An Old Illness: How the United States Uses Racist and Xenophobic Ideas About Disease to Exclude Haitian Migrants During the Covid-19 Pandemic

Emily McConnville
Indiana University Maurer School of Law, emmcconv@indiana.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/ijlse

Part of the Immigration Law Commons, and the Law and Race Commons

Publication Citation
11 Ind. J. L. & Soc. Equal. 360

This Student Note is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Journal of Law and Social Equality by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact kdcogswe@indiana.edu.
An Old Illness: How the United States Uses Racist and Xenophobic Ideas About Disease to Exclude Haitian Migrants During the Covid-19 Pandemic

Emily McConville

INTRODUCTION

In September 2021, horrific images emerged from Del Rio, Texas, spanning the border between the United States and Mexico. At least 15,000 migrants, nearly half of them children and most of them Haitian, had been camping under the Del Rio International Bridge, hoping to cross the U.S.-Mexico border. The reasons for their arrival varied. Some had fled Haiti after an earthquake earlier that year. Others got out after the assassination of Haitian President Jovenel Moïse and the resultant political turmoil. Still others had left Haiti years before, living and working in South American countries like Chile before economic prospects and discrimination grew too dire. Many had walked through Central America, facing abuse from criminals and even police. Conditions were little better at the border. “There’s people having babies down there, there’s people collapsing out of the heat,” the mayor of Del Rio told a reporter as the small city struggled to respond to the growing humanitarian crisis.

Most of the Haitians gathered at the border intended to ask for asylum—indeed, federal law requires that the government assess whether new arrivals plan to seek asylum or fear persecution. Instead, border patrol agents arrived on horseback to break up the camp. Swinging reins in a manner reminiscent of whips, they forcibly pushed the migrants back across the border. “Get out now! Back to Mexico!” one agent shouted. Photos showed migrants, carrying food or belongings in plastic bags, being driven into the Rio Grande. The border patrol’s actions were
swiftly condemned, including by President Joe Biden, and thousands of Haitians were ultimately given immigration court dates. However, thousands more were turned back to Mexico or flown directly to Haiti, some in shackles.

Before the clear out, soldiers prevented Haitians from leaving the Del Rio camp. In the fenced-in camp, they were unable to gather supplies, leading to widespread hunger. Bad drinking water, extreme temperatures, and even the dust kicked up by Customs and Border Patrol (CBP) helicopters made people sick. Those forced back into Mexico faced inadequate medical care, among other dangerous conditions. However, the justification for the migrants’ violent expulsion was one of public health. When the COVID-19 pandemic was first picking up, the Trump administration interpreted the United States’ public-health statute, 42 U.S.C. § 265, to mean that the Centers for Disease Control and Prevention (CDC) could order migrants crossing the northern and southern border to be turned away, simply because Covid-19 existed in Canada and Mexico.

The policy, known as the Title 42 policy, targeted asylum seekers and others entering the country without documents, essentially shutting down an already strained and curtailed asylum system and making it nearly impossible for migrants to seek protection in the United States. The Trump administration enacted the Title 42 policy, and the Biden administration kept it in place for more than a year before courts enjoined its attempts to end it. Even though the Biden administration rolled back many of its predecessor’s immigration restrictions, it oversaw the number of Title 42 expulsions hitting more than two million. Migrant

---


13 Chappell, supra note 12.


15 See Beyond the Bridge, supra note 1, at 24, 27.

16 Id. at 7, 27, 30, 34.


19 See Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060 (March 20, 2020) (“This order does not apply to U.S. citizens, lawful permanent residents . . . members of the armed forces of the United States . . . persons from foreign countries who hold valid travel documents . . . or persons from foreign countries in the visa waiver program . . . .”).


22 Beyond the Bridge, supra note 1, at 18.
groups, public health professionals, and legal experts condemned the deportations as unnecessary, illegal, and cruel.\textsuperscript{23} The reasons Haitians are seeking protection in the United States—and the United States’ reasons for turning them away—may have arisen recently. But using fears of infectious disease as a convenient way to turn away migrants, particularly migrants of color, is very old. By continuing its predecessor’s invocation of public health to prevent the entry of Haitian and other asylum seekers, the Biden administration is playing upon historic associations of foreignness with disease, constructing and reinforcing an “other” that justifies the exclusion, mistreatment, and dehumanization of immigrants.

This Note contributes to a body of legal and non-legal scholarship that connects centuries-old racist ideas and policies with more recent events at the southern U.S. border, using historic and current Haitian migration as a case study and a call for reform. Part II traces the use of public health during the nineteenth and early twentieth centuries to define U.S. borders and construct Americanness and whiteness. It also discusses the historical treatment of Haitian migrants, particularly during the HIV-AIDS crisis in the early 1990s. Part III lays out the use of Title 42 as a pretext for gutting U.S. and international asylum law. Part IV details ongoing litigation and solutions. This Note places anti-Haitian and anti-immigrant discrimination in a historical and legal context, but at its core, it repeats what Haitian immigrants, advocates, and scholars have said all along: U.S. immigration policies . . . are and have long been anti-Black.”\textsuperscript{24}

I. THE ASSOCIATION OF FOREIGNNESS AND DISEASE: FROM TYPHS TO AIDS

For much of its history, the United States has regulated or banned the entry of people it considers to be diseased. The fear of imported contagion, as reflected in immigration policy and practice, is a manifestation of this country’s deep-seated racism, ableism, and disdain for people in poverty. Many legal and non-legal scholars have described the ways that the U.S. government and sections of the American public have associated arriving noncitizens with disease.\textsuperscript{25} More recently, Sarah Sherman-Stokes has traced the history of health-based exclusions and federal quarantine power in the context of Title 42.\textsuperscript{26} Part I.A covers this familiar ground, focusing in particular on the difference in the treatment of migrants arriving on the East Coast, West Coast, and southern border. Part I.B elaborates on how the idea of foreignness-as-contagion has applied with devastating force to Haitian migrants fleeing war and natural disaster.

