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BRAVING THE NEW WORLD IN THE NINETIES

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On Christmas Eve, 1492, Christopher Columbus wrecked his flagship, the *Santa Maria*, on the north coast of Hispaniola. The island has been in trouble ever since. Although the Spanish initially made it the center of their Caribbean imperial venture, within a few decades their attention shifted westward to Mexican treasures. The little island of Tortuga, off Hispaniola's northern coast, became notorious as a base for pirates harrying the Spanish fleet in the seventeenth century. The Spanish had lost control of the western part of Hispaniola by the 1690s, and formally ceded it to the French in the Treaty of Ryswick. This transfer was to have fateful consequences.¹

Over the course of the eighteenth century, French Saint-Domingue developed into a rich colony of sugar plantations, supported by the labor of half a million black slaves. In the 1790s, the principles espoused in the French and American Revolutions unsettled the structure of local authority on the island. The slaves, ex-slaves and other free people of color of Saint-Domingue acted upon these principles, overthrowing their colonial masters in a long and bloody conflict. Ultimately, they established Haiti, the first independent nation without slavery in the post-Columbian Western Hemisphere.

The Haitians burst onto the pages of United States' immigration law even before their struggle for independence was won. Several states of the mainland Republic imposed a quarantine on West Indian blacks, slave or free—the potential bearers of dan-

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¹ This account draws principally on C.L.R. JAMES, *THE BLACK JACOBS: TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION* (2d ed. 1963), FRANKLIN W. KNIGHT, *THE CARIBBEAN: THE GENESIS OF A FRAGMENTED NATIONALISM* (2d ed. 1990), and THOMAS O. OTT, *THE HAITIAN REVOLUTION, 1789-1804* (1973).

gerously contagious ideas. In 1792, South Carolina was panicked into suspending the slave trade altogether.² When it restored the slave trade in 1803, it carefully barred the entry of any:

negro, mulatto, mustizo, or other person of colour, whether bond or free . . . from the Bahama or West-India islands, or from the continent of South-America; nor shall any negro or person of colour, who heretofore hath been, or now is, or hereafter shall be resident in any of the French West-India islands, enter or be brought into this state from any part or place without the limits thereof.³

In 1793, Georgia prohibited the importation of slaves "from any of the West India, Windward, Leeward, or Bahama islands, or from either of the adjacent provinces of East or West Florida," and required "all free negroes, mulattos, or mustizoes" seeking to reside in the state to procure a certificate of "their honesty and industry."⁴ In 1795, North Carolina banned the bringing in of people of color over the age of fifteen years "from any of the West-India or Bahama Islands, or the settlements on the southern coast of America."⁵

The Southern States even persuaded the United States Congress to enact a statute placing federal sanction behind their exclusionary policies.⁶ It prohibited vessels from bringing in foreign blacks to any state in violation of local laws—this at a time when Congress was powerless to prevent South Carolina from importing slaves from Africa. The United States did not extend diplomatic recognition to Haiti until 1862, when our own bloody civil war eliminated the need for deference to slaveholder interests.

For the moment, let us skip over the 1890s and consider the present. In 1992, the United States has been commemorating the Columbian anniversary on location in the Caribbean, on Coast Guard cutters, at Guantanamo Bay Naval Base, and at Port-au-Prince, Haiti, by taking extraordinary measures to keep Haitians

² S.C. Act of Dec. 21, 1792; see OTT, *supra* note 1, at 53-54.

³ S.C. Act of Dec. 17, 1803.

⁴ Ga. Act of Dec. 19, 1793.

⁵ N.C. Act of 1795, ch. 16, § 1.

⁶ Act of Feb. 28, 1803, ch. 63, 2 Stat. 205.

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away. The United States government has been intercepting boats whose occupants are attempting to flee Haiti, taking the refugees into custody, and detaining them either on the cutters or in camps at Guantanamo, before forcibly returning most of them to Haiti.

The United States government has been engaged in "interdiction" and repatriation of Haitian boat people since 1981.⁷ It suspended repatriation for several weeks in the autumn of 1991, after a military coup ousted Haiti's President Jean-Bertrand Aristide, and unleashed a wave of violent repression against his supporters.⁸ The United States government held interdicted Haitians on shipboard and at Guantanamo.⁹ But eventually the government's distaste for Haitians exceeded its disapproval of the bloodshed. When renewal of repatriation was preliminarily enjoined by a federal district court,¹⁰ the government quickly succeeded in having the district court's orders overturned by a divided panel of the Eleventh Circuit.¹¹ The Supreme Court then denied certiorari, over Justice Blackmun's anguished dissent, and the repatriations resumed.¹² After a second lawsuit resulted in a second injunction,¹³ the President issued a new Executive Order, rewriting the rules so that Haitians could be summarily repatriated without any opportunity to demonstrate their refugee status.¹⁴

⁷ See Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981), reprinted in 8 U.S.C. § 1182 (1982); see also Executive Order No. 12,324, 46 Fed. Reg. 48,109 & 48,210 (1981), reprinted in 8 U.S.C. § 1182 (1982).

