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# Cuban Exceptionalism : Migration and Asylum in Spain and the United States

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# CUBAN EXCEPTIONALISM: MIGRATION AND ASYLUM IN SPAIN AND THE UNITED STATES

MARYELLEN FULLERTON\*

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## I. INTRODUCTION

As all school children in Spain and the United States learn, European migration to the Caribbean began in 1492. A Spanish expedition, financed by Queen Isabella and King Ferdinand, and led by Christopher Columbus, himself a migrant from Genoa in northern Italy, headed west across the Atlantic Ocean in an attempt to chart a sea route to India and the rest of Asia.<sup>1</sup> From

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1. In 1492 Queen Isabella of Castile and King Ferdinand of Aragon conquered Granada, the last Muslim kingdom in the Iberian Peninsula. This demonstration of the combined power of the Catholic Monarchs, as they were known, was the beginning of modern Spain, which at the time was a geographical description and not yet a political entity. The successful *Reconquista* of the southern portion of the Iberian Peninsula fueled an expansionist policy into North Africa and toward the Far East by the Castilian crown. Indeed, as the investment in Columbus's expedition was solely a Castilian effort, the lands Columbus discovered were Castilian possessions, and even the Aragonese were considered foreigners there. See J.H. ELLIOTT, *IMPERIAL SPAIN: 1469-1716* 44-74 (1963).

schoolbooks we know them as explorers, but contemporary discourse might refer to them as economic migrants.<sup>2</sup> Sailing in three ships, much smaller than the ships loaded with North African and Chinese asylum seekers that create headlines when detected near the European or American coasts today,<sup>3</sup> the crew first sighted land on October 12, 1492. Two weeks later they arrived in Cuba,<sup>4</sup> which Columbus thought was the fabled Asian mainland. Later, when it became clear that Cuba was an island,<sup>5</sup> and the nearby continent was not Asia, Spain claimed Cuba as its first colony in the Americas.<sup>6</sup>

Since that time, Cuba has continued to play an important role in Spanish migration. It has also figured prominently in the more familiar migration story of the United States, particularly in the nineteenth and twentieth centuries. As this article will show, the treatment of Cuban immigrants continues to have a major impact on asylum policy in both Spain and the United States. Indeed, Spain and the United States have a tradition of giving special consideration to Cubans who seek asylum. The political symbolism of welcoming refugees from Cuba and the emotional significance of providing shelter to Cuban asylum seekers have been powerful forces in shaping public policy in Spain as well as in the United States.

The similarities between Spain's and the United States' response to Cuban asylum seekers first caught my eye when I moved to Spain in 2001. My research on asylum seekers entering the European Union via Spain focused on the routes the majority

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2. Columbus had negotiated with Ferdinand and Isabella to receive one tenth of the products and merchandise in the new lands he reached. *Id.* at 60.

3. The Santa Maria, the largest, was little more than 100 feet (30 meters) long; the Nina and the Pinta were each about 50 feet long. *Santa Maria*, Encyclopedia Britannica Online (2003), available at <http://www.britannica.com/eb/article?eu=67287> (last visited June 17, 2003). In contrast, the Golden Venture, a freighter with hundreds of asylum seekers that ran aground off New York City on 6/6/93, was 150 feet long. Steven Lee Myers, *Captain and Crew charged in Voyage of Chinese to U.S.*, N.Y. TIMES, June 8, 1993, at A1. A similar event occurred on 12/1/02 when a boat traveling from Libya to Italy sank off the Italian coast, drowning at least 12. Frank Bruni, *Perilous Immigrant Crossings Frustrate Italy*, N.Y. TIMES, Dec. 3, 2002, at A12.

4. Columbus landed on Cuba on October 29, 1492. ELIZABETH DE LIMA DANTAS, HISTORICAL SETTING IN CUBA, A COUNTRY STUDY 6 (James D. Randolph, ed., 1987) (1985).

5. The first Spaniard to circumnavigate Cuba was Sebastian de Ocampo in 1508. *Cuba*, Encyclopedia Britannica (11th ed. 1911), available at <http://71.1911.encyclopedia.org/C/CU/CUBA.htm> (last visited Aug. 21, 2003).

6. Diego Velázquez conquered Cuba in 1511. DE LIMA DANTAS, *supra* note 4, at 7.

of asylum seekers took, from North Africa to Spain.<sup>7</sup> I learned that the numbers of individuals who applied for asylum in Spain were surprisingly low for a western European country, fewer than 10,000 per year,<sup>8</sup> and the percentage of those who received asylum was shockingly low, less than 6%.<sup>9</sup> Nonetheless, local newspapers were full of articles about asylum seekers and economic migrants.<sup>10</sup> News stories about small boats known as *pateras* that were landing on the southern coast of Spain and in the Canary Islands, complete with photographs of sub-Saharan Africans rescued from the water, conveyed the feeling of an invasion.<sup>11</sup>

Amid the slightly hysterical news reports, I began to notice articles documenting an increasing number of Cubans who were

7. Comision Espanola De Ayuda Al Refugiado (CEAR), Informe 2003, La Situacion De Los Refugiados En Espana, 65 [Spanish Commission to Assist Refugees, 2003 Report, The Situation of Refugees in Spain] [hereinafter CEAR, 2003 Report] (showing that Nigeria, Algeria, Sierra Leone, Angola, and the Democratic Republic of the Congo, together with Cuba and Colombia, were the main countries of origin of asylum seekers in Spain in 2002).

8. Memoria De La Oficina De Asilo Y Refugio Ano 2000, at 2, Figura 1.1 [Annual Report of the Asylum and Refugee Office for the Year 2000] [hereinafter OAR, Annual Report for 2000] (showing 6,764 asylum seekers in Spain in 1998, 8405 in 1999, 7926 in 2000. In comparison, Germany received 98,640 asylum seekers in 1998, 95,113 in 1999, and 78,764 in 2000. France received 22,370, 30,830, and 38,588 respectively in the same three years. Belgium received 21,960, 35,780, and 42,691, while the United Kingdom received 59,830, 91,390, and 76,450). *Id.* at 4. Similar numbers have requested asylum recently, with Spain receiving 9,490 asylum applications in 2001 and 6,309 in 2002. See Delegacion del Gobierno para la Extranjeria y la Inmigracion, Ministerio del Interior [Ministry of Interior, Office of Immigration and Aliens], at Tabla VI.2, Tabla VIII.2, available at [www.mir.es/dgei](http://www.mir.es/dgei) (last visited Aug. 21, 2003).

9. PABLO SANTOLAYA MACHETTI, EL DERECHO DE ASILO EN LA CONSTITUCIÓN ESPAÑOLA [The Right of Asylum Under the Spanish Constitution] 91 (2001) [hereinafter THE RIGHT OF ASYLUM]. Santolaya reports that 4600 received refugee status and 1600 received humanitarian protection, a lesser form of protection. Together, these 6400 successful applicants constituted 8% of the asylum requests filed in Spain between 1990 and 1999. Those who received refugee status constituted 5.8% of the applicants.

10. See e.g., Aznar: *Hay que desincentivar la inmigracion ilegal*, EL MUNDO, May 27, 2002, at 12; M. Pino Perez, *El Gobierno regional celebra que Aznar "se comprometa" al traslado de inmigrantes*, LA PROVINCIA CANARIAS, May 28, 2002 at 6; Tomás Bárbulo, *Government to Shelter Immigrants to Fuerteventura in Disused Military Base*, EL PAIS (English ed.), Dec. 18, 2001.

