

THE LEGAL PRODUCTION OF THE TRANSGRESSIVE FAMILY: BINATIONAL FAMILY RELATIONSHIPS BETWEEN CUBA AND THE UNITED STATES*

DEBORAH M. WEISSMAN**

This Article reviews the relationship between U.S. policy after the 1959 Cuban Revolution and the legal mechanisms that have influenced the character of the binational Cuban-American family since then. Over the course of the last fifty years, the United States has used the rule of law to deny families fundamental customs of care-taking and comfort. Of course, the immigration regulations and attendant matters of travel and remittances are customarily linked to national policy and international concerns. However, in the case of U.S. laws governing the relationship of Cuban binational families, there is no normativity of impartiality that can be discerned, a condition that continues notwithstanding some recent changes announced by the Obama administration. These efforts have failed to achieve their goals. Cuban-American families have improvised—often extralegal—mechanisms of familial support. In doing so, they act as transgressors of laws and policies as a means to maintain family support systems.

INTRODUCTION	1882
I. 2004 FAMILY RESTRICTIONS: NEW MEANS TO OLD ENDS ..	1885
II. SANCTIONS, SABOTAGE, AND SUBVERSION: MIGRATION AND THE COLD WAR	1889
A. <i>Creating the Economic Context for Migration</i>	1889
B. <i>Migration, Fear-Mongering, and the Propaganda of the Cold War</i>	1892
C. <i>Open Door Policy: Migration and the Cuban Adjustment Act</i>	1895

* © 2010 Deborah M. Weissman.

** Reef C. Ivey II Distinguished Professor of Law. I am grateful to Louis A. Pérez, Jr., for informative conversation that helped shape this Article, and to Lars Schoultz for comments on an earlier draft. Special thanks to Caroline Smiley and Brandi Leigh Jones for excellent research assistance, as well as to Caroline Batchelor and the other editors at the North Carolina Law Review for their thoughtful editing.

D.	<i>From Open Door to Open Arms: Migration and the Mariel Boatlift</i>	1897
E.	<i>Maintaining Pressure, United States-Cuba Policy, and the Cuban-American National Foundation</i>	1902
III.	SANCTIONS AND THE POST-COLD WAR GLOBAL ECONOMY, 1990-PRESENT.....	1904
A.	<i>Torricelli, Helms-Burton, and the Migration Crisis of the 1990s</i>	1904
B.	<i>Shifting Strategies: Deterring Family Support</i>	1909
C.	<i>A Failed Policy: The Binational Family as Transgressor</i>	1913
IV.	OBAMA YEAR ONE: THE LIMITS OF CHANGE.....	1918
	CONCLUSION.....	1920

INTRODUCTION

Geographical proximity has long facilitated travel between Cuba and the United States. Throughout the nineteenth century and well into the twentieth and twenty-first, Cubans have traveled north in search of political sanctuary and economic opportunity.¹ Immigration to the United States has developed fully into a salient constant of the Cuban condition, one that has contributed to the emergence of a unique binational family system. Cuban migration has itself been a cause and consequence of U.S. policy. That Cuba was deemed vital to U.S. strategic interests meant that American foreign policy has often had as much an impact on migration patterns as Cuban domestic policy, with far-reaching consequences: some intended, others unintended.

The Cuban revolution of 1959 and the punitive U.S. response have provided the context for a vast continuing Cuban migration.² By the end of the twentieth century, more than one million Cubans—one-tenth of the total population—had emigrated,³ mostly to the

1. Gerald E. Poyo, *Cuban Communities in the United States: Toward an Overview of the 19th Century Experience*, in CUBANS IN THE UNITED STATES 44, 44 (Miren Uriarte-Gastón & Jorge Cañas Martínez eds., 1984) (describing nineteenth-century Cuban migration as a result of Cuban separatist activity and the cigar industry in the United States).

2. See *infra* Part II.

3. Throughout this Article, the use of the terms “emigration” and “émigré” correspond to the concept of the movement of people away from their homes to live in different places, the terms “immigration” and “immigrant” correspond to the concept of the movement of people to a place to settle there, and “migration” refers to the movement of people from one place to another. See THE AMERICAN HERITAGE DICTIONARY 602, 903, 1143 (3d ed. 1992).

United States.⁴ United States policy, relying principally on economic sanctions as the method to remove the Cuban government, has resulted in unrelieved hardship on the Cuban people, and in the process has profoundly transformed the nature of untold numbers of Cuban families.

Migration developed within two phases of specific global contexts, corresponding to Cuba's changing international position and U.S. policy: the period after 1960, when Cuba aligned itself with the Soviet bloc in the final decades of the Cold War; and the years after 1990, when Cuba adapted to the global economy in the post-Cold War environment ("Special Period").⁵ In both instances, the vicissitudes of U.S. policies that purposefully politicized migration as part of the larger strategy of economic sanctions adversely affected Cuban families. Divided families have found themselves continually separated not only by the Florida Straits but also by U.S. laws and policies that have manipulated migration procedures, restricted travel authorization, and tightened remittance regulations, the very means by which families maintain connections.⁶

This Article examines the relationship between U.S. policy after 1960 and the legal mechanisms that have influenced the character of the binational Cuban-American family. The United States has used the rule of law to deny families the capacity to fulfill the fundamental custom of caretaking and comfort for the purpose of subverting the Cuban revolution. Of course, the regulation of migration and attendant matters of travel and remittances are customarily linked to national policy and international concerns. However, in the case of U.S. laws governing the relationship of Cuban-American binational families, a normativity of impartiality cannot be discerned.

Part I considers the amendments to travel and remittance restrictions imposed in June 2004 by the administration of George W. Bush. These regulatory changes were certainly not the first to impose significant limitations on the ability of families to maintain connections across the Florida Straits, but they were the harshest to date. Part II demonstrates the ways in which the 2004 restrictions served as a new means to an old end. It reviews prior policy and legal

4. Lisandro Pérez, *Migration from Socialist Cuba: A Critical Analysis of the Literature*, in CUBANS IN THE UNITED STATES, *supra* note 1, at 12, 16.

5. Rafael Hernández et al., *Political Culture and Popular Participation in Cuba*, 18 LATIN AM. PERSP. 38, 43 (1991). Cuba declared a "Special Period in Time of Peace" in 1990 in response to the economic collapse prompted by the demise of the Soviet Union, its key trading partner and provider of subsidies. *Id.*

6. See *infra* Part II.

and covert strategies, which imposed sanctions, utilized fear mongering, or otherwise targeted families in the hopes that adversity and hardships would foster political discontent within Cuba and produce internal rebellion against the Cuban government. Part III argues that during the post-Cold War period after the collapse of the Soviet Union and the socialist bloc when Cuba lost its trading partners, the United States renewed its efforts to politically and economically isolate Cuba to ensure that Cuba would fail in its efforts to reintegrate itself into the global political economy. During this period, after the United States recognized that binational family relations transacted through visits and financial support for families in Cuba had created a flow of foreign exchange and goods that had allowed many Cubans to survive the very sanctions designed to topple the Cuban government, U.S. policy began to increase its focus on restricting travel remittances.⁷ Part III suggests that U.S. efforts to dislodge the Cuban government by way of inflicting hardship on Cuban families have failed. Cuban Americans improvised—often extralegal—mechanisms of mutual familial assistance. In doing so, they often have been obliged to act as transgressors of laws and policies as a means to maintain family support systems.

United States-Cuba policies are presently under review and revision in Washington.⁸ There is reason to hope for an end to the use of U.S. laws that create hardships for Cuban binational families in order to encourage the overthrow of the Cuban government. President Obama recently announced the liberalization of family travel and remittance laws.⁹ However, the administration's rhetoric has not shifted, and the all-too-familiar pronouncements of what is best for Cuba—as determined by the United States—persist. A bold transformation from Cold War rhetoric and hostilities to full engagement between the United States and Cuba is required to end the United States' practice of using laws that create hardship for Cuban binational families in attempts to overthrow the Cuban government; such a transformation will allow full restoration of binational relationships and reconciliation on both sides of the Florida Straits.

7. See *infra* Part III.

8. Mary Beth Sheridan, *Sides Gear Up for Fight over U.S. Ban on Travel to Cuba*, WASH. POST, Nov. 19, 2009, at A8.

9. See Press Release, U.S. Dep't of the Treasury, Fact Sheet: Treasury Amends Cuban Assets Control Regulations to Implement the President's Initiative on Family Visits, Remittances, and Telecommunications (Sept. 3, 2009), available at <http://www.treas.gov/press/releases/tg273.htm>.

I. 2004 FAMILY RESTRICTIONS: NEW MEANS TO OLD ENDS

In June 2004, the administration of George W. Bush announced new regulations restricting the rights of Cuban Americans to visit and support their families in Cuba.¹⁰ Travelers previously allowed to visit relatives on the island once a year for up to ninety days, and perhaps more in the event of a family crisis, were limited to one trip every three years for a maximum of fourteen days¹¹—no exceptions: not for an emergency visit to be with a dying parent, nor to attend a family funeral.¹² When questioned about the hardship imposed on families, Deputy Assistant Secretary of State Dan Fisk responded, “So if they have a dying relative, they have to figure out when they want to travel.”¹³

The new regulations further redefined what constituted “family” and prohibited visits to anyone other than spouses, children, parents, grandparents, siblings, and grandchildren.¹⁴ Aunts, uncles, cousins as well as individuals who, for example, may have previously functioned as parents or caretakers, were henceforth denied family status for purposes of visits.¹⁵ Those without living relatives on the island were thus barred from returning to their homeland. The new regulations also limited the right of Cuban Americans to provide financial aid to families in Cuba.¹⁶ A cap was set at \$300 quarterly.¹⁷ The maximum amount travelers were authorized to carry with them during their visits was reduced from \$3,000 to \$300.¹⁸ In addition, families were prohibited from sending clothes and personal items.¹⁹ Medicines and other critical necessities could not exceed \$200 in value.²⁰

10. Cuban Assets Control Regulations, 69 Fed. Reg. 33,771, 33,771 (June 16, 2004) (codified as amended at 31 C.F.R. § 515.561(a) (2009)).

11. *Id.*

12. *Id.*

13. 150 CONG. REC. H7284 (daily ed. Sept. 21, 2004) (statement of Rep. Delahunt), available at <http://fdsys.gpo.gov/fdsys/pkg/CREC-2004-09-21/pdf/CREC-2004-09-21.pdf> (quoting Deputy Assistant Secretary of State Dan Fisk).

14. 69 Fed. Reg. at 33,772 (codified as amended at 31 C.F.R. § 515.561(c) (2009)). The regulations also reversed prior regulations that authorized those who share a common dwelling as a family with the traveler to accompany the traveler, unless they are also immediate family members of the person to be visited. *Id.*

15. *Id.*

16. 69 Fed. Reg. at 33,773 (codified as amended at 31 C.F.R. § 515.570(a)(1) (2009)).

17. *Id.*

18. 69 Fed. Reg. at 33,773 (codified as amended at 31 C.F.R. § 515.560(c)(4)(i) (2009)).

19. 69 Fed. Reg. at 34,565 (codified as amended at 15 C.F.R. § 740.12(a)(2)(B)(1) (2009)).

20. *Id.*; see also HUMAN RIGHTS WATCH, FAMILIES TORN APART: THE HIGH COST OF U.S. AND CUBAN TRAVEL RESTRICTIONS 44, 53, 58 (2005) [hereinafter HUMAN

Notwithstanding the crisis suffered by Cubans after the devastating hurricanes of 2005, the new regulations forbade Cuban Americans from providing humanitarian assistance to their families and communities on the island.²¹ Assistant Secretary of State, Roger Noriega, conveyed the mean-spirited purport of the new regulations:

“[W]hat are we supposed to say to them? We’re going to continue to allow this money to be shoveled into the coffers of a regime that’s going to keep them in chains in–in–in under a dictatorship because we want to preserve the right of people to visit their aunts?”²²

Of course, as Human Rights Watch noted in its report on Cuban families affected by the restrictions, visiting aunts is not a trivial matter, especially for those whose aunts and uncles raised them.²³

That the 2004 travel and remittance regulations played havoc with the circumstances of Cuban and Cuban-American families was not a new phenomenon. For the past fifty years, family migration and corollary issues of travel and remittances have been politicized by the U.S. government as part of a larger U.S. strategy to effect “regime change” in Havana.²⁴ The Cuban alliance with the Soviet Union and the expansion of Cuban influence in Africa and Latin America were vital U.S. Cold War concerns. Certainly, this is the conventional wisdom. But U.S. hostility continued unabated into the post-Cold War period, suggesting that the sources of American attitudes toward Cuba were not based entirely on matters of strategic considerations.²⁵ Since the early 1990s, U.S. policy has been designed to thwart Cuban

RIGHTS WATCH], *available at* <http://www.hrw.org/en/reports/2005/10/18/families-torn-apart> (describing in vivid detail the effects of the travel and remittance restrictions on Cubans in Cuba and in the United States).

21. *See, e.g.*, 151 CONG. REC. E1571 (2005) (statement of Rep. Rangel) (highlighting restrictions on remittances, gift parcels, and family travel to Cuba in the wake of Hurricane Dennis, and arguing for the temporary suspension of those restrictions).

22. HUMAN RIGHTS WATCH, *supra* note 20, at 58 (quoting then Assistant Secretary of State for Western Hemisphere Affairs, Roger Noriega).

23. *Id.*; *see* JEANNE PARR LEMKAU & DAVID L. STRUG, LOVE, LOSS AND LONGING: THE IMPACT OF U.S. TRAVEL POLICY ON CUBAN-AMERICAN FAMILIES 10–11 (2007) (recounting the poignant story of a Cuban American who was unable to visit an uncle dying of cancer: “How could I tell my uncle that he . . . wasn’t family?”).

24. *See* LEMKAU & STRUG, *supra* note 23, at 1, 3.

25. *See* Press Release, Sec’y John Snow, U.S. Dep’t of the Treasury, Commission for Assistance to a Free Cuba Releases Initial Report: Snow Commends President Bush’s Vision for Hastening the Day Cuba Is Free and Democratic (May 6, 2004), *available at* <http://www.treas.gov/press/releases/js1528.htm> (identifying new and drastic means by which the United States intensified its efforts to bring down the Cuban government).

efforts to reintegrate into the global economy.²⁶ United States officials were convinced of Cuban vulnerability in the aftermath of the collapse of the Soviet Union and sought to cut off Cuban access to support of any kind in their continued efforts to precipitate the collapse of the Cuban government.²⁷

Notwithstanding the long and antagonistic history of regulatory maneuvers related to Cuban migration, travel, and remittances, the 2004 regulations were the harshest and most contentious to date.²⁸ The announcements of the new restrictions were timed with the release of a comprehensive cabinet-level report, entitled *Commission for Assistance to a Free Cuba*.²⁹ Charged with the formulation of policies to topple the Cuban government, the Commission provided a comprehensive program to hasten Cuba's "transition," including specific recommendations on matters affecting Cuban and Cuban-American families.³⁰ According to the Commission, families who continued to travel and send funds for household support were barriers to the establishment of a "free Cuba."³¹ The report offered instructions for supporting dissident groups, rebuilding the Cuban infrastructure, developing new school curriculum, and procedures for achieving a top-to-bottom overhaul of the Cuban Government, including the drafting of a new constitution and converting the Cuban economy to a free-market system.³² As one political scientist noted, the report "read like some antiquated colonial blueprint" and as "a symbol of the Bush administration's arrogant unilateralism and

26. See Sarah A. Blue, *State Policy, Economic Crisis, Gender, and Family Ties: Determinants of Family Remittances to Cuba*, 80 *ECON. GEOGRAPHY* 63, 69–70 (2004) (describing ongoing changes in remittance policies to deny Cuba access to capital).