⁸ See Howard W. French, *U.S. is Holding 200 Haitians on 2 Ships*, N.Y. TIMES, Nov. 8, 1991, at A3.

⁹ See *id.*: Al Kamen, *Possible Haitian Refugee Flood Concerns Officials*, WASH. POST, Nov. 16, 1991, at A24.

¹⁰ *Haitian Refugee Ctr., Inc. v. Baker*, No. 91-2653, 1991 WL 330942 (S.D. Fla. Nov. 19, 1991) (order granting preliminary injunction).

¹¹ *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1525 (11th Cir.), cert. denied, 112 S. Ct. 1245 (1992); *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1111 (11th Cir.) (dissolving injunction), cert. denied, 112 S. Ct. 1245 (1992).

¹² *Haitian Refugee Ctr., Inc. v. Baker*, 112 S. Ct. 1245, 1246 (1992).

¹³ *Haitian Ctrs. Council, Inc. v. McNary*, No. 92-1258, 1992 WL 155853 (E.D.N.Y. Apr. 6, 1992) (preliminarily enjoining repatriation of Haitians detained at Guantanamo Bay Naval Base without access to legal counsel), *aff'd in part, vacated in part*, 969 F.2d 1326 (2d Cir.), cert. granted, 113 S. Ct. 52 (1992).

¹⁴ See Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1992). The Second Circuit found this authorization to be in violation of statutory rights. See *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1352 (2d Cir.) (holding that government actions implementing Executive Order were violative of Immigration and Nationality Act, 8 U.S.C. §

Horrifying as the individual tragedies of the repatriation may be, their horror is multiplied by the implications of the government's legal defense for its exercise of power. The government has contended that, when it captures Haitians on the high seas or incarcerates them on an overseas naval base, it has caught them in a limbo where they have no rights.¹⁶ No right against repatriation under the United Nations refugee convention, no constitutional rights against United States government action, no rights of any kind. Therefore the government can do as it pleases with them, though it may choose to be generous.

People without rights: this was the theory of the conquistadors. Later it was the theory of the slaveholders of Saint-Domingue, who sought to keep the principles of the French Revolution out of the French colonies. It reappeared in the antebellum South, where the defenders of slavery scoffed at those who would naively interpret the Declaration of Independence as recognizing inalienable rights in *all* mankind.

It is troublesome enough when the Executive Branch makes a technical argument that a case involving the rights of citizens or aliens overseas is nonjusticiable. Their rights are left to the good judgment of bureaucrats or military officers, often without publicity and without supervision. But when the Executive Branch persuades itself that people *have no rights*, then even its internal deliberations will be guided only by considerations of self-interest or partisan advantage.

Judge Herbert Stern described, in his memoir *Judgment in Berlin*, the shock he felt when State Department lawyers maintained that a criminal defendant tried before him in West Berlin had no

1253(h) (Supp. 1992)), *cert. granted*, 113 S. Ct. 52 (1992). The Supreme Court however, stayed the resulting injunction pending certiorari. See *McNary v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3 (1992) (staying injunction).

¹⁶ See, e.g., Defendants' Response to Court's March 27, 1992 Order Directing Defendants to Show Cause Why a Preliminary Injunction Should Not Issue at 17-18, *Haitian Ctrs. Council, Inc. v. McNary*, No. 92-1258, 1992 WL 155853 (E.D.N.Y. Apr. 6, 1992), *rev'd in part*, 969 F.2d 1350 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992); Defendants' Memorandum Opposing Injunctive Relief at 4, 18, 27-28, 78-79, *Haitian Refugee Ctr., Inc. v. Baker*, No. 91-2653, 1991 WL 330942 (S.D. Fla. Nov. 19, 1991); see also Barbara Crossette, *U.S. Expanding Refugee Center As More Haitians Flee Homeland*, N.Y. TIMES, Dec. 3, 1991, at A6 ("In a rare appearance before a district court the Solicitor General of the United States, Kenneth Starr, told Judge Clyde Atkins that Haitians stopped at sea while trying to flee to the United States have no rights under American laws.").

rights but those the State Department chose to afford him:

What would the Communists say when the Americans proclaimed that they ruled Berlin with dictatorial powers, to keep it safe from Communism? What would the Berliners think when the American authorities claimed that no Berliner had any rights in occupied Berlin—in order to preserve democracy in Berlin?

