sought to establish additional “safe havens” across the region. While the Bahamas and Dominican Republic refused, Honduras, Belize, and Venezuela agreed"); Ghezelbash, Refugee Lost, 111.

294. Loyd et al., Boats, Borders, and Bases, 152.


296. While DHS would provide Panamanian migration authorities with “non-border inspection teams” (suggesting a crime-control purpose), this agreement also purports to create “a new mechanism to ensure more effective and complete coordination to address illegal immigration in the region.” See, “The government agrees with the US to create a Joint Migratory Task Force,” nodal, June 7, 2018, https://www.nodal.am/2018/06/el-gobierno-acuerda-con-eeuu-la-creacion-de-una-fuerza-de-tarea-conjunta-migratoria/ (includes press release from Panama); Calah Schlabach and Cronkte Borderlands Project, “Torn between humanitarian ideals and U.S. pressure, Panama screens migrants from around the world,” Cronkite News (CN), July 2, 2020, https://cronkitenews.azpbs.org/2020/07/02/humanitarian-flow-panama-migrants/ ("For many migrants, Panama is their first encounter with the U.S. immigration system, which is working with Panama’s border patrol to track entrants.")


303. Seapower Staff, “Coast Guard Interdicts; Lolo, “Authorities interdict 23 migrants.”

304. Seapower Staff, “Coast Guard Interdicts; Lolo, “Authorities interdict 23 migrants.”


just eight people are held in what the government calls the Migrant Operations Center in Guantanamo, a building reminiscent of a budget hotel on an isolated side of the base far from its commercial district and the military detention center. If they had managed to set foot on dry land in Florida, they would have a right to request asylum in the United States and would be entitled to lawyers and other legal protections as their claims were processed. But since they were picked up at sea, they have no right to asylum in the United States and instead have their cases processed at Guantanamo Bay, where they have no access to lawyers or courts. If they prove their persecution claims to the satisfaction of a U.S. official, they are resettled abroad, not in the U.S.”
