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BOOK REVIEW

THE TWILIGHT OF ORGANIZATIONAL FORM FOR CHARITY: MUSINGS ON NORMAN SILBER,
A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE MODERN NONPROFIT SECTOR

NORMAN I. SILBER, A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE MODERN NONPROFIT SECTOR.

Evelyn Brody* 

In the months following the September 11 attacks, the nonprofit sector took center stage. But with prominence comes scrutiny, and the extraordinary role of private philanthropy in this context has raised uncomfortable questions. First, over 250 new nonprofit organizations formed to handle the outpouring of contributions, and the Internal Revenue Service announced expedited review for new applications for federal tax exemption.1 Yet these organizations—along with existing major charities like the American Red Cross and the Salvation Army—found themselves tripping over each other, unable to ensure that the more than $1.5 billion in contributions was being distributed wisely,

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   The IRS . . . has established a special expedited review and approval process for new organizations seeking tax-exempt status to provide relief to the [September 11] victims. New organizations should apply for tax-exempt status by filing IRS Form 1023, available at www.irs.gov and write at the top of the form “Disaster Relief, Sept. 11, 2001.” The IRS will give such applications immediate attention.

Id. As of June 11, 2002, the IRS had recognized the exempt status of 284 new organizations formed for the purpose of providing relief to September 11 victims. See Internal Revenue Service: The Digital Daily, at http://www.irs.gov/exempt/display/0,,11=3&genericId=20932,00.html (last visited June 11, 2002).
fairly and expeditiously.² Wouldn’t fewer charities be better? Second, the fund raising practices of some of the charities—notably the Red Cross—brought charges of deceptive charitable solicitation practices.³ It turns out that some charities had a different purpose in mind than merely functioning as a conduit to victims.⁴ But isn’t the point of organized philanthropy its value added? Professionals experienced in the range and long-term effects of a multitude of calamities can minimize the particularism that characterizes individualized, as opposed to governmental, relief: The private donations, when added to the billions in federal relief and untold billions in private insurance and other governmental assistance, prompts the question of whether the victims of this particular disaster might reap a windfall.⁵ Third, the “dark side” of the sector came disturbingly to light with the federal government’s freezing of assets of the Holy Land Foundation and a few domestic

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². See, e.g., David Barstow, $850 Million for Charity, Not Centrally Monitored, N.Y. TIMES, Oct. 11, 2001, at B1 (“There are hundreds of disaster organizations, nonprofit groups, foundations, government agencies and corporations involved . . . . [D]onations are also piling up because many of the new relief funds still do not have the basic elements of governance in place, such as boards of directors, mission statements, written standards.”).

³. This finding was echoed in an August 2002 report on the American Red Cross posted by the Better Business Bureau’s Wise Giving Alliance, a charity rating agency. See http://www.give.org/reports/arc.asp (last visited Sept. 27, 2002). The controversy forced the board of the Red Cross to demand the resignation of its director, Bernadine Healy. See, e.g., Nightline: Did She Quit or Was She Pushed, and Why, As America Fights Back (ABC News Broadcast, Oct. 26, 2001) (transcript on file with the Hofstra Law Review). A congressional body held hearings into the performance of September 11 philanthropies. See List of Witnesses to Appear Before Committee on Ways and Means Subcommittee on Oversight on Response by Charitable Organizations to Recent Terrorist Attacks, available at http://waysandmeans.house.gov/oversite/107cong/ov7wit.htm (last visited June 11, 2002), containing links to prepared statements. Shortly thereafter, the Red Cross promised to spend the balance of the principal of the Liberty Fund on the victims and their families, and named former Senator George Mitchell to develop a plan of distribution. Accepting Mitchell’s recommendation that “recipients of these monies are in the best position to assess their own immediate and long-term needs,” the Red Cross announced that ninety percent of the nearly $1 billion raised would be distributed by the first anniversary of the attacks. See http://www.redcross.org/press/disaster/ds_pr/020130libertyfund.html (last visited Sept. 27, 2002). The Red Cross slightly reduced this percentage when it unexpectedly continued to receive another couple of hundred million dollars. It also expressed concern about jeopardizing its tax exemption by distributing living expenses to families that had no financial need. See Quarterly Report on the Liberty Fund (through July 31, 2002), at http://www.redcross.org.

⁴. See supra note 3.

⁵. See, e.g., Diana B. Henriques & David Barstow, Victims’ Fund Likely to Pay Average of $1.6 Million Each, N.Y. TIMES, Dec. 21, 2001, at A1 (describing distribution plan of federal compensation fund established by Congress for the families of victims who elect to waive their right to sue; awards would be reduced by life insurance, pension payments, or other government assistance, but not by charity); Thomas Connor, Terror Victims Aren’t Entitled to Compensation, WALL ST. J., Jan. 2, 2002, at A18 (comparing public payments for various terrorist acts. and proposing that the notion of “compensation” be replaced with need-based “compassionate aid”).
Muslim groups. An organization whose purposes can be carried out only through illegal activities clearly violates public policy; but what about multipurpose bona fide charities that incidentally engage in illegal activities?

Although unprecedented in scale, the questions raised by September 11 philanthropy have eternally troubled policy makers. To generalize from these examples, debate constantly revolves around what, if any, role the state should play in three key areas: (1) preventing duplication of charitable services, with its attendant inefficient use of resources; (2) protecting donors, from both misleading fundraising drives and look-alike charities; and (3) restricting “charitable” purposes and activities, for nonprofit corporate status and, separately, tax exemption. To complicate matters, the state itself consists of multiple players—which decisions should be left to legislatures, attorneys general and other regulators, and judges?

In time to help us understand this legal state of affairs is a provocative and illuminating historical study of American nonprofit corporate law by Norman Silber. Professor Silber challenges the modern nonprofit scholar and practitioner—accustomed to autonomy for charities—to consider living under quite a different regime. While state practices varied, American discomfort with the corporate form persisted in the nonprofit realm long after business incorporation became standardized. For most of the twentieth century, several states—notably New York and Pennsylvania—continued to treat the grant of a nonprofit charter as a privilege. And not just by the state legislature: Judges and administrators endeavored to avoid the perceived evils of wasteful duplication of charitable services; names that might cause confusion with an existing (and competing) nonprofit; and unpatriotic planned activities, if not purposes. Professor Silber, however, finds that discretion by judges “became so strong that their personal reservations—


9. See id. at 9.
10. See id. at 5-6.
11. See id.
12. See id.
religious, political, class, cultural, racial, and social—as a matter of legal
document were sufficient to sanction disapproval." Inevitably, state
paternalism came to be perceived as state suppression of nonmajoritarian
and unpopular causes. In the sweep of 1960s civil rights reforms
celebrating diversity and individual expression, the grant of nonprofit
corporate status was reconceptualized from a privilege to an
entitlement. Today, filing a certificate of incorporation for a nonprofit
corporation is merely one item on a law firm associate’s checklist in
setting up a new charity.

I. THE BENEFITS AND COSTS OF JUDICIAL DISCRETION

Professor Silber’s fascinating exploration of a near-century of
jurisprudential subjectivity reveals an extraordinary hunger for
uniformity in the conception of the public good. (Don’t forget that the
Justices of the New York Supreme Court are elected). World War I
brought a suspicion of national-identity groups, out of fear that they
foster “dual fealty.” Similarly, Justices were skeptical that advocacy
groups (“propagandists”) could promote the social order. Other forms
of heterodoxy were disapproved—a New York judge rejected the charter
of a Jewish group whose board would meet on Sundays. (Not
surprisingly, one Justice Levy in a later case held that the work of
charities was not “labor” and so would not be violating Sabbath laws).

Professor Silber also finds a few more-thoughtful jurists. He
recounts with evident appreciation the outcome of cases where Justice
Levy denied approval to the charter of a particularly unsettling
organization (one of the Nazi-supporting Bunds), and granted approval
to an unconventional but desperately needed group (an organization that
rescued Jewish children from Nazi Germany). A pro-American
patriotic group went too far in calling for amendments to the

13. Id. at 5.
14. See id. at 6.
15. See id. at 115.
16. A stylistic delight augments Professor Silber’s legal realism: For each decision by a
Justice of the New York Supreme Court, Professor Silber provides a biographical note based on the
17. SILBER, supra note 8, at 39-40.
18. See id. at 40-41.
19. See id. at 32.
20. See id. at 42.
21. See id. at 53-54, 76 n.165 (describing In re General Von Steuben Bund, Inc., 287 N.Y.S.
527 (Sup. Ct. 1936)).
22. See id. at 51, 75 n.154 (describing In re German Jewish Children’s Aid, 272 N.Y.S. 540
(Sup. Ct. 1934)).
Constitution that would provide for the forfeiture of the U.S. citizenship of those who join any organization supporting the overthrow of the government by force or violence, or who write, publish, or possess for purposes of circulation materials expressing such views. The Justice found it "unthinkable that approval should be given on behalf of the people of the State of New York to anyone to incorporate for the purpose of advocating a constitutional amendment of this character."24

Once the exigencies of the Second World War faded, however, continuing trial court hostility to civil rights groups in the 1950s provoked a fatal backlash to judicial discretion.25 In 1961, the New York Court of Appeals effectively ended the practice when it ordered the lower court to approve the charter of a white supremacist group.26 In Association for the Preservation of Freedom of Choice, Inc.,27 the trial judge had rejected the certificate of incorporation of a hate group, ruling: "Our system of government can only be maintained by the free and untrammled collision of ideas, but when those ideas run counter to the mores or policies of our laws, no group should be permitted to organize in corporate form with the sanction of the state to espouse such ideas."28 The New York high court reversed,29 declaring:

[Agitating] for the repeal or modification of any law . . ., provided such agitation is not coupled with the advocacy of force and violence[,] . . . is not against public policy whether indulged in by an individual or a membership corporation, but of course approval of a corporate charter devoted to such a purpose does not imply approval of the views of its sponsors. It simply means that their expression is lawful, and their sponsors entitled to a vehicle for such expression under a statute which cannot constitutionally be made available only to those who are in harmony with the majority viewpoint.30

At the same time that he chronicles the loss of the state's gatekeeper role in regulating incorporation, however, Professor Silber probes whether incorporation ever conveyed much information about the
worthiness of a particular organization. What difference would it have made if the Bund were granted corporate status? Why should the Jewish rescue organization have had to prove itself to the state? Moreover, as Professor Silber writes: "There is no clear way to measure the harm that free speech suffered and/or the social cohesiveness gained by discretionary review." How a nonprofit operates has more social significance. Thus, the notion of a benevolent despot who safeguards society by preventing the formation of harmful nonprofit corporations appeals to a false, unattainable, and undesirable god. While we might wish for the simplicity of identifying "good" and "bad" charities based on their organizational documents, even the most disturbing organization can dress up its purposes with the right-sounding words, and the regulator's job only begins at the moment of birth. The current approach conforms to the American bias against ascribing legal significance to individuals based on their status, as opposed to their actions.