\begin{itemize}
  \item \textsuperscript{23} See id. at 8 n.16–23.
  \item \textsuperscript{25} See, e.g., Howard Markel & Alexandra Minna Stern, \textit{The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society}, \textit{80 MILBANK QUARTERLY} 757, 777 (2002)
\end{itemize}
A. Exclusion, Inspection, and Quarantine

Since at least the 1880s, the United States has turned back or quarantined arriving migrants thought to have contagious diseases or conditions likely to make them a burden to the public. The Immigration Act of 1882 excluded people “unable to take care of [themselves] without becoming a public charge.” Driven by fears of Bubonic Plague, an 1891 amendment excluded those suffering from a “loathsome or a dangerous contagious disease,” directing public health officials to inspect arriving immigrants. Further legislation added specific diseases as grounds for exclusion: tuberculosis in 1907, alcoholism in 1917, and leprosy in 1952. Some conditions reflected social mores rather than pathology. For example, in 1917, “constitutional psychopathic inferiority,” which could include homosexuality, was added to the list of excludable diseases.

The statutes were implemented through a robust enforcement system. In the late 19th and early 20th centuries, the United States Public Health Service (USPHS) inspected people for disease both upon arrival and overseas before they boarded boats. Returning citizens and visitors were less likely to be inspected. The inspections themselves were responsible for many exclusions, often along race and class lines. In overseas inspections, USPHS rejected Asian migrants far more often than white Europeans. Those who made it past this step and arrived at a U.S. port by boat “underwent a much more cursory appraisal” if they were in first or second class than if they had traveled in steerage. Europeans arriving at Ellis Island on the East Coast were far less likely to be turned away than Chinese, Japanese, and Koreans arriving at Angel Island on the West Coast. Immigrants arriving at ports like Ellis Island were famously subject to painful and humiliating examinations, such as checking eyes for trachoma with a buttonhook.

---

28 Sherman-Stokes, supra note 26, at 268.
32 Parmet, supra note 29, at 215; see also Sherman-Stokes, supra note 26, at 268.
33 Markel & Stern, supra note 25, at 777; see also Sherman-Stokes, supra note 26, at 267.
34 Elliott Young, Beyond Borders: Remote Control and the Continuing Legacy of Racism in Immigration Legislation, in A Nation of Immigrants Reconsidered 25, 30 (Maddalena Mariani, Madeline Hsu & Maria Garcia, eds., 2018). Four to six percent of migrants were rejected from Naples, while up to sixty-five percent were rejected from China and Japan. Id.
36 Markel & Stern, supra note 25, at 764.
37 Id. at 763. One percent of Ellis Island arrivals were rejected for medical reasons, while seventeen percent of immigrants were rejected for the same reasons at Angel Island. Id. at 764.
However, inspections were more invasive on the southern border and West Coast, where Mexican and East Asian immigrants were more likely to enter the country.\textsuperscript{38} Chinese arrivals, for example, were asked for stool samples in the first half of the twentieth century, the result of evidence of hookworm in certain parts of China “merged with . . . the Sinophobic attitudes.”\textsuperscript{39} Farther south, to stem a 1917 typhus outbreak, U.S. officials quarantined Mexican citizens crossing the southern border into the United States and subjected them to a humiliating procedure that included naked inspections, kerosene showers, and chemical laundering of clothes.\textsuperscript{40} The inspection procedure remained for two decades after the typhus threat died down.\textsuperscript{41}

Ultimately, the number of immigrants excluded from the country for health reasons was relatively small.\textsuperscript{42} However, the United States’ so-called medicalized borders created an “outbreak narrative” that migrants bring diseases into the country\textsuperscript{43} and enduring associations of immigrants from specific places with specific diseases. At different points in time, specific ethnic groups were blamed for specific diseases: the Irish for cholera, the Jews for tuberculosis, the Chinese for bubonic plague, and the Italians for polio.\textsuperscript{44} As Wendy E. Parmet describes in the context of anti-Chinese racism, the language of blame led local and national officials to treat immigrant communities, “as dangerous vectors, or sources of contagion,” rather than as victims of an epidemic.\textsuperscript{45}

At its worst, the association of immigrants with disease tied into eugenicist ideas of racial hierarchy. Nineteenth century “evolutionary doctrines upheld a belief in the racial degeneracy of most nonwhite groups,” making it “relatively easy to attribute the weary condition of some immigrants . . . to their biological inferiority.”\textsuperscript{46} By the 1920s, proponents of national origins quotas in U.S. immigration law used the 1917 border quarantine to describe Mexicans as “filthy, lousy carriers” of typhus who would contribute to the country’s “bad hereditary stock.”\textsuperscript{47} When specific groups of immigrants were stereotyped as prone to hookworm, lice, trachoma, or “poor physique,” the “underlying premise” was that “immigrants threatened the health of the nation.”\textsuperscript{48}

