Introduction

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Introduction


Almost twenty-five years ago, Yale law students Lisa Daugaard and Michael Barr knocked on a professor's door to discuss what might loosely be called an extracurricular activity. They wanted to file a lawsuit against the U.S. government. They intended to do so without ever having spoken to their purported clients—thousands of Haitian nationals held incommunicado by the American military on the U.S. naval base at Guantánamo Bay. They did not understand a word of Haitian Creole and knew little if anything about the claims they might bring on behalf of the detainees. And their proposed suit would follow on the heels of a nearly identical case, filed months earlier by seasoned immigration lawyers, that had just been dismissed with prejudice.

It is no exaggeration to say that Lisa and Michael's plan bordered on ridiculous—and their law professor, Harold Koh, more or less thought as much. Yet only a few weeks later, as part of a larger team of lawyers and students, they filed the case on behalf of the Haitians in the U.S. District Court for the Eastern District of New York. What followed over the next fifteen months makes for one of the more remarkable human rights stories of recent decades—a David-and-Goliath battle in which a band of human rights lawyers and law students challenged the Justice Department, the State Department, the Pentagon, and the White House over a massive overseas Coast Guard and military operation involving thousands of Haitian nationals. The litigation, Haitian Centers Council (HCC) v. Sale, evolved into two distinct cases presenting complex issues of law and policy that remain as relevant today as ever: the U.S. government's use of Guantánamo as an extralegal detention camp and the morally untenable practice of directly returning refugees interdicted on the high seas to a place where they fear persecution.

On October 16, 2015, the New York Law School Law Review sponsored a symposium that brought together many of the key figures involved in the case, from plaintiffs' lawyers and former law students to government attorneys to Haitian activists and the clients themselves. We were especially honored to welcome the federal judge who presided over the trial in the Guantánamo branch of the litigation, Judge Sterling Johnson, Jr. of the U.S. District Court for the Eastern District of New York, as well

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1. See Brandt Goldstein, Storming the Court: How a Band of Law Students Fought the President—and Won 32-34 (First Scribner trade paperback ed. 2006). Almost all the information about the litigation described in this piece is taken from this book, the author's extensive interview notes, and Brandt Goldstein, Rodger Citron & Molly Beutz Land, A Documentary Companion to Storming the Court (2009).


3. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (holding that the U.S. government violated no federal or international law by the forcible return to Haiti of interdicted Haitian nationals who were given no opportunity to establish a credible fear of persecution in their homeland); Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993) (ordering release of Haitian nationals held at Guantánamo Bay, Cuba, on grounds that their continued detention violated due process). I refer to the foregoing Supreme Court decision as the "direct return" case in the text.

as U.S. Senator Christopher Coons, (D-Del.), who worked on the case as a third-year law student at Yale. The symposium was the largest gathering of “alumni” of this litigation to date—an occasion not only for analysis and inquiry, but for recollection and reflection, with old friends and colleagues reuniting to consider both the legal and political impact of the case and the ways it had affected them personally.

This symposium issue features contributions from four individuals at the symposium who were intimately involved with HCC v. Sale—Judge Johnson, Senator Coons, Professor Ray Brescia, who, like Senator Coons, worked on the litigation as a law student, and Professor Harold Koh, who argued the “direct return” case before the U.S. Supreme Court on behalf of the plaintiffs. Before offering a brief introduction to their contributions and some reflections on the symposium and Sale, I provide here a summary of the case as context for their work.

I. THE “HAITI CASE”

The “Haiti case,” as it is still referred to by the plaintiffs’ litigation team, traces its origins back to December 1990, when Jean-Bertrand Aristide became Haiti’s first democratically elected president. Aristide was the popular choice of Haiti’s poor and dispossessed, but he was seen as a threat by the country’s brutal military forces and the boujwazi, the tiny class of elites in Haiti that controlled the vast majority of the country’s wealth. Aristide was ultimately ousted in a military coup in September 1991, and he fled first to Venezuela and then to the United States. In the wake of his departure, Haitian soldiers and paramilitary forces persecuted pro-Aristide activists, particularly in Aristide strongholds such as Cité Soleil, a sprawling slum in the capital of Port-au-Prince. As a consequence, many Haitians began to flee the


7. Goldstein, supra note 1, at 12.

8. Id.

9. Goldstein, Citron & Land, supra note 1, at 4. Aristide was reinstalled as president after American forces invaded Haiti in 1994. His presidency did not fundamentally change the country and was considered by many to be a great disappointment. Aristide fled the country again in 2004 but returned in 2011. He still resides in Haiti today, and recently became active in the presidential campaign for his Fanmi Lavalas party candidate. David McFadden, Former President Aristide Leaps from Behind Scenes in Haiti, ASSOCIATED PRESS (Sept. 27, 2016, 12:17 PM), http://bigstory.ap.org/article/e07f34e8167b44818bf816ac5e92c17/former-president-aristide-leaps-behind-scenes-haiti.

10. Goldstein, Citron & Land, supra note 1, at 4.
country by boat, seeking safe haven from the military regime. From late October 1991 through May 1992, about 35,000 Haitians fled, often in unseaworthy vessels, and headed into the Windward Passage between Haiti and Cuba.