The aspect of judicial screening that sought to eliminate "harmful" competition between charities might evoke more sympathy, but, in the end, proves equally futile and misguided. Superficially, one can appreciate the sentiment expressed by Justice Stoddart: "I do not believe the public should have numerous groups soliciting funds when one well-recognized and well-operated organization is [already] seeking their contributions." However, the marketplace for contributions remains an


Nor does denial of a charter make the activity illegal. "Unincorporated associations, which do not ask the approval of the Supreme Court or the sanction and help of the state itself, ought to be just as able as any corporation to achieve the ends that these signers are aiming at." declared one New York Justice in denying the charter of a group that wanted to convert Jews to Christianity. In re Am. Jewish Evangelization Soc'y, Inc., 50 N.Y.S.2d 236, 237 (Sup. Ct. 1944) (discussed in Silber, supra note 8, at 61).

32. Silber, supra note 8, at 65.

33. See id.

34. In re Waldemar Cancer Research Ass'n, 130 N.Y.S.2d 426, 426-27 (Sup. Ct. 1954). For this and other examples, see Silber, supra note 8, at 62-63 and accompanying notes.
important check on older institutions, which in any case enjoy the advantages of greater name recognition and established reputation in attracting donative support. The regulator still can play an important role in seeking to ensure the efficient use of charitable resources: The New York Attorney General prodded the September 11 charities into privately coordinating their relief efforts by creating a combined database.\textsuperscript{35} As Professor Silber chronicles, the problem of fraudulent charitable solicitation has come to be addressed by regulatory agencies whose jurisdiction extends to all fundraisers, incorporated or unincorporated.\textsuperscript{36}

In the end, judicial discretion over charity incorporation fell during the general social rebellion against orthodoxy, the rise of advocacy and identity groups (notably the NAACP), the legal-process reform against ad hoc judicial rulings in favor of administrative deliberation and consistency, and the reconception of property rights to include government licenses.\textsuperscript{37} Entertaining as well as erudite, Professor Silber’s account of the transformation of New York law reads like a detective story with a bevy of improbable heroes: students.\textsuperscript{38} He observes that the majority opinion by the New York Court of Appeals in \textit{Preservation of Freedom of Choice} cites no authorities—no case law—other than academic pieces, including three student law review notes.\textsuperscript{39} The great irony that Professor Silber observes is that the corporate form no longer was the bane of liberals, but rather their salvation: as his book is titled, a “corporate form of freedom.”\textsuperscript{40}

\textbf{II. THE NEXT HISTORY}

In the concluding sections of his book, Professor Silber probes whether some of the continuing problems in nonprofit governance can be addressed through a tighter process for defining charity.\textsuperscript{41} These final

\textsuperscript{35} It appeared from press reports that the Attorney General initially sought public involvement, if not control, over such a database, but yielded to charities’ concerns over confidentiality. For a description of an umbrella group for the major New York human services charities, see the webpage on the New York Attorney General’s website, WTC Relief Info, at http://www.wtcrelief.info/Charities/Information/pages/News.jsp?newsID=9 (posted Dec. 14, 2001) (on file with the Hofstra Law Review). \textit{See also supra} note 3 and accompanying text.

\textsuperscript{36} \textit{See} SILBER, supra note 8, at 93, 148-49. Professor Silber examines the deficiencies of the regulatory schemes for fundraising, describing the paucity of monitoring and investigation. \textit{See id.} at 148-49.

\textsuperscript{37} \textit{See} SILBER, supra note 8, at 93-107.

\textsuperscript{38} \textit{See id.} at 114.

\textsuperscript{39} \textit{See id.} at 114-15. \textit{See generally id.} at 101-13 (discussing the academic pieces).

\textsuperscript{40} \textit{See id.} at 102.

\textsuperscript{41} \textit{See id.} at 172.
thoughts, though, have a tentative quality, and are the least satisfying part of Professor Silber's book. And not surprisingly—after all, Professor Silber himself just presented such a persuasive case against case-by-case definition of charity that he finds it difficult to articulate an argument for state supervision at the organizational stage.\footnote{See id. at 169-74.}

Consider tax exemption, which has come to be seen as the "true" subsidy by the state."\footnote{Id. at 9.} Professor Silber asserts: "the problem for the next generation of lawmakers and policymakers would be to find a way to redraw the line between privilege and entitlement to the advantages of nonprofit organization without allowing inappropriate actors to make objectionable, discretionary value judgments."\footnote{Id. at 153, 170.} But it turns out that there are turtles all the way down: Congress has shown little appetite for defining "charitable" any more narrowly than do the states—the key modifications being for activities that pester politicians, like political activity and excessive lobbying.\footnote{See I.R.C. § 501(c)(3) (granting charity status only if "no substantial part of the activities of [the organization] is carrying on propaganda, or otherwise attempting, to influence legislation . . . , and [the organization] does not participate in, or intervene in . . . , any political campaign . . . .").} Moreover, despite the view of the IRS as the charity regulator of last resort, Congress has never explicitly granted the IRS plenary equity authority over charities,\footnote{See I.R.C. § 501(c)(3) (granting charity status only if "no substantial part of the activities of [the organization] is carrying on propaganda, or otherwise attempting, to influence legislation . . . , and [the organization] does not participate in, or intervene in . . . , any political campaign . . . .").) Nor does Professor Silber see why tax exemption should be conditioned on a narrower conception of the public good than should nonprofit corporate status. See SILBER, supra note 8, at 156-58. See generally Evelyn Brody, Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption, 23 J. CORP. L. 585 (1998).} and hardly funds its exempt-organization division at a level sufficient to fully monitor and supervise the sector.

Like all good histories, Professor Silber’s monograph serves as a cautionary tale: By illustrating how inherently political (in the broad sense) is the answer to the question "how private is private

philanthropy?" he helps us to appreciate why we cannot go back to a
gatekeeper role for the charity regulator. The history of the next period
of the charitable sector will consider more fundamental issues. I believe
that understanding charity accountability today takes us from the
legitimacy of state oversight to the role of extra-legal institutions to a
questioning of the significance of organizational form.

A. Accountability of the Regulator

Regulators suffer from a lack of transparency in their charity
oversight, making it impossible to assess their effectiveness in
improving charity governance—or even whether they are acting at all.47
Moreover, state attorneys general might act out of parochial motives.
Perhaps the sector should call on state charity officials and the IRS to
publish annual reports explaining, at least in general terms, both the
level and types of enforcement and outcomes achieved.

B. "Private" Regulation

Formal law is probably the institution that least influences and
improves charity governance and performance.48 Over the decades,
private regulation of charitable activity has occurred through religious
institutions, scientific philanthropy, federated philanthropy, charities
bureaus, community foundations, and state and national associations of
nonprofit organizations. As described above with respect to the
September 11 charities, donor and public expectations (and news media)
can bring faster and more lasting changes than can government
prosecution.49 As the Attorney General of New York showed,
government can play a prescriptive, in addition to enforcement, role.50

47. As I have described elsewhere, few cases involving nonprofit fiduciary issues reach the
courts. Reform rather than punishment is generally the regulator's goal, and charities prefer a
chance to improve their behavior while avoiding embarrassment and personal liability. "Closing
agreements" between the regulator and the charity to end an enforcement action can be quite
detailed, often spelling out specific terms dealing with future governance. Sometimes regulators will
settle only if the charity assents to public disclosure of the agreement, which otherwise would be
confidential. See Brody, Fiduciary Law, supra note 7, at 1410-11.