\textsuperscript{39} Markel & Stern, supra note 25, at 764.
\textsuperscript{40} ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA 61–63 (2015).
\textsuperscript{41} Id. at 64.
\textsuperscript{42} Markel & Stern, supra note 25, at 763, 777.
\textsuperscript{44} Kraut, supra note 35, at 125; CHARLES E. ROSENBERG, THE CHOLERA YEARS: THE UNITED STATES IN 1832, 1849, AND 1866, at 137–38 (1962).
\textsuperscript{45} See Parmet, supra note 29, at 213.
\textsuperscript{46} Markel & Stern, supra note 25, at 761.
\textsuperscript{47} Stern, supra note 40, at 61.
\textsuperscript{48} Markel & Stern, supra note 25, at 761.
At no point did the actual risk of imported disease match the perception of it, nor did stringent inspection and exclusion measures actually prevent disease. “[T]he number of ‘diseased’ immigrants has always been infinitesimal when compared with the number of newcomers admitted to this country.” Moreover, examinations did not do much to prevent the spread of prevalent diseases like influenza or tuberculosis. Wendy E. Parmet argued that medical inspections were designed not to prevent disease, but to “keep out those who were thought to be unproductive, while reaffirming to all immigrants their lowly and tenuous status in their new country.”

The pathologization of migrants has persisted into the twenty-first century. The Immigration and Nationality Act still excludes people with a “communicable disease of public health significance,” which the government defines. Officials also consider health status when determining if somebody will become a public charge, meaning they will need government support. Association of immigrants with disease also permeates case law and public discourse. For example, Keith Cunningham-Parmenter has found at least three examples of Supreme Court justices not only characterizing immigrants as diseased but explaining migration using disease as a metaphor. More recently, President Donald Trump, members of his administration, and members of extreme anti-immigrant groups used the language of health and disease to disparage immigrants, particularly immigrants of color. Trump reportedly spoke of “tremendous infectious diseases pouring across the border,” referred to undocumented immigrants as an “infestation,” and called several countries, including Haiti, “shithole countries.” Meanwhile, the Southern Poverty Law Center has collected statements by white supremacists and immigration restrictionists associating immigrants with disease, falsely blaming newcomers for illnesses like swine flu, Ebola, and tuberculosis. People who worked for anti-immigrant groups like the Center for Immigration Studies and the Federation for American Immigration Reform later joined the Trump administration in immigration capacities.

---

49 Markel & Stern, supra note 25, at 758.
50 Parmet, supra note 29, at 215.
51 Parmet, supra note 29, at 215.
53 Parmet, supra note 29, at 215–16.
54 8 U.S.C. § 1182(a)(4)(A); Parmet, supra note 29, at 216.
58 Id. For example, a legal policy analyst for the Center for Immigration Studies became a senior advisor to ICE, and the former executive director of the Federation for American Immigration Reform became responsible for “handling civil rights complaints from detainees in DHS detention centers.” Id.
The pattern of associating immigration with disease and using public health as a justification for exclusion has continued with the COVID-19 pandemic. The overblown idea that immigrants are more likely to spread the virus is part of a long history of policy and perception that creates an “other” out of the newcomer.

B. Pathologizing Haitian Migrants

The association of foreignness with disease had a devastating impact on Haitian migrants in the latter part of the 20th century, though the roots of this association date back centuries. The U.S. government has long treated Haiti and Haitians with suspicion. Haiti became independent in 1804 following a rebellion of its enslaved population, but the United States did not recognize the country until 1862 for fear that doing so would encourage American enslaved people to emulate the liberation. The United States soon turned from ignoring Haiti to controlling it, occupying the country from 1915 to 1934. The stated reasons for the occupation were to protect American interests and stem European influence, but baked into American ambition in Haiti were the racist ideas that Black self-government had failed; Haiti was a site of “rampant decay” and its citizens, with their African origins and voodoo practices, were given to ignorance and superstition, unable to understand sanitation or indeed take care of themselves. Within Haiti, the Americans built a public health infrastructure and sanitation systems in service of the “experiment in the possibility of transforming . . . ‘disorderly and diseased’” subjects into “sanitary citizens.” As with other groups, the United States also used disease to control Haitian movement. Before being brought to U.S.-controlled Cuba to work, some 11,000 Haitians were subject to invasive inspections and treatments, reminiscent of the examinations of East Asian and Mexican arrivals at the southern border and West Coast.
The U.S. policy of containing and controlling Haitians continued after the occupation and into a new era of Haitian migration. During the brutal regimes of François Duvalier and his son Jean-Claude, middle-class and poor Haitians migrated to the United States “to escape violence and poverty, to raise families, [and] to work.” The large-scale rejection of those Haitians who sought asylum was bigger than disease and indeed bigger than Haiti: the Duvaliers were allies of the U.S. government, and the vast majority of people granted asylum came from communist countries. As a result, despite widespread political violence and poverty imposed by the state, Haitians seeking asylum were labeled “economic migrants,” ineligible for any form of humanitarian relief.

Still, Haitians were singled out for exclusion. In 1978 the Immigration and Nationality Service (INS) created the “Haitian Program,” aimed at detaining all arriving Haitians and removing them as quickly as possible. To speed up processing, the INS increased the number of asylum hearings and interviews per day, directed immigration judges to shorten the amount of time available to file an asylum application, and directed the judges to stop suspending deportation hearings when a Haitian made an asylum claim. Haitians were thus deported without proper hearings or sufficient access to attorneys. A Florida district court held that the Haitian Program “resulted in wholesale violations of due process, and only Haitians were affected.” Despite the ruling, widespread detentions and deportations continued.