Concerned that the Haitians intended to reach American shores, and unwilling to accept them in large numbers, the George H.W. Bush administration ordered Coast Guard cutters into international waters to intercept the Haitian boats—a policy made possible because former Haitian dictator Jean-Claude “Baby Doc” Duvalier had signed a treaty with the Reagan administration authorizing the United States to interdict Haitian vessels in international waters. Under President Bush’s orders, Coast Guard cutters stopped every Haitian vessel they located, brought everyone aboard, and blew up the Haitian boats as “hazards to navigation.”

In the first few weeks after the coup, with perhaps only a thousand Haitians having fled, the Coast Guard kept them on the decks of its cutters and awaited further instruction from Washington. But as more people began to flee Haiti, the Bush administration opted to forcibly return everyone who did not potentially qualify for refugee status. Assisted by Creole interpreters, officials from the Immigration and Naturalization Service (INS) on board the cutters conducted screening interviews of the Haitians and split them into two groups: (1) those who had demonstrated a “credible fear” of persecution if returned to Haiti, and (2) those who were supposedly trying to reach the United States solely in search of greater economic opportunity. Individuals who fell in the latter category were transported by Coast Guard cutter to the docks of Port-au-Prince and handed over to the Haitian military. Those who had demonstrated a “credible fear” of persecution were flown to the United States to file a formal application for asylum—a process that includes the right to an attorney.

11. Id. at 5.
12. Id.
14. Goldstein, Citron & Land, supra note 1, at 5.
15. Id.
16. Id.
18. Goldstein, Citron & Land, supra note 1, at 5.
19. Id.
20. Id. The more rigorous standard in an asylum proceeding requires that the applicant demonstrate a "well-founded fear of persecution" based on the grounds of "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (2012) (defining "refugee"); id. § 1158(b) (providing that asylum may be granted to a "refugee" and prescribing the burden of proof).
Immigration attorneys and Haitian refugee advocates in Miami believed that the INS interviews were too cursory and could potentially lead to the return of bona fide refugees to Haiti. Seeking reform of the procedures to identify those who might qualify for asylum, Ira Kurzban and other lawyers filed the first case for the Haitians, Haitian Refugee Center, Inc. v. Baker, in the U.S. District Court for the Southern District of Florida in November 1991. Meanwhile, as more Haitians continued to flee, the Coast Guard began transporting them to the American naval base at Guantánamo Bay. The Haitians were housed in military tents on the tarmac of an unused airfield and from that point forward, the screening interviews took place on Guantánamo.

The Baker case played out at a lightning pace, driven by a presidential administration loath to have human rights lawyers interfering with large-scale operations on Guantánamo and the Caribbean Sea—and a federal appellate court zealously supportive of the administration's position. Although the district court issued a preliminary injunction halting the interview process and granting the plaintiffs' lawyers access to Guantánamo, the Eleventh Circuit quickly vacated the injunction and, remarkably, remanded the action to the district court with instructions to dismiss it. On February 24, 1992, just three months after the litigation began, the Supreme Court denied certiorari, putting an end to the Baker case.

But almost immediately, students at Yale Law School—a few of whom had done research for Kurzban in the Baker case—began talking about filing a second suit. After intense discussion and a frantic effort to draft a complaint and a temporary restraining order (TRO) application, Haitian Centers Council, Inc. v. McNary was filed in the U.S. District Court for the Eastern District of New York on March 17, 1992. The gravamen of the complaint was that the plaintiffs had a right to counsel and that the lawyers had a First Amendment right to communicate with their clients—a claim not precluded by Baker because Koh and the other McNary attorneys were not part of that earlier case. Several dozen students and a number of experienced litigators were involved in McNary, perhaps most notably Michael

21. Goldstein, Citron & Land, supra note 1, at 5.
22. 789 F. Supp. 1552 (S.D. Fla. 1992); Goldstein, Citron & Land, supra note 1, at 5.
23. Goldstein, Citron & Land, supra note 1, at 5.
24. Id. at 5–6.
25. Id. at 5.
26. Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1503–04 (11th Cir. 1992); see Goldstein, Citron & Land, supra note 1, at 5.
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Ratner of the Center for Constitutional Rights, who at the time was running the Allard K. Lowenstein International Human Rights Clinic with Koh at Yale.

Little more than a week after the case was filed, Judge Sterling Johnson, Jr. issued a TRO halting the interview process, barring any further repatriations, and granting the plaintiffs’ attorneys access to Guantánamo. ⁴⁰ It was a stunning development, and days later, to the extreme displeasure of the administration, several plaintiffs’ lawyers and law students were flown by government transport plane to Guantánamo to meet with their clients and gather facts about the interview process. ⁴¹ On April 6, after another hearing, Judge Johnson issued a preliminary injunction that kept in place the prohibition against interviews and repatriations. ⁴² But the breakneck pace of the litigation continued, and after the Second Circuit refused to stay the injunction, the Justice Department raced to the Supreme Court, which issued a stay order on April 22. ⁴³