27. María Cristina García, *Hardliners v. "Dialogueros": Cuban Exile Political Groups and United States–Cuba Policy*, 17 *J. AM. ETHNIC HIST.* 3, 21 (1998) (describing support for federal legislation that would isolate Cuba and bring it to collapse).

28. See HUMAN RIGHTS WATCH, *supra* note 20, at 38 (noting that unlike past restrictions, the 2004 regulations did not allow for any exceptions).

29. See generally COMM'N FOR ASSISTANCE TO A FREE CUBA, REPORT TO THE PRESIDENT (2004) [hereinafter COMM'N FOR ASSISTANCE TO A FREE CUBA, 2004 REPORT], available at <http://2005-2009.cafc.gov/rpt/2004/c18166.htm> (discussing regulatory changes related to U.S.-Cuba relations). The Commission released a second report in 2006 with more of the same proposals; however, no regulatory changes were made following its distribution. See generally COMM'N FOR ASSISTANCE TO A FREE CUBA, REPORT TO THE PRESIDENT (2006), available at <http://www.cafc.gov/documents/organization/68166.pdf> (outlining many of the same proposals as the 2004 report).

30. COMM'N FOR ASSISTANCE TO A FREE CUBA, 2004 REPORT, *supra* note 29, at 7–54.

31. *Id.* at 9.

32. *Id.* at 155, 201–51. The proposed overhaul called for U.S. "assistance" in drafting a new constitution based on the view that "initially, Cubans may not be ideally positioned to govern themselves." *Id.* at 175.

penchant for intervention.”³³ The Secretary General of the Organization of American States, José Miguel Insulza, was equally blunt in responding to the administration’s report: “‘There is no transition, and it’s not your country.’”³⁴

With these new restrictions, President Bush, who had made “family values” the centerpiece of his 2000 presidential campaign and a central part of his speeches in Latin America with the oft-repeated quote that “[f]amily values do not stop at the Rio Bravo,”³⁵ made clear that commitments to family did stop at the shores of the Florida Straits.³⁶ The President often remarked on the importance of family integrity and expressed an understanding for families who migrated to provide for their loved ones.³⁷ He approved of remittances to enable migrants to “feed their families just like the citizens of America can find work to feed their families.”³⁸ The new regulations made clear, however, that Cubans and Cuban Americans were an exception, and they were expected to suffer differently than their

33. William M. LeoGrande, *Engaging Cuba: A Roadmap*, WORLD POL’Y INST., Dec. 2008, at 87, 94; see also Alberto R. Coll, *Harming Human Rights in the Name of Promoting Them: The Case of the Cuban Embargo*, 12 UCLA J. INT’L L. & FOREIGN AFF. 199, 227 (2007) (describing the Commission report as “interventionist”).

34. LeoGrande, *supra* note 33, at 94 (quoting Secretary General of the Organization of American States José Miguel Insulza).

35. See, e.g., George W. Bush, Remarks at the University of Toledo in Toledo (Sept. 6, 2001), available at <http://www.presidency.ucsb.edu/ws/?pid=64618>.

36. See George W. Bush, Proclamation 7848—National Family Week, 2004 (Nov. 23, 2004), available at <http://www.presidency.ucsb.edu/ws/?pid=62132> (“During National Family Week, we underscore our commitment to supporting families and recognize the significance of family to our country.”); see, e.g., George W. Bush, Interview with Latin American and American Spanish Language Journalists (Mar. 19, 2002), available at <http://www.presidency.ucsb.edu/ws/?pid=62632>; George W. Bush, Remarks at Townhall Meeting, Ontario, California (Jan. 5, 2002), available at <http://www.presidency.ucsb.edu/ws/?pid=62589>; George W. Bush, Remarks at a Welcoming Ceremony in Temozon Sur, Mexico (Mar. 13, 2007), available at <http://www.presidency.ucsb.edu/ws/?pid=24583>; George W. Bush, Remarks to the American Embassy Community in Quebec City (Apr. 22, 2001), available at <http://www.presidency.ucsb.edu/ws/?pid=45640>; George W. Bush, The President’s News Conference with President Francisco Flores Pérez of El Salvador in San Salvador, El Salvador (Mar. 24, 2002), available at <http://www.presidency.ucsb.edu/ws/?pid=73272> \fs24softline; George W. Bush, The President’s News Conference with President Oscar Berger Perdomo of Guatemala in Guatemala City (Mar. 12, 2007), available at <http://www.presidency.ucsb.edu/ws/?pid=24582>; George W. Bush, The President’s Radio Address (May 5, 2001), available at <http://www.presidency.ucsb.edu/ws/?pid=45586>.

37. See, e.g., George W. Bush, Interview with Latin American and American Spanish Language Journalists, *supra* note 36.

38. George W. Bush, Remarks at the University of Toledo, *supra* note 35 (reminding the audience of parents’ desires to support their children in pushing migration-related issues).

counterparts in other Latin American countries and elsewhere throughout the world.

II. SANCTIONS, SABOTAGE, AND SUBVERSION: MIGRATION AND THE COLD WAR

The 2004 restrictions in many ways signified the culmination of nearly fifty years of policy designed to visit hardship on families as a way to topple the Cuban government.³⁹ Since the early 1960s, successive U.S. governments have adopted a policy of political isolation and economic sanctions as a cost-effective way to undermine the government of Cuba.⁴⁰ The vicissitudes of migration over the course of fifty years were consequences of a policy that itself often lacked both clarity of purpose and consistency of implementation, that sometimes was in contradiction with itself, but always caused untold hardships for families who were denied customary means of contact and mutual support with those who remained on the island.

A. *Creating the Economic Context for Migration*

The United States' approaches to migration occurred within the larger context of sanctions imposed against Cuba through both legal and irregular means. In 1962, President John F. Kennedy authorized a trade embargo premised on existing statutory powers within the Foreign Assistance Act of 1961 and the Trading with the Enemy Act of 1917.⁴¹ The Treasury Department subsequently promulgated the Cuban Assets Control Regulations ("CACR") to prohibit financial transactions and trade with Cuba.⁴² The U.S. government also

39. See LARS SCHULTZ, *THAT INFERNAL LITTLE CUBAN REPUBLIC: THE UNITED STATES AND THE CUBAN REVOLUTION* 143, 175, 192–200 (2009). In response to the nationalization of U.S. property, the Cuban alliance with the Soviet Union, and Cuban support for armed struggle in Latin America, the United States adopted a series of actions designed to overthrow the Cuban government, first through the ill-fated Bay of Pigs (Playa Girón) in 1961, and later through a program of covert operations. *Id.*

40. See *infra* notes 41–48, 135–46 and accompanying text.

41. Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 620(a), 75 Stat. 424, 444–45 (codified at 22 U.S.C. § 2370(a) (2006)); Trading With the Enemy Act of 1917, ch. 106, 40 Stat. 411, 415 (codified at 50 U.S.C. app. § 5(b) (2006)). For a list of other statutory and regulatory sections that serve to prohibit trade and economic exchange with Cuba, see generally DIANNE E. RENNACK & MARK P. SULLIVAN, *U.S.-CUBAN RELATIONS: AN ANALYTIC COMPENDIUM OF U.S. POLICIES, LAWS & REGULATIONS* (2005), available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=CAB359A3-9328-19CC-A1D2-8023E646B22C&lng=en&id=13542>.

42. Cuban Assets Control Regulations, 28 Fed. Reg. 6974, 6975 (July 9, 1963) (codified as amended at 31 C.F.R. § 515 (2009)). The Cuban Assets Control Regulations ("CACR") also froze all Cuban government assets in the United States. *Id.*

resorted to covert means that went beyond the boundaries of the embargo statutes and regulations. The CIA's covert program known as Operation Mongoose included objectives that were carried out through clandestine means, including one designed to "[h]arass the economy."⁴³ The United States set in motion plans to sabotage export agricultural commodities, industries, public utilities, and transportation capabilities in order to "reduce available economic supplies and services," and "cripple Cuban commerce vital to the regime's domestic economic program."⁴⁴

The American determination to politicize hunger was a key facet of U.S. efforts to bring down the Cuban government. President Dwight Eisenhower encouraged "quarantin[ing] Cuba," stating that "if [the Cuban people] are hungry, they will throw Castro out."⁴⁵ Eisenhower explained that U.S. policy had as a "primary objective . . . to establish conditions which will bring home to the Cuban people the cost of Castro's policies and of his Soviet orientation."⁴⁶ Similarly, President Kennedy used economic sanctions as a means to hasten Fidel Castro's departure as a result of the "'rising discomfort among hungry Cubans.'"⁴⁷ The State Department advocated that "'every possible means should be undertaken promptly to weaken the economic life of Cuba [in order to] bring about hunger, desperation and [the] overthrow of the government.'"⁴⁸

43. Memorandum from the Chief of Operations, Operation Mongoose (Lansdale) to the Special Group (Augmented) (Aug. 31, 1962), in X FOREIGN RELATIONS OF THE UNITED STATES, 1961-1963, at 974, 974 (Louis J. Smith & David S. Patterson eds., 1996) [hereinafter FRUS VOL X], available at <http://history.state.gov/historicaldocuments/frus1961-63v10/d399>.

44. *Id.* at 985, 988; see, e.g., *id.* at 928, 931, 984.

45. Memorandum of a Conference with the President (Jan. 25, 1960), in VI FOREIGN RELATIONS OF THE UNITED STATES, 1958-1960, at 763, 763-64 (John P. Glennon & Ronald D. Landa eds., 1991) [hereinafter FRUS VOL VI].

46. Letter from President Eisenhower to Prime Minister MacMillan, Doc. 551 (July 11, 1960), in FRUS VOL VI, *supra* note 45, at 1000, 1003; see also Memorandum from the Assistant Sec'y of State for Inter-American Affairs (Mann) to the Sec'y of State, Doc. 594 (Oct. 19, 1960), in FRUS VOL. VI, *supra* note 45, at 1091, 1091-92 (noting that economic pressure will contribute to "dissatisfaction and unrest").

47. NOAM CHOMSKY, FAILED STATES: THE ABUSE OF POWER AND THE ASSAULT ON DEMOCRACY 113 (2006) (quoting President Kennedy).

48. Louis A. Pérez, Jr., *Fear and Loathing of Fidel Castro: Sources of U.S. Policy Toward Cuba*, 34 J. LATIN AM. STUD. 227, 242 (2002) (quoting Deputy Assistant Secretary of State, Lester D. Mallory); see also Memorandum from the Assistant Sec'y of State for Inter-American Affairs (Martin) to the Deputy Under Sec'y of State for Political Affairs (Johnson), Doc. 432 (Sept. 19, 1962), in FRUS VOL X, *supra* note 43, at 1068, 1068-69 [hereinafter Doc. 432] (predicting the peak of Cuban dissatisfaction with the Castro regime as a result of the weakened economy).

The logic of political isolation and economic sanctions was based on an effort to create adversity and hardship within Cuba to foster political disaffection and popular discontent, and thus create optimal conditions to produce internal rebellion. In fact, economic hardship did not result in sustained political opposition at home, but instead produced migration abroad.⁴⁹ With the exception of the years from 1959 to 1965—when immigration consisted principally of Cubans associated with the Batista regime, upper-middle-class Cubans who were mostly white, and individuals who feared retribution because of their actions as informers or because of their collaboration with the failed Bay of Pigs invasion—Cuban migration has followed discernable patterns that corresponded to U.S. policies.⁵⁰

Between 1965 and 1980, migration consisted of Cubans who left principally because of the economic hardship and desires to reunite with family in the United States primarily in South Florida and New Jersey.⁵¹ Scholars of this migration period described this cohort as “self-imposed exiles,”⁵² and “migrants who resembled the traditional immigrants who came to the United States in search of better economic opportunities”⁵³ as a result of changing, and for many,

49. See LOUIS A. PÉREZ, JR., CUBA: BETWEEN REFORM AND REVOLUTION 319 (3d ed. 2006) (noting that Cubans sought relief from economic pressures through migration).

50. See PATRICK SYMMES, THE BOYS FROM DOLORES: FIDEL CASTRO'S SCHOOLMATES FROM REVOLUTION TO EXILE 207 (2007) (describing the initial flight of Cubans as being the wealthy and people implicated in the previous government); see also Guillermo Bernal, *Cuban Families*, in ETHNICITY AND FAMILY THERAPY (Monica Goldrick et al. eds., 1982), reprinted in CUBANS IN THE UNITED STATES, *supra* note 1, at 135, 137 (explaining the different phases and classes of Cuban migration to the United States); Silvia Pedraza-Bailey, *Cuba's Exiles: Portrait of a Refugee Migration*, 19 INT'L MIGRATION REV. 4, 9 (1985) (stating that the first wave of Cuban departures consisted of the elite and wealthy); Alejandro Portes, *Naturalization and Voting Patterns of Cubans in the United States*, in CUBANS IN THE UNITED STATES, *supra* note 1, at 1, 7 (describing the cause and scope of Cuban immigration to the United States).

51. Bernal, *supra* note 50, at 137. Throughout this period, many Cubans were allowed to migrate through a number of negotiated migration processes. *Id.* From 1965–1973, Cuba opened the Camarioca port to allow Cuban *émigrés* to arrive by boat to pick up their relatives. *Id.* From 1965–1971, the United States and Cuba negotiated airlifts (“Freedom Flights”) from Havana to Miami to allow primarily family members but also those who were seeking economic opportunities, to migrate. *Id.*

52. John Scanlan & Gilbert Loescher, *U.S. Foreign Policy, 1959–80: Impact on Refugee Flow from Cuba*, 467 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 119 (1983) (referring to the early emigrants from Cuba as “[s]elf-imposed political exiles”).

53. Bernal, *supra* note 50, at 137; see also Robert L. Bach, *Socialist Construction and Cuban Emigration: Explorations into Mariel*, 15:2 CUBAN STUD. 19, 25 (1985) (stating that the economy in Cuba created social pressures which resulted in emigration); Blue, *supra* note 26, at 67–68; Scanlan & Loescher, *supra* note 52, at 116, 118, 125 (reviewing testimony that described Cuban *émigrés* after the first two years following the revolution as neither poor nor political, but rather frustrated by the lack of easily accessible consumer goods).

worsening political and economic conditions in Cuba. As the next section will describe, the economic conditions from which Cubans were escaping during these years were often exacerbated, if not created, by U.S. policy.