In 1981, the United States began its infamous interdiction program. Under an agreement with Jean-Claude Duvalier, the U.S. Coast Guard would intercept vessels carrying Haitian migrants and conduct short interviews. Those who expressed a fear of persecution were “screened in” and brought to Florida to apply

---

72 Id. at 272.
73 Id. at 276.
74 See Dollar & Kent, supra note 69, at 93.
76 Id. at 522.
77 Id. at 532.
78 Id. at 532.
79 Little, supra note 71, at 277.
81 See id. at 160–61.
for asylum, while those identified as “economic migrants” were sent back to Haiti.\(^{82}\) Over the next decade, only twenty-eight out of the more than 23,000 Haitians interdicted were screened in.\(^{83}\) Matters in Haiti only worsened after the democratically elected President Jean-Bertrande Aristide was overthrown in 1991, and up to 7,000 were killed in the aftermath.\(^{84}\) While at least on paper interdicted Haitians had previously been allowed to go to the United States to seek asylum if they expressed a fear of persecution, in 1992 the George H.W. Bush administration issued an executive order directing intercepted migrants to be returned without screening for refugee status at all.\(^{85}\) Most were returned to Haiti, but the more than 10,000 who feared persecution were detained at Guantanamo Bay until a federal court ordered that they be admitted.\(^{86}\)

U.S. officials and media outlets used disease—both the prospect of infection and the resulting drain on public resources—to prime the American public to be wary of potential Haitian arrivals, going so far as to label the situation the “Haitian threat.”\(^{87}\) Jeffrey S. Kahn has traced the public discourse about Haitians during the late 1970s and early 1980s.\(^{88}\) Newspaper articles asserted that Haitians had high rates of tuberculosis and sexually-transmitted diseases; one Associated Press reporter connected these diseases with Haitian “voodoo” practices.\(^{89}\) As the 1980s went on a “folk model” of Haitianness developed, portraying Haitians as an exotic “other” due to their religious practices, patois language, alleged sexual deviance, and supposed uncleanness.\(^{90}\) These classist and racist “stigmata”\(^{91}\) made it easier for U.S. immigration officials to exclude Haitians from American society.

When HIV/AIDS emerged, the disease quickly became associated with Haitians. In the early days of the disease, health professionals noticed that some of those infected were Haitians who did not fall into other risk categories.\(^{92}\) Commentators—incredibly, some of them doctors—believed HIV/AIDS originated in Haiti\(^{93}\) and that “[s]omething that went on around ritual fires . . . triggered AIDS in cult adherents, a category presumed to include the quasi-totality of Haitians.”\(^{94}\) The
association was, like past disease scares, racialized: Journalists and healthcare professionals blamed Haitians’ propensity to contract and spread AIDS on their supposed “voodoo blood rituals, occult sex practices, homosexuality, human sacrifice, and prostitution.” From 1982 to 1985, the CDC considered four “H” factors for contracting HIV: “homosexual, hemophiliacs, hypodermic drug users, and Haitians.”

The association of Haitians with AIDS, at least in part, resulted in changes in U.S. immigration law. In 1987, Congress amended an appropriations bill to require the President to add HIV to the list of diseases that could render a migrant inadmissible to the United States. Jesse Helms, the Senator who led the charge on the amendment, referred to Haiti and central Africa as he warned that those with AIDS might “infiltrate healthy communities.” Regulations required testing of all arriving immigrants as well as those already in the country applying for lawful permanent resident status—but not visitors or students. After Congress overhauled the grounds of exclusion from the Immigration Nationality Act of 1952 (INA) in 1990, the body that designated excludable diseases proposed removing HIV from the list, but the public outcry was so fierce that the virus remained on the list.

The HIV ban was the vehicle for one of the most shameful chapters in the U.S. treatment of Haitians: the detention of HIV-positive migrants on Guantanamo Bay. Starting in 1991, after the coup that ousted Aristide, officials started testing Haitians—and only Haitians—for HIV. Those who tested positive could not be returned to Haiti where they might be persecuted, but because of the HIV ban, they could not enter the United States. Approximately 270 HIV-positive asylum seekers were held at Camp Bulkeley within Guantanamo Bay, some for nearly two years. They were outright mistreated, with reports of beatings, shackling, and

95 KAHN, supra note 38, at 122.
96 Dollar & Kent, supra note 69, at 100. “Haitian” was the “only risk category defined by ascriptive racial/ethnic/national characteristics.” KAHN, supra note 38, at 122.
98 KAHN, supra note 38, at 123.
99 Osuna, supra note 30, at 483–84. The actions of Congress sparked considerable international controversy, including boycotts of AIDS conferences in the U.S., which prompted the Immigration and Nationality Service to grant more waivers of excludability. Id. at 487–89.
100 Id. at 492–494.
101 Id. at 496.
103 Sherman-Stokes, supra note 26, at 269.
105 See id.
106 Id. at 305. Creola Johnson has argued the United States violated international law by arbitrarily detaining the migrants. Id. at 306.
forced contraception within the camp’s barbed-wire fences.\footnote{Paul Farmer, The Uses of Haiti 229–30 (2005).} Demonstrations against these conditions were met with more beatings and solitary confinement.\footnote{Id. at 233.} Eventually, the detainees were forced to go on a hunger strike.\footnote{Id.}