Following the stay, the INS hurriedly implemented a new plan at Guantánamo. Up to this point, all “screened-in” Haitians—those who had established a credible fear of persecution—had been flown to the United States to seek asylum with the assistance of counsel. ⁴⁴ But several hundred such screened-in individuals had recently tested positive for HIV—in an era of widespread panic, even hysteria, about AIDS—and the Bush administration opted to keep this group on Guantánamo. ⁴⁵ Not only did the administration believe it would be politically unpopular to allow them into the United States, but a controversial federal regulation in place at the time barred HIV-positive aliens from entering the country. ⁴⁶ Accordingly, the INS began holding formal asylum hearings at Guantánamo for these HIV-positive, screened-in Haitians—but without the statutorily mandated access to counsel. ⁴⁷ All those who

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30. McNary, 789 F. Supp. at 545, 548; Goldstein, Citron & Land, supra note 1, at 6.
31. See Goldstein, Citron & Land, supra note 1, at 6.
34. Goldstein, Citron & Land, supra note 1, at 6–7.
35. Id.; Goldstein, supra note 1, at 56–57. Many of the parents or guardians of children tested positive for HIV but the children did not. These families were separated from the rest of the refugees. Furthermore, the HIV testing was not always accurate. Michael Ratner, How We Closed the Guantánamo HIV Camp: The Intersection of Politics and Litigation, 11 Harv. Hum. Rts. J. 187, 195 & n.38 (1998). Children were not separately screened unless they were unaccompanied by a parent or guardian. Clawson, Detweiler & Ho, supra note 6, at 2341 n.19.
36. 42 C.F.R. § 34.2(b)(4) (1992). At the time, the attorney general had the power to “parole” into the United States HIV-positive aliens for “emergent reasons,” 8 U.S.C. § 1182(d)(5)(A) (1994), and to waive the HIV exclusion on an individual basis for “humanitarian purposes.” Id. § 1157(c)(3). The Justice Department refused to use either of these options to bring the HIV-positive Haitian refugees into the United States. Goldstein, supra note 1, at 333 n.120.
37. Goldstein, Citron & Land, supra note 1, at 6.
either failed to establish a well-founded fear of persecution or refused to submit to the hearing were then sent back to Haiti.\textsuperscript{38}

During this process, the case took a dramatic new turn, with the White House taking a much harder line against the ongoing exodus of Haitians from their homeland. On May 24, 1992, President George H.W. Bush issued an executive order authorizing the Coast Guard to return all fleeing Haitians directly to Haiti without first conducting screening interviews.\textsuperscript{39} On its face, the order seemed to violate the plain language of both the Refugee Act of 1980\textsuperscript{40} and Article 33 of the U.N. Convention Relating to the Status of Refugees, which prohibit the “return” of individuals to a place where they fear persecution.\textsuperscript{41} Days later, the plaintiffs’ lawyers sought a TRO from Judge Johnson that would halt the administration’s new direct return policy.\textsuperscript{42}

On May 29, Judge Johnson heard arguments by Harold Koh and Solicitor General Kenneth Starr, who made the rare move of appearing in a U.S. district court to convey the White House’s concern. On June 6, Judge Johnson ruled for the government,\textsuperscript{43} but the Second Circuit reversed his decision on July 29 and enjoined the Bush administration from returning Haitians without conducting screening interviews.\textsuperscript{44} Just three days later, however, the Supreme Court issued a stay of the Second Circuit’s order, and the direct return policy immediately went back into effect.\textsuperscript{45}

By mid-July, the only Haitians left at Guantánamo were HIV-positive individuals who had either: (1) proved a well-founded fear of persecution in an asylum hearing or (2) not yet undergone an asylum hearing for various reasons.\textsuperscript{46} Unable to send this group of people back to Haiti and unwilling to bring them to the United States, the
government relocated them to a remote spot on Guantánamo known as Camp Bulkeley,\textsuperscript{47} surrounded it with razor wire, erected guard towers, and evidently planned to hold the detainees there indefinitely.\textsuperscript{48} 

Soon after, in the fall of 1992, electoral politics assumed a central role in the litigation. On the campaign trail, Bill Clinton, the Democratic presidential nominee, had repeatedly criticized the Bush administration's direct return policy and stated his intention to reverse that policy if elected.\textsuperscript{49} There were also indications that Clinton intended to lift the ban on HIV-positive aliens once he became president, which led many to expect that he would release the Haitians on Guantánamo. There was widespread, though not unanimous, belief among the plaintiffs' team that the litigation would soon be over.

But after Clinton was elected president, he jettisoned his campaign positions on the Haitians. On January 14, 1993, six days before his inauguration, he adopted the Bush administration's direct return policy, and not long afterward, he also declined to remove the HIV ban.\textsuperscript{50} Congress later voted to make the ban—at the time only a federal regulation—federal law.\textsuperscript{51} As a consequence, the Haitians detained on Guantánamo could only enter the United States if the attorney general provided individual waivers for all of them, and the Clinton administration made clear to the plaintiffs' lawyers that it would not do so.\textsuperscript{52} Astonishingly, at a meeting in Washington at the time, a Justice Department official told Harold Koh, Michael Ratner, and Yale student Mike Wishnie that “[i]n the view of those close to the president, he can weather dead HIV-positive Haitians on Guantánamo better than the political fallout of letting them into the U.S.”\textsuperscript{53}

The litigation came to a head that spring. The original suit filed a year earlier, which focused on the rights of lawyers and clients to communicate with one another, had now evolved into two distinct cases, both of them far more ambitious than the initial action: (1) a suit to obtain the release of the HIV-positive Haitians detained on Guantánamo,\textsuperscript{54} and (2) a suit to put an end to the Bush administration's “direct return”

\textsuperscript{47} Id. Notably, this would later be part of the area used to hold terrorist suspects after the George W. Bush administration chose to use Guantánamo as a detention facility in early 2002. \textit{Goldstein, supra} note 1, at 309.