B. Migration, Fear-Mongering, and the Propaganda of the Cold War

The U.S.-Cuba policy had a larger purpose. In the throes of the Cold War, the United States sought to use Cuban migration to demonstrate to Africa, Asia, and Latin America that socialist systems could not adequately provide for their people.⁵⁴ The spectacle of tens of thousands of Cubans in flight from their homeland made for good propaganda. The United States also used migration to weaken the Cuban government from within. Additionally, the United States encouraged the exodus of professional and skilled workers from Cuba to create a “brain drain”⁵⁵ that would sap Cuba of those individuals with knowledge and needed abilities while positioning the United States as a symbol of the “gateway to freedom.”⁵⁶ By promoting migration, the United States hoped to gain control of a cohort of exiles and put them to use in carrying out covert operations, sabotage, and sowing fear amongst Cubans in order to turn world opinion against Cuba.

United States documents declassified in 1996 reveal the importance of migration in service of efforts to bring down the Cuban government.⁵⁷ Plans were made to produce “Cuban refugees and

54. See 2 THE WORLD BANK: ITS FIRST HALF CENTURY 207–08 (Devesh Kapur et al. eds., 1997) (noting foreign policy decisions formulated to concerns that third world countries would succumb to socialist influences); Pérez, *supra* note 48, at 239 (describing U.S. concerns about containing communism and maintaining influence in these areas).

55. Pérez, *supra* note 48, at 249.

56. 107 CONG. REC. A6111 (Aug. 7, 1961) (statement of Rep. Hale Boggs) (quoting William S. White, *How to Put Squeeze on Castro—United States Considering Economic Blockade, Permanent Resettlement of Refugees*, WASH. EVENING STAR, Aug. 7, 1961, which Rep. Boggs had entered into the record); see, e.g., Felix Masud-Piloto, *Cuba: Colonizers, Slaves, Exiles, and Refugees in Cuban History*, in MIGRATION AND IMMIGRATION: A GLOBAL VIEW 53, 58 (Maura I. Toro-Morn & Marixsa Alicea eds., 2004) (describing the scope and impact of the Cuban Refugee Program); Memorandum from the Chief of Operations, Doc. 399 (Aug. 31, 1962), in FRUS VOL X, *supra* note 43, at 976, 991 [hereinafter Doc. 399] (encouraging the exodus of skilled labor).

57. See, e.g., Memorandum from the Dir. of the U.S. Info. Agency (Murrow) to Dir. of Cent. Intelligence McCone, Doc. 240 (Dec. 10, 1962), in XI FOREIGN RELATIONS OF THE UNITED STATES, 1961–63, CUBAN MISSILE CRISIS AND AFTERMATH 605, 605 (David S. Patterson et al. eds., 1996), available at <http://history.state.gov/historicaldocuments/frus1961-63v11/d240> (discussing the use of radio broadcasts and economic pressure as a means to turn the Cubans against their government); Priority Operations Schedule for Operation Mongoose, Doc. 338 (May 17, 1962), in FRUS VOL X, *supra* note 43, at 810,

defectors as dramatic witnesses against the Castro-Communist regime” in Cuba and in the Western Hemisphere.⁵⁸ Other projects sought to produce an exile force that the United States could control for purposes of disseminating propaganda materials which would be delivered to them by the CIA in order to “disaffect the Cuban people.”⁵⁹ Once Cubans arrived in the United States, the CIA planned to cultivate certain groups for the purpose of creating dissent inside Cuba.⁶⁰ The State Department plotted to infiltrate Cuban migrant groups who would in turn encourage and engage in acts of sabotage, “creat[e] and nurtur[e]” political opposition, and “encourage resistance elements inside Cuba.”⁶¹

One of the most politicized efforts to encourage Cuban migration known as the “Pedro Pan Operación” (“Peter Pan Operation”), targeted families with young children.⁶² In the fall of 1960, a CIA-sponsored radio station broadcasted reports alleging that the Cuban government planned to remove children from their parents for purposes of indoctrination and military training.⁶³ With

812 [hereinafter Doc. 338] (noting the importance of controlling migration for the purpose of influencing activities within Cuba).

58. Doc. 338, *supra* note 57, at 814. In this memorandum, the U.S. government candidly admits that it is the “task” of the CIA to produce defectors. *Id.* The government also admits its plans to “[e]ncourage and exploit the defection of Cuban diplomats,” to “expand the delivery of propaganda material into Cuba,” and to “disaffect the Cuban people.” Doc. 399, *supra* note 56, at 978, 982. Additionally, the government planned to engage in “psychological propaganda” against Cuba. Doc. 338, *supra* note 57, at 813–14. The subversive nature of these plans was underscored by the very fact that the CIA was tasked with producing the defectors. *See id.* at 814.

59. Doc. 399, *supra* note 56, at 982.

60. *See supra* notes 43–45 and accompanying text.

61. Doc. 432, *supra* note 48, at 1070; Doc. 338, *supra* note 57, at 814.

62. MARÍA DE LOS ANGELES TORRES, *THE LOST APPLE: OPERATION PEDRO PAN, CUBAN CHILDREN IN THE U.S., AND THE PROMISE OF A BETTER FUTURE* 23 (2003) [hereinafter TORRES, *THE LOST APPLE*] (describing Operation Peter Pan as an ideological struggle to control children in Cuba as a means to influence the U.S. battle against Cuban communism).

63. *See id.* at 67–69, 89 nn.8–10 (recounting the participation of Esso Standard and Shell Oil, the Catholic Welfare Bureau, and the State Department); *see also* SANFORD J. UNGAR, *FRESH BLOOD: THE NEW AMERICAN IMMIGRANTS* 201 (1998) (describing actions by the State Department and various charities that assisted in getting children out of Cuba). A number of corporations, including those whose interests had been nationalized in Cuba, participated in the initiative along with the Catholic Church and the U.S. State Department. *See, e.g.*, María de los Angeles Torres, *Elián and the Tale of Pedro Pan*, *NATION*, Mar. 27, 2000, at 21 [hereinafter Torres, *Elián and the Tale of Pedro Pan*] (noting a highly irregular grant of power to the executive director of the Miami Catholic Welfare Bureau, Father Bryan Walsh); Jean Abreu, ¡No Te Dejes Quitar A Tu Hijo! Operation Pedro Pan and the Cuban Children’s Program 9 (Apr. 2008) (unpublished Honors Thesis, Duke University), available at <http://dukespace.lib.duke.edu/dspace/>

deliberate intent to alarm parents with false information, the radio broadcasts announced that children would be removed according to newly enacted laws and instructed parents to take their children to churches to await further instructions.⁶⁴ Families were told that their children would receive scholarships to study in the United States.⁶⁵ As a result, an estimated 14,000 Cuban children from mostly white and middle class families were relocated to camps, foster homes, orphanages, and other institutions throughout the United States.⁶⁶ Children were separated from siblings and were often cut off from families, who were denied permission to visit them.⁶⁷ Many endured abusive conditions.⁶⁸ One woman, who suffered from her interactions with terrified children who repeatedly called for their mothers who remained in Cuba, described the devastating effects of the operation.⁶⁹ From the perspective of the Cold War politics, however, the operation was a success. As María de los Angeles Torres, a Pedro Pan herself, writes: “[t]he image of helpless children fleeing the island captured the imagination of anti-Communists throughout the world,” adding that “[i]f the battle over the children’s minds in the 1960s had been a way to contest the country’s political future, interpreting the

bitstream/10161/837/3/Abreu_Honors_Thesis.pdf (noting the participation of Esso Standard Oil and Pan American Airlines).

64. See TORRES, THE LOST APPLE, *supra* note 62, at 89, 91. The CIA coordinated its efforts with Special Operations in the Department of Defense to disseminate propaganda not only in Cuba, but throughout Latin America in hopes of creating political divisions within the Western Hemisphere. *Id.* at 90–91.

65. See *id.* at 88, 158–59 (stating that many Cubans were promised scholarships to study in the United States as a means to disguise Operation Pedro Pan from Cuban officials). Many teenagers who were anticipating scholarship opportunities were devastated to learn there were none and instead endured life in military barrack-type conditions. *Id.* at 159, 170–71, 180–82.

66. Mariana Ortega, *Exiled Space, In Between Space: Existential Spatiality in Ana Mendieta’s Siluetas Series*, 7 PHIL. & GEOGRAPHY 25, 29 n.14 (2004); cf. Emron Esplin, *Cuban Types, Distorted Memory, and a Return to Cuba in Cristina Garcia’s The Aguero Sisters*, 20 CONFLUENCIA 83, 86 n.3 (2005) (investigating the effects of Operation Pedro Pan on Cuban youths in the United States and in Cuba). Some parents were further motivated to choose this course based on the assumption that they would then have an easier time migrating to rejoin their children. Torres, *Elián and the Tale of Pedro Pan*, *supra* note 63, at 21 (stating that half the Cuban children arriving in America lived with relatives and the other half were placed in the foster care system); see also Abreu, *supra* note 63, at 7 (describing how false information from the CIA and Cuban parents’ fear of the Cold War resulted in thousands of Cuban parents desperately sending their children to the United States without knowing where they would stay, who would care for them, or how long the separation would be).

67. See, e.g., TORRES, THE LOST APPLE, *supra* note 62, at 157, 162.

68. See, e.g., *id.* at 170–71 (detailing poor living conditions, cruel working situations, and allegations of sexual abuse).

69. See *id.* at 157 (reporting the woman as saying that “her heart could not take it”).

exodus became a way to control its history.”⁷⁰ Decades later, narratives revealing “The Dark Side of Pedro Pan” would reveal the role of the CIA in the operation.⁷¹ These narratives illustrate the United States’ active effort to encourage Cuban migration, an effort that continued throughout the decade.

C. *Open Door Policy: Migration and the Cuban Adjustment Act*

Perhaps no measure set in such sharp relief the politics of migration as the Cuban Refugee Act of 1966.⁷² The United States received the increasing Cuban migration by adopting an open-door policy best described as exceptional. Most of the 165,000 Cubans who came to the United States up to 1966 entered without immigrant visas, without prior security checks, and without proof of guaranteed employment in the United States.⁷³ To accommodate them, Congress adopted the Cuban Refugee Act (“Cuban Adjustment Act”).⁷⁴ The Cuban Adjustment Act allowed Cubans to apply for permanent residency one year after arrival without having to leave the country to apply—a privilege, as noted by Ruth Wasem, that has been afforded to no other nationality.⁷⁵ The Act waived permanent resident application fees for Cuban refugees.⁷⁶ In addition to the privileged application of the immigration laws, federally funded centers and

70. *Id.* at 93, 228–29.

71. See UNGAR, *supra* note 63, at 201 (“[T]he *Miami Herald* and other publications . . . have begun only recently to write about ‘the dark side of Pedro Pan,’ raising questions about the morality of having encouraged the separation of children from parents for reasons dictated by U.S. foreign policy.”). Other U.S. offenses targeted at children were uncovered, including efforts to sabotage food distribution and taint milk delivered to school with cement powder. Abreu, *supra* note 63, at 52 (describing the revelations of Verne Lyon who had been recruited to work for the CIA in 1962).

72. Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255n (2006)) (“The Act”). The Act was amended by the Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 9, 90 Stat. 2703, 2707 (codified as amended at 8 U.S.C. § 1153 (2006)). The Immigration and Nationality Act Amendments exempted those who could obtain lawful permanent resident status under the Act from numerical limits of the preference system. *Id.* The Act was also amended by the Refugee Act of 1980, Pub. L. No. 96-212, § 207, 94 Stat. 102, 103 (codified as amended at 8 U.S.C. § 1153 (2006)). The Refugee Act reduced the length of the physical presence requirement from two years to one year. *Id.*; see also RUTH ELLEN WASEM, CONG. RESEARCH SERV., CUBAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS 2 (2009), available at <http://www.fas.org/sgp/crs/row/R40566.pdf> (discussing the Cuban Adjustment Act of 1966 and subsequent amendments).

73. Scanlan & Loescher, *supra* note 52, at 118 (comparing the exceptional treatment afforded Cubans as compared with the Hungarians also fleeing a communist regime).

74. See *supra* note 72 and accompanying text.

75. See WASEM, *supra* note 72, at 2.

76. *Permanent Resident Application Fees for Cuban Refugees Waived*, 55 DEP’T ST. BULL. 967, 967 (1966).

services—such as housing, counseling, education, training, and work opportunities—expanded in South Florida to assist specifically new Cuban residents.⁷⁷

Legislators defended the exceptional treatment of Cubans, who were first paroled into the United States without visas and subsequently allowed to adjust status in an unusually short period of time, without regard to quotas, and with blanket fee waivers.⁷⁸ Some argued that there was no consulate post in Cuba to which the Cubans could apply for visas, although the decision to close the embassy was unilaterally made by the U.S. government.⁷⁹ Others argued that the normal residency adjustment process by which noncitizens without immigrant visas were required to leave and apply at a consulate outside of the United States would be “costly and inconvenient” for Cubans.⁸⁰

Several legislators made efforts to extend the Act to similarly situated immigrants from other countries. Some legislators unsuccessfully attempted to include exiles from the Dominican Republic who were fleeing the political instability of the post-Trujillo years.⁸¹ Others endeavored to add amendments that would grant similar adjustment benefits to immigrants from the Western Hemisphere in the United States and whose petitions for adjustment were pending on December 1, 1965.⁸² These amendments were rejected.⁸³ Legislators argued, unsuccessfully, that the financial burden of leaving the United States to apply for adjustment of status

77. See, e.g., 108 CONG. REC. 8380–81 (1962) (statement of Sen. Philip Hart regarding the “Resettlement of Cuban Refugees,” detailing the federally funded types of assistance offered to Cubans); Bernal, *supra* note 50, at 137; Carlos Forment, *Caribbean Geopolitics and Foreign State-Sponsored Social Movements: The Case of Cuban Exile Militancy 1959–1979*, in CUBANS IN THE UNITED STATES, *supra* note 1, at 65, 71.

78. See *supra* notes 72–75 and accompanying text.

79. See Editorial Note, Doc. 2 (Jan. 3, 1961), in FRUS VOL X, *supra* note 43, at 2, 2, available at http://www.fas.org/irp/ops/policy/docs/frusX/01_15.html. On January 3, 1961, after receiving a request from the Cuban government to reduce the number of U.S. personnel in the embassy, President Eisenhower determined to completely break off diplomatic relations while simultaneously directing the Joint Chiefs of Staff to intensify efforts to invade Cuba. *Id.* (documenting that the Joint Chiefs of Staff were ordered to investigate ways to train Cuban refugees and expand the program to invade Cuba).