While the HIV/AIDS pandemic was real and terrifying, the fears of Haitian immigrants bringing the illness to the United States were misplaced. First, AIDS was already rampant in the United States; migration would not make it worse.\footnote{Parmet, supra note 29, at 216.} Second, testing all immigrants but not visitors or students opened up other avenues for noncitizens to introduce disease, defeating the purpose of the testing and exclusion program.\footnote{See Lyn G. Shoop, Health Based Exclusion Grounds in United States Immigration Policy: Homosexuals, HIV Infection, and the Medical Examination of Aliens, 9 J. CONTEMP. HEALTH L. & POL’Y. 521, 532 (1993).} Finally, excluding HIV-positive immigrants contributed to the stigma surrounding the disease, driving affected people “underground” and making it difficult for health officials to conduct education and outreach.\footnote{Anthony S. DiNota, Note, The World Health Organization’s Resolution Condemning AIDS-Related Discrimination and Ongoing United States Noncompliance at the Border, N.Y.L.S. J. OF INT’L & COMPAR. L. 151, 159 (1991).} Even USPHS had proposed to remove HIV/AIDS from the list of communicable diseases, following public health recommendations.\footnote{Osuna, supra note 30, at 496.} The CDC eventually acknowledged that the immigration ban on those living with HIV did not further public health.\footnote{Prashasti Bhatnagar, Public Health as Pretext: The Evisceration of Asylum Law and Protections During a Pandemic, 35 GEO. IMMIGR. L.J. 317, 320 (2020).} But “[b]y the time the CDC stopped singling out Haitians, they were already widely associated with the disease.”\footnote{Audain, supra note 61, at 421.}


upheld the Guantanamo detentions,\textsuperscript{121} the Clinton Administration ultimately settled and allowed the HIV-positive detainees into the United States.\textsuperscript{122} Haitian activism has continued. In 1997, when Haitians were left out of an immigration statute that protected Cubans and Nicaraguans, advocates mobilized until the Haitian Refugee Immigration Fairness Act was passed, allowing thousands of Haitians to become lawful permanent residents.\textsuperscript{123}

Since the 1990s, other avenues have opened up for Haitians seeking immigration status or humanitarian protection. Following the 2010 earthquake, the United States granted Temporary Protective Status (TPS) to Haitians living in the country, a designation that was extended through 2021.\textsuperscript{124} When the Trump administration was considering ending TPS for Haitians, the United States Citizenship and Immigration Service tried to find crime data to justify its decision while failing to consider ongoing dangerous conditions in Haiti, as immigration law requires.\textsuperscript{125}

\section*{II. The Use of Title 42 to Exclude Haitian Migrants}

Title 42 allows the government to “prohibit . . . the introduction of persons or property from such countries or places as [it] shall designate” in order to prevent the introduction of communicable diseases.\textsuperscript{126} Starting in March of 2020, as the COVID-19 pandemic swept across the country, the CDC issued a proposed rule and a series of orders “suspending the right to introduce certain persons into the United States from countries where a quarantinable communicable disease exists.”\textsuperscript{127} The orders covered people trying to enter without valid documents, including asylum seekers, but they did not apply to citizens, lawful permanent residents, or visitors.\textsuperscript{128} Essentially, the policy targeted only asylum seekers and other

\begin{itemize}
  \item \textsuperscript{122} Koh, \textit{supra} note 119, at 1004.
  \item \textsuperscript{123} Dollar & Kent, \textit{supra} note 69, at 102–03. The HRIFA was not a perfect solution since it did not protect children who might age out before their immigration cases were processed, did not protect people who entered with false documents, and only applied to people who had received a certain type of parole. \textit{Id.} at 103–04.
  \item \textsuperscript{125} See Audain, \textit{supra} note 61, at 417–18.
  \item \textsuperscript{126} 42 U.S.C. § 265. Sarah Sherman-Stokes has noted the origins of this statute—the federal quarantine power—in a series of Yellow Fever outbreaks in the nineteenth century. Sherman-Stokes, \textit{supra} note 26, at 270. Starting in the 1870s, a series of public health bodies were empowered to monitor contagious diseases and quarantine immigrants and non-immigrants, but in 1944 the U.S. Public Health Service was authorized to stop migrants from entering the United States. \textit{Id.}
  \item \textsuperscript{127} Notice of Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65,806 (Oct. 16, 2020). This slapdash regulatory scheme started on March 20, 2021, when the CDC issued a rule allowing its director to suspend entry of people during a public health crisis. 42 C.F.R. § 71.40. The same day, the CDC director issued an order doing exactly that. 85 Fed. Reg. 17,060 (March 26, 2020).
  \item \textsuperscript{128} See Notice of Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. at 65,806.
\end{itemize}
undocumented migrants. Migrants excluded under the policy were returned to Mexico or Canada or expelled to their country of citizenship.

The policy, coinciding with a wave of instability in Haiti and discrimination in South America, hit Haitians particularly hard. This Part describes how the use of Title 42 to target Haitians fit squarely into a pattern of associating immigrants of color with disease, then using disease to justify their exclusion. Part II.A describes the Title 42 policy and explains how it circumvented international law and U.S. immigration statutes and regulations, violating the principle of non-refoulement. Part II.B explains how the use of Title 42 helped the government associate all migrants, not just Haitians, with Covid-19. Part III.C explains the impact of Title 42 on Haitians specifically.

A. How the Title 42 Policy Violates U.S. and International Law

The United States follows the principle of non-refoulement, which broadly states that a person must not be returned to a place where their life or freedom would be threatened on account of a protected ground, even if that person is not necessarily admissible to the United States. Non-refoulement has been incorporated into the INA and federal regulations. In U.S. law, the principle perhaps has its most generous expression in asylum. A person already in the United States or arriving at the border can be granted asylum if they can show a well-founded fear of persecution on account of race, religion, nationality, particular social group, or political opinion. If a person is not eligible for asylum, they still cannot be returned to a country where their life or freedom would be threatened, or where they would be tortured.