11. See e.g., F. Berenguer, *Detenidos 53 inmigrantes subsaharianos tras arribar a una playa de Tuineje*, CANARIAS 7, May 27, 2002, at 72; Trillo plantea el uso del Ejercito en tareas de observacion frente a las pateras, LA PROVINCIA CANARIAS, May 28, 2002, at 6; Tomás Bárbulo, *Massive Wave of Illegal Crossings to Canary Islands Expected from Morocco*, EL PAIS (English ed.), Nov. 10, 2001, at 1; Tomás Bárbulo, *Situation Terminal in Fuerteventura as Immigrants' Airport Stay Lengthens*, EL PAIS (English ed.), Dec. 17, 2001; Jerome Socolovsky, *Emigrants from Africa Risk Watery Grave*, PHILA. INQUIRER, Aug. 19, 2001; Suzanne Daley, *African Migrants Risk All on Passage to Spain*, N.Y. TIMES, July 10, 2001, at A1.

arriving at the Madrid airport and requesting asylum.<sup>12</sup> According to the press, these asylum seekers, generally passengers on flights from Havana to Moscow who filed asylum applications during their stopover in Madrid, did not, in most cases, receive asylum.<sup>13</sup> The Spanish authorities decided that the great majority of them lacked a well-founded fear of persecution in Cuba. Nevertheless, journalists reported that the Spanish officials did not send the rejected asylum seekers back to Cuba.<sup>14</sup> Instead, the immigration officers granted the Cubans temporary residence permits,<sup>15</sup> which enabled them, despite their lack of entry visas, to enter Spain and try to find a job, a place to live, and a means to regularize their legal status.

To my American ears, this sounded similar to the long-standing treatment of Cubans who reach the United States: whether they can prove a well-founded fear of persecution or not, the Cuban refugees are allowed to enter and, ultimately, transform their temporary status into lawful permanent residence.<sup>16</sup> I noticed that the press was critical of the Spanish policy, but not of the decision to admit the rejected Cuban asylum seekers to Spain. Rather, the newspapers criticized the authorities for not providing longer temporary residence permits.<sup>17</sup>

I heard other echoes. The Spanish press published many reports in which refugee advocates argued that it was unfair to grant special treatment to Cuban asylum seekers.<sup>18</sup> They argued that the treatment that Cubans automatically received should also be afforded to asylum seekers from other nations, such as Colombia, where people faced danger.<sup>19</sup> In the United States, the

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12. See, e.g., Tomás Bárbulo, *Barajas Airport the New Gateway for Cuban Asylum Seekers*, EL PAIS (English ed.), Jan. 3, 2002, at 1.

13. See, e.g., *Cubans in Barajas*, EL PAIS, (English ed.), Jan. 7, 2002, at 2.

14. See, e.g., Bárbulo, *supra* note 12, at 1. See also CEAR, 2003 Report, *supra* note 7, at 75, 122-123.

15. See, e.g., Tomás Bárbulo, *Government Says Worried Over "Avalanche" of Cuban Arrivals*, EL PAIS (English ed.), Jan. 5, 2002, at 1; see also Art. 25.4 of the Aliens Law, Organic Law 8/2000 of Dec. 22, 2000, amending Organic Law 4/2000 of Jan. 11, 2000, Concerning the Rights, Liberties, and Social Integration of Aliens in Spain, *infra* note 124 (providing that foreigners who do not satisfy the entry requirements may be admitted to the country for humanitarian reasons).

16. See *supra* text accompanying notes 143-148.

17. See, e.g., Bárbulo, *supra* note 14, at 1.

18. E.g., Tomás Bárbulo, *Cubans Seeking Asylum Given Priority Over Other Refugees*, EL PAIS (English ed.), Jan. 2, 2002, at 1; see also *Cubans in Barajas*, EL PAIS, (English ed.), Jan. 7, 2002, at 2 (editorial responding to criticisms of positive discrimination in favor of Cubans).

19. See, e.g., Bárbulo, *supra* note 12, at 1 (noting the differential treatment of

overpowering contrast was between the differential treatment of Haitian and Cuban asylum seekers.<sup>20</sup>

Soon I discovered yet another resonance. The growing numbers of Cuban asylum seekers in Spain, the continuing criticism of the preferential treatment of those that are rejected, and the political pressure generated by the notion that Cubans had found a chink in the armor of 'Fortress Europe' led the Spanish government in 2002 to take steps to prevent Cuban asylum seekers from touching down on Spanish soil. Spain imposed a transit visa requirement on Cubans, which means that Spanish consular officials stationed in Cuba will be able to prevent potential Cuban defectors from even boarding airplanes that stop in Spain.<sup>21</sup>

Again, there are parallels to United States policy. In the mid-1990s, in response to a concern about growing numbers of Cubans embarking in small boats, the United States adopted measures to try to stop Cuban asylum seekers at the source in Cuba. After several years of attempts to justify differential treatment between Haitians and Cubans and in light of a substantial increase in Cuban *balseros*, or boat people, headed for Florida, the United States began patrolling the seas around Cuba to intercept Cuban asylum seekers.<sup>22</sup> Under current policy, U.S. ships take the intercepted Cubans directly to the U.S. Naval Base in Cuba at Guantánamo Bay, from which they are sent back to Havana.<sup>23</sup>

I had always thought of the preferential treatment afforded to Cubans arriving in the United States as a peculiarly American response to migrants and refugees from a neighboring country that stood as a communist outpost close to American shores. In light of the geographical distance between Cuba and Europe and the less heated political responses that European nations have displayed toward communist governments, I was surprised to encounter in Spain the phenomenon of Cuban exceptionalism with

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Colombian and Cuban asylum seekers, and the related decision to boycott Spain announced by Nobel prize winning author Gabriel Garcia Marquez).

20. See, e.g., Rick Bragg, *Haitian Immigrants in U.S. Face a Wrenching Choice*, N.Y. TIMES, Mar. 29, 2000, at A1; Noah Isakson, *Immigration Inequity Cited: Cubans Welcome, Haitians in Limbo, Jackson Says*, CHIC. TRIB., Apr. 26, 2000, at N3; Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 755 (2000); Malissia Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687 (1993).

21. See *supra* text accompanying notes 296-98.

22. See *supra* text accompanying notes 249-58.

23. See *supra* text accompanying notes 258-59.

which I was familiar in the United States.<sup>24</sup>

I wondered whether similar factors explained the Cuban policy in Spain and in the United States. There is a substantial literature in the United States that examines the historical origins of the welcome provided to Cubans seeking asylum in the United States. Many articles have explored the political significance of the American response to Cubans fleeing their homeland.<sup>25</sup> During the Cold War, the flight of thousands of refugees to the land of liberty from the clutches of communism was a powerful symbol. United States policy had certainly welcomed refugees from communist regimes before — witness the special programs for Hungarian refugees after the failed revolution of 1956<sup>26</sup>— but the Cubans were close neighbors, which carried an extra impact.