\textsuperscript{48} \textit{Goldstein, Citron \& Land, supra} note 1, at 5, 7–8.

\textsuperscript{49} Id. at 7.

\textsuperscript{50} Id. at 7, 9.


\textsuperscript{52} \textit{Goldstein, supra} note 1, at 163.

\textsuperscript{53} Id. at 214.

policy of forcibly repatriating Haitians to their homeland without screening interviews. Harold Koh argued the direct return case before the Supreme Court on March 2, and just a week later, the trial for the release of the Guantánamo Haitians began in Brooklyn before Judge Sterling Johnson, Jr. The most damning revelation of the trial was the admission in open court by a government attorney that the Haitians who had developed full-blown AIDS were not receiving adequate medical treatment but would nevertheless remain on Guantánamo. The trial concluded on March 25, and a day later, Judge Johnson issued an interim order requiring the government to either release all the Haitians who were not receiving adequate medical care or provide them adequate care while still in confinement.

The government chose to free them, and the first members of this group arrived in the United States on April 5, 1993. Judge Johnson issued his final decision on June 8, 1993, holding that constitutional due process barred the U.S. government from detaining the Haitians indefinitely on Guantánamo without charge. In his opinion, the judge wrote:

Although the defendants euphemistically refer to [the] Guantánamo operation as a "humanitarian camp," the facts disclose that it is nothing more than an HIV prison camp presenting potential public health risks to the Haitians held there. . . .

. . . [Their] plight is a tragedy of immense proportion and their continued detention is totally unacceptable to this Court.

The last Haitians on Guantánamo were released into the United States on June 21, 1993, for medical treatment and resettlement.

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56. Goldstein, Citron & Land, supra note 1, at 9. Lead counsel for the plaintiffs at trial was Joseph Tringali, a partner at Simpson Thacher & Bartlett who had been part of the plaintiffs’ team since the filing of the initial TRO application a year earlier. Tringali attended the symposium. See Storming the Court Speakers, supra note 5.


59. Goldstein, Citron & Land, supra note 1, at 9.


61. Id. at 1038–39, 1045.

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In a case of remarkable timing, the Supreme Court issued its decision in the direct return case on June 21 as well, but it ruled in favor of the government and held that the direct return policy violated neither federal nor international law. As Harold Koh has argued, it may have been an 8–1 decision, but the opinion, authored by Justice John Paul Stevens, is utterly unpersuasive. It ignores the plain language of both the Refugee Act of 1980 and Article 33—refusing to give effect to the clear command not to "return" refugees—and expressly admits to disregarding the purpose of both laws. As Justice Stevens wrote:

The drafters of the Convention and the parties to the Protocol—like the drafters of § 243(h)—may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33 . . .

. . . "Although the human crisis is compelling, there is no solution to be found in a judicial remedy."66

II. THE CONTINUING RELEVANCE OF SALE

The preceding summary of HCC v. Sale should provide useful background for readers as they consider this symposium issue, but it does not remotely capture the great human drama of the case. The story of the Haiti case presents life-and-death stakes, all the plot twists and turns of a legal thriller, and a cast of remarkable real-life characters. It is no surprise that it might one day become a Hollywood movie. First, the litigation was driven in significant part by the participation of dozens of appealed Judge Johnson's decision. It had no effect on the refugees, who were now in the United States, but the Clinton Justice Department did not want to let stand a ruling that the due process clause applied to Guantánamo. In October, the plaintiffs' attorneys and the Justice Department reached a final settlement agreement. Under the agreement, the government would drop its appeal and reimburse plaintiffs' counsel over $634,000 for litigation costs and attorneys' fees. In exchange, plaintiffs' counsel would join a motion by the Justice Department to vacate Judge Johnson's final order. On February 22, 1994, Judge Johnson approved the settlement and vacated the order. See Goldstein, supra note 1, at 298–301. Accordingly, there was no precedent regarding the application of the due process clause to Guantánamo when the George W. Bush administration reopened it as a detention facility for suspected terrorists in early 2002. Id. at 309–10.