The Title 42 policy effectively superseded the asylum and withholding provisions of the INA as well as the United States' compliance with the Refugee Convention. Officials were initially directed to turn away migrants unless they specifically said they feared torture, providing no opportunity to apply for asylum and sharply curtailing the usual questioning that border officials use to determine whether a person fears returning to their home country. While the Biden administration took many steps to undo the restrictive immigration policies of its

---

129 See Armstrong, supra note 20, at 370–71.
130 Notice of Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. at 65,807; see also Armstrong, supra note 20, at 371.
132 Criddle & Fox-Decent, supra note 131, at 1125.
134 See 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.18
135 See Armstrong, supra note 20, at 363 (explaining how, because of the sheer number of people turned back at the southern border under Title 42 without regard to their fears of return to their home countries, [t]he Order has effectively ended the U.S. asylum regime . . . .
136 See id. at 367, 371.
predecessor,137 it kept the Title 42 policy in place for more than a year.138 A CDC order effective as of August 2021 directed border officials to exempt individuals from the order based on “public safety, humanitarian, and public health interests,” ostensibly providing an avenue for those needing refugee protection to find safety in the United States.139 Even so, there have been more than two million expulsions under Title 42 since the policy began, the vast majority under the Biden administration.140

The COVID-19 pandemic accelerated a trend of weakening humanitarian protections, with various countries turning more and more people away at the border even if those people face persecution or torture in their home countries.141 In doing so, these countries, including the United States, violate international law’s prohibition of “repulsing refugees at their borders.”142 Moreover, the government’s initial practice of “[f]ailing to interview persons who fear persecution, and requiring officers to receive approval from supervisors for those who fear torture”143 means that migrants are being refouled.

B. How Title 42 Inaccurately Associates Migrants with COVID-19

A major difference between the Title 42 policy and the 1990s HIV ban is that while the HIV ban impacted those who had tested positive, Title 42 applies to migrants who have not been tested, simply because they came from a country where Covid cases have been detected.144 A striking similarity lies in the utter ineffectiveness of both the HIV ban and Title 42. In the same way the HIV ban did not prevent the spread of AIDS, the use of Title 42 did not prevent the spread of COVID-19 in the United States. Covid was already rampant when the CDC order was issued, meaning border crossings were unlikely to make it worse.145 The order specifically targeted asylum seekers and others without documents while allowing

---

137 For example, the Biden administration doubled the number of refugees (people designated as such outside the United States, as opposed to asylum-seekers) it was willing to accept into the United States in 2022, reopened the border to certain vaccinated travelers, revoked the Trump administration’s so-called Muslim ban, and announced plans to ease migration from Central America. The Biden administration also tried to end the so-called “remain-in-Mexico” program, but a federal court blocked the termination. See generally Biden Administration Continues Efforts to Change Immigration Policy Amidst Surges of Migrants and Court Losses, 116 Am. J. of Int’l L. 197 (2022).


141 See Criddle & Fox-Decent, supra note 131, at 1070–71.

142 Id. at 1126.

143 Armstrong, supra note 20, at 393.


145 See Armstrong, supra note 20, at 383.
in citizens and other noncitizens who might be carrying Covid-19, meaning that if new arrivals were a cause of the spread, the Title 42 policy did little to rectify it.\textsuperscript{146} And some countries the CDC targeted had lower infection rates than the United States.\textsuperscript{147}

Instead of public health protection, Title 42 is a pretext for racism and xenophobia.\textsuperscript{148} The specific public health crisis does not matter to immigration restrictionists: Former Trump immigration adviser Stephen Miller had contemplated using illness to restrict migration since at least 2018 and attempted to use mumps and the flu to tighten restrictions at the border in 2019.\textsuperscript{149} Miller and former Vice President Mike Pence reportedly pressured an initially reluctant CDC to issue its Title 42 directives in the first place.\textsuperscript{150} The orders prompted many public health experts to protest, including a Johns Hopkins expert who warned that the new policy could “amplify dangerous anti-immigrant sentiment and xenophobia.”\textsuperscript{151} In this way, the CDC orders were like “a bullseye drawn on the side of a barn around the arrow that has already been shot.”\textsuperscript{152}

While the Biden administration does not openly disparage immigrants in the same way its predecessor did, it continued to cite the dangers of congregate settings even as public health experts rebutted this assumption and touted the effectiveness of testing and vaccines.\textsuperscript{153} It also appealed a court order that halted Title 42 expulsions but left in place inadmissibility of migrants on public health grounds.\textsuperscript{154} Department of Homeland Secretary (DHS) Secretary Alejandro Mayorkas called the policy a way to “protect the American public” and “protect the communities along the border,” an othering of immigrants that makes the rest of his statement—“to protect the migrants themselves”—ring hollow.\textsuperscript{155}

Just as exclusion policies created associations between Chinese people and the bubonic plague, and between Haitians and HIV/AIDS, Title 42 policies create

\textsuperscript{146} See id.
\textsuperscript{147} Id. at 376–77.
\textsuperscript{148} Id. at 376–77.
\textsuperscript{149} THE INVISIBLE WALL, supra note 59, at 15.
\textsuperscript{150} Id.
\textsuperscript{151} Id. (quoting Jason Dearen & Garance Burke, Pence Ordered Borders Closed After CDC Experts Refused, ASSOCIATED PRESS (Oct. 3, 2020)).
and reinforce associations between migrants arriving at the southern border and Covid-19. One poll found that a third of unvaccinated American citizens believed foreigners caused a spike in COVID-19 infections in the summer of 2021. Those supporting immigration restriction, from state governors to the Wall Street Journal editorial board characterize COVID-19 as an imported phenomenon, contradicting the public health experts who blamed the spike in infections on low vaccination rates among those already in the United States. This echoes a theme throughout American history: “It’s always been easier for politicians to blame people from somewhere else.” As a result, significant human rights abuses are excused or ignored. As of December 2022, the organization Human Rights First had tracked more than 13,000 reports of “murder, torture, kidnapping, rape, and other violent attacks on migrants and asylum seekers expelled to Mexico under Title 42 since President Biden took office.”