Perhaps a similar explanation might pertain to Spain. Franco, after all, was a ferocious anti-Communist<sup>27</sup> who led the nationalist rebels in the Spanish Civil War, and publicly denounced the opponents as the forces of “Red” terror. When Franco assumed control after the nationalists won, he promptly severed all diplomatic relations with the Soviet Union and refused to recognize other communist governments that came to power in

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24. I soon learned that preferential treatment for Cubans was a Spanish policy, not a European one, just as the U.S. policy favoring Cubans is not the approach taken by the rest of North America. Canada and Mexico have sheltered Cubans, but have not adopted an open-door policy. No other European country receives a significant number of Cuban asylum seekers, and none has provided a special welcome for Cubans. Cuba was not even listed among the top 40 countries of origin of asylum seekers arriving in Europe from 2000 through 2002. See, e.g., European Commission on Refugees and Exiles, Quick Facts, Origin of asylum applicants in Europe, 2000-2002, Table 8, available at [www.ecre.org/factfile/facts.shtml](http://www.ecre.org/factfile/facts.shtml) (last visited Aug. 21, 2003). However, Cuba was routinely among the top 3 or 4 countries of origin of asylum seekers who filed applications in Spain during the same time. See DELEGACION DEL GOBIERNO PARA LA EXTRANJERIA Y LA INMIGRACION, MINISTERIO DEL INTERIOR, *Anuario Estadístico de Extranjería 1996-2002, General Solicitudes y Solicitantes de Asilo según Continente de Origen*, Table VI.2, Table VIII.2, available at [www.mir.es/dgei](http://www.mir.es/dgei) (last visited Aug. 21, 2003).

25. See, e.g., MARIO ANTONIO RIVERA, *DECISION AND STRUCTURE: U.S. REFUGEE POLICY IN THE MARIEL CRISIS* (1991); LYNN DARRELL BENDER, *THE POLITICS OF HOSTILITY* (1975); Note, *The Cuban Adjustment Act of 1966: Mirando por los Ojos de Don Quijote o Sancho Panza?* 114 HARV. L. REV. 902 (2001); Maria E. Sartori, *The Cuban Migration Dilemma: An Examination of the U.S. Policy of Temporary Protection in Offshore Safe Havens*, 15 GEO. IMMIGR. L.J. 319 (2001); Joyce A. Hughes, *Flight from Cuba*, 36 CAL. W. L. REV. 39 (1999); Matias F. Travieso-Diaz, *Immigration Challenges and Opportunities in a Post-Transition Cuba*, 16 BERKELEY J. INT'L L. 234 (1998); Katherine Tonnas, *Out of a Far Country: The Sojourns of Cubans, Vietnamese, Haitians, and Chinese to America*, 20 S.U. L. REV. 295 (1993).

26. See DALGLISH, *supra* note 144.

27. See *supra* notes 106-23 and accompanying text (discussing Franco's intense anti-Communism and the specific points mentioned in this paragraph).

Eastern Europe and in Asia. In *fútbol*-mad Spain, Franco even cancelled the European Cup match between the Spanish and Soviet teams, rather than allow the Soviet flag to fly and the Soviet anthem to sound publicly in Spain.<sup>28</sup> In light of this political setting, a Cold War motive to shelter Cubans fleeing from a communist regime may have prompted the Spanish policy favoring Cuban asylum seekers.

I decided to examine the situation more closely. I wanted to understand the parameters of the preferential treatment of Cubans in Spain, and I wanted to look in greater detail at the factors that might have given rise to the pro-Cuban policy. First, I studied the history of migration between Spain and Cuba and between Cuba and the United States. As this article details, throughout Cuba's colonial period, Cuban migration was, in effect, a revolving door. Hundreds of thousands of Spaniards went to Cuba, and many thousands returned to Spain. For many of those people, this round trip was made on multiple occasions. There was a similar revolving door between Cuba and the United States. Although the numbers were much smaller, thousands of Cubans traveled to the United States from colonial Cuba, often more than once. Indeed, famous Cuban political exiles, including José Martí and Fidel Castro, spent temporary periods in the United States.

Second, this article examines the evolving Spanish policies towards Cubans who left their homeland after Castro came to power in 1959. It compares the Spanish reception of Cubans in the 1960s and 1970s with the U.S. response during that same period. There are major similarities, but also important differences. As this study reveals, the Spanish welcomed Cuban asylum seekers with open arms, but did so with the knowledge that most of the Cubans viewed Spain as a transit country, merely one stop on their journey to the United States.

Third, this article surveys the Spanish policies favoring Cuban asylum seekers during the 1990s and the new, more restrictive policies the Spanish government put in place in 2002. Again, as indicated earlier, there are powerful similarities in the long-standing preferential policies for Cubans who reach the borders of both countries, as well as in the recent Spanish and U.S. policy changes that attempt to prevent asylum seekers from even leaving Cuba. Spain and the United States differ, though, in the numbers of asylum seekers, the size and political strength of the

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28. Canceling the 1960 match triggered a substantial fine against the Spanish Soccer Federation. STANLEY G. PAYNE, *THE FRANCO REGIME: 1936-1975* 531 (1987).



Cuban immigrant community, and the geographical barriers that Cubans fleeing their homeland have to overcome. Moreover, the United States coupled its restrictive measures with alternative avenues for entry into the United States, and there is no equivalent policy in Spain.

Fourth, my study of migration to and from Cuba starkly revealed one of history's ironies. The 1951 Convention Relating to the Status of Refugees,<sup>29</sup> the post World War II effort to enshrine protection of refugees in international law, has not been used in either Spain or the United States to afford safety to Cuban refugees. Although Spain and the United States have generously sheltered many who fled fears of persecution in Cuba, they used general immigration measures to admit Cubans to their shores. For decades, neither Spain nor the United States asked whether the Cubans had well-founded fears of persecution, presuming, instead, that they were all refugees. At the end of the twentieth century, this began to change. Both Spain and the United States started to apply the international refugee standards to Cubans, and the numbers of Cubans receiving refuge plummeted. While these policies did not necessarily violate the legal standards set forth in the 1951 Refugee Convention, the framers of the convention would likely have been dismayed to see its emergence as an instrument to halt migration.

## II. MIGRATION AND COLONIAL CUBA

### A. *Cuba and Spain*

The migration flows between Spain, Cuba, and America first developed in the early sixteenth century. When Ferdinand and Isabella realized that their sailors had reached a new continent, they decided to expand and protect the Spanish claim to the new lands by establishing strong colonies. Soon, Spanish ships were ferrying conquistadors to the Americas. Rumors of wealth in the new land attracted many immigrants from Spain, and Cuba became the gateway for explorers who ventured further into the Americas, to Florida, Mexico, Peru and beyond. The *encomienda* system,<sup>30</sup> through which those who invested in the exploration received title to a proportional share of the land conquered in the

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29. Geneva Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Geneva Convention].

30. The *encomienda* system had been used earlier by Isabella in the *Reconquista* of the Muslim-ruled lands in the Iberian Peninsula. Conquistadors assisting in this military effort received royal grants that provided them with jurisdiction over

name of the monarchs, encouraged many to join the ranks of the conquistadors. Entrepreneurial migrants<sup>31</sup> created a series of Spanish settlements that stretched from the southern tip of South America to the southern region of the current-day United States.<sup>32</sup>

Cuba was a vitally important colony. It was the seat of substantial Spanish power in the new world. In addition to serving as a staging ground for Spanish journeys further into the Americas, it became a major administrative center of the Spanish colonial empire. Furthermore, it provided a source of great wealth for the Spanish crown, sending shipments of copper, tobacco and sugar to Spain.<sup>33</sup>

In return, Spain sent Cuba large numbers of migrants from Extremadura in the southwest,<sup>34</sup> Galicia in the northwest, other poor regions of the Iberian Peninsula, and the Canary Islands.<sup>35</sup>

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portions of the newly conquered land and those living on it. ELLIOTT, *supra* note 1, at 68-69.