48. See generally Evelyn Brody, Institutional Dissonance in the Nonprofit Sector, 41 VILL. L.
REV. 433 (1996) [hereinafter Brody, Institutional Dissonance]; Evelyn Brody, Accountability, and
Public Trust, in THE STATE OF NONPROFIT AMERIcA (Lester Salamon, ed., Brookings Institution

49. See supra notes 1-4 and accompanying text.

50. See, for example, the "Years in Review" published by the Pennsylvania Attorney General,
containing summaries of significant cases brought by the Charitable Trusts and Organizations
Section. Years 1997-2000 are available at http://www.attorneygeneral.gov/pei/years.cfm (last
visited Sept. 26, 2002). For a proposal for public-private collaboration, see Joel Fleishman, Public
I do not suggest, however, that the law should be tightened to codify these institutional dictates, because institutional dictates can be as misguided as they are strong. Notably, Professor Silber advocates "tailored and standardized" disclosure rules regarding "such matters as the use to which funds solicited have been applied, salaries, overhead costs, and other information." Were it only so easy! A fierce debate has longed raged over how to categorize fungible dollars—to achieve meaningful and not just uniform reporting. Think of the practical pressures on a charity trying to raise funds from a public ignorant of the charity's fiscal requirements. After all, many people think that providing charity is a free good—and so general overhead, much less fund raising expenses, should be zero. Unfortunately, one of the great lost opportunities of the September 11 experience was the failure of charities to defend the costs of wisely allocating charitable resources. If any charity had the reputation to explain costs of overhead, it was the American Red Cross; once the public outcry grew over how it intended to distribute the money contributed to its Liberty Fund, however, the charity was forced into such a retreat that it even asserted that all

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Trust in Not-for-Profit Organizations and the Need for Regulatory Reform, in PHILANTHROPY AND THE NONPROFIT SECTOR 172 (Charles T. Clotfelter & Thomas Ehrich eds., 1999). Distinguishing between two aspects of charity governance, Professor Fleishman would leave the nonprofit sector to address "unwise, injudicious, or careless—but not illegal—patterns of actions by bona fide not-for-profit organizations," while confining government enforcement action to fraudulent behavior by those acting "under cover of a fake not-for-profit mask." Id. at 186. He then advocates for joint efforts by the sector and government. See id. at 187. Finally, if the two prior strategies fail, as a last resort Professor Fleishman would adopt a new federal agency (subordinate to state enforcement) whose powers would be limited to procedural issues, rather than program content, and which would generally "defer to state accountability-enforcing authorities who have earned the reputation for effective action...." Id. at 187-91.


51. SILBER, supra note 8, at 171.
overhead costs of the Fund's activity would be borne from other sources.\textsuperscript{52}

C. The Twilight of Organizational Form for Charity?

Ultimately, Professor Silber still believes that we can invest the nonprofit corporate charter with legal significance for the benefit of the public—although he would augment the regime by requiring provisional charters and periodic reviews.\textsuperscript{53} I, on the other hand, have become an organizational-form agnostic: While supporting periodic regulatory review of charity operations, why should the public care whether the entity forms as a trust, a corporation, or an unincorporated association?\textsuperscript{54} After all, the consequences of failing to satisfy legal standards should meaningfully relate to a state interest—loss of tax exemption, say, rather than loss of limited liability protection for organizing as a corporation.\textsuperscript{55}

\begin{itemize}
\item \textsuperscript{52} See supra note 3 and accompanying text (describing Congressional hearings into how the Red Cross (among others) was intending to honor the wishes of donors). We need to appreciate that a state attorney general wears two potentially conflicting hats: to protect consumers and to oversee the wise expenditure of charitable resources. Focusing exclusively on the first role, as the New York Attorney General appeared to do, risks treating charities as mere agents of donors, without regard to the greater social good that can be accomplished with now-charitable resources.
\item \textsuperscript{53} See SILBER, supra note 8, at 170-71.
\item \textsuperscript{55} Thus, the hate group Association for the Preservation of Freedom of Choice, as discussed above, might be a nonprofit corporation, but it will not likely be entitled to federal income tax exemption. See, e.g., Nationalist Movement v. Comm'r of Internal Revenue, 102 T.C. 558 (1994), aff'd per curiam, 37 F.3d 216 (5th Cir. 1994) (denying section 501(c)(3) status to an organization chartered under Mississippi law as a "a non-profit charitable, educational and fraternal organization dedicated to advancing American freedom, American democracy and American nationalism"). I doubt that Professor Silber would support the approach either of the Charity Commission in England with respect to the Church of Scientology or of the Attorney General of Illinois with respect to the World Church of the Creator. See Decision of the Charity Commissioners [slc] for England and Wales, available at http://www.charity-commission.uk.gov/registration.pdfs/costfulldoc.pdf (Nov. 17, 1999) (last visited June 6, 2002) [hereinafter Decision: England and Wales]; People ex rel. Ryan v. World Church of the Creator, 760 N.E.2d 953 (Ill. 2001). In England, the Charity Commission rejected the application of the Church of Scientology (England and Wales) to register as a charity, on the grounds that it was not a religion and its core activities of “auditing” and “training” provide private, rather than a public, benefit. See Decision: England and Wales, supra; see also Debra Morris, \textit{Church of Scientology is Denied Charitable Status by the Charity Commission}, 28 EXEMPT ORG. TAX REV. 219 (2000); Rosamund Smith et al., \textit{The Parity of Charity, LAW. 39} (Mar. 19, 2001) ("charity lawyers are waiting to see whether an appeal will be lodged and whether the [European] Human Rights Act will be invoked"). In Illinois, the Attorney General sought to freeze the assets of a white supremacist group, The World Church of the Creator, for failing to register as a charity. See People ex rel. Ryan, 760 N.E.2d at 955. The organization succeeded in having the statute voided as unconstitutionally vague, but the Illinois Supreme Court upheld the statute. See id. at 963. Incidentally, in its
\end{itemize}
Most recently, the debate over the legal relevance of organizational form has focused on the extent to which an attorney general’s common law authority over charitable trusts extends to the activities and decisions of charities taking the nonprofit corporate form. Incidentally, in its application for sales-tax exemption, the organization had been denied charity status by the Illinois Department of Revenue.

Moreover, the nonprofit organization (in any form) itself is continuing to diminish in importance. Under federal welfare reform and devolution, states can contract with for-profit providers as well as nonprofits for social services. Medicare “vouchers” are good at for-profit, nonprofit, and public hospitals; similarly, demand-side tax credits, such as the education credits, can be used for tuition paid to any type of accredited institution. The state of Pennsylvania just turned over the management of the Philadelphia public schools to Edison Schools, a private company.

As Professor Silber’s study shows, we can add the act of obtaining nonprofit corporate status to the list of once-hotly-debated legal issues that no longer trouble us, but whose ghostly outlines remain. To the perplexity of law students, corporate statutes continue to explicitly grant perpetual life, the right to acquire and alienate property, and the power to sue and be sued. Going forward, the legal system will concern itself more with the harder questions of regulating charitable activity, and less with how charitable activity is organized.

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60. See, e.g., N.Y. BUS. CORP. LAW § 202 (McKinney 1986).
NOTE

MODERN APPLICATION OF THE CUBAN ADJUSTMENT ACT OF 1966 AND HELMS–BURTON: ADDING INSULT TO INJURY

"Remember, remember always that all of us, and you and I especially, are descended from immigrants and revolutionists."

—President Franklin D. Roosevelt

I. INTRODUCTION

In the summer of 1955, while in the Mexican apartment of Cuban exile Maria Antonia Gonzalez, two young and well-educated men, one a doctor and the other a lawyer, met and developed a friendship that would eventually form the core of the Cuban revolution. These two revolutionaries were Fidel Castro and Ernesto “Che” Guevara. Around the one year anniversary of their meeting, Fidel Castro and “Che” Guevara, along with eighty other men departed Mexico from Tuxpan in an overloaded thirty-eight-foot sea vessel named The Granma. Their destination was the Oriente Province of Cuba and upon arrival during the predawn hours of December 2, 1956, the Cuban revolution had begun. Having been detected, the revolutionary assault met heavy gunfire upon reaching the shore. Forced to disband and regroup inland, the original group of eighty-two men would eventually be reduced to

1. JOHN BARTLETT, FAMILIAR QUOTATIONS 972 (1968) (quoting President Franklin Delano Roosevelt during a speech before the Daughters of the American Revolution on April 21, 1938).
3. See Anderson, supra note 2, at 175 (quoting a diary entry by “Che” describing his perception of meeting Fidel Castro for the first time as a “political occurrence” and noting humbly, “I think there is a mutual sympathy between us”).
4. See id. at 204, 207; see also Thomas, supra note 2, at 894.
5. See Anderson, supra note 2, at 212.
only twenty-two. 7 Nevertheless, a little over two years later, on January 8, 1959, Fidel Castro would arrive in the capital city of Havana, victorious and hailed as a savior and hero. 8 The Cuban dictator, Fulgencio Batista, was ousted from power and had fled the island days prior to Castro's arrival in Havana. 9 The departure of Batista would mark the beginning of Cuban immigration to the United States. 10

Immigration of Cuban citizens to the United States subsequent to Batista's overthrow by the Castro revolution can be generally categorized within six stages. 11 The first stage, approximating 215,000 refugees, was comprised of industrialists, landowners and others directly affected by Castro's immediate alterations to the political structure in Cuba. 12 This group immigrated freely between 1959 and 1962, mostly through commercial flights still permitted at the time. 13

The second stage of immigration, dating from 1962 to 1965, experienced a sharp decrease in refugees—totaling about 74,000. 14 This group included family members of exiles already in the United States as well as those able to depart Cuba through "clandestine means" 15 or via restricted travel to a third, unrelated country. 16

The third stage, taking place between 1965 and 1973, brought over 680,000 refugees, half of which arrived on flights permitted by an agreement between Cuba and the United States. 17 The fourth stage, beginning in 1973, after Cuban termination of flights to the United States, marked a significant decrease in immigration. 18 The methods of departure once again returned to "clandestine escapes" and travel to countries where it was still permitted. 19 This stage continued through the beginning of 1980 and would be followed by the largest flow of

7. See id.
8. See THOMAS, supra note 2, at 1033.
9. See id. at 1026.
10. See ALEJANDRO PORTES & ROBERT L. BACH, LATIN JOURNEY: CUBAN AND MEXICAN IMMIGRANTS IN THE UNITED STATES 85 (1985) (delineating five main stages of immigration from Cuba to the United States beginning upon the departure of Batista and his supporters).
11. See id.; see also Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1417 (11th Cir. 1995) (citing the 1994 influx of refugees eventually detained at the Guantánamo Naval Base).
12. See PORTES & BACH, supra note 10, at 85-86.
13. See id.
14. See id. at 86.
15. See id.
16. See id.
17. See id.
18. See id.
19. See id.
immigration experienced since shortly after the Castro government took power. The fifth stage of immigration occurred entirely during 1980 and brought almost 125,000 refugees to American shores via the Carter administration's "open hearts and open arms" policy. Former President Carter "extended an invitation to those Cubans seeking refuge to come to the United States." Castro allowed departure through the Cuban port of Mariel, giving rise to the name "Mariel Cubans" or Marielitas for the refugees.