**C. The Impact of Title 42 on Haitians**

Title 42 expulsions have had a disproportionate and deadly effect on Haitians. The United States’ sharp immigration restrictions at the beginning of the pandemic coincided with tens of thousands of arrivals at the border. Many had left Haiti years ago and were making their way to the southern border after facing unemployment, racism, and xenophobia in Brazil and Chile. Others left Haiti more recently due to poverty, increased violence, or political instability. Events in the summer of 2021, including the assassination of President Jovenel Moïse, another earthquake, and a tropical storm, pushed even more people out of the country. Some of the thousands who caught the country’s attention at the bridge

---


157 *Id.*


159 *Id.*

160 *Id.* (paraphrasing the words of Natalia Molina, who has written about the scapegoating of Chinese immigrants in California).


162 This is not to discount the impact of Title 42 on migrants of other nationalities. In her article on the links between public health policy and exclusions of migrants, Sarah Sherman-Stokes focuses on the impact of Title 42 on Central Americans by interviewing advocates along the U.S.-Mexico border and highlighting other racist immigration policies disproportionately impacting people from the Northern Triangle countries of Guatemala, Honduras, and El Salvador. Sherman-Stokes, *supra* note 26, at 274-284.

163 *The Invisible Wall*, *supra* note 59, at 20.

164 *Id.* at 19.

in Del Rio in September 2021 may have believed that the government’s grant of Temporary Protected Status to Haitians inside the country also applied to them.

Despite these dire circumstances, the United States has conducted mass expulsions of Haitians. A few examples stand out. First, in the first month of Biden’s administration, Immigrations and Customs Enforcement (ICE) sent up to 1,200 people on deportation flights to Haiti. Second, in September 2021—the same month as the Del Rio bridge incident—a further 8,000 were flown to Haiti during a short period in which an injunction against the expulsions was stayed. Third, at least 4,000 people were flown to Haiti in May 2022. Human Rights First reports that while Haitians represent only six percent of people trying to cross the border, they represent sixty percent of expulsion flights. The United States conducted these expulsion flights even though the U.S. State Department strongly discourages American citizens from going to Haiti, the United Nations has urged receiving countries not to deport Haitians, and at least two administration officials have resigned over the issue.

Thousands more Haitians were not flown back to Haiti but were simply turned away at the border. While the fate of the 15,000 migrants in Del Rio is unclear throughout the pandemic an unknown number of Haitians have been turned back to Mexico, in one case “wearing the same black sandals, which they


167 *The Invisible Wall*, supra note 59, at 22.


170 Id.


174 According to DHS Secretary Mayorkas, who explained the whereabouts of 30,000 migrants rather than 15,000, more than 12,000 were actually paroled into the United States while their immigration claims were pending, 2,000 were expelled that same week, and 5,000 were detained. Maria Verza & Juan Lozano, *Officials: All Migrants Are Gone from Texas Border Camp*, ASSOCIATED PRESS (Sept. 24, 2021), https://apnews.com/article/immigration-coronavirus-pandemic-lifestyle-texas-caribbean-67a91b80b0e9661472af931b0becaef. However, the *Washington Post* reported that many thousands returned to Mexico, and it was unclear how many Haitians were still in the United States. Nick Miroff, *Most of the Migrants in Del Rio, Tex., Camp Have Been Sent to Haiti or Turned Back to Mexico, DHS Figures Show*, WASH. POST (Oct. 1, 2021, 5:58 AM), https://www.washingtonpost.com/national/haitians-border-deportations/2021/10/01/bfa38852-222a-11ec-8fd4-57a5d9bf4b47_story.html.
said they’d received from U.S. immigration authorities.”\textsuperscript{175} Attorneys and activists have reported that these people who were turned back to Mexico were never screened for fear of persecution.\textsuperscript{176}

Despite the government’s stated rationale of preventing the spread of COVID-19 in congregate settings, many Haitian migrants and asylum seekers, including families, were held in detention for days or weeks. In 2020 and early 2021, families were being held in detention centers or hotels, allegedly incommunicado,\textsuperscript{177} and sometimes without access to showers or medical care.\textsuperscript{178} According to some reports, ICE failed to test many of the people it placed on deportation flights and in some cases even deported people who had tested positive.\textsuperscript{179}

DHS Secretary Mayorkas again defended the use of Title 42 to expel Haitians specifically, saying the policy is in place “to protect the migrants themselves, to protect the local communities, our personnel and the American public.”\textsuperscript{180} This “bad faith reliance on pandemic fears to shirk our legal duty to asylum seekers at the border,”\textsuperscript{181} not only distracts from the real causes and solutions of the pandemic; it adds another layer to the continued pathologization of Haitian and other migrants.

III. UPDATES AND NEXT STEPS

In April 2022, the Biden administration announced that the Title 42 policy would end the following month.\textsuperscript{182} Due to ongoing litigation, however, the policy persists into 2023. This Part details litigation, government action, and solutions surrounding Title 42 up to the time of writing. Part IV.A details litigation, legislation, and administrative action aimed at ending or continuing the Title 42 policy. Part IV.B details recommendations for ending Title 42 or ameliorating its effects, drawing from the work of asylum advocates and scholars.