31. Making one's fortune, or at least making a living, has always played a notable role in migration. One current example of this motivation can be seen in those known as treaty traders and investors in current U.S. immigration parlance. U.S. immigration law provides visas to those who contribute to the U.S. economy by investing in it or by generating substantial trade with the U.S. These individuals must be from countries that have treaties of investment, free trade, or commerce and navigation with the U.S. The current requirements include a substantial investment, typically in the amount of \$1,000,000, that must generate significantly more income than is necessary to provide for the investor and his or her family, or it must have a significant economic impact in the United States. 8 U.S.C. § 1101 (2000); 8 C.F.R. § 214.2 (2003). For a recent discussion of US policy concerning immigration visas for immigrant investors, see Lincoln Stone, *Immigrant Investment in Local Clusters*, 80 INTERPRETER RELEASES 837 (June 16, 2003).

32. Ponce de Leon led a Spanish expedition to Florida in 1513. After ceding the Florida colony to Great Britain and later receiving it back, Spain ceded Florida to the United States in 1819. See *Florida*, in FUNK & WAGNALLS NEW ENCYCLOPEDIA (2003), available at LEXIS, Reference, General. Spaniards under the leadership of Juan Diaz de Solis reached Argentina in an expedition in 1515-1516. See *Argentina*, in FUNK & WAGNALLS NEW ENCYCLOPEDIA (2003), available at LEXIS, Reference, General. The Spanish conquest of the Inca rulers in Chile took place during 1536-1540. See *Chile*, in FUNK & WAGNALLS NEW ENCYCLOPEDIA (2003), available at LEXIS, Reference, General.

33. DE LIMA DANTAS, *supra* note 4, at 10. Spain monopolized all trade from its American colonies. *North America*, in FUNK & WAGNALLS NEW ENCYCLOPEDIA (2003), available at LEXIS, Reference, General.

34. Some of the most famous conquistadors, such as Francisco Pizarro, who conquered the Inca civilization in Peru, came from Trujillo in Extremadura. HAMMOND INNES, *THE CONQUISTADORS* 22 (1969). Hernan Cortes, who conquered the Aztec empire in Mexico, came from Medillin in Extremadura. *Id.* Vasco Nuñez de Balboa, the first Spaniard to cross Panama and see the Pacific Ocean, also hailed from Extremadura from the town Jerez de los Caballeros. *Vasco Nuñez de Balboa*, in FUNK & WAGNALLS NEW ENCYCLOPEDIA (2003), available at LEXIS, Reference, General.

35. MANUEL R. MORENO FRAGINALES & JOSE J. MORENO MASO, GUERRA,

There was also a sizeable migration of Spanish settlers from other colonies in the West Indies. For example, when England took control of Jamaica from Spain in 1656, a group of 8,000 Spanish colonials left Jamaica for Cuba.<sup>36</sup> When Spain ceded its portion of Santo Domingo to France in 1795, Spanish settlers left the French-controlled territory for Cuba.<sup>37</sup>

This pattern repeated itself during the eighteenth and nineteenth centuries as other Spanish colonies in the Americas came under the control of other European powers or achieved independence from Spain.<sup>38</sup> However, the Spanish mainland continued to dominate the migration to Cuba. Reliable migration statistics are unavailable because, in effect, many viewed Cuba as another, albeit distant, Spanish province, and saw little need to document the migration of Spanish nationals within the provinces.<sup>39</sup> Nonetheless, it is clear that Spanish immigrants continued to flock to Cuba in large numbers. More than 52,000 Spanish men immigrated to Cuba between 1846 and 1862.<sup>40</sup> Over 163,000 Spaniards immigrated to Cuba between 1868 and 1880.<sup>41</sup> Close to 254,000 Spanish immigrants journeyed to Cuba between 1881 and 1894,<sup>42</sup> followed by 47,000 more in the last few years of the century.<sup>43</sup>

Spanish migration to Cuba continued to have both entrepreneurial and expeditionary elements. While many came to

MIGRACION, Y MUERTE: EL EJERCITO ESPAÑOL EN CUBA COMO VIA MIGRATORIO 109 (1993). Although early statistics are unreliable, records show, for example, that between 1846 and 1862 there were 34,000 male immigrants to Cuba from the Spanish mainland and 18,000 male immigrants to Cuba from the Canary Islands. *Id.* at 61. Later, between 1850 and 1950, 3.5 million Spaniards left from Galicia, Asturias, and the Canary Islands to work in Cuba, Argentina, Uruguay, and other American countries. Nieves Ortega Perez, *Spain: Forging an Immigration Policy*, MIGRATION INFORMATION SOURCE (Feb. 2003), available at <http://www.migrationinformation.org/Profiles/print.cfm?ID=97>.

36. Rolando Garcia Quinones, *International Migrations in Cuba: Persisting Trends and Changes, An Old Phenomenon*, 3 n.2, Sistema Económico Latinoamericano (2002), available at <http://anic.utexas.edu/~sela/AA2K2/ENG/docs/Coop/migra/spsmiridi12-02/spsmiridi12-1.htm> (last visited May 29, 2003) [hereinafter *An Old Phenomenon*]; England took control of Jamaica from Spain in 1655. *England*, in FUNK & WAGNALLS NEW ENCYCLOPEDIA (2003), available at LEXIS, Reference, General.

37. Spanish soldiers returned to Cuba after several attempts to regain control of Santo Domingo. MORENO & MORENO, *supra* note 35, at 84-85.

38. Spanish colonials came to Cuba from Louisiana, Florida, Peru, Bolivia, and Mexico. *Id.* at 46-47.

39. *An Old Phenomenon*, *supra* note 36, at 1-2.

40. MORENO & MORENO, *supra* note 35, at 61.

41. *Id.* at 99.

42. *Id.* at 121.

43. *Id.* at 132.

seek their fortune, more came as conscripts. In total, Spanish military forces sent over 700,000 soldiers, sailors, and administrators to Cuba during the four centuries of colonial rule.<sup>44</sup> Many military men remained in Cuba; others went back to Spain, but later returned to Cuba to settle.<sup>45</sup> This large movement of Spanish soldiers and sailors dwarfed the number of civilian migrants and matched the number of enslaved Africans transported involuntarily to Cuba during the colonial epoch.<sup>46</sup> The huge volume of Spanish military forces who went to, and often remained in, Cuba increased Spanish migration to Cuba and created still more connections between Spain and Cuba.

Many colonial families maintained strong ties with Spain and with their Spanish compatriots in Cuba. The networks, consisting of family members and neighbors from the same Spanish village, in turn, encouraged further migration from those regions in Spain. Other reasons for migration existed as well, including economic problems. For example, dire economic conditions in Galicia during the mid-nineteenth century caused many Galicians to consider migration to Cuba.<sup>47</sup> In fact, between 1840 and 1859 Galicians composed the largest group of Spanish migrants to Cuba.<sup>48</sup> At the same time, the increasing presence of Spanish companies in Cuba made it easy for Spaniards to emigrate to the island. No longer did Spaniards consider the military as the only means of reaching Cuba.<sup>49</sup> The Galician peasants who had settled in Cuba attracted other Galicians to consider moving there. They even organized a Galician Society in Havana in 1871, which supported the continuing connection between people in Cuba and

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44. MORENO & MORENO, *supra* note 35. During the last half of the 19th century alone, Spanish troops sent to Cuba numbered more than 510,000. From 1868 to 1880, military forces totaling 209,000 were sent to Cuba. *Id.* at 99. From 1881 to 1895, 83,000 Spanish troops went to Cuba. *Id.* at 121. From 1895 to 1899, approximately 220,000 Spanish troops were ordered to Cuba. *Id.* at 132.

45. Between 1868 and 1880, 209,000 Spanish troops were sent to Cuba; 63,000 of them returned to Spain. *Id.* at 101. Between 1887 and 1899, 346,000 Spanish troops were sent to Cuba; 146,000 troops returned, and 200,000, or 57.6%, remained. *Id.* at 136.