Finally, the sixth stage encompasses the most recent period of massive immigration. On August 13, 1994, the Castro government announced that Cubans wishing to leave would not be prevented from doing so. The announcement caused an influx of over 30,000 refugees departing from the island in small boats and rafts. Many refugees risked their lives attempting to reach American soil. The United States responded by announcing that Cuban refugees attempting to reach the United States would be intercepted. In contradiction to thirty years of immigration policy granting Cuban refugees passage, the United States sent the interdicted refugees to Guantánamo naval base in Guantánamo Bay, Cuba.

The immigration crisis eventually culminated in the New York Agreement. In this agreement, the United States promised to accept at least 20,000 immigrants a year in exchange for Cuban government efforts to prevent citizens from leaving Cuban shores. A companion to

20. See id. at 86-87.
21. See id.
23. See id. at 143.
25. See id.
27. See id.
28. See id. (citing the Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418 as the authority under which the United States maintains "complete jurisdiction and control" of the naval base while acknowledging the ultimate sovereignty of Cuba over the land).
30. See id.
the New York Agreement was entered into on May 2, 1995. This agreement established the current United States policy of repatriating interdicted Cubans to their homeland and contained Cuban government promises that no reprisals will be had against the interdicted refugees for their attempts to escape. The current policy instituted by the immigration agreement of May 2, 1995 has evolved into what has been called the “Wet Feet, Dry Feet” policy, termed such because repatriation occurs if the Cubans are interdicted in the water by the U.S. Coast Guard.

The Cuban Adjustment Act of 1966 ("CAA") was the United States' response to the pervasive problem of Cuban immigration and the issues raised by those migrations since 1959. The CAA grants the Attorney General discretion to adjust the status of a Cuban refugee, present in the United States for at least one year, to that of a permanent resident—the status required to apply for citizenship. Enacted almost four decades ago, the legislation has proven itself durable and flexible in the tumultuous political relationship of the United States and Cuba.

The current immigration policy providing for the interdiction and repatriation of Cuban refugees under the May 2, 1995 migration accord diminishes the effectiveness of the CAA. The purpose of this Note is to advocate the enforcement of the CAA as legislatively intended without the arbitrary limitation of the “Wet Feet, Dry Feet” policy and provide justifications for the continued acceptance of Cuban refugees under the CAA.

Part II explicates the policy considerations contained within the legislative history supporting the fiat of the CAA. Part III proposes modern justifications for the CAA and contends that American trade sanctions against Cuba spawn a duty to provide haven for Cuban refugees. Alternatively, it advocates the cessation of economic sanctions. Part IV calls for the enforcement of the CAA as originally intended.


32. See Migration Agreement, supra note 31, at 397.

33. See Sartori, supra note 24, at 353.


35. See id.

36. See Migration Agreement, supra note 31, at 397.
while distinguishing the Cuban refugee situation from that of other refugees in order to refute claims of inequity and discrimination.

II. LEGISLATIVE HISTORY OF THE CAA

The CAA effectively allows Cuban exiles to circumvent the usual methods used to determine refugee status and their conversion from refugee to permanent resident. The CAA grants the Attorney General discretion to adjust the status of a Cuban citizen admitted or paroled into the United States who has maintained a physical presence for at least one year to the status of an “alien lawfully admitted for permanent residence.” This distinct treatment of Cuban immigrants has been considered by some to be “preferential.” To understand the reasoning behind the creation of this “preferential treatment,” a review of the legislative underpinning and policy concerns is necessary.

A. Humanitarian and Practical Reasons

The first policy concern behind enactment of the CAA was for “humanitarian and practical reasons.” Existing law prior to the enactment of the CAA forced Cuban refugees living in the United States and wanting to adjust their status to permanent residency to follow the “awkward procedure” of departing the United States, traveling to a consular office, applying for an immigrant visa there, and only upon approval, returning permanent residents. The United States government

38. See THOMAS ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 987 (4th ed. 1998) (stating that a refugee may gain the status of permanent resident through either “overseas refugee programs” or “political asylum”).
40. See id. at 244 (defining individuals that are paroled as not eligible for admission but, instead of repatriation, the immigration inspector allows them to travel in the country for limited purposes).
43. Id.
44. H.R. REP. No. 1978, at 4, reprinted in 1966 U.S.C.C.A.N. 3792, 3795 (citing a letter by Under Secretary of State George Ball in which he states that the help provided by the “proposed legislation is being given for purely humanitarian and practical reasons”).
45. See id. at 3, reprinted in 1966 U.S.C.C.A.N. 3792, 3794; see also Silva v. Bell, 605 F.2d 978, 980-81 (7th Cir. 1979).
acknowledged that termination of diplomatic relations with Cuba was
the reason Cubans had to travel to a third country in order to apply for
residency. 46

Although at the time of enactment, 75,000 Cuban refugees had
chosen this “awkward procedure” as the path to residency, 165,000
Cuban refugees remained in the United States without permanent
status. 47 The government acknowledged that existing law imposed a
great burden upon the refugees, as well as the United States consular
offices, which were insufficiently staffed to accept the influx of exiles. 48
Through the enactment of the CAA, the government expected to reduce
government expenditures pertaining to Cuban refugees by permitting
Cuban natives or citizens to gain adjustment at the discretion of the
Attorney General while remaining in the United States. 49 Concern by
legislators that the enactment would be perceived as the United States
acknowledging the permanency of the Castro leadership in Cuba was
relieved by Under Secretary of State George Ball when he assured the
Committee on the Judiciary (“Committee”) that the help provided by the
“proposed legislation is being given for purely humanitarian and
practical reasons.” 50

B. Self-Sufficiency

The second aim of the enactment, cited in the legislative history,
was to provide a mechanism through which Cuban refugees would find
it easier to gain lawful employment. 51 Deputy Attorney General Ramsey
Clark, in a letter by the Department of Justice supporting the enactment
of the legislation, stated that it would remove obstacles preventing the
“self-sufficiency” of the refugees by increasing their probability to
obtain employment. 52 The interests of the United States would also be
promoted by allowing individual refugees to seek employment in

46. See H.R. REP. No. 1978, at 3, reprinted in 1966 U.S.C.C.A.N. 3792, 3794; see also Joyce
A. Hughes, Flight from Cuba, 36 CAL. W.L. REV. 39, 44 (1999) (citing President Eisenhower
breaking diplomatic and consular relations on January 3, 1961, shortly after the nationalization
of United States institutions operating within Cuba).
48. See id. at 3, reprinted in 1996 U.S.C.C.A.N. at 3794; see also Silva, 605 F.2d at 981
(stating that many Cubans “arrived in this country in an impoverished state and were unable to pay
for a trip outside the United States to visit a consulate”).
50. Id. at 4, reprinted at 1966 U.S.C.C.A.N. at 3795.
51. See id. at 3, reprinted in 1996 U.S.C.C.A.N. at 3794 (stating that it will aid refugees “in
their resettlement by enhancing their opportunity to qualify for employment in all areas of the
Nation”).
professions of their choice, making the resettlement process less burdensome upon the Department of Health, Education, and Welfare and providing for more qualified employees in the labor force, especially in areas where manpower shortages were present at the time.\(^5\)

C. Haven Provision from Persecution

Finally, the third policy behind the enactment was to provide a mechanism for refugees to escape the political persecution of Communist countries.\(^5\) The provision of relief from persecution served two policy goals.\(^5\) The first dealt with providing protection for those politically persecuted under the Communist government of Cuba.\(^5\) The committee cited previous enactments providing for the aid of persecuted persons as precedent for such socio-political legislation.\(^5\) Authority cited in the Committee report referred to legislation passed on behalf of Hungarian refugees and for refugees fleeing Communist countries outside of the Western Hemisphere.\(^5\)

The second goal of providing haven from Communist Cuba is not clearly stated in the legislation, but well established by history. The post-1960’s relationship between the United States and Cuba is one intertwined with the Soviet Union and the Cold War.\(^5\) Castro’s declaration of his Marxist-Leninist beliefs shortly after the United States-supported invasion at the Bay of Pigs\(^6\) had been considered a call for support from the Communist nations.\(^6\) The United States policy against Communist expansion was promoted by allowing the Cubans who came to the United States to denounce communism through finding

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53. See id. at 9-10, reprinted in 1996 U.S.C.C.A.N., at 3798, 3800 (discussing employment advantages of the CAA and also citing a letter by Wilbur J. Cohen, Under Secretary of the Department of Health, Education and Welfare, where he states that there is a shortage of medical professionals in the country).
57. See id.
58. See id.
59. See id.
60. See Masud-Piloto, supra note 55, at 24-29.
61. The Bay of Pigs is the translation of Cochinos Bay in Cuba, the landing point of the failed invasion which brought 1200 men comprised of Cuban ex-patriots trained by the United States in order to invade and hopefully incite rebellion within the country to overthrow Fidel Castro. See THOMAS, supra note 2, at 1355-71.
61. See Hughes, supra note 46, at 45.
refuge in the democratic United States while at the same time draining Cuba of vital resources such as an educated labor force.\textsuperscript{62} The departure from Communist Cuba to the democratic United States by refugees was considered a vote against Communism and a vote for democracy.\textsuperscript{63} Modern support for this proposed legislative intent is found in the repeal of the CAA being conditioned upon determination by the President that a democratically elected government is in power within Cuba.\textsuperscript{64}

III. MODERN RATIONALIZATIONS FOR THE CAA

The modern justifications for the CAA generally fall under two categories: modern political persecution and humanitarian concerns.\textsuperscript{65} These categories are comprised of rationalizations at the time of enactment that are still pertinent, as well as independent, current justifications.