Who would ever believe, he wondered, that American lawyers and diplomats would say such things? And in a place like Berlin!

Thirty years ago this same American occupation government—which now claimed to rule Berlin without legal restraint—had convicted German judges for proclaiming the same doctrine, in the same city.¹⁶

Ultimately, the government's stance forced him into an attitude of judicial activism, and Judge Stern ended up sentencing the defendant to time served because otherwise there would be no guarantee that he would *ever* be released.¹⁷

The Berlin case was unique, involving what technically remained an occupied territory, although its residents were by then citizens of one of the United States' staunchest allies. An attenuated link to the war power clouded the situation. In the Haitian cases, the government asserts that, in times of peace, it can reach out onto the high seas to arrest people it suspects of attempting to violate its immigration laws, and can hold them incommunicado without any rights at all, so long as it prevents them from reaching our territorial waters. The government also claims that the Constitution, statutes, and international refugee laws do not forbid it to capture refugees anywhere in the world and hand them over to their persecutors, so long as it acts outside its own borders.¹⁸ This amazing assertion—which no court has ac-

¹⁶ HERBERT J. STERN, JUDGMENT IN BERLIN 98-99 (1984). The published opinion in the case appears as *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979).

¹⁷ See STERN, *supra* note 16, at 370 ("Gentlemen, I will not give you this defendant . . . You have persuaded me. I believe, now, that you recognize no limitations of due process.").

¹⁸ See, e.g., *Haitian Refugee Ctr., Inc. v. Smith*, 949 F.2d 1109, 1110 (11th Cir.) (dissolving preliminary injunction against government from forcibly repatriating Haitians in government custody), *cert. denied*, 112 S. Ct. 1245 (1992). In *Smith*, the panel majority decided

cepted—sets a dreadful example for European governments attempting to cope with unprecedented refugee flows from the disintegrating Eastern bloc.

On what basis could such dehumanizing doctrines be defended? Professor Paul Stephan has appropriately invoked Thomas Hobbes as the ideological godfather of this type of argument.¹⁹ For Hobbes, the world began in a state of nature, which he described as no “idyll” but as the “warre of every man against every man.”²⁰ A commonwealth may be formed by a group of individuals coming together for their mutual protection and agreeing to submit to a common sovereign. The sovereign’s power over its subjects is absolute, so long as the sovereign affords them a minimal level of physical security. Nonparties to this social compact remain in a state of nature vis-à-vis the commonwealth. The sovereign’s only constraint in dealing with nonparties is to comply with agreements (if any) it voluntarily enters into. Otherwise, outsiders are entirely at risk, for “the Infliction of what evill soever, on an Innocent man, that is not a Subject, if it be for the benefit of the Common-wealth, and without violation of any former Covenant, is no breach of the Law of Nature.”²¹

Hobbes did not flinch from recognizing the consequences of his reasoning. The Hobbesian sovereign has no moral authority outside its borders; foreigners have no obligation to respect its laws; and its enforcement activities are actions of self-interested, naked force. Internally, the sovereign is absolute, and the citizens—more accurately, subjects—have hardly more rights than the foreigners.²²

We invoke Hobbes at our peril.²³ If we were consistent Hobbe-

only that the refugees’ treaty rights were not judicially enforceable. *Id.* at 1110-11; see also *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 815-16 (D.C. Cir. 1987). In *Gracey*, the panel majority found that the plaintiff, an organization on the mainland, lacked standing to assert the rights of refugees. *Id.*

¹⁹ See Paul B. Stephan III, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 CONN. L. REV. 831, 850-56 (1987) (contrasting Victorian and Hobbesian approaches to terrorism and torture of aliens).

²⁰ THOMAS HOBBS, *LEVIATHAN* 188 (C.B. MacPherson ed., 1968).

²¹ *Id.* at 360.

²² See Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 921-23, 984-85 (1991) (describing Hobbes’ social contract analysis and approach to extra-territorial action).

²³ Certainly law professors do. See HOBBS, *supra* note 20, at 350 (“Likewise in a Professor of the Law, to maintain any point, or do any act, that tendeth to the weakening of the

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sians, we would have to scrap the Constitution altogether and submit. Even if we could swallow the contradiction of being internal Lockeans and external Hobbesians, the extraterritorial enforcement of our laws would lose all moral legitimacy, and we would have no argument but force or bribery to offer to other sovereigns when we object to their dealings with our own citizens or other individuals. Moreover, it is not clear how we can swallow the contradiction. How can we justify exercising sovereign power over people to whom we afford no rights?