80. 112 CONG. REC. 25,468 (1966) (statement of Sen. Jacob K. Javitz); see also 112 CONG. REC. 22,915 (1966) (statement of Rep. William F. Ryan quoting Under Secretary George Ball) (describing the difficulty many Cubans have experienced in trying to apply for visas outside the United States).

81. See, e.g., 112 CONG. REC. 25,467 (1966) (statement of Sen. Edward Kennedy).

82. 112 CONG. REC. 22,920 (1966) (statement of Rep. Jacob H. Gilbert); see 112 CONG. REC. 22,915, 22,916 (1966) (statement of Rep. William F. Ryan).

83. 112 CONG. REC. 25,468 (Oct. 6, 1966).

was equally onerous on many Latin Americans and sought to “[put] the people of Latin America on an equal footing” with people of the rest of the world.⁸⁴

The legislative debates illuminated the degree to which the issue of Cuban migration served Cold War politics. Representative Feighan put it succinctly: “granting of permanent resident status would further American policy objectives: by further demonstrating the desire of the United States to play a full and sympathetic role as a country of asylum to refugees from communism.”⁸⁵ Representative Claude Pepper stated his support for the Act because Cubans showed opposition to the communist regime.⁸⁶ Similarly, Senator Philip Hart concluded that “we could find no more effective spokesmen to describe the destruction of freedom under Castro’s brand of communism.”⁸⁷ Precisely because Cubans could serve larger ends, they were the “special favorites” in the realm of immigration laws and policies.⁸⁸ The Cuban Adjustment Act served its purpose and then some. By the end of 1979, over 670,000 Cubans had migrated to the United States.⁸⁹ Because they were easily able to obtain permanent residency, Cubans naturalized at a faster rate than other immigrant groups and thus obtained political power more rapidly.⁹⁰ But the Act was not without consequences. Many families were traumatized by the prospect of settling in the United States without contact with family, and close relationships were disrupted.⁹¹ Parents were separated from children, brothers from sisters, and many were never to see grandparents, cousins, aunts, and uncles again. Additionally, families were not immune to the political conflicts occasioned by the nature of the Cuban revolution and the manipulation of the politics of exile engendered to facilitate U.S. Cold War interests.

D. From Open Door to Open Arms: Migration and the Mariel Boatlift

In addition to the Cuban Adjustment Act, there were other ways in which Cubans migrated to the United States. The Mariel exodus,

84. 112 CONG. REC. 22,915, 22,916 (1966) (statement of Rep. William F. Ryan).

85. 112 CONG. REC. 22,914 (1966) (statement of Rep. Michael A. Feighan).

86. 112 CONG. REC. 22,918 (1966) (statement of Rep. Claude Pepper).

87. 110 CONG. REC. 2918 (1964) (statement of Sen. Philip Hart).

88. Joyce A. Hughes, *Flight from Cuba*, 36 CAL. W. L. REV. 39, 39–40 (1999).

89. FELIX ROBERTO MASUD-PILOTO, *WITH OPEN ARMS: CUBAN MIGRATION TO THE UNITED STATES* 3 (1988).

90. Portes, *supra* note 50, at 2.

91. See Bernal, *supra* note 50, at 148–50 (giving examples of how families were negatively affected by migration).

which took place between April 1980 and October 1980, provides additional evidence of the politicization of migration by way of the continued efforts by the United States to manipulate conditions on the island and the favored treatment of Cuban immigrants once they reached U.S. soil.⁹² During this period, over 125,000 Cubans entered the United States.⁹³ This large-scale migration occurred after a period in the late 1970s in which some Cubans on the island were hijacking boats, at times at gunpoint, in order to force boat captains to take them to Florida where they were immediately paroled into the United States.⁹⁴ A series of dangerous attempts by Cubans to storm Latin American embassies followed the hijackings. The most notable incident occurred on April 1, 1980, when six Cubans seeking asylum crashed their bus through the gates of the Peruvian embassy in Havana, killing a Cuban guard and setting off turmoil and violence on the embassy grounds.⁹⁵ Weary of the U.S. government's refusal to treat the embassy incidents and hijackings as illegal acts of violence—a policy that appeared to encourage such acts even though Cuba had prosecuted U.S. hijackers who had flown U.S. planes to Cuba—the Cuban government declared the Port of Mariel open, and invited exiles to come by boat to transport their relatives to the United States.⁹⁶

The Mariel exodus must be further understood in its specific historical context. It followed a period of slow emigration and other important but momentary changes in U.S. policy. During the years of

92. Silvia Pedraza, *Cuba's Refugees: Manifold Migrations*, in 5 CUBA IN TRANSITION 311, 318 (Ass'n for the Study of the Cuban Econ. ed., 1995), available at <http://lanic.utexas.edu/la/cb/cuba/asce/cuba5/FILE26.PDF>.

93. *Id.*

94. SCHOULTZ, *supra* note 39, at 354.

95. MASUD-PILOTO, *supra* note 89, at 78–79; see RENNACK & SULLIVAN, *supra* note 41, at 285; SCHOULTZ, *supra* note 39, at 353–54; Lorena Barberia, *Remittances to Cuba: An Evaluation of Cuban and U.S. Government Policy Measures* 8 (Rosemary Rogers Working Paper Series, 2002), available at http://web.mit.edu/cis/www/migration/pubs/rrwp/15_remittances.pdf. The incident at the Peruvian embassy was not the first of its kind. Previous attempts by Cubans to force their way into Latin American embassies occurred as early as May 1979 and resulted in injuries to embassy employees and other Cubans. See SCHOULTZ, *supra* note 39, at 353–54.

96. MASUD-PILOTO, *supra* note 89, at 82–83 (describing the factors that led the Cuban government to open the Port of Mariel); SCHOULTZ, *supra* note 39, at 354–56 (“The United States encourages illegal departures from Cuba, the hijacking of boats, and it receives the hijackers almost as if they were heroes.” (quoting Fidel Castro)). The Immigration and Nationalization Service did the best that it could to prosecute boat owners who traveled to Cuba to bring Cubans to Florida. There were a few unsuccessful attempts, but the policy was to ignore these law breakers. *Id.* at 356; see, e.g., Pollgreen v. Morris, 770 F.2d 1536, 1538 (11th Cir. 1985); United States v. Anaya, 509 F. Supp. 289, 289–90 (S.D. Fla. 1980).

the Carter presidency (1977–1981), and for the first time since the Cuban revolution, the United States had indicated a willingness to discuss normalization of relations with Cuba without preconditions.⁹⁷ Although the United States did not lift the embargo in 1977, the Carter administration ended restrictions on travel to Cuba, permitted limited remittances, and signed a number of bilateral agreements to signal possibilities for reconciliation.⁹⁸

In 1978, the Cuban government welcomed exiled families previously barred from visiting Cuba.⁹⁹ At the invitation of the Cuban government, exiles entered into a series of talks, known as “the *diálogo*,” for the purpose of determining how best to accomplish family reunification.¹⁰⁰ Although many who entered into the dialogue were threatened with violence, and in some instances suffered extreme violence and even death by hard-line Cuban-American exiles opposed to any form of reconciliation, for many, the desire to reunite with families prevailed over fear and intimidation.¹⁰¹ Cuban Americans quickly took advantage of the new opening, and within a year’s period, over 100,000 families paid visits to their loved ones and communities.¹⁰² Reunification efforts also led to the establishment of organizations whose goals were to continue to advocate for the needs of binational families.¹⁰³

With the influx of Cuban-American visitors and the dollars and goods they introduced into the island, conditions for many families improved.¹⁰⁴ Relatives could not, however, sustain the Cuban economy, and indeed, economic sanctions continued to take their

97. MASUD-PILOTO, *supra* note 89, at 71.

98. MARK P. SULLIVAN, CONG. RESEARCH SERV., CUBA: ISSUES FOR THE 111TH CONGRESS 2, 3 (2009), available at <http://www.fas.org/sgp/crs/row/R40193.pdf> (noting that President Carter amended the Office of Foreign Assets Control (“OFAC”) regulations allowing travel from 1977 through 1982 when the restrictions were reimposed again); MASUD-PILOTO, *supra* note 89, at 71.

99. MARÍA CRISTINA GARCÍA, HAVANA USA: CUBAN EXILES AND CUBAN AMERICANS IN SOUTH FLORIDA, 1959–1994, at 47 (1996).

100. *Id.*

101. *Id.* at 49–52 (noting that this was particularly true for families of political prisoners, over four thousand of whom were released).

102. Bernal, *supra* note 50, at 152–53.

103. *U.S. Policy and the Future of Cuba: The Cuban Democracy Act and U.S. Travel to Cuba: J. Hearing Before the H. Subcomms. on Economic Policy, Trade, and Environment; Western Hemisphere Affairs; and International Operations of the Comm. on Foreign Affairs*, 103d Cong. 56, 70 (1993) (statement of Alicia M. Torres, Ph.D., Executive Director of the Cuban-American Committee Research & Education Fund) (describing the creation of the Cuban-American Committee Research and Education Fund following the *diálogo*).

104. GARCÍA, *supra* note 99, at 52.

toll.¹⁰⁵ These were times of increasing tension in Cuba as a result of exposure to U.S. consumer goods (the “blue jean revolution”).¹⁰⁶ Cubans were introduced to the proposition, if not myth, of “material abundance” on the other side of the Florida Straits.¹⁰⁷ These factors, together with additional encouragement from the United States, set the stage for the Mariel phenomenon.¹⁰⁸

Notwithstanding the changing forces that affected the Mariel migration, there were important consistencies with regard to the *Marielitos*¹⁰⁹ in the realm of U.S. policy and its treatment of Cuban migration. First, the U.S. government continued its strategy of manipulation of events in Cuba that encouraged the mass exodus. Following the tragic incident at the Peruvian embassy, the Carter administration not only failed to condemn the violence, on the contrary, it applauded it. In response to the Mariel exodus that ensued, Vice President Walter Mondale, echoing earlier sentiments on the propaganda value of Cuban migration, stated, “[t]here is no better proof of the failure of Castro’s revolution than the dramatic exodus which is currently taking place.”¹¹⁰ President Carter responded to the crisis by granting refugee status to all those who entered the Peruvian embassy and promising to “continue to ‘provide an open heart and open arms for the tens of thousands of refugees seeking freedom from Communist domination’ ” and from economic deprivation, brought about primarily by Fidel Castro and his government.¹¹¹

105. *Id.* at 52–53.

106. *See id.* at 53–54 (describing cultural changes in Cuba as a result of increased contact with Cuban *émigrés*); Scanlan & Loescher, *supra* note 52, at 135 (describing the impact of visits on Cubans who never left and who were impressed by the wealth and lifestyles of the visitors from the United States); *see, e.g.*, Bach, *supra* note 53, at 37; Blue, *supra* note 26, at 69; Barberia, *supra* note 95, at 8–9.

107. *See* Pérez, *supra* note 4, at 12, 14 (critiquing the U.S. manufactured “myth of abundance” used to lure Cubans to the United States).

108. *Id.* at 12–14; Jorge Cañas Martínez, *The Cuban Immigrant of 1980: An Exploration of Psychosocial Issues in the Migration Experience*, in CUBANS IN THE UNITED STATES, *supra* note 1, at 181, 181–82.

109. The term *Marielitos* refers to those Cubans who arrived in the United States during the period between April 1980 and October 1980. *See* PAUL ALLATSON, KEY TERMS IN LATINO/A CULTURAL AND LITERARY STUDIES 155 (2007).

110. *Cuban Refugees, White House Statement*, 80 DEP’T ST. BULL. 68, 68 (1980).

111. MASUD-PILOTO, *supra* note 89, at 83 (quoting President Jimmy Carter). Carter was also facing re-election and was motivated by the concerns of the Cuban-American community who, despite some level of disdain for the *Marielitos*, would not accept a termination of the open-door immigration policy Cubans had enjoyed. Scanlan & Loescher, *supra* note 52, at 136.

Second, the United States granted *Marielitos*, like their predecessors, exceptional legal status. At the time of the exodus, the United States had passed the Refugee Act of 1980, which placed a quota on “refugees” from Cuba.¹¹² Cubans were no longer allowed blanket entrance as refugees. They were to be treated in a similar manner as any other arriving immigrants seeking asylum, that is, they were subject to individual case review according to asylum standards and procedures and subject to detention while awaiting determinations in their case.¹¹³

Though the Refugee Act of 1980 was intended to reduce the arbitrary and political nature of the executive’s parole power, the President continued to grant such relief to Cubans, who continued to enter the United States notwithstanding the fact that the U.S. government had spurned the idea that the great majority of Cuban immigrants were eligible for asylum.¹¹⁴ Moreover, a subsequent amendment to the Immigration and Nationality Act extended the special privileges that encouraged migration from Cuba over all other countries.¹¹⁵ These entrants were not only allowed to adjust their status to lawful permanent residents outside of regular legal processes but were also granted access to other federal statutory relief entitling them to social services and benefits not available to other immigrants.¹¹⁶ The Mariel exodus episode illuminated the dilemma created by the United States’ politicized migration policies and laws that served U.S. Cold War politics.

112. Refugee Act of 1980, Pub. L. No. 96-212, § 207, 94 Stat. 102, 103 (codified as amended at 8 U.S.C. § 1153 (2006)); see Richard A. Boswell, *Throwing Away the Key: Limits on the Plenary Power*, 18 MICH. J. INT’L L. 689, 689 (1997) (reviewing FELIX MASUD-PILOTO, *FROM WELCOMED EXILES TO ILLEGAL IMMIGRANTS: CUBAN MIGRATION TO THE U.S., 1959–1995* (1996) and MARK S. HAMM, *THE ABANDONED ONES: THE IMPRISONMENT AND UPRISING OF THE MARIEL BOAT PEOPLE* (1995)).

113. Hughes, *supra* note 88, at 56.

114. See MASUD-PILOTO, *supra* note 89, at 84, 86. The President was forced to grant somewhat similar relief to a group of Haitians who had migrated because the discrepancy in treatment between the two nationalities was too great to continue. Boswell, *supra* note 112, at 689 n.3. A separate status termed “Cuban-Haitian Status” was enacted by executive order to deal with the admission of Cubans and Haitians during this period. *Id.*

115. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 202, 100 Stat. 3359, 3404 (codified as amended at 8 U.S.C. § 1101 (2006)).

116. The exception here was a short-lived category of Haitian entrants. See WASEM, *supra* note 72, at 5–6 (referencing the Immigration Reform and Control Act and Title V of the Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, § 501, 94 Stat. 1799, 1809); Boswell, *supra* note 112, at 697–98.