---


\textsuperscript{176} See Neusner & Kizuka, supra note 154, at 7.


\textsuperscript{178} \textit{The Invisible Wall}, supra note 59, at 28.

\textsuperscript{179} Id. at 22.


\textsuperscript{182} \textit{CDC Public Health Determination and Termination of Title 42 Order}, \textit{CTRS. FOR DISEASE CONTROL & PREVENTION} (Apr. 1, 2022), https://www.cdc.gov/media/releases/2022/s0401-title-42.html.
A. The Fight to End Title 42—and to Keep It

In the same way that Haitian immigrants turned to the courts during the
days of interdiction, migrants and advocates are litigating to end Title 42 or
mitigate its effects. Some of the results have been encouraging. In P.J.E.S v.
Mayorkas, the American Civil Liberties Union and others challenged the
application of the policy to unaccompanied minors, arguing that the use of Title
42 bypassed immigration laws and arbitrarily denied procedural protections to
minors trying to cross the border. A district court enjoined the Title 42 order as it
applied to unaccompanied minors, holding that the statute did not authorize
expulsions, but the D.C. Circuit Court of Appeals stayed the injunction. The
Biden administration later issued regulations exempting unaccompanied minors
from the Title 42 policy. The same organizations also represented detained
asylum-seeking families in Huisha-Huishu v. Mayorkas. Though an initial
injunction only stopped expulsions to places where the expelled might be
tortured, the District Court for the District of Columbia ultimately held that the
Title 42 policy was not the least restrictive means of preventing the spread of
disease and the CDC failed to consider the harsh impacts on migrants.

Other developments are far more discouraging. When the Biden
administration announced its intent to end the Title 42 policy, several states sued to
block this action. A Louisiana district court enjoined the end of the policy, holding
in part that the Biden administration did not go through the proper notice-and-
comment procedure in issuing the new regulation. Many states also sought to
intervene in the Huisha-Huishu litigation, causing the Supreme Court to grant
certiorari—and leave the Title 42 policy in place in the meantime. In dissent,
Justice Gorsuch wrote that the grant was an exercise in futility since “the public-
health justification undergirding the Title 42 orders has lapsed.” At the time of
writing, the Biden administration is arguing that because it is ending the COVID

\[185\] P.J.E.S., 502 F. Supp. 3d at 502.
\[186\] P.J.E.S v. Pekoske, No. 20-5357, 2021 WL 9100552, at *1 (D.C. Cir. Jan. 29, 2021); see also Comment on
Title 42 Immigration Stay Ruling, CTR. FOR GENDER & REFUGEE STUD. (Jan. 29, 2021),
\[187\] Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries
\[190\] Huisha-Huishu v. Mayorkas, No. CV 21-100 (EGS), 2022 WL 16948610 at *7–11 (D.D.C. Nov. 15, 2022),
\[192\] Id. at 434.
\[194\] Id. at 479.
public health emergency, Title 42 will automatically end as well.\textsuperscript{195} Even more worryingly, there are efforts in Congress to codify Title 42 expulsions.\textsuperscript{196}

\textbf{B. Ending Title 42}

Several solutions could ameliorate the negative impacts on Haitians and all migrants impacted by Title 42. Advocacy groups have proposed the deceptively simple: the Biden administration should end the Title 42 policy, follow U.S. and international law regarding asylum-seekers, and cease deportations to Haiti, where many migrants feel unsafe returning.\textsuperscript{197} This also includes providing resources to organizations working on the border so that Haitians and other migrants have access to shelter, lawyers, and interpreters.\textsuperscript{198} Sarah Sherman-Stokes, noting that Title 42 violates international law and the opinions of public health experts, proposes directing more resources to process migrants at the southern border and using alternatives to immigration detention to reduce the need for congregate settings.\textsuperscript{199}

If detention is necessary, the Biden administration should implement policies that protect migrants and U.S. communities. These include “using masks; hand hygiene; distance demarcations and barriers; adapting protocols to minimize delays; avoiding congregate and high-density situations; maximizing ventilation; [and] ramping up testing capacity.”\textsuperscript{200} Moreover, instead of excluding asylum seekers wholesale, the government can and should test new arrivals and release migrants on parole pending further proceedings so that they do not overcrowd detention facilities.\textsuperscript{201}

\textbf{CONCLUSION}

Overturning more than a century’s association of foreignness, Haitianess, and pathology will take more time and effort. Fortunately, if policies helped create these associations, policies can help undo them. An immigration policy that recognizes the history of the United States’ relationship with Haiti and Haitians,

\textsuperscript{197} See THE INVISIBLE WALL, supra note 59, at 37.
\textsuperscript{199} Sherman-Stokes, supra note 26, at 286–89.
\textsuperscript{200} THE INVISIBLE WALL, supra note 59, at 37.
\textsuperscript{201} Armstrong, supra note 20, at 384–86. Reporting from the field showed that many facilities are not even trying to prevent the spread of Covid-19 in detention. One practitioner who visited a detention facility in 2020 observed that nobody was wearing personal protective equipment, and detainees, who were kept in rooms so crowded that they could not lie down, did not have access to soap or other hygiene items. Karyn Kurichety, Deliberate Endangerment: Detention of Noncitizens During the Covid-19 Pandemic, 68 UCLA L. REV.: DISCOURSE 118, 124, 126 (2020).
and at the very least treats them equally with other immigrant groups when evaluating asylum and other immigration claims, will go a long way.