A. Modern Political Persecution

The political persecution, which the CAA was enacted to alleviate, continues to exist in Cuba. Amnesty International, an organization which campaigns for the advancement of human rights,\textsuperscript{66} raised concerns over the persecution of Cuban citizens in a letter sent to the Cuban government dated January 16, 2001: ""The increasing number of people jailed for peacefully exercising their rights to freedom of expression, clearly demonstrates the level to which the government will go in order to weaken the political opposition and suppress dissidents.""\textsuperscript{67} In addition, Amnesty International, in its Annual Country Report for 2001, classified Cuba as a country in which ""[i]ndividuals and groups


\textsuperscript{63} See MASUD-PILOTO, supra note 55, at 33.

\textsuperscript{64} See Pub. L. No. 104-208, § 606, 110 Stat. 3009-176 (1996) (providing the method for determination of a democratically elected government to be made by the President under section 203(c)(3) of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Pub. L. No. 104-114)).

\textsuperscript{65} See discussion infra Part IIIA-D.


peacefully exercising their rights to freedom of expression, association and assembly continued to face repression.\textsuperscript{68} The country report also asserted, "[t]he authorities continued to use short term detention, house arrest, threats and harassment to stifle and discourage political dissent."\textsuperscript{69}

The State Department recently acknowledged the continuance of persecution in its "Cuba: Country Report on Human Rights Practices-2000."\textsuperscript{70} The Cuban government prohibits criticism of Fidel Castro, the National Assembly of Cuba and the Revolution.\textsuperscript{71} Laws that have been enacted against such actions carry penalties that vary from three months to three years of incarceration.\textsuperscript{72} Penalties of up to fourteen years imprisonment exist for "disseminating enemy propaganda."\textsuperscript{73} Governmental pressure has been exerted upon religious entities as well.\textsuperscript{74} They have been pressured to avoid political topics.\textsuperscript{75} Certain church-related publication activities have even been classified as counterrevolutionary.\textsuperscript{76}

Human Rights Watch, the largest human rights organization based in the United States,\textsuperscript{77} noted in its "2001 World Report" that, although human rights conditions in Cuba have slightly improved, the country remains repressive.\textsuperscript{78} Cuba continued to deny "freedom of expression, association, assembly, movement, and of the press."\textsuperscript{79} The government

\begin{itemize}
\item 69. \textit{Id.}
\item 70. See U.S. Dep't of State, Cuba: Country Reports on Human Rights Practices-2000, \textit{available at} http://www.state.gov/g/drl/rls/hrrpt/2000/vhr/index.cfm?docid=751.htm (last visited Aug. 20, 2002) [hereinafter Human Rights Practices]; see generally Steven C. Poe et al., \textit{How Are These Pictures Different?: A Quantitative Comparison of The US State Department and Amnesty International Human Rights Reports, 1976-1995}, 23 \textit{Hum. RTS. Q.} 650 (2001) (proposing that although Amnesty International reports and State Department reports regarding human rights violations have differed as to their findings in the past, reports have been found to be increasingly in agreement in recent years).
\item 71. See Human Rights Practices, \textit{supra} note 70.
\item 72. See \textit{id.}
\item 73. \textit{Id.}
\item 74. See \textit{id.}
\item 75. See \textit{id.}
\item 76. See \textit{id.}
\item 77. See Human Rights Watch, \textit{About HRW, available at} http://www.hrw.org/about/whoweare.html (last visited Aug. 20, 2002).
\item 79. \textit{Id.}
\end{itemize}
also criminalized freedom of speech under the claim of "protecting state security." 80

Arguments have been advanced questioning the validity of the CAA, claiming that economic conditions, and not political persecution, are the driving force behind Cuban immigration. 81 Undoubtedly, economic conditions play a predominant role in the refugee situation, but persecution is apparent and should not be selectively ignored by the government in order to deny entry. 82 An additional disputation of the continued enforcement of the CAA is enmeshed with the Soviet Union's withdrawal of military and economic assistance from Cuba at the conclusion of the Cold War. 83 It has been correctly asserted that the withdrawal of the Soviet Union from Cuba extinguished the indirect purpose of thwarting communist expansion in the Americas served by providing safe haven through the CAA. 84 What the argument fails to acknowledge is that dissuading communist expansion by allowing Cuban refugees to escape to the United States, in turn draining Cuba of an educated labor force, was but one indirect goal of the CAA. 85 The eradication of the mission still leaves the set purpose of providing haven for the sake of protection from communist nations, which the legislative history directly stated as a justification. 86 Moreover, the legislators provided precedent for taking such actions. 87 As long as the well-documented persecution in Cuba persists, the CAA continues to serve a valuable role in ensuring a mechanism through which persecuted persons may find relief. Additional support justifying the continued enforcement of the CAA as originally intended is found in the current state of humanitarian conditions within Cuba.

B. Humanitarian Concerns

The economic condition in Cuba is dismal. The country is eleven billion dollars in debt. 88 The economy receded thirty-five percent in 1989 after Soviet economic support amounting to four billion dollars a year...
was terminated. Although the economy has made small strides towards normalcy, Cuban citizens have paid a serious price. The average monthly salary in American dollars amounted to $10.52 in 2000. There are chronic shortages of medical supplies and governmental food rations have been deemed to be less than half of what is necessary.

It is undeniable that many seek to depart Cuba based on economic conditions, yet this relief is not available under current immigration regulations. Immigration law does not grant refugee asylum based on economic reasons. The statutory definition of a “refugee” eligible for asylum is “any person who is outside any country of such person’s nationality . . . unable or unwilling to avail himself or herself of the protection of, that country because of persecution . . . on account of race, religion, nationality, membership in a particular social group, or political opinion.” This legal requirement has been used to support arguments against the continued acceptance of Cuban refugees, claiming that most are economic refugees failing to meet the required definition and are not political refugees. Consequently, these refugees have been termed by some as “consumer refugees.” The refusal to allow economic refugees from Cuba, however, is counterintuitive.

The State Department acknowledges that Cubans seeking refugee status, regardless of their basis for it, suffer economic strife. Support is found in State Department reports that note the fees charged by the Cuban Government for travel to the United States ($500 per adult and $400 per child) are a “significant hardship,” equivalent to about five years of salary. Additionally, the refugee is also responsible for the

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89. See id.
90. See id.
91. See id.; see also Human Rights Practices, supra note 70 (noting that Cuba’s Labor Code establishes the salaries of workers under the law).
92. See DeYoung, supra note 88 (stating the quantity of food per month as six pounds of rice and sugar, one and a half pounds of legumes (half peas, half beans), one-quarter pounds of coffee, one dozen eggs, one to two pounds of meat, one-eighth of a pound of cooking oil, one pound of salt, one to two pounds of fish and less than three ounces of bread and approximately two pints of milk per day).
93. See ALEINIKOFF ET AL., supra note 38, at 986-87.
94. Immigration and Naturalization Act § 101(a)(42)(A), 8 U.S.C. § 1101 (a)(42)(A) (2000); see also Garcia-Ramos v. INS, 775 F.2d 1370, 1373-74 (9th Cir. 1985) (describing the analysis of “well-founded fear” as embodying a subjective standard for determination of “fear” relating to the applicant’s state of mind and an objective standard for the determination of “well-founded” related to finding a basis of reasonable possibility of persecution).
95. Cuban Adjustment Act, supra note 42, at 913.
96. Id.
98. See id.
airfare to the United States. This is a great obstacle, as most Cuban refugees have trouble obtaining food and medical treatment, much less the requisite funds to leave the country. This state of political and economic affairs creates a paradoxical situation.

C. The Paradox of the Economic Refugee

In Abraham Maslow's *Theory of Human Motivation*, Maslow suggests five categories of general human needs, ordered by priority of satisfaction. The needs are ordered as follows: physiological and biological needs, safety needs, love or belongingness needs, esteem needs, and finally, self-actualization or needs for self-development.

The first need, physiological, is comprised of biological necessities for survival, including food, air, and water. Maslow describes these as "the most prepotent of all needs." He also states that an individual lacking "food, safety, love, and esteem would most probably hunger for food more strongly than for anything else." The next necessity along Maslow’s hierarchy consists of the "safety needs." These are characterized by the human necessity of security, protection and the need for structure and law, to name a few. Only upon satisfaction of this requirement would an individual become concerned with the satisfaction of Maslow’s third level of needs, belongingness and love needs. Love needs are related to the development of affectionate familial relationships as well as relationships in general. The fourth level of Maslow’s hierarchy, reached upon fulfillment of love needs, is esteem needs. Esteem needs are related to the desire for positive self-respect and self-esteem, as well as the esteem of others. Finally, the paramount of the hierarchy is termed "self-actualization" and is affiliated with the full achievement of one’s potential.