66. Id. at 183, 188 (quoting Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 841 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part)).
67. The film rights to the story were originally purchased by Warner Bros. and a screenplay has been written by Michael Seitzman, but there are currently no production plans. Michael Fleming, Warners Storms 'Court,' VARIETY (Mar. 17, 2005, 9:00 PM), http://variety.com/2005/film/markets-festivals/warners-storms-court-1117919741/.
law students, who overcame inexperience with energy and hard work, handling everything from client interviews on Guantánamo to direct examinations at trial to negotiations with government lawyers to the resettlement of the Haitians in New York City and elsewhere after their release. The students were not just passionate and committed, but exceedingly strong-willed, and it is fair to say that Sale never would have been filed had they not forced the issue with Harold Koh and his colleagues. Second, the case had an extraordinarily high profile among politicians, policymakers, and the media—hardly surprising, given that the plaintiffs' team was seen by two presidential administrations to be interfering in a major foreign policy crisis with highly charged political implications. Indeed, Presidents George H.W. Bush and Bill Clinton were both actively concerned about the litigation and its possible effects on their efforts to manage the situation both in Haiti and on Guantánamo. Third, Sale rocketed through the courts with almost unprecedented velocity—by Koh's count, it reached the Supreme Court for one reason or another no less than eight times—followed by a district court trial and a Supreme Court merits argument that both took place less than one year after the original complaint was filed. Fourth, the clients on Guantánamo were not passive observers, but active—even disruptive—agents for their cause. They held protests and marches, openly challenged the motives and efficacy of their attorneys, staged a hunger strike, and late in the case even broke out of their detention camp, leading to brutally repressive measures by the military officials charged with guarding them (including, among other things, solitary confinement for some of the detainees). 68

The story of the case is so dramatic, in fact, that I was compelled to research and write a narrative account of it with the collaboration of many of the litigation's principal figures. The resulting book, Storming the Court, tells the story of Sale from the perspectives of Koh, several of the students, two of the government lawyers, and a Haitian refugee with the pseudonym Yvonne Pascal. 69 In addition to serving as an extensively-documented record of the litigation, the book is a David-and-Goliath tale, pitting a team of human rights lawyers and law students against the most powerful litigation force in the world: the U.S. government. It is also a testament to the courage and perseverance of a group of Haitian detainees who were held on Guantánamo very much like prisoners of war, despite having committed no crime.

68. See Goldstein, supra note 1, at 201–02, 257–58, 310 (recounting the Haitian refugees' experiences while held at Guantánamo).

69. See generally Goldstein, supra note 1. Storming the Court primarily focuses on Yale Law School students Lisa Daugaard, Michael Wishnie, and Tory Clawson, all of whom attended the New York Law School symposium, but I also wrote about the experiences of around twenty other students. The government lawyers I focused on were Paul Cappuccio, Deputy Associate Attorney General at the Justice Department during the George H.W. Bush administration, and Robert Begleiter, who was then chief of the Civil Division at the U.S. Attorney's Office for the Eastern District of New York (though I also wrote about Assistant U.S. Attorney Scott Dunn and several others). Yvonne Pascal was not at the symposium, but her older son did attend. It bears noting that the book was only possible because of the extraordinary generosity and patience of the aforementioned individuals and many others, who collectively endured hundreds of hours of interviews with the author.
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Equally important, the story of the case remains a cautionary tale about both our government's conduct in the face of a refugee crisis and the dangers of using Guantánamo as an extralegal detention facility beyond the reach of American (indeed, any) law. Taking the issue of refugee crises first: We live in a period that might be deemed the Age of the Refugee. As of the writing of this piece, there are almost 65 million displaced persons in the world—more than the population of Canada, Australia, and New Zealand combined—and the ongoing war in Syria alone has produced some 4.9 million refugees.\footnote{Adrian Edwards, Global Forced Displacement Hits Record High, UNHCR (June 20, 2016), http://www.unhcr.org/en-us/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html.} Turkey currently hosts roughly 2.5 million of those Syrian refugees and Lebanon another one million, the latter despite having a population of about 4.5 million people.\footnote{See Goldstein, Citron & Land, supra note 1, at 5.} These overwhelming numbers provide an extraordinary contrast to the Haitian crisis of the early 1990s, which involved a mere 35,000 refugees.\footnote{See Syria’s Refugee Crisis in Numbers, Amnesty Int’l (Feb. 3, 2016), https://www.amnesty.org/en/latest/news/2016/02/syrias-refugee-crisis-in-numbers/.} Yet the government of the United States, by far the wealthiest nation in the world, reacted then as if the fleeing Haitians presented a grave threat to national security—and took a series of measures, from indefinite detention on Guantánamo to the morally untenable direct return policy, that in retrospect seem even more cold-hearted and senseless than they did at the time.

After adopting the direct return policy, President George H.W. Bush assured the media that “the Statue of Liberty still stands,”\footnote{See Goldstein, Citron & Land, supra note 1, at 5.} but if the men, women, and children fleeing Haiti in 1991 and 1992—many of them democracy activists—were not the huddled masses yearning to breathe free, then who would be? To be sure, the Bush administration did allow a number of Haitians to enter the country before adopting the direct return policy in May 1992, and the United States continues today to offer safe haven to a limited number of refugees from around the world. But it is difficult to believe that we are shouldering our fair share of the refugee burden, not only in light of the extreme burdens faced by countries such as Turkey and Lebanon, but also by Western European nations such as Germany, which currently has about 300,000 Syrian refugees.\footnote{Europe Migrant Crisis: Germany Expects 'up to 300,000' This Year, BBC News (Aug. 28, 2016), http://www.bbc.com/news/world-europe-37207800; cf Migrant Crisis: Migration to Europe Explained in Seven Charts, BBC News (Mar. 4, 2016), http://www.bbc.com/news/world-europe-34131911 (stating that the vast majority of migrants are from Syria).} By contrast, as of August 2016, the United States has accepted a total of only 12,000 Syrian refugees since civil war began five years ago.\footnote{Haeyoun Park & Rudy Omri, U.S. Reaches Goal of Admitting 10,000 Syrian Refugees. Here’s Where They Went., N.Y. Times (Aug. 31, 2016), http://www.nytimes.com/interactive/2016/08/30/us/syrian-refugees-in-the-united-states.html.} Instead, as Harold Koh points out in his piece for this issue, we generally fail to deal adequately with the root cause of the problem—in this case, the war in Syria—and rather treat
those who flee as the problem instead of a symptom. This is not to say that we should ignore legitimate security issues raised by our immigration and refugee policies, but surely there is a balance to be struck between security and humanitarian concerns, particularly in light of the vast advantage in resources that the United States enjoys in comparison to, say, Lebanon.