Which brings us to the 1890s. That was the decade of both the world's Columbian Exposition and the Spanish-American War. The latter established the United States as a Great Power with colonial possessions of its own, including Puerto Rico. Partisans of empire contended that the United States could acquire these possessions without bringing them under the protection of the Constitution, and often invoked the racial superiority of Anglo-Saxons as a justification for withholding rights from overseas populations. Of course, in the post-*Brown v. Board of Education*, post-colonial era, that particular method of self-delusion is no longer available.

In 1899, William Graham Sumner published an article in the *Yale Law Journal* with the provocative title, *The Conquest of the United States by Spain*.²⁴ He wrote:

Spain was the first, for a long time the greatest, of the modern imperialistic States. The United States, by its historical origin, its traditions and its principles, is the chief representative of the revolt and reaction against that kind of a state. I intend to show that, by the line of action now proposed to us, which we call expansion and imperialism, we are throwing away some of the most important elements of the American symbol, and are adopting some of the most important elements of the Spanish symbol. We have beaten Spain in a military conflict, but we are submitting to be conquered by her on the field of ideas and policies.²⁵

As many are recalling in this anniversary year, scholarship over

Sovereign Power, is a greater Crime, than in another man . . .").

²⁴ 8 *YALE L.J.* 168, 168 (1899).

²⁵ *Id.*

the past half-century has demonstrated how greatly United States' practice contradicted United States' principle in the century preceding Sumner's article. But his point remains valid—the decision to step into the shoes of Spain by acquiring its overseas colonies, and denying them equal rights and status with the frontier territories of the continental United States, represented a new departure, doing further violence to the American constitutional system.

A similar danger awaits the United States in the 1990s. Having declared itself the victor in a Cold War against a totalitarian system that regarded law as an instrument of revolutionary policy and denied the constraint of fundamental human rights, the United States faces a turbulent world in which it is, for the moment, the sole remaining “superpower.” Without the orientation of ideological alliances, this world has come to resemble the Hobbesian state of nature. Long suppressed nationalisms rage in the form of ethnic violence. The economic collapse of the Soviet Union has broken dependency relationships with former clients, which now may allow them to enjoy a buyer's market for weapons of mass destruction.

Under these circumstances, a President whose primary interest is foreign affairs, and a military and intelligence establishment bent on preserving its Cold War budgets, together aspire to a grand role as the military guarantor of a “new world order.” The United States is succumbing to the temptation to demand a free hand with which to promote democratization, anti-terrorism, and respect—by others—for human rights. Whether this results from cynicism or from an arrogant faith in our own infallibility, it is certain to lead to tragedy. The United States cannot foster human rights and the rule of law while placing itself above them.

The dangers lurk at our doorstep as well as at a distance. The victorious Western nations are also faced with the consequences of the fall of the walls. After decades of demanding freedom of emigration to the subjects of communism, their wish has been granted. The United States experienced this irony in microcosm in 1980, with the Mariel boatlift from Cuba. Deteriorating conditions in former Communist countries are producing greater migratory pressures, both from economic deprivation and from eth-

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nic violence. With aid from Moscow cut off, Cuba itself may yet again produce a similar exodus.

Neither the Constitution nor international law obliges the United States to let these migrants enter. But if they end up in United States' custody, other rights must become effective. The Guantanamo episode demonstrates the fact that the Executive Branch might pursue an offshore strategy, establishing extraterritorial refugee camps where it claims to govern without legal constraint. It is conceivable that the Rehnquist Court might abet such evasions. The Chief Justice and his antiquarian colleague, Justice Scalia, have shown a disposition to enforce premodern limits on constitutional rights without concern for their contemporary justification.²⁶ They have even expressed uncertainty about whether "illegal aliens" *within* the United States have constitutional rights²⁷—a proposition that the Supreme Court of the 1890s never doubted.²⁸ The 1990s will test whether the United States can remain faithful to its principles. If our Constitution is wrecked on a Caribbean shore, we will have only ourselves to blame.

²⁶ See, e.g., *Harmelin v. Michigan*, 111 S. Ct. 2680, 2684 (1991) (Scalia, J., joined by Rehnquist, C.J.); *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1046 (1991) (Scalia, J., concurring); *Cruzan v. Director, Missouri Dep't of Health*, 110 S. Ct. 2841, 2859 (1990) (Scalia, J., concurring); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 92 (1990) (Scalia, J., dissenting); *Burnham v. Superior Court*, 495 U.S. 604, 607 (1990) (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J.).

²⁷ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (dictum).

²⁸ See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (invalidating congressional statute for violating Fifth and Sixth Amendment rights of aliens unlawfully residing within United States).