46. Because the forced migration of slave labor is beyond the scope of this article, the text does not refer to the migration of slaves from Africa, which reached its height in the 19th century; nor to the importation of Chinese "coolie" labor, which occurred under circumstances similar to slavery. There are estimates that roughly 800,000 African slaves were brought to Cuba between the 17th and 19th centuries, and that close to 125,000 Chinese laborers were imported during the second half of the 19th century. *Id.* at 1.

47. MORENO & MORENO, *supra* note 35, at 66.

48. *Id.* at 65-66.

49. *Id.* at 114, 134-35.

Spain.<sup>50</sup>

Indeed, the careers of two major contemporary political figures attest to the migration from Spain to Cuba during the nineteenth century. Angel Maria Castro, the son of a poor farmer in Galicia, was sent by the Spanish army to fight against the Cuban revolutionaries in the 1895 War of Independence.<sup>51</sup> He went back to Spain with the defeated Spanish army, but returned to Cuba in the early years of the twentieth century.<sup>52</sup> By the time his son Fidel was born in the Cuban countryside in 1926, Angel Castro had developed from a penniless immigrant into an entrepreneur and a landowner.<sup>53</sup> In 1992, Fidel Castro, the pre-eminent Cuban figure of the twentieth century visited his ancestral village in rural Galicia. "My father always wanted to return here," said Fidel, as cousins welcomed him<sup>54</sup> and the Galician government offered him a retirement home.<sup>55</sup>

Around the same time that Castro's father left Galicia for Cuba, so did Manuel Fraga Bello. In Cuba he met and married a woman from Galicia and started a family.<sup>56</sup> Their son, Manuel Fraga Iribarne,<sup>57</sup> lived in Cuba as a child,<sup>58</sup> but later returned to Spain. He became an important minister in Franco's government in the 1960s and was instrumental in developing tourism in Spain.<sup>59</sup> After Franco died, Fraga formed a conservative political party, the People's Alliance, and vied for power in the first democratic elections in 40 years.<sup>60</sup> Now the government leader of Gali-

50. JOAQUIN ROY, *LA SIEMPRE FIEL: UN SIGLO DE RELACIONES HISPANO CUBANAS 1898-1998* 41 (1998).

51. FIDEL CASTRO, *MY EARLY YEARS* 29 (Deborah Shnookal & Pedro Alvarez Tabio, eds., 1998).

52. *Id.* at 29.

53. Angel Castro worked for a U.S. owned sugar mill and later leased land from the United Fruit Company to launch his own successful sugar plantation. CLIVE FOSS, *FIDEL CASTRO* 2 (2000). He died a wealthy landowner on October 21, 1956, two months after Fidel's 30th birthday. CASTRO, *supra* note 51, at 30-31.

54. *Castro Visits His Father's Spanish Home*, N.Y. TIMES, July 29, 1992, at A3.

55. Phil Davison, *Francoist PM Set For New Term*, THE INDEPENDENT (London), October 16, 1993, at 9.

56. *Castro Visits His Father's Spanish Home*, *supra* note 54, at A3.

57. Fraga is the president of the government of Galicia, one of the 17 autonomous communities in Spain. As such, Fraga is somewhat akin to a governor of one of the states in the U.S., yet more powerful because decentralization and regional autonomy is much greater in Spain than in the U.S. Moreover, Fraga has been a prominent figure in national politics in Spain for 40 years. Davison, *supra* note 55.

58. Mauricio Vincent, *¡Bienvenido, Mister Fraga!*, EL PAIS (Madrid), Nov. 2, 1998.

59. Mauricio Vincent, *Manuel Fraga Inicia un Viaje de 12 Dias a Cuba, Mexico y Guatemala*, EL PAIS (Barcelona), Oct. 29, 1998, at 26; Davison, *supra* note 55; see also PAYNE, *supra* note 28, at 400-01, 504-12.

60. JOHN HOOPER, THE NEW SPANIARDS 37 (1995). Fraga's party won only 16 seats

cia and the mentor of José Maria Aznar, the Prime Minister of Spain from 1996 to 2004, Fraga,<sup>61</sup> has made two official trips to Cuba<sup>62</sup> and pronounces himself the son of immigrants.<sup>63</sup>

The Cuban immigration stories of the Castro and Fraga families are not isolated coincidences. In fact, they are prototypes. The thrifty, hard-working Galician is the Cuban stereotype of a Spanish immigrant,<sup>64</sup> and the Cuban nickname for all Spaniards, no matter their region of origin, is "Galician."<sup>65</sup>

### B. Cuba and the United States

While the major migratory flows crossed the Atlantic from Spain to Cuba and sometimes back again to Spain, there were also significant movements of people between Cuba and the United States. Cuba, the largest and most populous island in the Caribbean, struggled for more than a century with the Spanish monopoly on trade with the colony. The situation improved when Cuba emerged from the Spanish monopoly on trade in the 18th century and received special privileges from Spain.<sup>66</sup> Cuba became relatively autonomous during Spain's war with France in the early 19th century and there was talk of Cuban independence. At the same time in the United States, the powerful new nation to the north, there was talk of annexation of Cuba.<sup>67</sup>

Cuban emigration to the United States came alive in the nineteenth century.<sup>68</sup> By 1870, 12,000 Cubans had put down roots in the United States.<sup>69</sup> This number increased to 20,000 by 1890, and to 40,000 by 1910.<sup>70</sup> There were vocal Cuban exile groups in

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in the 1977 general elections, but he and his party continued to be active in the elections in 1979, 1982 and 1986. *Id.* at 56, 65.

61. Davison, *supra* note 55.

62. Fraga traveled to Cuba as president of the Government of Galicia in 1991 and again in 1998. Vincent, *supra* note 59.

63. E-mail from Manuel Fraga Iribarne, President, Xunta de Galicia, to author's research assistant, Brooklyn Law School (March 7, 2003, 11:34:39 EST): "I am, in effect, the son of emigrants who met in Cuba. Two of my siblings were born there." (On file with author.) Fraga's family moved from Cuba back to Galicia, where Manuel Fraga was born on November 23, 1922, and then returned to Cuba where Manuel spent his childhood. Vincent, *supra* note 59.

64. CONSUELO MARTIN FERNANDEZ & VICENTE ROMAN, *LA EMIGRACION CUBANA EN ESPANA* 23 (1994).

65. *Id.*

66. DE LIMA DANTAS, *supra* note 4, at 10-11.

67. *Id.* at 13.

68. *An Old Phenomenon*, *supra* note 36, at 3.