E. Maintaining Pressure, United States-Cuba Policy, and the Cuban-American National Foundation

As hostilities between Havana and Washington continued unabated and ongoing efforts to use migration as a political means failed to achieve U.S. purposes, the United States sought additional ways to weaken Cuba. Once again, the government looked for ways to control, if not exploit, the Cuban-American community and the identity of exile for these purposes.¹¹⁷ In 1981, Cuban Americans in Miami, encouraged and supported by the Reagan administration, created the Cuban-American National Foundation (“CANF”) to function as a Cuban-American political action committee modeled after the American Israel Public Affairs Committee, the pro-Israel lobbying group.¹¹⁸ The group was conceived in the context of larger global concerns, specifically regarding the Western Hemisphere and what U.S. policy makers perceived as growing threats to U.S. political and economic domination of the region.¹¹⁹ The founding of CANF was linked to President Reagan, Republican Party operatives, and CIA veterans who came to appreciate the efficacy of a fiercely conservative Cuban-American lobby to provide domestic impetus to U.S. foreign policy and “popularize the Reagan administration’s policies.”¹²⁰

CANF wielded significant influence in Congress through sizeable campaign donations targeted particularly at Senate candidates with influence in matters of foreign policy.¹²¹ CANF members were appointed by the Reagan administration to United Nations committees as part of the government’s efforts to globalize the U.S. purpose of and means for isolating Cuba and fostering economic

117. See *supra* Parts II.A., II.B.

118. See SCHOULTZ, *supra* note 39, at 370; Damián J. Fernández, *From Little Havana to Washington, D.C.: Cuban-Americans and U.S. Foreign Policy*, in *ETHNIC GROUPS AND U.S. FOREIGN POLICY* 115, 125 (Mohammed E. Ahrari ed., 1987); *Introduction, History as Prologue: Cuba Before the Special Period*, in *A CONTEMPORARY CUBA READER* 1, 20 (Philip Brenner et al. eds., 2008) [hereinafter *CUBA READER*].

119. MARÍA DE LOS ANGELES TORRES, *IN THE LAND OF MIRRORS: CUBAN EXILE POLITICS IN THE UNITED STATES* 114–15 (1999) (describing the directions from Roger Fontaine, a principal advisor to President Reagan on Latin America on the National Security Council, to create such a lobby based on a report that cited concerns about Soviet and Cuban influence in the region).

120. PATRICK J. HANEY & WALT VANDERBUSH, *THE CUBAN EMBARGO: THE DOMESTIC POLITICS OF AN AMERICAN FOREIGN POLICY* 35–36 (2005); see Fernández, *supra* note 118, at 124 (noting the Cuban-American National Foundation’s (“CANF”) strategic lobbying and contributions to politicians with foreign policy influence).

121. See HANEY & VANDERBUSH, *supra* note 120, at 87.

turmoil on the island.¹²² In turn, CANF received government contracts, funding for projects related to migration, and support for its propaganda efforts through control of Radio Marti.¹²³

CANF's main purpose was to gain political influence over the Cuban-American community in service of U.S. policies. It opposed a continuation of "the *diálogo*" and attacked Cuban Americans who encouraged negotiations between the United States and Cuba.¹²⁴ Although it was not the most extreme of the exile groups, its privileged relationship to the Reagan administration gave it legitimacy and resources with which to impose its views.¹²⁵ Indeed, Human Rights Watch condemned the climate of fear, intimidation, and suppression of speech fostered by CANF.¹²⁶

CANF functioned as "a product of the North American pathology . . . an instrument—not an instigator—of policy."¹²⁷ By virtue of its ties to policy makers, CANF wielded power in an attempt to shape exile politics. It succeeded in obtaining prohibitions and restrictions on accords and agreements designed to facilitate family contact, claiming that these relationships served to support Castro.¹²⁸ It was with CANF support that in 1982, President Reagan reimposed travel restrictions that the Carter administration had lifted.¹²⁹ Families

122. See SCHOULTZ, *supra* note 39, at 415 (describing the work of CANF in producing a bill of particulars against Cuba and bringing it before the U.N. General Assembly); TORRES, *supra* note 119, at 131 (noting the appointment of a CANF operative as U.S. Representative to the U.N. Human Rights Commission in order to exert pressure on Cuba); see also HANEY & VANDERBUSH, *supra* note 120, at 39 (noting the relationship between Otto Reich and CANF); Mia Taylor Valdes, *Double Standard for Human Rights*, PROGRESSIVE, Aug. 1992, at 20, 21, reprinted in THE UNITED NATIONS' ROLE IN WORLD AFFAIRS 192 (Donald Altschiller ed., 1993) (noting Otto Reich's position as co-chair of U.S. Mission to the U.N. Human Rights Commission).

123. See, e.g., HANEY & VANDERBUSH, *supra* note 120, at 40–42; SCHOULTZ, *supra* note 39, at 370, 414; TORRES, *supra* note 119, at 146; Fernández, *supra* note 118, at 126.

124. See Sallie Dinkel, *Exile's End*, TOWN & COUNTRY, July 1993, at 83, 87.

125. See Carlos Forment, *Caribbean Geopolitics and Foreign State-Sponsored Social Movements: The Case of Cuban Exile Militancy 1959–1979*, in CUBANS IN THE UNITED STATES, *supra* note 1, at 65, 84 (arguing that Cuban-American political consciousness was shaped primarily in the United States, not in Cuba).

126. See REESE ERLICH, DATELINE HAVANA: THE REAL STORY OF U.S. POLICY AND THE FUTURE OF CUBA 46 (2009).

127. LOUIS A. PÉREZ, JR., CUBA IN THE AMERICAN IMAGINATION: METAPHOR AND THE IMPERIAL ETHOS 273 (2008).

128. TORRES, *supra* note 119, at 143. CANF would change its position on this over time. See *infra* Part III.C.

129. MARK P. SULLIVAN, CONG. RESEARCH SERV., CUBA: U.S. RESTRICTIONS ON TRAVEL AND REMITTANCES 3 (2007), available at <http://fpc.state.gov/documents/organization/83002.pdf>.

were now burdened with the requirement of a special license to travel to Cuba.¹³⁰

The Cuban-American community, while associated with the politics of exile, has long lost its monolithic character, and its members have demonstrated divergent views on Cuba and U.S.-Cuba relations.¹³¹ CANF set the stage for the post-Cold War struggle between the political economy of globalization and the transcendent desires of the binational Cuban-American family to maintain ties and support.

III. SANCTIONS AND THE POST-COLD WAR GLOBAL ECONOMY, 1990-PRESENT

A. *Torricelli, Helms-Burton, and the Migration Crisis of the 1990s*

In the early 1990s, a dramatic global shift occurred. The collapse of the Soviet Union and the socialist bloc signaled Cuba's loss of trading partners. In the aftermath of the Cold War, Cuba plunged into a deep economic crisis that threatened the survival of the Castro government.¹³² Cuba responded by seeking to engage with other countries and establish and improve international relationships—including its relationship with the United States—in its efforts to seek new economic ties and foreign investors.¹³³ The government also introduced political reforms as well as domestic economic adaptations as a means to weather the crisis and fend off internal collapse.¹³⁴

130. Cuban Assets Control Regulations, 47 Fed. Reg. 32,060, 32,060 (July 23, 1982) (codified as amended at 31 C.F.R. § 515.560(b) (2009)).

131. See generally Sung-Chang Chun & Guillermo Grenier, *Anti-Castro Political Ideology Among Cuban Americans in the Miami Area: Cohort and Generational Differences*, LATINO RES. NOTRE DAME, Nov. 2004, at 1, available at <http://latinostudies.nd.edu/pubs/pubs.php?type=91&sterms=Castro&stype=0&Submit=Search> (explaining that while an anti-Castro ideology still pervades the Cuban-American population, a shift in approach has allowed more mainstream elements of the community to adopt a more conciliatory attitude).

132. See *supra* note 5 for a description of Cuba's "Special Period."

133. See Robert S. Gelbard, *U.S. Policy Toward Cuba*, 3 DEP'T ST. DISPATCH 312, 313 (1992); James Petras & Morris Morley, *Clinton's Cuba Policy: Two Steps Backward, One Step Forward*, 17 THIRD WORLD Q. 269, 280 (1996).

134. CUBA IN THE INTERNATIONAL SYSTEM 1, 5 (Archibald R.M. Ritter & John M. Kirk eds., 1995). The Cuban government legalized the use of dollars and granted Cubans access to dollar-only stores. The government authorized farmers and artisans to establish free markets, and liberalized self-employment opportunities. See SULLIVAN, *supra* note 98, at 13. In 1994, in response to U.S. prohibitions on foreign trade with Cuba in dollar exchange, Cuba announced that dollars would need to be exchanged for convertible pesos. *Id.*

It was in this changing global setting that the United States seized new opportunities to further increase pressure on Cuba by enacting the Cuban Democracy Act of 1992 (“Torricelli Act”)¹³⁵ for the stated purpose of “wreak[ing] havoc on the island.”¹³⁶ In response to Cuban efforts to reintegrate itself into the global economy, the Torricelli Act sought to assume extraterritorial authority and prohibited third-country subsidiaries of U.S. companies from doing business with Cuba.¹³⁷ It authorized the President to impose sanctions, including cutting aid and debt relief on any country that traded with or assisted Cuba.¹³⁸

During the next four years, Cuba continued to expand market-style economic reforms, establish trade relationships with countries outside of the former Soviet bloc, and open its markets to foreign investors.¹³⁹ Although the Clinton administration acknowledged the reforms, the administration nonetheless dismissed them as a sign of weakness—proof that the embargo was working and that more of the same would deliver the coup de grace to the struggling Cuban government.¹⁴⁰ Thus, in pursuit of never-ending hopes of accelerating the Cuban government’s demise, and in response to further deteriorating relationships between the United States and Cuba, Congress enacted yet another embargo-related statute, the Cuban Liberty and Democratic Solidarity Act of 1996 (“Helms-Burton Act”).¹⁴¹

135. Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (codified at 22 U.S.C. §§ 6001–6010 (2006)).

136. ERLICH, *supra* note 126, at 106 (noting the statement made by the bill’s author, Rep. Robert Torricelli).

137. Cuban Democracy Act of 1992 § 6003(a); *see* Gelbard, *supra* note 133, at 317 (noting concerns that the law demanded other countries similarly embargo Cuba).

138. Cuban Democracy Act of 1992 § 6003(b)(1). Any vessel known to be engaging in trade with Cuba was barred from loading or unloading freight at any place in the United States. § 6005. The statute included U.S. territories and “possessions.” § 6005(b)(4)(B).

139. *See supra* note 133 and accompanying text.

140. *See* CUBA IN THE INTERNATIONAL SYSTEM, *supra* note 134, at 5 (noting that the Clinton administration misread the developments in Cuba); Petras & Morley, *supra* note 133, at 275 (“‘Everything they’ve done recently are things we’ve been advocating. That’s good, but our question is what’s next?’” (quoting a State Department official)).

141. Pub. L. No. 104-114, 110 Stat. 785 (codified as amended at 22 U.S.C. §§ 6021, 6021–6091 (2006)). Among other provisions, the Act required the ouster of the Castro brothers as a condition precedent to normalization of relations. § 6065 (a)(7). It also included provisions known as “Track Two,” which included “humanitarian aid” to Cuba and support for “democracy-building efforts.” §§ 6039, 6061. Despite its claims to improve telephone communication and mail services, the Act accomplished neither because it prohibited payment of revenues for services to Cuba. *See Cuban Democracy Act of 1992; And Withdrawal of MFN Status from the Federal Republic of Yugoslavia, Hearings Before the Subcomm. on Trade of the H. Comm. on Ways and Means*, 102d Cong. 80–81 (1992)

The Helms-Burton Act expanded restrictions, added new sanctions, and codified all aspects of the embargo, thereby prohibiting the executive branch from easing the restrictions without an act of Congress.¹⁴² The new law expanded the extraterritorial reach of the embargo and prohibited the importation of any products, including goods “made or derived in whole or in part of any article which is the growth, produce, or manufacture of Cuba.”¹⁴³ Congress instructed the executive branch to exercise its authority to prevent Cuba’s membership in international financial institutions and the Organization of the Americas.¹⁴⁴ International financial institutions that engaged in financial transactions with Cuba would suffer a forfeit of payment by the United States.¹⁴⁵ As a result, the lack of access to international financing severely limited Cuba’s integration into the global economy.¹⁴⁶

After the Torricelli and Helms-Burton Acts, the embargo operated at full throttle, despite admissions by the U.S. government that the threat of communism in the region was nonexistent.¹⁴⁷ The extraterritorial provisions were effective. Countries dependent on U.S. aid and corporations engaged in U.S. trade, fearful of reprisals, pulled out of Cuba.¹⁴⁸ The logic of U.S. policy remained constant: to

(statement of Alicia Torres, Ph.D., Executive Director of the Cuban-American Committee Research & Education Fund); Phillip Brenner, Patrick J. Haney & Walter Vanderbush, *The Confluence of Domestic and International Interests: U.S. Policy Toward Cuba, 1998–2001*, 3 INT’L STUD. PERSP. 192, 194 (2002) (describing a new migration crisis and the actions by an extreme exile group known as “Brothers to the Rescue,” which dropped leaflets over Havana and violated Cuban airspace, provoking Cuba to shoot down two of the planes in international waters).

142. Helms-Burton Act §§ 6021, 6032(h).

143. § 6040.

144. §§ 6034, 6035.

145. § 6034. In 2004, the United States fined UBS, Switzerland’s largest bank, in the amount of \$100 million for trading with Cuba in dollars. See Marc Frank, *Will Cuba Be Allowed to Use Dollars Again? Cuba Dollar Tax Reveals Complexity of Trade Embargo*, ABCNEWS.COM, May 18, 2009, <http://abcnews.go.com/International/Story?id=7595000&page=>.

146. See Mauricio de Miranda Parrondo, *The Cuban Economy: Amid Economic Stagnation and Reversal of Reforms*, in CUBA READER, *supra* note 118, at 128, 132–33 (describing such lack of access as a principal factor that prevents the Cuban economy from adequate development); Will Weissert, *Cuba Says US Should Lift Embargo Unconditionally*, ABCNEWS.COM, Sept. 16, 2009, <http://abcnews.go.com/International/wireStory?id=8591409> (reporting figures provided by a Cuban official that U.S. trade sanctions have cost Cuba \$96 billion in economic damages).