The reference above to the Statue of Liberty brings me back to Guantánamo, for as I argued during the symposium, if the former is an expression of what is best in America, Guantánamo may well have come to represent the worst—the dark shadow of American fear, anger, and lawlessness. The Bush administration chose to hold the Haitian refugees on Guantánamo in part because it contended that U.S. law did not apply there, supposedly enabling the administration to treat the refugees however it saw fit. The impetus may have been convenience and flexibility, but this position is fatally flawed. Not only did it prove to be mistaken as a matter of law—rejected first by Judge Johnson in his final order in 1993 that due process applies on Guantánamo and then over a decade later by a series of Supreme Court decisions relating to the terrorist suspects—but it resulted in unconscionable policy choices by the U.S. government, none more appalling than the refusal to provide the detained Haitians with proper medical care.

In George Santayana’s oft-repeated phrase, “[t]hose who cannot remember the past are condemned to repeat it.” And condemned we have been after the George W. Bush administration repeated the errors of the two previous administrations, reopening Guantánamo as a detention facility during the War on Terror. The results were predictably catastrophic: the long-term incarceration of innocent people, inhumane treatment and even torture, and the unwitting creation of a recruiting tool for Islamic terrorists. The warning signs were there during the earlier detainment of the Haitians, but the Bush administration ignored the lessons of the Sale case. Indeed, Justice Department lawyers went out of their way in a December 2001 legal memo to advise the administration that Judge Johnson’s decision imposing due process constraints on Guantánamo had been vacated, leaving no precedent that might constrain federal officials in their treatment of the terrorist suspect detainees. Fifteen years later, here we are: The very word “Guantánamo” is shorthand for cruelty, hypocrisy, and lawlessness.

79. See Goldstein, supra note 1, at 244, 266, 276.
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III. THE CONTRIBUTORS: FOUR PERSPECTIVES ON SALE

The four pieces that follow, all from symposium participants, offer rich and contrasting perspectives of the Sale litigation. While they all consider the broader legacy of the case, there is a distinctly personal element to them as well. This is not by coincidence. A common theme of those who spoke at the symposium was the lasting impact the litigation had on them individually. As should be clear by now, it was an unusually intense and demanding case that taxed the intellectual, emotional, and even physical reserves of the participants, and few of them emerged unchanged. Any number of more traditional analyses of the litigation are available in prior articles; what the contributions in this issue offer is more personal, even intimate, starting with the interview of Judge Sterling Johnson, Jr.

A. A Reflection on HCC v. Sale: A Conversation with Judge Sterling Johnson, Jr.

Judge Johnson, a lifelong New Yorker and former narcotics prosecutor for the City of New York, had only been on the bench about six months when he was assigned the Sale case. Despite pressure from the administration to give the case the back of his hand, Judge Johnson granted the plaintiffs’ initial TRO application and ultimately issued the final judgment and order, some fifteen months later, that released the Haitians from detention on Guantánamo. In the interview, he sheds light on how his background has influenced his judicial decisionmaking and, in addition to several memorable anecdotes from the case, he offers a frank, even blunt, assessment of the ways he believes that race influenced the government’s treatment of the Haitians. Judge Johnson used appropriately harsh language in his decision releasing the detainees on Guantánamo; he is even tougher in this interview. For readers accustomed to (and perhaps weary of) judges speaking with bland circumspection in public forums, his words will serve as a bracing corrective.

B. HCC’s Lasting Impact; Remarks from Senator Chris Coons

Two more pieces offer perspectives from a pair of former law students who worked on the litigation (and remain good friends to this day): U.S. Senator Christopher Coons and Albany law professor Ray Brescia. Senator Coons, a third-year student at the time the case was filed, was struggling to finish a long-overdue paper just a few months before graduation when Brescia and other students corralled

82. It would be difficult to overstate how hard some of the lawyers and students worked. Student Lisa Dauguard, whom I interviewed dozens of times while researching the story, got so little sleep that at one point, her hair began to fall out and her gums began to bleed.

83. See, e.g., Koh, supra note 64; Koh, supra note 62; Ratner, supra note 35.


85. Id. at 70–72.

86. Id. at 72.

87. Id. at 70–72, 75–78.
him in early March 1992, seeking his assistance on bluebooking a brief that would accompany the plaintiffs’ application for a TRO. Coons agreed to provide a few hours of help, but, like a number of his classmates, ended up working on the case essentially full-time until graduation day. In his remarks, the senator offers insight into the way the case has affected his work on Capitol Hill and in particular the importance he places on giving a voice to the voiceless. In addition, in an especially resonant passage, Senator Coons discusses his tour of Guantánamo in its current form as a detention facility for terrorist suspects.