69. *Id.*

70. *Id.*

New York and Florida, which encouraged Cubans to revolt against the Spanish colonial administrators,<sup>71</sup> a revolution that ultimately encompassed three wars and close to 30 years of fighting. Many important Cuban political leaders, including José Martí, the mythic 19th century Cuban revolutionary, spent substantial portions of their exile in the United States.<sup>72</sup>

Cuban rebels took up arms against the Spanish forces in Cuba during the Ten Years' War, which ended in 1878 when Spain agreed to a degree of autonomy for Cuba.<sup>73</sup> The peace was short-lived. Disappointed with the superficial political changes, angered that Spain had curtailed trading between Cuba and the United States, and outraged that the Spanish Governor of Cuba suspended constitutional guarantees, José Martí and other leaders of the Ten Years' War again rebelled in the War for Independence in 1895.<sup>74</sup> Some forces sought revolution while others demanded reform; regardless of the motives, however, fierce fighting took place. The United States sent food to Cuban civilians, and threatened military intervention in aid of the rebels.<sup>75</sup> Spain offered Cuba greater autonomy, with ultimate power retained by the Spanish Captain General.<sup>76</sup>

Two months after the end of this war, in February 1898, the American battleship *U.S.S. Maine* exploded in the Havana harbor and the United States declared war on Spain. Thus, began the battle over the remaining portion of Spain's American empire. Many Cuban exile groups in the United States lobbied for Cuba's

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71. Hundreds of exiled Cuban separatists resettled in New York City, Key West and New Orleans during the 1870s. New York City served as headquarters for Cuban nationalist and anti-imperialist groups, including Martí's Cuban Revolutionary Party. ROBERT L. BACH, *Cubans, in REFUGEES IN THE UNITED STATES* 78-79 (David W. Haines, ed., 1985). See also DE LIMA DANTAS, *supra* note 4, at 18 (stating that Martí, hailed as the "Apostle of Independence", organized Cuban exiles in the U.S).

72. José Martí, famous both as a literary figure and a political leader, was exiled from Cuba in 1869. He lived in Spain and the U.S., among other countries, during his exile. From 1881 to 1895, he was the leading voice in the U.S. calling for Cuban liberation from Spain. DE LIMA DANTAS, *supra* note 4, at 18.

73. *Ten Years' War*, in FUNK & WAGNALLS NEW ENCYCLOPEDIA (2003), available at LEXIS, Reference, General.

74. DE LIMA DANTAS, *supra* note 4, at 19-20 (containing a brief time line of events following Martí's return to Cuba to his death in battle on 5/19/1895).

75. Encyclopedia Britannica, *Cuba* (11th ed. 1911) available at <http://71.1911.encyclopedia.org/C/CU/CUBA.htm> (last visited June 17, 2003); see also *Spanish-American War*, in FUNK AND WAGNALLS NEW ENCYCLOPEDIA (2003), available at LEXIS, Reference, General.

76. Autonomy was offered by Spain in October 1897, and put into effect in December 1897. *Id.*

independence from Spain<sup>77</sup> and applauded the U.S. destruction of the Spanish naval fleet in Cuba.<sup>78</sup> The Spanish-American War proceeded quickly and by the end of 1898, Spain had given up its claim to its last remaining American colony.<sup>79</sup> The loss of Cuba, a land that had loomed large in the popular imagination of Spain as well as in its political history, was a great blow to the Spanish population.

### III. MIGRATION AND THE REPUBLIC OF CUBA

Although Spain gave up its claim to Cuba, a self-declared republic, Cuba was not independent. The United States occupied Cuba for the next three years, withdrawing in 1902 after ensuring that the new Cuban Constitution allowed the United States the right to intervene in the future.<sup>80</sup> A succession of Cuban governments, U.S. interventions, chaos and corruption followed.

During this time, migration, which had increased at the end of the nineteenth century, continued to grow. New Spanish migrants arrived in Cuba; soldiers sent to put down the rebellion came under the Cuban spell and remained to seek their fortune after the Spanish military withdrew,<sup>81</sup> while Cuban émigrés left the United States and headed back to their homeland.<sup>82</sup> At the same time, a number of settlers left Cuba for Spain.<sup>83</sup>

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77. DE LIMA DANTAS, *supra* note 4, at 20.

78. July 3, 1898. *Id.* at 21.

79. Treaty of Peace Between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754.

80. The Platt Amendment provided, among other things, that "the government of Cuba consents that the United States may exercise the right to intervene for the protection of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba." Platt Amendment, ch. 803, 31 Stat. 895-98 (1901); CONSTITUCIÓN DE LA REPUBLICA DE CUBA, art. III (Platt Amendment) (1901). The United States saw strategic importance in Cuba's geographical location: 90 miles from Florida and controlling the Windward Passage from the Atlantic Ocean into the Caribbean Sea, the Gulf of Mexico, the mouth of the Mississippi River, and the Panama Canal. Pursuant to the United States-Cuba Treaty of 1903, the United States maintains a 45 square mile naval base at Guantánamo Bay on the southeastern coast of Cuba. Treaty on Relations with Cuba, May 22, 1903, U.S.-Cuba, 33 Stat. 2248. The Treaty on Relations of 1934 between Cuba and the United States reaffirmed the pre-existing arrangement concerning U.S. control over the Guantánamo Bay Naval Base. Relations with Cuba, May 29, 1934, U.S.-Cuba, T.S. No. 866.

81. See discussion *supra* note 45.

82. Encyclopedia Britannica, *Cuba* (11th ed. 1911), available at <http://1911encyclopedia.org/C/CU/CUBA.htm> (last visited Aug. 21, 2003).

83. MORENO & MORENO, *supra* note 35, at 137.



Starting in 1902, the pace of immigration to Cuba expanded exponentially. More than 1,000,000 new settlers arrived in Cuba during the next three decades.<sup>84</sup> Of these, more than 730,000 came from Spain, while 60,000 came from the United States.<sup>85</sup> Most of the immigrants were—like Angel Castro and Manuel Fraga—single young men.<sup>86</sup>

During the economic downturn of the 1930s and the collapse of the world-wide sugar market,<sup>87</sup> Cuba changed from a country of immigration to one of emigration. Many of the Spanish settlers returned to Spain,<sup>88</sup> while 35,000 Cubans emigrated to the United States between 1930 and 1950.<sup>89</sup>

#### IV. MIGRATION AND REVOLUTIONARY CUBA

During the mid 20th century, Fidel Castro, after training in Mexico and with the financial backing of Cubans living in Florida and New York,<sup>90</sup> launched a rebellion against the corrupt Cuban government of Fulgencio Batista. Ultimately, Batista fled in January 1959,<sup>91</sup> and Castro came to power. Castro's new government enacted fundamental economic and social reforms, which included nationalization of banks, industries and agricultural holdings.

During 1959, the year that the revolutionaries led by Fidel Castro assumed power, Cuba experienced significant immigration as political exiles returned, and emigration as those fearing the new Cuban government departed. Beginning in 1960, the migratory flows were generally outward, punctuated and triggered by high profile political events. The majority of those who left went to the nearby United States where they formed sizeable Cuban communities that, over time, developed substantial political power.<sup>92</sup> Not surprisingly, given the common language, the long-

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84. *An Old Phenomenon*, *supra* note 36, at 2. See also DE LIMA DANTAS, *supra* note 4, at 24 (stating that Cuban economic development attracted 10,000 Spanish immigrants by 1906).

85. *An Old Phenomenon*, *supra* note 36, Table 2. In addition, roughly 325,000 came from the Caribbean, particularly from Jamaica, Haiti, and Puerto Rico, while 10,000 came from China, mostly via the United States. *Id.*

86. More than 80% were men, more than 90% were between 15 and 45 years old and more than 70% were single. *Id.* at 3.

87. *Id.* See also DE LIMA DANTAS, *supra* note 4, at 26, 29.

88. *An Old Phenomenon*, *supra* note 36, at 3.

89. *Id.*

90. DE LIMA DANTAS, *supra* note 4, at 37.

91. *Id.* at 38. Fulgencio Batista, an army sergeant who took power in the 1930s, ruled on and off until he fled in the face of Castro's forces on Jan. 1, 1959. *Id.*

92. BACH, *supra* note 71, at 82-83.

standing ties between the colony and the mother country, and the sizeable twentieth century emigration from Spain, many Cubans also moved to Spain.