147. See Petras & Morley, *supra* note 133, at 269, 271.

148. See *The Implementation of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996: Hearing Before the Subcomm. on the Western Hemisphere of the H. Comm. on International Relations*, 104th Cong. 61–65 (1996) (statement of the Cuban

deepen economic hardship among Cubans who were now especially vulnerable in the post-Soviet environment, and thereby generate popular discontent inside Cuba and—the Americans hoped—uprisings against the Cuban government. The embargo laws and regulations were successful, particularly with regard to the impact on Cuban families. Families suffered nutritional deficits and limited access to medicines.¹⁴⁹ The prohibition on trade and travel made the pain of family separation all the more difficult.¹⁵⁰

Many Cuban-American families objected strenuously to these laws. Alicia Torres, testifying before Congress on behalf of the Cuban-American Committee Research and Education Fund, argued that families should not be used as weapons in the U.S. war against Cuba.¹⁵¹ The “pressure cooker” theory, she noted, would have repercussions principally on “our relatives in Cuba” who would suffer “greater hardships.”¹⁵² Representatives of the Cuban Democratic Party in Miami, the Coordinated Organizations of Human Rights in Cuba, and Cuban dissident groups testified about the wrong-headedness of the restrictions, including the travel restrictions, noting that in Cuba, “ordinary citizens are consumed by the daily struggle for survival.”¹⁵³

The burden, of course, fell primarily on Cubans who lived on the island. For example, a public health expert who visited Cuba following the Torricelli Act noted the detrimental effect of the new law on the health of Cuban citizens due to the U.S. domination of the

American National Foundation) (providing a list of banks, companies, and a wide range of commercial interests that no longer did business in Cuba).

149. See INTER-AM. COMM’N ON HUMAN RIGHTS, 2 INTER-AMERICAN YEARBOOK ON HUMAN RIGHTS 1902 (1998) (excerpting from findings of the Inter-American Special Rapporteur on the impact of the embargo on Cuban families).

150. See ROSEMARIE SKAINE, *THE CUBAN FAMILY: CUSTOM AND CHANGE IN AN ERA OF HARDSHIP* 78–79 (2004).

151. See *Cuban Democracy Act of 1992; And Withdrawal of MFN Status from the Federal Republic of Yugoslavia, Hearings Before the Subcomm. on Trade of the H. Comm. on Ways and Means*, *supra* note 141, at 79–86. Torres also noted that the provisions of the Act that were hailed as benefits to Cuban families, such as improved telephone communication, were of no use because the embargo prohibited improvement to the lines and payment to Cuba for their share of telecommunications revenues. *Id.* at 80, 85.

152. *Id.* at 87.

153. *Consideration of the Cuban Democracy Act of 1992: Hearings and Markup Before the H. Comm. on Foreign Affairs*, 102d Cong. 107, 110 (1992) (statement of Dr. Enrique Baloyra, Professor of Political Science, Graduate School of International Studies, University of Miami, and President, Coordinadora Social Demócrata de Cuba); *id.* at 138 (testimony of Alfredo Duran, Representative of Cuban Dissidents); *see id.* at 138, 147 (testimony of Ramon Cernuda, Representative of Coordinated Organizations for Human Rights in Cuba).

pharmaceutical industry, the ban on subsidiary trade, and the newly imposed licensing requirement for sending medicines and medical supplies.¹⁵⁴ A report by the American Association of World Health concluded that the embargo had resulted in a number of nutritional deficiency related illnesses, including the highly publicized eye disease (neuropathy) that has affected so many Cubans.¹⁵⁵ Indeed, a *Miami Herald* poll in Cuba found that a majority of Cubans identified the U.S. embargo and not the Cuban government as the cause of economic turmoil and misery.¹⁵⁶

Predictably, the combination of the Soviet collapse, the ensuing loss of Soviet subsidies, and the consequences of the Torricelli and Helms-Burton Acts resulted in a marked increase in the number of Cubans who made desperate attempts to leave the island. In 1994, tens of thousands of Cubans left Cuba in unseaworthy boats and homemade rafts precipitating what has come to be known as the *balseero* (“rafters”) crisis.¹⁵⁷ Like the *Marielitos* before them, the *balseeros* fit the prototype of economic refugees and garnered less sympathy than earlier *émigrés* who were more readily classified as political exiles.¹⁵⁸

The response of the United States to the *balseero* crisis indicated a shift in U.S.-Cuba foreign policy. President Clinton initially prohibited “‘illegal refugees from Cuba’” from entering the United States and ordered their confinement at the Guantanamo Naval Base.¹⁵⁹ Though he allowed them entrance soon afterwards, the tide of migration did not subside. In response, the United States closed the “preferential open door” policy and introduced the “wet foot/dry foot” policy, which allowed those Cubans who reached land to avail

154. Robin C. Williams, *In the Shadow of Plenty, Cuba Copes with a Crippled Health Care System*, in CUBA READER, *supra* note 118, at 281, 282.

155. See MIGUEL A. DE LA TORRE, LA LUCHA FOR CUBA: RELIGION AND POLITICS ON THE STREETS OF MIAMI 73 (2003).

156. Mimi Whitefield & Mary Beth Sheridan, *Cuba Poll, The Findings*, in CUBA READER, *supra* note 118, at 101, 101 (describing the results of the *Miami Herald* poll).

157. See JUAN GONZALES, HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA 108 (2004) (describing a flotilla of makeshift boats and rafts that left Cuba in the summer of 1994); DAVID GREGORY GUTIÉRREZ, THE COLUMBIA HISTORY OF LATINOS IN THE UNITED STATES SINCE 1960, at 167 (2004) (attributing the increasing numbers of Cubans who left in rafts and small boats to worsening economic conditions precipitated by the collapse of the Soviet Union).

158. YOLANDA PRIETO, THE CUBANS OF UNION CITY: IMMIGRANTS AND EXILES IN A NEW JERSEY COMMUNITY 13 (2009) (noting that the *balseeros* were also caught up in race and anti-immigration issues).

159. MARK P. SULLIVAN, CONG. RESEARCH SERV., CUBA: ISSUES FOR CONGRESS 1 (1996) (quoting President Clinton), available at <http://www.fas.org/man/crs/94-005.htm>; Brenner et al., *supra* note 141, at 192, 194.

themselves of the privileges of the Cuban Adjustment Act but required the Cubans intercepted at sea to return to Cuba.¹⁶⁰ These arrangements were based on new migration accords in 1994 and 1995 designed to further stem the tide of rafters.¹⁶¹

The policy of encouraging migration to the United States as a means to weaken Cuba had failed and was no longer considered an effective means to remove the Cuban government. United States sanctions had indeed contributed to weakening Cuba's economy. But as historian Louis A. Pérez, Jr., observed, "[t]he concept of sanctions . . . was deeply flawed" since pressures created by sanctions "were in large part relieved by Cuban emigration."¹⁶² Because Cuban families in the United States overwhelmingly desired to visit and support their families in Cuba, a flow of foreign exchange and goods allowed many Cubans to survive the very sanctions designed to topple the Cuban government.¹⁶³ As a result, U.S. policy began to increase its focus on restricting travel and remittances.

B. *Shifting Strategies: Deterring Family Support*

Cuban *émigrés* had been afforded privileges in the realm of entry into the United States. They gained admission according to laws that were exclusively created for and applied to Cubans.¹⁶⁴ They benefited from social services designed for Cubans only and achieved political enfranchisement with relative ease.¹⁶⁵ But these privileges were conceived in service of U.S. foreign policy—not as a matter of family sustenance—and could not be parlayed into the circumstances of the everyday practices of maintaining binational family relationships.

With some brief exceptions, families who wished to travel to Cuba and send funds to relatives on the island have always suffered

160. Guillermo J. Grenier, *The Creation and Maintenance of the Cuban American "Exile Ideology": Evidence from the FIU Cuba Poll 2004*, J. AM. ETHNIC HIST., Winter/Spring 2007, at 209, 212–13; see also SULLIVAN, *supra* note 98, at 49–50 (detailing the criticism of the policy).

161. See SULLIVAN, *supra* note 98, at 49. Per the 1994 migration accords, the United States agreed to accept 20,000 Cubans, not including immediate relatives, and agreed to discontinue the policy of granting parole to all Cubans who reached land. *Id.* Cuba agreed to take measures to stop unsafe departures from Cuba. *Id.* Pursuant to a second accord in 1995, the United States paroled in some 30,000 Cubans in Guantanamo but thereafter would intercept and return them to Cuba. *Id.* Cuba agreed to provide information about legal immigration processes and agreed that it would take no adverse action against those who attempted the trip. *Id.*

162. Pérez, *supra* note 48, at 249.

163. *Id.*

164. See *supra* notes 74–77 and 115 and accompanying text.

165. See *supra* notes 77 and 116 and accompanying text.

the punishment of the U.S. economic war on Cuba.¹⁶⁶ Since 1959, U.S. laws and regulations affecting families have operated in a dialectical warp that has corresponded to weaknesses that continually burden the Cuban state, as well as global economic conditions, affronts, and perceived wrongs committed by the Cuban government. The pattern of restrictions alternating with relaxation of the rules by which Cuban-Americans must abide in order to support their families continues to the present, with little sign of normalization of relations.

Although the initial embargo and Treasury Department regulations did not specifically ban travel or remittances, the restrictions on financial transactions with Cuba ultimately did.¹⁶⁷ In 1977, Cuban families benefited from a brief exception to the restrictions when the Carter administration permitted travel-related transactions under a general license for anyone wishing to travel to Cuba.¹⁶⁸ The Carter administration authorized limited remittances in 1978.¹⁶⁹ In 1982, the Reagan administration reinstated travel restrictions but continued to allow general licenses for families visiting close relatives.¹⁷⁰ Then, in 1988, the Reagan administration imposed new hardships on families wishing to travel or send remittances by creating a new licensing system for travel services and remittance forwarding businesses engaged in Cuba-related transactions.¹⁷¹ These changes were made to discourage such businesses in order to “reduce the flow of hard currency to Cuba through transactions with persons subject to the jurisdiction of the United States.”¹⁷²

During the 1990s, global circumstances demonstrated the importance of travel and remittances.¹⁷³ Cuba undertook significant

166. *See supra* note 91 and accompanying text.

167. MARK P. SULLIVAN, CONG. RESEARCH SERV., CUBA: U.S. RESTRICTIONS ON TRAVEL AND REMITTANCES 1 (2009), available at <http://www.fas.org/sgp/crs/row/RL31139.pdf>.

168. *Id.* at 2–3.

169. Cuban Assets Control Regulations, 43 Fed. Reg. 1336, 1336 (Jan. 9, 1978) (codified as amended at 31 C.F.R. § 515.561 (2009)) (permitting a maximum of \$500 in any three month period and a one time remittance of \$500 for the purposes of facilitating immigration to the United States to “close relatives” defined as a “spouse, child, grandchild, parent, grandparent, uncle, aunt, brother, sister, nephew, niece, or spouse, and widows or widowers of the foregoing”).

170. Cuban Assets Control Regulations, 53 Fed. Reg. 47,526, 47,527 (Nov. 23, 1988) (codified as amended at 31 C.F.R. § 515.560 (2009)).

171. *Id.*

172. *Id.*

173. *See* Enrique V. Iglesias, *Foreword* to BEYOND SMALL CHANGE: MAKING MIGRANT REMITTANCES COUNT, at ix, ix–x (Donald F. Terry & Steven R. Wilson eds.,

reforms to increase the flow of funds to families and endeavored to improve relations with *émigrés*.¹⁷⁴ In this period, the characteristics of Cuban migration resembled the migration patterns and consequences elsewhere in Latin America; the economies of which were based on a growing dependency on family remittances as an important source of national income.¹⁷⁵ Remittances from abroad, particularly from the United States, dramatically increased.¹⁷⁶ It was at this point that U.S. laws became increasingly punitive.

In addition to the provisions of the Torricelli Act that sought to halt all trade with Cuba, the Act authorized the President to impose restrictions on remittances to Cuba and thus limit the amount that could be spent on Cuban families wishing to travel to the United States to visit family.¹⁷⁷ In 1992, the Office of Foreign Assets Control (“OFAC”) reduced the sum that families could send from \$500 to \$300 in any one quarter.¹⁷⁸ The Act authorized the Treasury Department to take enforcement action against families who violated the 1992 restrictions.¹⁷⁹ In an effort to avoid the more rigorous standards of proof necessary to proceed in criminal matters, OFAC amended its rules to enact civil penalties of up to fifty thousand dollars.¹⁸⁰

From 1994 through 1998, the Clinton administration prohibited family remittances except “when extreme hardship is demonstrated in

2005) (relating the increased movement of people who leave their homes to obtain jobs and remit funds back to their families as a feature of the circumstances of globalization).

174. Barberia, *supra* note 95, at 10–13, 24 (noting the legalization of the dollar, banking reforms, augmenting consumer spending and investment options in the economy, and the establishment of a special office dedicated to *émigrés* relations).

175. Manuel Orozco, *Globalization and Migration: The Impact of Family Remittances in Latin America*, LATIN AM. POL. & SOC., Summer 2002, at 41, 46. Remittances also serve an additional purpose of demonstrating broader global economic relations—an important consideration for Cuba. *See id.* at 62. In recent years, Cubans have migrated to Canada, Spain, Germany, Pakistan, Venezuela, and Kuwait from where they have been sending remittances. Joel Millman, *Cuba Receives More Cash from Workers Abroad*, WALL ST. J., Mar 5, 2009, at A12.

176. Barberia, *supra* note 95, at 25.

177. Cuban Democracy Act of 1992, Pub. L. No. 102-484, § 1706, 106 Stat. 2575, 2579 (1992) (codified at 22 U.S.C. § 6005(c) (2006)).

178. Cuban Assets Control Regulations, 56 Fed. Reg. 49,847, 49,847 (Oct. 2, 1991) (codified as amended at 31 C.F.R. § 515.560 (2009)).

179. Cuban Democracy Act of 1992, § 1710, 106 Stat. at 2580 (codified at 22 U.S.C. § 6009(a), (e) (2006)).

180. *See Consideration of the Cuban Democracy Act of 1992: Hearings and Markup Before the Comm. on Foreign Affairs*, 102d Cong. 388, 398 (1992) (statement of R. Richard Newcomb, Director OFAC, Dep’t. of the Treasury).

cases involving extreme humanitarian need.”¹⁸¹ Cuban Americans were no longer permitted to travel under a general license to family; instead, they were required to submit to a case-by-case review for permission to engage in “travel-related transactions.”¹⁸² Both travel and remittance rules were liberalized again in 1995, then tightened in 1996 as a consequence of the Helms-Burton Act,¹⁸³ and relaxed again in 1998.¹⁸⁴ However, in 1998, new regulations obliged Cuban Americans to sign a remittance affidavit that included data on households of both sender and recipient, a requirement that discouraged individuals from sending money through officially sanctioned channels.¹⁸⁵

Between 2000 and 2004, the Bush administration again eased and tightened the regulations. In 2003, a notable regulatory amendment allowed visits of relatives within three degrees of relationship without having to demonstrate humanitarian need.¹⁸⁶ These amendments also increased the amount of money that could be carried to Cuba from \$300 to \$3,000, although the limit of \$300 per quarter destined for each household did not change.¹⁸⁷ At the same time, OFAC enforcement capabilities were once more strengthened, and President Bush directed the Department of Homeland Security to increase enforcement efforts related to travel and any item sent to Cuba.¹⁸⁸

The ongoing changes and ever-tightening restrictions affecting migration, travel, and remittances raise persistent concerns about the nature of U.S. policy toward Cuba. The policy has relied primarily on

181. Cuban Assets Control Regulations, 59 Fed. Reg. 44,884, 44,885 (Aug. 30, 1994) (codified as amended at 31 C.F.R. § 515.560 (2009)). CANF insisted that President Clinton stop remittances altogether, and the President agreed. Barberia, *supra* note 95, at 29.