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99. See id.
100. See id.
102. See id.
103. See id. at 35-36.
104. Id. at 36.
105. Id. at 37.
106. Id. at 39.
107. See id.
108. See id. at 43.
109. See id.
110. See id. at 45.
111. See id.
112. See id. at 46.
As previously stated, only upon satisfaction of a prior need does the individual become concerned with the gratification of the next hierarchical need. More clearly, Maslow states, "[t]he merely surviving man will not worry much over the higher things of life ... the right to vote, the good name of his city ... he is primarily concerned with more basic goods." In accepting Maslow's theory, it would be paradoxical to deny an individual refugee status based on her classification as an economic refugee. The situation that makes her an economic refugee may be the obstacle preventing her from exhibiting the necessary political persecution because she is consumed by satisfying her physiological needs.

Additionally, a second paradox arises. The economic strife suffered is partially caused by the marginalization of Cuban citizens who are not members of the communist party in Cuba—the only allowed political party based on the country's constitution. Under Law 77, enacted by the Cuban National Assembly in 1995 in order to promote economic expansion through foreign investment, Cuban employees are contracted by foreign investors through Cuban agencies. This prohibits foreign investors from selecting employees based on their criteria and instead empowers the Cuban government to choose those citizens they feel appropriate for employment. The government also monitors employees via the maintenance of an individual "Labor Record" which archives, among other information, conduct relating to the political ideology of the employee. The potential for economic discrimination based on political beliefs is inescapable upon recognizing that a one-party government is determining who gains employment. Similarly, the "Cumulative Academic Record" of students contains an assessment of the students' and their parents' political and ideological conduct which may potentially inhibit the opportunity of higher education or career choice. The economic reasons behind seeking asylum, ironically, both deny the individual haven under American immigration law, and also serve as proof of the very persecution necessary to qualify for safe

113. See id. at 70.
114. Id.
117. See id. at 95.
119. See id.
haven. Unfortunately, the current "Wet Feet, Dry Feet" interdiction policy does not acknowledge this paradox and is returning thousands of refugees to political and economic persecution.\(^{120}\)

The counterargument can be made that the floodgates of immigration from all countries with economic refugees would be opened if these paradoxes were acknowledged and corrected. But the flow of immigration could justifiably be limited to Cuban refugees since the Cuban situation is distinguishable from that of other nations. Due to United States trade sanctions against Cuba and the devastating impact they have on the economic conditions within Cuba, a duty arises incumbent upon the United States to enforce the CAA and accept refugees without interdiction or alternatively, cease the embargo altogether.\(^{121}\)

**D. Creation of Duty**

Another justification for continued enforcement of the CAA without interdiction policies is also related to the humanitarian rationale. The United States economic policies against Cuba create a duty to refugees arising from the degradation of the Cuban economy caused by unsuccessful economic sanctions against Cuba.\(^{122}\) Economic sanctions enacted since 1960\(^{123}\) and fortified by the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996\(^ {124}\) (known as the Helms-Burton Act) have debilitated the Cuban economy.\(^ {125}\) The embargo has cost Cuba an estimated sixty-seven billion dollars\(^ {126}\) and placed Cuban per capita food consumption last among Latin American countries.\(^ {127}\) The economic repercussions also extend to the healthcare of Cuban citizens through the lack of medical supplies and prescription medication.\(^ {128}\)

\(^{120}\) See Sartori, supra note 24, at 326.

\(^{121}\) See discussion infra Part III.D.

\(^{122}\) See DONNA RICH KAPLOWITZ, ANATOMY OF A FAILED EMBARGO: U.S. SANCTIONS AGAINST CUBA 1-6 (1998).

\(^{123}\) See id. at 2 (citing five different phases of embargo policy, beginning first with its development from 1960 to 1962, then its expansion between the years of 1960 and 1970, followed by limited efforts to reduce the scope during the years from 1971 to 1980, then returning to a "tightening of the bilateral embargo" and finally the fifth stage, attempting to globalize the embargo coupled with international resentment towards the policy).


\(^{125}\) See Cuban Adjustment Act, supra note 42, at 920-21.


\(^{127}\) See Cuban Adjustment Act, supra note 42, at 920.

\(^{128}\) See id. at 920-21.
It is widely-accepted in tort law that there is no duty to act to the benefit of a party even if the harm caused is a foreseeable result of the failure to act.\textsuperscript{129} An equivalent rule exists in criminal law, asserting that a moral duty to engage in affirmative action does not create a legal duty to do so.\textsuperscript{129} Yet both areas of law account for situations that may create a legal duty to act. Such a situation, according to criminal law, is a duty based upon the creation of peril.\textsuperscript{131} Such a relationship arises when a person places another in a dangerous position.\textsuperscript{132} If the acts placing the other in peril are due to affirmative acts on behalf of the actor, it is incumbent upon her to protect the potential victim from the created harm.\textsuperscript{133} The analogous rule in tort law goes a step further.\textsuperscript{134} Tort law places a duty upon the creator of peril, regardless of intent.\textsuperscript{135} If the actor is aware or should be aware of the peril created by her actions, she owes a duty of reasonable care to the potential victim, regardless of fault.\textsuperscript{136}

The economic embargo instituted by the United States affirmatively creates peril for the Cuban people. This peril manifests itself in the forms of hunger and lack of necessary medical supplies; together, they give rise to a duty to act.\textsuperscript{137} Although the House and the Senate agreed in October 2000 to end all “unilateral U.S. food and medicine embargoes” instituted against “Cuba, Iran, Libya, Sudan and North Korea,” Cuba was singled out and prohibited from purchasing food and medicine on credit.\textsuperscript{138} This prohibition effectively maintained the embargo against food and medicine sales since Cuba remains cash deficient.\textsuperscript{139} The absolute failure to meet any of the objectives of the economic embargo provides additional support for the duty to accept Cuban refugees under the CAA or more importantly eliminate the policy altogether.

\textsuperscript{129} See DAN B. DOBBS, THE LAW OF TORTS 853 (2000).
\textsuperscript{130} See WAYNE R. LAFAVE, CRIMINAL LAW 215 (3d ed. 2000).
\textsuperscript{131} See id. at 218-19.
\textsuperscript{132} See id.
\textsuperscript{133} See id.
\textsuperscript{134} See DOBBS, supra note 129, at 856-57. It should be noted that a duty arising from innocent acts is also found in criminal law but is not as widely accepted. See LAFAVE, supra note 130, at 218.
\textsuperscript{135} See DOBBS, supra note 129, at 856-57.
\textsuperscript{136} See id.
\textsuperscript{137} See supra text accompanying notes 126-28.
\textsuperscript{138} Karen DeYoung, Embargo Foes Feel Let Down on Cuba, WASH. POST, Oct. 8, 2000, at A16 [hereinafter Embargo Foes].
\textsuperscript{139} See id.
E. The Failures of the Economic Embargo

The goals of enforcing trade sanctions against Cuba have been classified into six categories: (1) the removal of Castro; (2) retaliation and compensation for the nationalization of American assets; (3) containment of the revolution; (4) elimination of Cuban-Soviet ties; (5) symbolizing American opposition; and (6) promoting change within Cuba. The first goal, overthrow, has obviously not succeeded. Castro remains President and has arguably used the embargo to fortify his stance against the United States. The failure of the second goal—retaliation and compensation for the nationalization of American assets—was actually assured by the institution of an economic embargo. Indeed, by prohibiting trade, the United States eliminated the source of income Cuba intended to use for underwriting the repayment of seized assets. In further support, various nations choosing not to institute the failed policy of sanctions have since settled their respective nationalization claims.

The third goal—containment of the revolution—developed as a response to the inability to remove Castro from power. Once again, the embargo failed to meet its objective. Cuba has remained active in its support of populist left-wing movements throughout the Americas. Moreover, the embargo arguably increased the desire to promote revolutionary change in the region. The fourth goal, breaking ties between the Soviets and Cuba, was to be accomplished by making the relationship too financially burdensome to maintain. Although the embargo increased the costs of maintaining a relationship, it forced Cuba into a closer and more dependent relationship with the Soviets.

140. See Kaplowitz, supra note 122, at 3.
141. See id. at 3-4.
142. See id.
143. See id. at 4-5.
144. See id. at 4 (stating that the Cuban government planned to use twenty-five percent of trade earnings to pay off nationalization claims).
146. See Kaplowitz, supra note 122, at 5.
147. See id.
148. See id. at 5 (stating “that the U.S. embargo imbued Cuba’s internationalist zeal with even greater urgency, born of Cuba’s need to compensate for the perceived threat and concrete economic disturbance the embargo produced on the island”).
149. See id. at 6.
150. See id. (estimating the debt owed to the Soviets by Cuba to be in the range of twenty to thirty billion dollars and total Soviet assistance between sixty and eighty billion dollars).
The value of the fifth goal, symbolizing American opposition to the revolution has diminished in importance. Any benefit from demonstrating to the citizens of the United States and the international community that American resolve would not accept the Castro government has outlived whatever usefulness had arguably existed. The international disapproval to the policy has manifested in the United Nations voting in condemnation of the embargo for five consecutive years dating from 1992 to 1997. Domestically, polls have indicated that a majority of American citizens favor “reestablishing diplomatic and economic relations.” Finally, the utter failure of the sixth goal—creating internal change within Cuba—cannot be denied.

The embargo has failed to meet any of its goals and instead manifests itself as a punishment for the people of Cuba. The persistence of Helms-Burton in light of its categorical failures portrays the legislation as the codification of a monumental grudge, leaving eleven million Cuban citizens to suffer the pervasive repercussions. The United States has a duty to alleviate the harm it has created either by eliminating the policies perpetuating such harm or by accepting the refugees under the CAA as originally intended. One of the underlying rationales supporting the enactment of the CAA provides an example for United States acknowledgement of such a duty.