Cuban sources report that 900,000 Cubans emigrated legally during the first four decades of the Revolution.<sup>93</sup> Of these, close to 40,000 Cubans currently live in Europe, mostly in Spain.<sup>94</sup> Approximately 130,000 Cubans currently live in Latin American countries, while most of the others reside in the United States.<sup>95</sup> Cuban sources also report a large number who emigrated illegally during those years.<sup>96</sup>

The Cuban emigration policies and the Spanish and United States immigration policies have changed substantially over the past four decades. These policies have evolved in a highly interactive manner. As just one example, the lack of Cuban exit restrictions in the early 1960s, together with the liberal admission of Cuban asylum seekers into the United States, encouraged Spain—at the time a poor country that exported workers to Germany and Switzerland<sup>97</sup> — to provide a generous welcome to Cubans seeking shelter. In analyzing the movement of people from Cuba during the last 40 years, it is clear that the United States, bound to Cuba by geography and pushed away by ideology, played the leading role. On more than one occasion, Castro announced that Cubans with relatives in the United States could leave, an offer not extended to those whose families lived in Spain or elsewhere.<sup>98</sup> Nonetheless, although Spain's actions have had a less momentous impact on the late twentieth century Cuban diaspora, they have played a significant part in this epic tale. Indeed,

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93. Rolando Garcia-Quinones, *International Migrations in Cuba: Persisting Trends and Changes, Cuban Emigration: Ways and Means* 1, Sistema Económico Latinoamericano (2002), available at <http://lanic.utexas.edu/~sela/AA2K2/ENG/docs/Coop/migra/spsmirdi12-02/spsmirdi12-3.htm> (last visited May 29, 2003) [hereinafter *Cuban Emigration: Ways and Means*].

94. *Id.* at 1.

95. *Id.* Most reports in the United States indicate that more than 1,000,000 Cubans arrived in the U.S. between 1959 and 1995. See, e.g., FELIX ROBERTO MASUD PILOTO, WITH OPEN ARMS: CUBAN MIGRATION TO THE UNITED STATES 1 (1988).

96. Illegal emigration is always harder to quantify. Cuban sources report roughly 90,000 illegal emigrants between 1985 and 2000. *Id.*

97. Nearly 100,000 Spaniards emigrated annually as guest workers to other countries in Europe during the 1960s. Ortega Perez, *supra* note 35, at 1.

98. For example, on September 28, 1965, Castro announced that all Cubans with relatives in the United States could leave Cuba if their relatives invited them to the United States. MASUD-PILOTO, *supra* note 95, at 57. See also Fidel Castro, Speech Marking Fifth Anniversary of CDR (Sept. 29, 1965), available at <http://lanic.utexas.edu/la/cb/cuba/castro/1965/19650929>.

each of the successive Spanish governments, from Franco's National Movement to the current-day Popular Party, has made a special place for Cubans in Spain. Viewing Spain's evolving reactions to Cubans who rejected Castro's revolution, while noting the impact of contemporaneous political events in Cuba and the United States, sheds light on how Cuban exceptionalism developed in Spain. It also reveals how both Spain and the United States avoided viewing Cubans through the prism of international law until they decided that adopting international refugee standards would help them stop the migratory patterns they had encouraged for many years.

### A. *The Franco Era*

#### 1. The Anti-Communist Heritage

Spanish policy toward revolutionary Cuba must be seen in the context of Spain's long historical ties to Cuba and its tumultuous encounter with communism in the 20th century. In Spain, as in the United States, antipathy to Marxist-Leninist ideology was a hallmark of the second half of the 20th century. The Spanish government's hostility to communism had its roots in the devastating Civil War that engulfed Spain from 1936 to 1939. Extremist rhetoric characterized the bitterly fought election campaign in 1936. Spaniards were warned that votes for the left-wing Popular Front coalition would result in red flags flying over Spain.<sup>99</sup> On election day, the Popular Front officials barely edged out the rightist National Front in the popular vote,<sup>100</sup> but the electoral system ensured that the Popular Front emerged with close to two-thirds of the seats in the parliament.<sup>101</sup> The Socialists, who had won eighty-eight seats,<sup>102</sup> refused to participate in the "bourgeois" government, which led to a minority Left Republican government that became increasingly ineffectual.<sup>103</sup> Mass strikes by Socialists and anarchist groups and revolutionary land seizures led to grave concern by conservatives and by many military leaders. As strikes, arson, and political assassinations mounted in the spring

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99. HUGH THOMAS, *THE SPANISH CIVIL WAR* 155-56 (Penguin Books 1977) (1961).

100. Roughly 73% of the voters went to the polls in the 1936 elections. The Popular Front received 34.3%, the Nationalist Front received 33.2%, and the center group received 5.4%. *Id.*; PAYNE, *supra* note 28, at 44.

101. Due to the electoral list system, the leftist parties won nearly 2/3 of the seats in the parliament. THOMAS, *supra* note 99, at 156; PAYNE, *supra* note 28, at 44-45.

102. THOMAS, *supra* note 99, at 156.

103. PAYNE, *supra* note 28, at 45.

and early summer of 1936,<sup>104</sup> rumors circulated of a communist plot to seize power during July 1936.<sup>105</sup> Fears of a communist coup, among other factors, led a small group of military officers to rebel against the Popular Front government on July 18, 1936, triggering the Spanish Civil War.<sup>106</sup>

During the war, the nationalist forces, led by Francisco Franco, identified themselves as the "true Spain" and denounced their opponents as "anti-Spain" and the forces of the "Red terror."<sup>107</sup> After the nationalists won in 1939, Franco maintained martial law for the next decade<sup>108</sup> and there was absolutely no talk of reconciliation.<sup>109</sup> The victors executed approximately 30,000 political opponents<sup>110</sup> and imprisoned close to 300,000.<sup>111</sup> The laws were rewritten in 1939, and made retroactive to 1934, in order to penalize all political activity and aid that had been given to the Republican war effort, including "grave passivity" during the war.<sup>112</sup> Mere membership in left-liberal political parties, as well

104. *Id.* at 45, 97. The leader of the rightist coalition in parliament, Calvo Sotelo, was arrested by the Left Republican police and murdered on July 13, 1936. This execution conveyed that a leftist revolutionary movement that did not tolerate political dissent had taken control in Spain. *Id.*

105. *Id.* at 97. No evidence of a specific leftist plot to take control in July 1936 has ever been established. *Id.*

106. *Id.* at 100. Historians note that although there was rebellious activity in 44 of the 51 Spanish army posts, the core of the military rebellion probably numbered fewer than 1000 army officers. *Id.*

107. *Id.* at 220.

108. The army rebels had promptly formed a military council, *Junta de Defensa Nacional*, and had declared martial law on July 28, 1936. Franco did not repeal martial law until April 7, 1948. *Id.* at 221.

109. Indeed, Franco used religious terms to justify imposing forced labor on his political opponents rather than seeking reconciliation with them:

It is necessary to liquidate the hatred and passions left by our past war. But this liquidation must not be accomplished in the liberal manner, with enormous and disastrous amnesties, which are a deception rather than a gesture of forgiveness. It must be Christian, achieved by means of redemption through work accompanied by repentance and penitence.

*Id.* at 224, quoting Franco, cited in MAX GALLO, HISTOIRE DE L'ESPAGNE FRANQUISTE 1:102 (1969).

110. The statistics are fuzzy. There were frequent allegations that Franco's forces had executed 200,000. Many historians believe that number is inflated, with a more accurate estimate being 28,000-30,000. *Id.* at 216-20.