C. Professor Raymond H. Brescia—Through a Glass, Clearly; Reflections on Team Lawyering, Clinically Taught

For his part, Professor Brescia offers a thoughtful, persuasive account of how and why the law students worked so effectively as a team in Sale. Brescia writes not only as a former student involved in the case, but now as a professor himself at Albany Law School, working with students on projects in much the way he once did with Harold Koh, Michael Ratner, and other practitioners. Drawing on the literature of team-building as well as his personal experience in the case, Brescia identifies some of the key components that contribute to successful student teams, including the opportunity for them to develop mastery over a subject and to operate with a considerable degree of autonomy, as well as the importance of working with a strong sense of collective purpose. Moreover, Brescia is adamant that the student experience in the Haiti case, though extraordinary, was not unique. His message in this regard is important enough to preview it here:

Although some might say this [experience] was only possible at a law school like Yale, I disagree. I have seen law students and undergraduates from all types of institutions, including where I teach now, rise to the occasion to take on difficult projects, stick with them, produce innovative work, learn and grow from the experience, and change the world, even if just a little bit. There is something about that trust and confidence that both spurs the granting of autonomy, and can bring out the best in people. . . . Teams should not go into a setting unprepared or untrained, but once ready and trained, they should be given leeway to execute projects large and small in order to bring out their best.

89. Id. at 85.
90. It is no accident that the group referred to itself as “Team Haiti.”
92. Id. at 113–14 (footnote omitted).
D. Professor Harold Koh—The Enduring Legacies of the Haitian Refugee Litigation

Finally, we present the symposium keynote address by Harold Koh, who, since litigating Sale, has served as Yale Law School’s dean and, at the State Department, as both Legal Adviser under President Barack Obama and Assistant Secretary of State for Democracy, Human Rights, and Labor under President Bill Clinton. I am, however, quite confident that if Koh were asked to identify the most significant accomplishments of his legal career, he would put the Haiti case at or near the top of the list—not only for the impact it had on those released from Guantánamo, but for the lifelong friendships and personal transformation that resulted from his work on the case. His address, which reflects an abiding commitment to the issues raised in Sale as well as the continuing camaraderie of Team Haiti, puts the case in a broader historical, legal, and strategic context.

Koh makes three important points. First, he explains that Sale is only one instance of efforts by both the United States and other governments to establish “legal back holes” in the name of national security.93 By this, Koh means the creation of zones beyond the reach of human rights law, both through the implementation of physical operations—such as offshore detention camps and interdiction operations on the high seas—and the deployment of specious legal arguments in their defense.94 Guantánamo and the Haitian interdiction program are of course paradigmatic examples of the former, and the Supreme Court’s Sale decision is a prime example of the latter. Unfortunately, as Koh explains, certain other countries have followed America’s lead in the creation of legal black holes, using high seas interdiction, establishing offshore detention facilities, and persuading courts to limit the geographic reach of human rights treaties.95

But as Koh argues, this bleaker legacy has been countered by two other developments that also trace back in part to Sale.96 The first development is the rise of transnational public law litigation.97 This model replaces the traditional view of litigation—a private claim for damages, a retrospective orientation—with a more expansive approach: a complex public law claim to address a systemic problem, a prospective orientation with a focus on injunctive relief, and, importantly, the use of the lawsuit as a bargaining chip in political negotiations.98 Koh considers a number of recent decisions in tribunals beyond the United States that reflect this new approach—decisions that have largely rejected the Supreme Court’s reasoning in Sale and affirmed the application of human rights norms to, for instance, interdiction on

93. Koh, supra note 76, at 35.
94. Id. For example, an overbroad presumption against extraterritorial application of human rights norms and the argument that such norms are displaced by the law of armed conflict.
95. Id. at 45 n.68 and accompanying text.
96. Id. at 35–36, 55.
97. Id. at 54–58.
98. Id. at 58–59.
the high seas.99 Moreover, as Koh notes, the Supreme Court itself has largely come around to Judge Johnson's position that Guantánamo is not a legal black hole.100

The second positive legacy of Sale that Koh identifies is the rise of a more robust and widespread form of human rights advocacy, fueled by both the active engagement of legal scholars and, crucially, human rights clinics based at law schools and staffed by motivated, idealistic law students.101 Koh has in mind the sort of work being done by, among many others, his former students and Team Haiti alumni Sarah Cleveland at Columbia Law School and Mike Wishnie at Yale Law School (the latter of whom was an instrumental participant in the symposium). School-based human rights clinics are, of course, a subset of the broader clinical practice and experiential learning movement that has had a revolutionary impact in American legal education, including here at New York Law School.102

IV. IN MEMORY OF MICHAEL RATNER

Finally, no discussion of Sale would be remotely complete without acknowledging the central role played in the litigation by Michael Ratner, a leader of the plaintiffs' team and the former president of the Center for Constitutional Rights, who died on May 11, 2016, at the age of seventy-two. Ratner had more experience in human rights litigation than anyone else involved in the case and understood all too well what the plaintiffs were up against. Years before Sale, he had repeatedly sued the U.S. government—and repeatedly lost.103 Indeed, after Judge Johnson issued his initial TRO in favor of the plaintiffs, Koh had asked Ratner what they were supposed to do next and Ratner replied, "I don't know. I've never won one of these before."104