American foreign policy, namely, the termination of diplomatic relations with Cuba in 1962, created a hardship since Cubans seeking asylum would have to reach a third country in order to establish a refugee claim as prescribed by United States immigration laws. The CAA instead eliminated the requirement of applying for asylum in a third country, in part to alleviate the hardship the United States created by terminating diplomatic relations.
IV. STRICT ENFORCEMENT OF THE CAA

The rationale provided during the creation of the CAA supported its enactment and modern justifications promote its continued enforcement. The enforcement of the CAA as intended is necessary for its desired results to be realized. The intrusion of other immigration policies such as the “Wet Feet, Dry Feet” policy arbitrarily denies entry into the United States for individuals that otherwise would be deserving under the CAA.

A. Wet Feet, Dry Feet

Current immigration policy toward Cuban refugees requires Cubans to reach United States soil in order to invoke the CAA, otherwise known as the “Wet Feet, Dry Feet” policy.159 If intercepted at sea, refugees are returned to Cuba unless they are found to have a “credible fear of persecution”, in which case they are taken to Guantánamo naval base and granted a second interview.160 If during the second interview it is determined that a “fear of persecution” exists, they are then transferred to a third country.161 If no “credible fear of persecution is determined” to exist, the refugee is automatically repatriated to Cuba.162 The “Wet Feet, Dry Feet” interdiction policy is used to circumvent the CAA since in order to invoke the CAA, a refugee has to be within the United States.163

Besides the questionable legality of interdicting refugees at sea,164 whether or not a Cuban refugee is discovered in the water or on land has no logical relation to the reasons why she seeks to invoke the CAA and the policy advances behind its legislation. Furthermore, interdiction creates additional hardships.165 Interdicted refugees must establish a “credible fear of persecution” in order to prevent repatriation.166 This standard is comprised of two prongs.167 The first entails determining

158. See Sawczyn, supra note 62, at 348-49.
159. See Migration Agreement, supra note 31.
160. See id.; see also INS 800 Number on Cuban Migrant Interdiction Process, supra note 31.
161. See INS 800 Number on Cuban Migrant Interdiction Process, supra note 31.
162. See Clinton Administration Reverses Policy on Cubans, 72 No. 18 Interpreter Releases 622, 622-23 (May 8, 1995).
163. See supra text accompanying note 33.
164. See Sawczyn, supra note 62, at 351-52 (arguing that Cuban refugees found in the territorial waters of the United States are there for purposes of “innocent passage” and therefore the Coast Guard has no right to interdict since passage does not threaten national or international security).
166. See id.
167. See id. at 72.
whether there exists a "substantial likelihood" the refugee is being truthful. The second prong requires making the determination of whether or not the claimant would have a "reasonable possibility of establishing...a well-founded fear of persecution." The "substantial likelihood" standard required in the first prong is a much stricter test than required by the United Nations High Commissioner for Refugees ("UNHCR").

The UNHCR standard states that "a refugee claimant should be granted the benefit of the doubt if his or her statements are coherent and plausible and do not run counter to generally known facts." The UNHCR standard takes into consideration the possibly stressed nature of the refugee’s mental state and the difficulty experienced in providing evidentiary support for the refugee’s claim. The United States interdiction standard does not take either of these concerns into consideration. Ponder for a moment the insurmountable fear and despair, which must engulf someone when deciding to navigate shark-infested tropical waters on a congested makeshift raft—the failure to grant consideration for a refugee’s mental state becomes reprehensible. In addition to requiring stricter standards in order to avoid repatriation, it is also argued that performing an asylum hearing on board a Coast Guard vessel by "shipboard adjudicators", as required by interdiction policy, limits the opportunity for a fair hearing. Additional concerns arise once refugees are determined ineligible for asylum and repatriated.

168. See id.
169. Id. at 72-73.
170. See id. at 73.
171. Id.
172. See id.
174. Frelick argues:
Given the difficulty the courts have had in refining even less nuanced distinctions between the "well-founded fear" standard for asylum and the "clear probability" standard for withholding deportation, it seems unreasonable to expect a low-level INS officer on the high seas to be able to make any meaningful distinction between assessing if an asylum seeker has a "well-founded fear" (which they are not supposed to do) and assessing 'the reasonable possibility of establishing a well founded fear' (which they are supposed to do).

Frelick, supra note 165, at 7; see also Sawczyn, supra note 62, at 356 (stating that practically speaking, an individual experiences a better chance to obtain asylum if that asylum is requested within the country where it is sought).
175. See Sawczyn, supra note 62, at 356.
One such concern is that repatriation prevents the refugee from possibly obtaining refuge in a country other than the United States. It has also been proposed that the repatriation may leave the refugee open to additional persecution, acknowledging that it is impossible to prevent the Castro government from harassing repatriated refugees. Repatriated refugees may also face fines of $500 each or suffer three years imprisonment.

The CAA was instituted almost forty years ago to provide haven from political persecution and for some, that persecution continues to exist today. The CAA was also enacted to provide humanitarian support for the Cuban people, also a necessity that persists today. The interdiction policies prevent the CAA from serving its intended role. Unfortunately, enforcing the CAA as originally intended has come under criticism by commentators, claiming that the CAA provides preferential treatment to Cubans over other immigrants and it should therefore be eliminated.

B. Claims of Preferential Treatment

The arguments claiming that the CAA provides favoritism for Cuban refugees over other immigrants vary from claims of inequity within American immigration policy to claims of racism. It is an inescapable fact that Cubans reaching United States soil and invoking the CAA receive preferential treatment under the CAA. Also inescapable is the fact that racism plays a formidable role in the formation of immigration law, a factor that has been attributed to the restrictions placed on Cuban immigration in recent decades. In order to determine if the situation in Cuba, accounting for and supporting the

176. See id.
177. See id.
178. See UNHCR, World News: Cubans Who Didn’t Reach U.S. Shores Have Little Choice – Cuba or Haiti, available at http://www.unhcr.ch/cgi-bin/texis/vtx/home/+RwwBmenyrzwwwgwwwwwwhFqmN0bHlFqnDn5AFqnN0blcFqnqL.xwMzm0wwwwwwwwwwwdFqidGmnGaxOa-uPPyER0ay0Ig/opendoe.htm (June 11, 2001) (last visited Aug. 22, 2002).
179. See supra text accompanying notes 63-82.
180. See supra text accompanying notes 88-100.
182. See Cuban Adjustment Act, supra note 42, at 914-17.
183. See id.
favoritism, can be distinguished from the situations experienced in other countries, an analysis is required. Most claims of preferential treatment are based on the disparity between the treatment of Cuban immigrants and the treatment of Haitian and Mexican immigrants. Therefore, distinguishing the situations among these countries would provide the best foundation upon which to justify (if possible) the preferential treatment.

The characteristic that most distinguishes the situation in Cuba versus that in Haiti and Mexico is the existence of diplomatic and trade relations between the United States and both the Mexican and Haitian governments. Commitments by the United States to promote change within Haiti have been prevalent, while any commitment for change in Cuba on behalf of the United States has remained nonexistent. Additionally, Haiti receives the benefits of trade relations with the United States as their largest trading partner. Haiti also received 1.04 billion dollars in funds from the United States between the years of 1995 and 2001 to be allocated to such programs as food assistance, health care programs, and agricultural expansion. Contrarily, Cuba receives no humanitarian funds from the United States government and has been prohibited from trading with the United States for almost half of its existence as an independent nation.

Yet, although these distinguishing factors and the possibility for political change exist within Haiti, the social and economic strife experienced within the country justifies a call for equivalent treatment. The perpetual suffering experienced by the 7.5 million people in Haiti is

185. See id. at 124-25.
186. See Frelick, supra note 165, at 68. In June of 1994, American authorities detained massive numbers of Haitian refugees fleeing Haiti due to political upheaval. See Chronology: A Recent History of Haiti, N.Y. TIMES, Oct. 16, 1994, at 18. By October 15, with United States military and economic support, President Aristide, whose ouster from power by revolutionary forces caused the political upheaval, was back in power and the political turmoil had subsided. See id.
188. See id.
189. It should be noted that the United States offered humanitarian aid to Cuba after the country was struck by a hurricane on November 4, 2001 although Cuba instead chose to purchase food in cash under the eased sanctions pertaining to food. See Tim Padgett, Steaming Through the Embargo, TIME, Dec. 24, 2001, at 19; see also Embargo Foes, supra note 138.
190. See KAPLOWITZ, supra note 122, at 2.
191. Another difference between the two countries is found in the make-up of their respective political systems. The State Department lists at least six different political parties within Haiti while at the same time recognizing that Cuba only has one, the Communist/Socialist party. See Background Note: Haiti, supra note 187; Human Rights Practices, supra note 70.
beyond comprehension.\textsuperscript{192} What minimal infrastructure exists is in a state of deterioration; for example, six out of ten Haitians are unable to access potable water.\textsuperscript{193} One in twelve children contract the HIV virus every year—the same virus that has orphaned an estimated 163,000 children.\textsuperscript{194} Additionally, the nation is in the throes of a sixty percent unemployment rate with those fortunate enough to have a job earning only 250 dollars a year, on average.\textsuperscript{195} As conditions in Haiti worsen, hundreds of millions of dollars are being withheld from the Haitian people via economic sanctions instituted by the United States.\textsuperscript{196} The sanctions came after Haitian political elections in 2000 were met with accusations of "electoral fraud."\textsuperscript{197} The need for legislation providing safe haven for political and humanitarian purposes is self-evident.\textsuperscript{198} Some members of the Cuban community, along with others, have called for better treatment of Haitian refugees\textsuperscript{199}—a group that has suffered from poor political representation in the United States.\textsuperscript{200} In the case of Haiti, the preferential treatment provided under the CAA is obvious, but in accomplishing equal treatment, it is imperative to fight for the legislative equivalent to the CAA for Haitians and not equality through the retraction of it.