182. Cuban Assets Control Regulations, 59 Fed. Reg. at 44,885.

183. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 112, 110 Stat. 785, 802 (codified at 22 U.S.C. § 6042 (2006)).

184. *Id.*; SULLIVAN, *supra* note 129, at 3–4.

185. Barberia, *supra* note 95, at 30 (noting that OFAC licensing requirements served to deter remittances).

186. Cuban Assets Control Regulations, 68 Fed. Reg. 14,141, 14,147 (Mar. 24, 2003) (codified as amended at 31 C.F.R. § 515.561 (2009)).

187. 68 Fed. Reg. at 14,146 (codified as amended at 31 C.F.R. § 515.560(c)(4)(i) (2009)).

188. SULLIVAN, *supra* note 167, at 13–14. Ironically, in 2004, the same year that Cuban-American families suffered the most severe Bush administration prohibitions, a report on the Treasury Department’s allocation of resources disclosed that only four employees were investigating Osama bin Laden and Saddam Hussein’s money, while twenty-four agents were working on the Cuba embargo. See John Solomon, *More Agents Track Castro than Bin Laden*, ASSOCIATED PRESS, Apr. 29, 2004, <http://www.globalexchange.org/countries/americas/cuba/1803.html> (noting that the Treasury had 93 enforcement investigations open related to terrorism and 10,683 cases relating to embargo violations in the same period).

statutory and regulatory schemes to deny Cuban families the ability to discharge fundamental commitments to loved ones.¹⁸⁹ Although as Adam Feibelman points out, remittances may “act as incentives for workers to migrate internationally, in some cases increasing their exposure to unfair business practices and imposing costs on family members who remain in the workers’ home countries;”¹⁹⁰ in the case of Cuba, it is more complicated. The migration context of Cuban remittances is entwined with the economic turmoil caused by the embargo. On one side of the Florida Straits, the Cuban government readily encouraged remittances in an attempt to redress the effects of an economic war and a global capitalist economy.¹⁹¹ On the other side, for most of the past fifty years, U.S. laws have restricted Cuban Americans from sending remittances.¹⁹² Despite the refusal of the United States to depoliticize the practices of family sustenance, Cuban Americans have continued to find ways to meet their obligations to family notwithstanding obstacles posed by U.S. law.¹⁹³

C. A Failed Policy: The Binational Family as Transgressor

While restrictions on remittances and travel have been a nearly constant feature of U.S. foreign policy, so too has the willingness of Cuban-American families to violate the law. Whether funds are sent to assist family members to migrate or to help with everyday necessities in Cuba, remittances have flowed continuously since Cubans first migrated to the United States.¹⁹⁴ Families have traveled illegally, typically through third countries.¹⁹⁵ They have also sought to bring their loved ones to the island through unauthorized and sometimes dangerous means.¹⁹⁶

189. Remittance restrictions are not applicable to any other Latin American immigrant. See Susan Eckstein, *Diasporas and Dollars: Transnational Ties and the Transformation of Cuba* 16 (Inter-University Comm. on Int’l Migration, Working Paper No. 16, 2003), available at http://web.mit.edu/cis/www/migration/pubs/rrwp/16_diasporas.pdf.

190. North Carolina Law Review, Symposium Schedule, <http://nclawreview.net/symposium/syposium-details/> (last visited Mar. 26, 2010); see Adam Feibelman, *The Very Uneasy Case Against Remittances: An Ex Ante Perspective*, 88 N.C. L. REV. 1771, 1786 (2010).

191. Eckstein, *supra* note 189, at 12.

192. See, e.g., SULLIVAN, *supra* note 98, at 27.

193. See *infra* Part III.C.

194. See Barberia, *supra* note 95, at 26.

195. See, e.g., SULLIVAN, *supra* note 98, at 28 (noting that the U.S. government cracked down on religious organizations that facilitated unauthorized trips to Cuba).

196. Lissa Weinmann, *Washington’s Irrational Cuba Policy*, WORLD POL’Y J., Spring 2004, at 22, 26. See generally Matias Rojas Bruce, *Cuba’s Open Boats*, AM. SPECTATOR, Sep. 1991, at 12 (describing desperate relatives who hire boats to aid families to migrate).

The determinants of transgressive behaviors are varied and complex. They include historic, political, and cultural forces, some unique to Cuba, others related to globalization factors, and still others that are characteristic of families generally. The history of Cuban immigration to the United States dates back to the nineteenth century and includes a sustained pattern of immigrants providing support to relatives on the island.¹⁹⁷ Notwithstanding the disruption to households occasioned by the constancy of migration flows, experts who have studied the sociology of the Cuban family have described families as “the most important social unit in the life of Cubans.”¹⁹⁸ “Familism” is the basic structure of Cuban society and includes not only nuclear and extended family, but friends, neighbors, and communities who represent fictive kin.¹⁹⁹ The strength of these relationships overrides laws that limit the ability of families to sustain relationships.

Professor Guillermo Bernal, who has studied Cuban migration, notes that “the degree of connectedness that Cuban families maintain to their birthplace, culture, and roots is an important element in the assessment of the Cuban families in the United States . . . [l]oyalty and legacy issues are particularly visible with Cuban families.”²⁰⁰ Cubans have successfully established a society in accordance with historic ideals of self-sacrifice, collective duty, and civic participation and have cultivated a consciousness of being Cuban (“*conciencia*”).²⁰¹ As one Cuban scholar has noted, “nationalism constitutes a force for unifying people that is superior to any ideological or philosophical creed.”²⁰²

Scholars who have studied patterns of remittance have observed that Cuban Americans are less likely than other remitters to be

197. See Poyo, *supra* note 1, at 45–48 (describing the forces of Cuban nationalism in the exile community that led to the raising of funds to support leaders on the island).

198. Bernal, *supra* note 50, at 140; see also Lisandro Pérez, *The Household Structure of Second-Generation Children: An Exploratory Study of Extended Family Arrangements*, 28 INT’L. MIGRATION REV. 736, 741 (1994) (describing how Cuban families in the United States often consist of three generations, a structure that is consistent with traditional, Cuban values).

199. Bernal, *supra* note 50, at 140; see also LEMKAU & STRUG, *supra* note 23, at 2–3 (noting the tendency of Cuban families to maintain close ties and extended family and community relationships).

200. Bernal, *supra* note 50, at 151.

201. Deborah M. Weissman & Marsha Weissman, *The Moral Politics of Social Control: Political Culture and Ordinary Crime in Cuba*, 35 BROOK. J. INT’L L. (forthcoming Apr. 2010).

202. Rafael Hernández, “Conflict Resolution” *Between the United States and Cuba: Clarifications, Premises and Precautions*, in CUBA IN THE INTERNATIONAL SYSTEM, *supra* note 134, at 177, 179.

motivated for self-interested purposes and more apt to send money to families primarily out of altruistic motives.²⁰³ Unlike other remitters who send funds back to the home country where they may have some expectations of return, Cuban *émigrés* generally consider themselves to be in the United States permanently.²⁰⁴ They have no assumptions of personally benefitting from funds sent to the island.²⁰⁵ Moreover, they cannot expect their funds to be privately invested or yield profits given the nature of the Cuban political economy.²⁰⁶

It is these characteristics that provide the context for considering the variety of ways that Cubans confront the restrictions. Some are legal but many are illegal. Cuban Americans formed the Cuban-American Commission for Family Rights to counter the travel and remittance restrictions.²⁰⁷ In 2004, as opinions moderated in the exile community, CANF reversed its support of travel restrictions and denounced the Bush administration restrictions.²⁰⁸ More recently, CANF released a “White Paper” for the purposes of addressing U.S.-Cuba relations and encouraging the U.S. government to lift restrictions on all family travel and remittances.²⁰⁹ Other groups have attempted to bring political pressure in an effort to lift the restrictions.²¹⁰

203. Blue, *supra* note 26, at 64 (concluding that, given the social and structural factors that influence remittances, Cuban Americans remit for altruistic purposes as opposed to self-interest); see Jørgen Carling, *The Determinants of Migration Remittances*, 24 OXFORD REV. ECON. POL'Y 581, 583 (2008) (reviewing the economic literature on migrant remittances and the motivational models as determinants for sending remittances).

204. Portes, *supra* note 50, at 4.

205. Cf. Barberia, *supra* note 95, at 30–31 (noting that despite the fact that remittance restrictions were lessened, many Cuban Americans were deterred from sending them because of attitudes that doing so was treasonous).

206. See Eckstein, *supra* note 189, at 26.

207. Philip Brenner & Marguerite Jimenez, *U.S. Policy on Cuba: Beyond the Last Gasp*, N. AM. CONGRESS ON LATIN AM., Jan.–Feb. 2006, at 15, 19.

208. *Id.* (“‘It divides our base It’s not in [President Bush’s] political best interest to divide a community whose support for President Bush makes Crawford, Texas, look like enemy territory.’” (quoting the former CANF head and then-board member)).

209. THE CUBAN AM. NAT’L FOUND., A NEW COURSE FOR U.S.–CUBA POLICY: ADVANCING PEOPLE-DRIVEN CHANGE 7, 10–11 (2009), http://graphics8.nytimes.com/packages/pdf/national/20090409cuba_CANF_paper.pdf.

210. See *Families Torn Apart: Human Rights and U.S. Restrictions on Cuban-American Travel: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. 22–58 (2008) (statements of Hector Palacios, Cuban pro-democracy activist; Marlene Arzola, Cuban American with family in Cuba; Blanca González, mother of a political prisoner; Luisa Montero-Díaz, Cuban American with family in Cuba; Ignacio Sosa, Board Member, Cuba Study Group; Sylvia Iriando, President, Mothers Against Repression; Ninoksa Pérez, Board Member, Cuban Liberty Council; Francisco J. Hernández, President, Cuban-American Nat’l

However, many Cubans denied legal means to visit family have opted for extralegal means.²¹¹ Families have resorted to obtaining licenses to travel on false pretenses, signing up with religious organizations as religious workers without any intentions of carrying out religious work, or traveling illegally through third countries.²¹² Informal means of travel and remittance-sending include black market couriers, or *mulas*, to carry funds and transit through third countries.²¹³ The Cuban-American community in Miami facilitates networks to assist with the processes and practices of sending money with other travelers.²¹⁴ Anywhere from sixty to seventy-five percent of remittance dollars to Cuba are transmitted through covert means.²¹⁵

Between 1994 and 1998, when remittances were fully banned, Cuba simultaneously enacted regulatory changes that liberalized the receipt and use of remittances.²¹⁶ Ironically, it was during this period that funds from Cuban Americans to their families actually increased.²¹⁷ Cuban Americans were responding not to U.S. laws, but rather to legal changes in Cuba that facilitated the use of dollars by their families.²¹⁸

Sending remittances illegally is not uncommon among Cuban Americans. Early exiles contribute a significant portion of remittances, despite a perception that they have few relatives in Cuba, and are hostile to sending remittances.²¹⁹ In one recent study of attitudes toward remittances among Cuban Americans, political disincentives were found to have no major effect on the decision

Found.; Philip Peters, Vice President, Lexington Inst.), available at <http://www.internationalrelations.house.gov/110/44530.pdf>.

211. Peter Slevin, *Policy Met Politics in Cuba Rules*, WASH. POST, Aug. 24, 2004, at A7 (“I get very offended with someone telling me how to engage with my family . . . I don’t want to go illegally, but if I need to go see my family because my uncle’s not doing well or somebody’s dying, I’ll figure out a way to get there.” (quoting a Cuban American)).

212. HUMAN RIGHTS WATCH, *supra* note 20, at 52, 60; see SULLIVAN, *supra* note 98, at 28 (noting that the U.S. government cracked down on religious organizations that facilitated unauthorized trips to Cuba); Weinmann, *supra* note 196, at 26.

213. See Jonathan P. Decker, *Smuggling Cash to Cuba Rises in Defiance of Embargo*, CHRISTIAN SCI. MONITOR (Boston), May 24, 1995, at A3; Eckstein, *supra* note 189, at 15.

214. Decker, *supra* note 213, at A3 (reporting that the Cuban-American community transmits information about who is traveling back to Cuba and when they are going).

215. Eckstein, *supra* note 189, at 15. Moreover, even today, only a small number of Cubans enter the United States according to the legal procedures set forth in the Immigration and Nationality Act. WASEM, *supra* note 72, at 9.

216. Barberia, *supra* note 95, at 25, 32 (noting Cuba’s legalization of the bank accounts and investments for *émigrés* and legalization of the dollar).

217. *Id.* at 31–32.

218. Blue, *supra* note 26, at 65 (observing that since the embargo, remittance flows correspond to Cuban government policies and initiatives).

219. *Id.* at 75.

whether or not to send funds.²²⁰ Additionally, over time, the flow of dollars to Cuba has steadily increased, even after migrants assimilate in the United States.²²¹ Cuban Americans who visit their homeland are additionally motivated to send money.²²² For most Cuban Americans, humanitarian concerns for family override political issues.²²³

Although it is difficult to measure remittances to Cuba because of the informal corridors through which funds are transmitted, the existing data on the volume of funds remitted corroborates the resolve with which Cuban Americans support their families. Notwithstanding the remittance restrictions, from the early 1990s until 2004, dollars were the principal currency in Cuba as a result of funds sent by Cuban Americans.²²⁴ Even as remittances have declined elsewhere as a result of the recent global economic crisis, the amount of remittances to Cuba has increased.²²⁵ In short, the restrictions do not reduce the transmission of funds; rather, they only increase the informality by which they are sent.

Although families may be successful at times in circumventing the restrictions, they have nonetheless been devastated by their impact. In 2005, Jeanne Parr Lemkau and David L. Strug, concerned about the mental health effects on Cuban-American families as a result of the 2004 restrictions, conducted in-depth surveys with affected individuals.²²⁶ The stories they captured led one commentator to conclude that “[s]eparating families by restricting travel is unjust; the suffering inflicted on families, unbearable.”²²⁷ In their report, they document an unyielding commitment expressed by Cuban Americans for their loved ones in Cuba, a sentiment given clear expression by one woman who stated “[T]he family is more powerful than any law.”²²⁸ Such a sentiment serves as a convincing critique of legal mechanisms that facilitate U.S. hegemonic policies toward Cuba.

220. *Id.* at 63.

221. *Id.* at 69, 74.

222. *Id.* at 76 (noting that increased visits to Cuba result in more remittances).

223. See Ezra Rosser, *Immigrant Remittances*, 41 CONN. L. REV. 1, 6 (2008) (arguing that remittances are a demonstration of love by and for transnational families and should not be politicized).

224. Frank, *supra* note 145.

225. Millman, *supra* note 175 (noting also that Cuba has sent migrant workers abroad beyond the United States in search of jobs).