Not that losing ever deterred the man. Even if a case had no chance in court, he firmly believed in filing it for other reasons: to throw a spotlight on the wrongdoing of the defendants, draw the attention of the media and the public, generate political pressure, and create negotiating leverage—an early form of the transnational model of litigation that Koh discusses in his piece. But beyond any strategic considerations, Ratner was always guided by an unwavering and unapologetic commitment to

99. Id. at 44.
102. New York Law School has twenty-six student-staffed clinics ranging from civil rights to criminal defense to immigration. Through the New York Law School Impact Center for Public Interest Law, students can also participate in the Safe Passage Project (which provides representation of unaccompanied minors in the immigration process), the Racial Justice Project, and other efforts. For more information, see Academics: Office of Clinical and Experiential Learning, N.Y.L. Sch., http://www.nyls.edu/academics/office_of_clinical_and_experiential_learning/ (last visited Nov. 15, 2016). For an analysis of the impact clinical legal education has on developing students' lawyering skills, see Rebecca Sandefur & Jeffrey Selbin, The Clinic Effect, 16 CLINICAL L. REV. 57 (2009).
104. Goldstein, supra note 1, at 88-89.
principle. Not long after Guantánamo was reopened as a detention camp as part of the War on Terror, Ratner sued the U.S. government on behalf of the new detainees.\textsuperscript{105} The case was so controversial at the time that even some of Ratner's traditional allies did not want to be involved. Americans were still in shock over 9/11, the nation was at war in Afghanistan, and the invasion of Iraq was not long off. Ratner was the target of ugly criticism and even death threats.

Yet he pressed on, and years later—after many dozens of lawyers had joined him in the fight—he was vindicated in a triumvirate of decisions by the Supreme Court.\textsuperscript{106} In one of those cases, \textit{Rasul v. Bush}, Justice John Paul Stevens, writing for the majority, said that if a detainee was not involved in terrorism, holding him for years at Guantánamo without access to a lawyer “unquestionably” violated the “Constitution or laws or treaties of the United States.”\textsuperscript{107} The \textit{Rasul} ruling was, perhaps, the definitive legal expression of the intuitive sense of injustice that had driven Lisa Daugaard and Michael Barr to knock on Harold Koh’s door a dozen years earlier.

Ratner’s former colleague, Georgetown law professor David Cole, later asked him what chance he thought he had of winning when he first brought the case in 2002. “None whatsoever,” Ratner said.\textsuperscript{108} “We filed 100 percent on principle.”\textsuperscript{109} “That,” said Cole in an interview soon after Ratner’s death, “could be his epitaph.”\textsuperscript{110}

Michael Ratner was too ill to join us at the symposium last fall, and though he was dearly missed, he was mentioned often and warmly during the event. His passing is an incalculable loss not just for the human rights community—in the narrow sense of the lawyers and activists and clients alongside whom he fought—but for the human community as a whole. Few people have worked so long and so hard for such important causes, and with the publication of this issue, the symposium participants and Team Haiti recognize Michael for all he has done for the cause of human rights in the United States and throughout the world.

\begin{itemize}
\item \textsuperscript{106}See Boumediene v. Bush, 533 U.S. 723, 798 (2008) (holding that the Suspension Clause has full effect at Guantánamo and that detainees are entitled to the privilege of habeas corpus); Hamdan v. Rumsfeld, 548 U.S. 557, 635 (2006) (holding that the executive must comply with the prevailing rule of law when trying and punishing detainees held at Guantánamo for crimes unrelated to terrorism); \textit{Rasul}, 542 U.S. at 485 (holding that the federal courts have jurisdiction to determine the legality of indefinite detention).
\item \textsuperscript{107}542 U.S. at 483 n.15.
\item \textsuperscript{109}Id.
\item \textsuperscript{110}Id.
\end{itemize}
Days before this issue was scheduled to go to publication, Donald J. Trump was elected as the forty-fifth president of the United States. On the campaign trail, he declared his intention to keep the U.S. detention facility at Guantánamo open and "load it up with some bad dudes,"\(^\text{111}\) whatever that might mean. He also pledged to bring back waterboarding and "a hell of a lot worse,"\(^\text{112}\) and even proposed trying American terrorist suspects before military commissions on Guantánamo, though he offered no legal basis for this last notion.\(^\text{113}\)

As of mid-November 2016, Guantánamo only holds about sixty detainees, a third of whom have been cleared for release,\(^\text{114}\) but it now seems almost certain that President Obama will not manage to close the detention facility before leaving the White House. We cannot know for sure what President Trump, as opposed to candidate Trump, will do when he takes office—in the early days after the election, he backed away from a number of campaign promises—but there is little reason to believe he will change his position on Guantánamo, particularly given the widespread Republican opposition to closing it. And so, it seems, the story of our ill-fated detention policy there will drag on through yet another administration.


\(^{113}\) See Welna, supra note 111.

\(^{114}\) *Id.*