Conversely, the diplomatic relationships the United States shares with Cuba and Mexico justifies the preferential treatment under the CAA for Cuban versus Mexican immigrants. Relations between the United States and Mexico have only improved since the election of President Bush.\textsuperscript{201} These improved relations translate into cooperation on issues relating to the environment, drugs and most importantly, immigration.\textsuperscript{202} Trade between the United States and Mexico makes up ten percent of

\begin{footnotesize}
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\item \textsuperscript{192} See Canute James, \textit{Haiti Parties Inch Towards Reconciliation: A Political Imbroglio has Left the Deprived Country Worse Off than Ever}, \textit{FIN. TIMES (LONDON)}, July 2, 2002, at 2.
\item \textsuperscript{193} See id.; Sanjay Bhatt, \textit{Four From Haiti Land on Jupiter Island: Political Deadlock in Haiti Spurs More Immigrants}, \textit{PALM BEACH POST}, Apr. 28, 2002, at 1C.
\item \textsuperscript{195} See James, supra note 192.
\item \textsuperscript{196} See Liz Balmaseda, \textit{Refugees Face a Test of Faith}, \textit{MIAMI HERALD}, July 21, 2002, at 1A.
\item \textsuperscript{197} See Haiti: Review, supra note 194.
\item \textsuperscript{198} See generally Cheryl Little, \textit{InterGroup Coalitions and Immigration Politics: The Haitian Experience in Florida}, 53 U. \textit{MIAMI L. REV.} 717 (1999).
\item \textsuperscript{199} See id. at 739.
\item \textsuperscript{200} See Little, supra note 181, at 317-18.
\item \textsuperscript{202} See id.
\end{enumerate}
\end{footnotesize}
United States trade and accounts for eighty-two percent of Mexican exports and seventy-two percent of Mexican imports. 203 Preferential treatment exists for Cuban refugees under the CAA and therefore provides for some inequity in American immigration laws. However, the fact remains that immigrants not subject to the CAA and returned to their home country benefit from relations maintained between their respective countries and the United States. Cuban immigrants forced to stay within Cuba do not experience these benefits and therefore have no other recourse than to accept their situation or risk government reprisal by fighting for change. 204

V. CONCLUSION

As the Cuban Revolution triumphed, Senator Barry Goldwater stated that the American public “shook their head in bewilderment.” 205 Now, more than four decades later, bewilderment seems an understatement. In July 2002, Governor Jeb Bush appointed Raoul Cantero III, the grandson of ex-Cuban dictator Fulgencio Batista—the reviled dictator overthrown by Fidel Castro and “Che” Guevara—to the Florida Supreme Court. 206 Mr. Cantero, having never served as a judge, was an appellate attorney serving on such defense teams as that of known terrorist—labeled such by the United States after participation in over thirty terrorist acts—Orlando Bosch. 207 Mr. Bosch—a man referred to by Mr. Cantero as a “Cuban Patriot”—was charged with the bombing of a Cuban airliner in October 1976, the “single worst act of air terrorism in the hemisphere” prior to the September 11, 2001, killing seventy-three passengers including members and coaches of the Cuban national fencing team among other Cuban citizens. 208 After serving eleven years in a Venezuelan prison, Orlando Bosch was acquitted of charges and released. 209 It has been suggested that the lobbying efforts of the American Ambassador to Venezuela at the time, Otto Reich, played a

204. See supra text accompanying notes 66-80.
206. See Julie Hauserman, Choice a Swipe at Activist Court, ST. PETE TIMES, July 11, 2002, at 1B.
207. See id.; see also ANN LOUISE BARDACH, CUBA CONFIDENTIAL 200 (2002).
208. BARDACH, supra note 207, at 187-88; see also Hauserman, supra note 206, at 1B.
209. See BARDACH, supra note 207, at 200.
large role in his release. On January 11, 2002, President Bush appointed Otto Reich as Assistant Secretary of State for the Western Hemisphere, considered by some as a “staunch anti-communist” who as recently as 1999 advocated a Cuban policy similar in scope to “economic warfare” in order to end communism in the country. Along with assisting in the creation of the Helms-Burton Act, Mr. Reich has also been a paid lobbyist for Bacardi, a Rum manufacturer that made substantial political contributions to those working on the passage of Helms-Burton. While Mr. Cantero’s appointment may be classified as ironic, Mr. Reich’s appointment is tragic and does not provide much hope for any substantial change in the current policy. Any movements toward the normalization of relations with Cuba are confronted with negative reactions and unsubstantiated accusations.

In May 2002, as hopes for a “new period of greater understanding” were raised by a pending visit to Cuba by former President Carter, Under Secretary of State John Bolton accused Cuba of having a limited-developmental biological weapons research and development-effort capability and identified the country as member of the “axis of evil.” The claim—though worthy of proclamation prior to President Carter’s visit—was interestingly not worthy of inclusion within the May 2002 Terrorism Report or a matter of concern for the Pentagon. The “timely” comments by Under Secretary Bolton have been compared to those made by Dan Fisk, a former aide of Senator Jesse Helms and currently an underling of Otto Reich. In September 2002, one week prior to American companies departing for a trade presentation in Cuba—the first since the embargo—Mr. Fisk accused Cuba of providing false information regarding terrorist threats and wasting the time of

210. See id. (citing “half a dozen State Department cables” by Otto Reich lobbying for Orlando Bosch).
212. Alfredo Corchado, Iran-Contra Figure Up For Key Aide’s Job; Critics Say His Views On Cuba Could Hurt Relations With Mexico, DALLAS MORNING NEWS, Mar. 4, 2001, at 11A.
213. See Alfredo Corchado, Castro Foes Bet Big As Donors; Study Details How a Few Cuban Exiles Have Aided Key U.S. Lawmakers, DALLAS MORNING NEWS, May 20, 2002, at 1A.
214. Ironic, considering that many elder Cubans find themselves once again under the governmental authority of a Batista.
217. See David Adams, Spy Games Entrap Both Sides in Cuba Embargo Debate, ST. PETER TIMES, Sept. 19, 2002, at 6A.
enforcement agencies.\textsuperscript{218} The Cuban government denied the claim vehemently and accused Mr. Fisk of "lying with impudence."\textsuperscript{219} When asked for confirmation of the claims, officials stated that the alleged misinformation could not be divulged for security purposes.\textsuperscript{220}

Nevertheless, Cuba has been utilizing its ability to purchase American food products with cash, highlighted by the presentation of a Food Expo near Havana on September 26, 2002 with almost 300 American companies in attendance.\textsuperscript{221} Ranked last among 228 countries that bought food and agriculture from the United States in 2000, Cuba is expected to move to forty-five by year-end 2002.\textsuperscript{222} However, the requirement that food purchases be in cash reduces the potential relief provided from the exception to the embargo, leaving substantial future changes in policy, if any, frustratingly distant and unclear.\textsuperscript{223}

Immigration policies, regarding Cuban refugees over the last decade, have served to dilute the strong policy justifications, past and present, behind the CAA. The "Wet Feet, Dry Feet" policy serves no rational purpose in the realm of Cuban and American immigration policy other than to prevent immigration through the circumvention of the CAA. The embargo preventing the economic expansion of Cuba creates a recognizable duty upon the United States to enforce the CAA as originally intended, or in the alternative, take affirmative steps to alleviate the negative economic impact on the Cuban people. Should the latter course be chosen, the initial step should be the lifting of economic trade sanctions.

The embargo unnecessarily perpetuates the economic strife experienced by Cuban citizens, increasing the need for escape from Cuba without providing the United States any benefit in return. Alternatively, if current policy towards Cuba remains steadfast, the only hope Cuban citizens have to emancipate themselves from their situation remains immigration. It is incumbent upon the United States to provide a safety valve for the pressure cooker its policies create in Cuba, and only

\textsuperscript{218} See id.
\textsuperscript{219} See id.
\textsuperscript{220} See id. Additionally, during a hearing held by the Senate Commerce Subcommittee, Senator Ernest Hollings questioned Mr. Reich as to the State Department's discouragement of food purchases from Cuba to which he replied they neither encourage nor discourage sales to Cuba. See \textit{Senate Committee Hearing, supra} note 216. Senator Hollings went on to state that such "antipathy of the State Department" has made what little food trade is allowed more difficult by taking actions such as denying a travel visa for a Cuban representative of Alimport, the Cuban import agency. \textit{Id.}
\textsuperscript{222} See id.
\textsuperscript{223} See id.
the CAA can serve that purpose. Policy makers should keep in mind the words of Franklin D. Roosevelt, "[r]emember, remember always that all of us, and you and I especially, are descended from immigrants and revolutionists." 224

Roland Estevez*

224. BARTLETT, supra note 1, at 972.

* Este escrito se lo dedico a mi querida madre, Martha H. Larralde Estevez, mi querida abuela, Gladys H. Horta Fleites Larralde y mi querido abuelo Marcos G. Larralde Pineda. Hace treinta años que emigraron a los Estados Unidos y con todo su amor, trabajo y sacrificios me han dado la oportunidad de obtener una vida mejor. Devido a sus esfuerzos he logrado vivir en un lugar donde he podido realizar mis sueños, y por ello, les estoy eternamente agradecido con todo mi corazón. I would like to express my gratitude to Professor Nora M. Demleitner for the patience she exhibited in sharing her knowledge and providing me with guidance throughout the development of this Note. I would also like to thank the Editors and Staff of Hofstra Law Review for their tireless effort and dedication to excellence. And finally, I extend my deepest and heartfelt thanks to Jeannette, Jairy and Israel Estevez for their unconditional love and encouragement throughout all my endeavors.