226. See LEMKAU & STRUG, *supra* note 23, at vii.

227. *Id.* at iii.

228. *Id.* at 28 (quoting a Cuban American distraught about her inability to visit her sister).

IV. OBAMA YEAR ONE: THE LIMITS OF CHANGE

On April 13, 2009, days prior to attending the Summit of the Americas and after increasing pressure from Latin American countries for the United States to signal a change in relations with Cuba, President Obama announced the lifting of restrictions on family travel and remittances.²²⁹ The new regulations continue to impose a limit on funds that can be used for travel (restored to the levels in effect before the 2004 changes) and continue to require families to complete affidavits in order to send remittances.²³⁰ Travel restrictions for Americans of non-Cuban descent remain in effect.²³¹ However, families, now redefined to once again include aunts, uncles, cousins, and second cousins, are allowed unlimited visits.²³² Furthermore, there are no restrictions on the amount of remittances that can be sent.²³³ New regulations also make it easier for families to send gift packages to Cuba.²³⁴

The news was, of course, welcomed not only in countless Cuban-American households and throughout Cuba but also among a broad range of policy makers, analysts, and international leaders long opposed to U.S. policies toward Cuba.²³⁵ Travel agencies were immediately flooded with reservation requests.²³⁶ On the same day of

229. Memorandum on Promoting Democracy and Human Rights in Cuba, DAILY COMP. PRES. DOC. 200900257 (Apr. 13, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900257.pdf>; Ian Swanson, *Obama to Lift Some Restrictions on Cuba*, HILL, Apr. 10, 2009, <http://thehill.com/homenews/news/19161-obama-to-lift-some-restrictions-on-cuba>.

230. Press Release, U.S. Treasury Dep't, *supra* note 9; Barberia, *supra* note 95, at 30, 33.

231. SULLIVAN, *supra* note 167, at 9–11 (itemizing ongoing travel restrictions).

232. *Id.* at 9.

233. *Id.* at 12.

234. Cuba: Revisions to Gift Parcel and Baggage Restrictions, 74 Fed. Reg. 45,985, 45,986 (Sept. 8, 2009) (to be codified at 15 C.F.R. pts. 736, 740, 746).

235. Laura Meckler, *U.S. to Lift Some Curbs on Travel to Cuba*, WALL ST. J., Apr. 4, 2009, at A1; Sheryl Gay Stolberg & Alexei Barrionuevo, *Obama Declares U.S. Will Pursue Thaw with Cuba*, N.Y. TIMES, Apr. 18, 2009, at A1; *Obama Eases Some Cuba Sanctions*, U.S. NEWS & WORLD REP., Apr. 14, 2009, http://www.usnews.com/usnews/politics/bulletin/bulletin_090414.htm.

236. See Damien Cave, *Charter Companies Flying to Cuba Thrive Despite Complaints*, N.Y. TIMES, May 20, 2009, at A16 (noting the rise in reservations to go to Cuba in light of the more lenient White House policy on travel to Cuba); Damien Cave, *Cuban-Americans Are Ready for New Era in Relations, Poll Finds*, N.Y. TIMES, Apr. 21, 2009, at A12 (noting that a significant majority of Cuban Americans now support the removal of all restrictions for travel to Cuba, including “historic exiles”); Alfonso Chardy & Rui Ferreira, *South Florida Sees Upswing in Family Trips to Cuba*, MIAMI HERALD, Sept. 8, 2009, <http://www.miamiherald.com/news/americas/cuba/story/1224032.html> (noting thousands of travelers in the Miami airport months after Congress loosened the restrictions on family visits to Cuba); Alan Gomez & David Jackson, *Limits Lifted; Cuban Americans Make*

the President's announcement, remittance-sending providers issued their own media statements to report that they were ready for a new surge in business.²³⁷

But the recent modifications of U.S. regulations do not signal the end of the paradigm within which they function. In the realm of family travel, it merely restores the position of binational families to the circumstances prior to the 2004 restrictions. The lifting of the restrictions was encoded in an unchanging political jargon and captioned as an event to "[promote] democracy and human rights in Cuba," the euphemism of choice for toppling the Cuban government.²³⁸ Although President Obama hailed his announcement at the Summit as a "new beginning,"²³⁹ and despite the fact that his administration acknowledged the failure of the fifty-year-old policy of hostility toward Cuba, he made clear that the United States would not lift the embargo.²⁴⁰ Indeed, in September 2009 the President renewed the Trading with the Enemy Act against Cuba, stating that it was in the interest of the United States to do so—an act overwhelmingly condemned by the international community.²⁴¹ The Obama administration has continued to impose significant fines for embargo violations and has continued the ban on the exportation of medical

Travel Plans, USA TODAY, Apr. 13, 2009, http://www.usatoday.com/news/world/2009-04-13-obama-cuba_N.htm (predicting many reservations to Cuba).

237. See Press Release, Western Union, Western Union Prepared to Meet Consumer Demand and Expand Money Transfer Services from U.S. to Cuba (Apr. 13, 2009), <http://ir.westernunion.com/press/releasedetail.cfm?ReleaseID=376921>.

238. Memorandum on Promoting Democracy and Human Rights in Cuba, DAILY COMP. PRES. DOC. 200900257 (Apr. 13, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900257.pdf>; see Louis A. Pérez, Jr., *Welcome Change in U.S.-Cuba Policy, but Not Far Enough*, PROGRESSIVE, Apr. 30, 2009, <http://www.progressive.org/mpperez043009.html>.

239. Remarks to the Summit of the Americas in Port of Spain, Trinidad and Tobago, DAILY COMP. PRES. DOC. 200900269 (Apr. 17, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-the-Summit-of-the-Americas-Opening-Ceremony/.

240. See *id.*; Mark Landler, *Clinton Impresses Foreign Audiences by Saying U.S. Policies Have Failed*, N.Y. TIMES, Apr. 18, 2009, at A4; Stolberg & Barrionuevo, *supra* note 235.

241. See Sophia Weeks, *The President's Words Versus His Performance: One More Prong of His Presidency Shifting Towards the Democratic Centrist Wing of the Party* (Sept. 28, 2009), <http://www.coha.org/the-president-words-versus-his-performance-one-more-prong-of-his-presidency-shifting-towards-the-democratic-centrist-wing-of-the-party/>; see also Neil MacFarquhar, *U.S. Embargo on Cuba Again Finds Scant Support at U.N.*, N.Y. TIMES, Oct. 29, 2009, at A8 (reporting that the most recent vote of 187 in support, 3 opposed, and 2 abstaining, indicated a total lack of support for U.S. efforts to isolate Cuba).

equipment.²⁴² Moreover, the Obama administration decided to continue to keep Cuba on the list of terrorist states.²⁴³

As historian Louis Pérez has observed, “Obama’s ‘new beginning’ possesses a wearisome familiarity.”²⁴⁴ Since the Clinton administration, U.S. officials have noted a readiness to change policy toward Cuba, and a willingness to respond albeit “‘in a carefully calibrated way’ ” to Cuban economic and political reforms.²⁴⁵ But reforms in Cuba, when they are made, have been used in the United States as evidence of Cuban weakness, followed by U.S. demands for more reforms. Carlos Gutierrez, outgoing Commerce Secretary under the Bush administration, counseled then-President-elect Obama about the need to be cautious with regard to policy toward Cuba, describing it as “‘something between a game of chicken and a game of chess.’ ”²⁴⁶ Given President Obama’s continuation of failed policies, one would assume that he has followed Gutierrez’s advice and that binational family relations still remain subject to foreign policy manipulation.

CONCLUSION

There are good reasons to seek meaningful changes toward Cuba. What is required is no less than the normalization of relationships to foster dialogue, debate, and engagement in the pursuit of solutions to the various concerns of mutual interests to both Cuba and the United States. In a recent report issued by the Center for Democracy in the Americas, Cuba analysts from a broad range of disciplines have offered various proposals for shifting from a failed Cuba policy.²⁴⁷ In addition to lifting all restrictions on trade and travel, the report’s authors have endorsed “cooperation in military affairs and law enforcement, health research and hurricane preparedness, energy development and migration policy, commerce and academic exchange, and for reuniting Cuban families—to build

242. MacFarquhar, *supra* note 241.

243. Weeks, *supra* note 241.

244. Pérez, *supra* note 238.

245. Petras & Morley, *supra* note 133, at 274 (quoting Secretary of State Warren Christopher).

246. Steve LeVine, *The U.S. and Cuba: A Thaw in Rhetoric, Not Trade*, BUS. WK., Apr. 20, 2009, http://www.businessweek.com/bwdaily/dnflash/content/apr2009/db20090419_125338.htm (quoting Carlos Gutierrez).

247. See generally CTR. FOR DEMOCRACY IN THE AMS., 9 WAYS FOR U.S. TO TALK TO CUBA & FOR CUBA TO TALK TO U.S. (Sarah Stephens & Alice Dunscomb eds., 2009), available at <http://democracyinamericas.org/cubacentral/blog-post/new-report-9-ways-us-talk-cuba-and-cuba-talk-us> (combining several experts’ views on how to find solutions to mutual problems shared by the United States and Cuba).

trust back into the U.S.-Cuba relationship.”²⁴⁸ Colonel Lawrence Wilkerson, former Chief of Staff to Secretary of State Colin Powell, noted the importance of Cuba to U.S. relationships in the Western Hemisphere. “By [acting positively toward Cuba] . . . we open the door to our backyard, our hemisphere, to Canada, to Mexico, to all of Central and South America. We open the door in a way we have never done before.”²⁴⁹ Certainly Cuba’s close relationship with Venezuela and the Bolivarian Revolution, described as a “movement” that “has galvanised people, first across Venezuela and then across South America as a whole,” demonstrates Cuba’s hemispheric importance.²⁵⁰ Cuba has played a significant role in the formation of Bolivarian Alliance for the Americas Agreement (“ALBA”), which has given rise to a financial institution (“Banco del Sur”) designed to provide alternatives to the World Bank and the development of alternative structures to neoliberalism.²⁵¹ Recently, old Cold War rhetoric has re-emerged as former high-ranking officials have proclaimed post-coup Honduras “as the principal battleground in a proxy fight with Cuba and Venezuela.”²⁵² These actions challenge the paradigm of U.S. hegemony in the Western Hemisphere. Until the United States ceases to see itself as “‘the centre of political enlightenment and as teachers to a great part of the rest of the world,’ ” a change of policy is unlikely.²⁵³

United States laws that have facilitated these policies violate the very normative functions of law by their failure to operate as a

248. Sarah Stephens, *Preface to 9 WAYS FOR U.S. TO TALK TO CUBA & FOR CUBA TO TALK TO U.S.*, *supra* note 247, at 8.

249. Colonel Lawrence B. Wilkerson, Remarks at the University of North Carolina at Chapel Hill Conference on the United States and Cuba: Rethinking Engagement (Sept. 26, 2008), *available at* <http://isa.unc.edu/Wilkerson-Cuba%20Speech%20at%20UNC%20Chapel%20Hill,%20Sept%20%2708.pdf> (noting U.S.-Cuba relations as having singular importance for U.S.-Latin American relations).

250. See Mohsen al Attar & Rosalie Miller, *TWAIL Revisited—The Bolivarian Reconstruction of International Law* 8 (July 22, 2009) (SSRN, Working Paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1437362 (identifying the progressive, if not revolutionary candidates who have won elections in Brazil, Chile, Bolivia, Ecuador, Paraguay, and Nicaragua).

251. *Id.* at 1, 9, 10, 13 (describing, for example, Cuba’s efforts to rescue Bolivia’s soybean crop and its role in thwarting U.S. efforts to establish the Free Trade Area of the Americas).

252. Ginger Thompson & Ron Nixon, *Leader Ousted, Honduras Hires U.S. Lobbyists*, N.Y. TIMES, Oct. 8, 2009, at A1 (identifying former officials who have characterized the efforts to restore Manuel Zelaya, President of Honduras ousted after a coup, by using rationale and language approximating Cold War rhetoric).

253. Pankaj Mishra, *Rise of the Rest*, LONDON REV. BOOKS, Nov. 6, 2008, at 13, 15 (quoting George Kennan, author of the “Long Telegram” that became the basis of the Truman Doctrine).

“‘body of general principles, not a collection of special commands.’”²⁵⁴ Using the law in this way is ironic, given U.S. demands of the Cuban government for change that include greater democratic freedoms for Cuban people and to respect basic human rights.²⁵⁵ United States restrictions on family travel violate principles of family reunification that have served as the cornerstone of immigration law, as well as a number of human rights laws that guarantee the right to leave and return to one’s country.²⁵⁶ The prohibitions on remittances have served to interfere with the personal bonds, emotional ties, and basic family rights that such transactions represent.²⁵⁷ The irony has not been lost on Cuban Americans who have suffered the restrictions and whose grief and anger are expressed by one woman who stated, “‘Some day it will seem preposterous to anyone that the U.S. government ever devised such restrictions.’”²⁵⁸ It would seem that day is long overdue.

For now, the restrictions that most directly burden the Cuban binational family have been lifted. But the Trading with the Enemy Act, the Torricelli Act, and the Helms-Burton Act, which have functioned as a personal embargo against families who have borne the brunt of U.S. policies, remain in place. Binational families continue to suffer the consequences of these laws. The hope lies in the very words expressed by President Obama on the eve of the lifting of restrictions—that “the Cuban people’s desire to freely determine their future and that of their country is in the national interest of the United States.”²⁵⁹ Only time will tell if those words will be given meaning and whether fifty years of a loathsome policy can be reversed.

254. PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* 83 (1998) (quoting Professor Joseph Beale).

255. Karen DeYoung, *U.S. Lifts Almost All Curbs on Family Visits to Cuba*, WASH. POST, Sept. 4, 2009, at A10; Press Briefing, Robert Gibbs, Press Sec’y & Dan Restrepo, Special Assistant to the President and Senior Dir. for W. Hemisphere Affairs (Apr. 13, 2009), http://www.whitehouse.gov/the_press_office/Briefing-by-Pres-Secretary-Robert-Gibbs-and-Dan-Restrepo-Special-Assistant-to-the-President-and-Senior-Director-for-Western-Hemisphere-Affairs/.

256. Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 HOFSTRA L. REV. 1271, 1275–81 (2008). For a discussion of the various international human rights laws violated by interfering with Cuban Americans’ rights to visit family in Cuba, see HUMAN RIGHTS WATCH, *supra* note 20, at 64–67.

257. Rosser, *supra* note 223, at 11, 17, 43.

258. LEMKAU & STRUG, *supra* note 23, at 16 (quoting Aidil, a Cuban emigrant).

259. See Press Release, White House, Office of the Press Sec’y, Fact Sheet: Reaching Out to the Cuban People (Apr. 13, 2009), *available at* http://www.whitehouse.gov/the_press_office/Fact-Sheet-Reaching-out-to-the-Cuban-people.