111. There seems to be more agreement about the numbers imprisoned. When the war ended on April 1, 1939, the prison population was 100,292. By the end of December 1939, the population in prison had swelled to 270,719. At the end of December 1940, 233,373 were in prison. *Id.* at 222-23.

112. The Law of Political Responsibilities of February 9, 1939, was retroactive to October 1, 1934. *Id.* at 221.

as in revolutionary groups, was criminalized.<sup>113</sup> In 1940 Franco promulgated a new law outlawing communism, defined to include Trotskyists, anarchists, and other similar elements, as well as members of the Communist Party.<sup>114</sup> A year after the war ended, the prison population was still over 230,000.<sup>115</sup> Franco's regime was notorious for "constant, regular, and methodical" repression.<sup>116</sup> Gradually, the prison population grew smaller.<sup>117</sup> The repression continued, but death sentences and long prison terms diminished.<sup>118</sup>

## 2. The Policy Toward Cuban Refugees

Throughout his forty years of rule,<sup>119</sup> Franco's dictatorship was known for both its anti-communism and its isolationism. The Communist Party and the Socialist Party remained outlawed in Spain.<sup>120</sup> There was no talk of rapprochement with the Soviet Union,<sup>121</sup> the People's Republic of China,<sup>122</sup> or the eastern European countries under communist rule.<sup>123</sup> This was the setting when the leftist revolutionary forces chased the military dictator from Cuba in 1959.

Furthermore, under Franco, who ruled dictatorially from 1939 to 1975, there was no Spanish law on immigration or on asylum.<sup>124</sup> Decisions on entry and residence in Spain were essentially

113. *Id.* at 222.

114. The Law for the Suppression of Masonry and Communism of March 1, 1940. *Id.* at 225.

115. *Id.* at 223 (Table 11.2).

116. *Id.* at 223, quoting JOSEP MARIA SOLE I SABATER, *LA REPRESSION FRANQUISTA A CATALUNYA* 268 (1985).

117. 40,000 political prisoners were freed on the second anniversary of Franco's victory. During the fall of 1941, Franco released 20,000 more prisoners. The following winter he released 50,000 political prisoners, with another 50,000 released in December 1943. *Id.* at 226-27.

118. *Id.* at 226-28.

119. Franco died on November 20, 1975. *Francisco Franco*, Encyclopedia Britannica Online (2003), available at <http://www.search.eb.com/ebi/article?eu=296306>.

120. Only in February 1977 did the Socialist Party again become a legal organization. The Communist Party was legalized in April 1977. HOOPER, *supra* note 60, at 36.

121. Spain severed diplomatic relations with the U.S.S.R. when Franco came to power in 1939, and only re-established diplomatic relations on 2/10/77 after Franco died.

122. Shortly before Franco died, Spain established diplomatic relations with the P.R.C. on 3/9/73.

123. Spain established diplomatic relations with Hungary and Czechoslovakia on 2/10/77 and with East Germany on 1/11/73.

124. SANTOLAYA MACHETTI, *supra* note 9, at 54. The first Spanish legislation

administrative, and were completely discretionary.<sup>125</sup> Refugees from Cuba who arrived in Spain after Castro came to power, therefore, faced a legal vacuum. Those who had retained their Spanish citizenship could, of course, enter Spain. Those who lacked Spanish citizenship did not have the right to enter Spain, but as they were fleeing a communist revolution in a former Spanish colony, they had reason to hope the anti-communist Spanish regime would give them shelter, which Franco did. He presided over a major reverse migration. Many of the thousands of Spaniards who had emigrated to Cuba before 1959 found themselves and their families returning to Spain after Castro's revolution took power.<sup>126</sup>

In this discretionary admission system, Spain had no legislation or regulation distinguishing refugees from other migrants. There was no procedure to determine whether a Cuban, or anyone else, was fleeing from persecution, from difficult economic circumstances, from personal crises, or was not fleeing at all. Not surprisingly, there was also an absence of public information concerning those who had been admitted to Spain. This makes quantitative conclusions less than reliable. Nonetheless, it is clear that Cubans began to arrive in Spain soon after the Cuban Revolution.

A look at the situation in Cuba at that time indicates that relatively wealthy landowners and members of the professional and managerial classes were among the first Cubans to arrive in

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addressing refugees and asylum, *Ley 5/1984, de 26 de marzo de 1984, reguladora del derecho de asilo y de la condición de refugiado*, *Boletín Oficial del Estado*, #74, de 27 de marzo 1984 [Act 5/1984 of March 26, 1984 Regulating the Right of Asylum and Refugee Status, published in the Official State Gazette, #74, Mar. 27, 1984], was enacted in 1984. This law has since been modified by *Ley 9/1994 de 19 de mayo*, *Boletín Oficial del Estado*, # 122, de 23 de mayo 1994. Before any refugee legislation had been enacted, the Spanish Ministry of Interior had issued an order guaranteeing protection to those in Spain who had already been deemed refugees by the United Nations High Commissioner of Refugees (UNHCR). *Orden de Ministerio del Interior de 16 de mayo*, *Boletín Oficial del Estado* #124, de 24 de mayo 1979. The first Spanish legislation addressing immigration, *Ley Orgánica 7/1985, sobre derechos y libertades de los extranjeros en España*, *Boletín Oficial del Estado*, de 3 de julio 1985 [Organic Law 7/1985 Concerning the Rights and Liberties of Aliens in Spain], was enacted in 1985. *Id.* The Law on Aliens was amended twice in 2000, *Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, en su redacción dada por la Ley Orgánica 8/2000, de 22 de diciembre 2000*, *Boletín Oficial del Estado*, de 23 de diciembre 2000.

125. Interview with Pablo Santolaya Machetti, Professor of Constitutional Law, Complutense University, Madrid, Spain (May 14, 2002) (transcript of interview on file with author).

126. MARTIN FERNANDEZ & ROMAN, *supra* note 64, at 23.

Spain in 1959 and 1960. The basic land reform legislation of 1959,<sup>127</sup> followed by a trade agreement between Cuba and the Soviet Union,<sup>128</sup> the expropriation of British and U.S.-owned refineries that refused to process Soviet crude oil in Cuba,<sup>129</sup> the U.S. suspension of the sugar quota allocated to Cuba,<sup>130</sup> and the seizure of U.S.-owned property in Cuba<sup>131</sup> established a spiral of hostility threatening those in business. There were also executions of some political opponents, imprisonment of others, and efforts to limit civil liberties.<sup>132</sup> Many who felt endangered or unsettled by these events must have wanted to leave Cuba, and if they had money or other resources, they could. At the beginning of the Castro government, emigration remained, as it had been under Batista, essentially uncontrolled.<sup>133</sup>

In terms of the economic situation in Spain, the timing of the first Cubans to arrive after the revolution was propitious. In the 1960s, Spain was entering a decade of intense development and these first Cuban emigrants tended to be businessmen, property owners and entrepreneurs.<sup>134</sup> They brought timely skills and knowledge. Moreover, the building boom beginning to transform Spain into a mass tourist destination also provided work for Cubans who lacked professional or technical training.<sup>135</sup>

Without a doubt, however, the majority of the Cubans who entered Spain planned to remain only temporarily.<sup>136</sup> They saw Spain as a way station for a few months while they satisfied the legal formalities and obtained visas for the United States.<sup>137</sup> By

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127. The land reform law was enacted on May 17, 1959. DE LIMA DANTAS, *supra* note 4, at 40.

128. On February 15, 1960 there was a Joint Communiqué on Soviet-Cuban Commercial Agreement. *Id.* at 42.

129. BENDER, *supra* note 25, at 21. See also ANDRES SUAREZ, CUBA: CASTROISM AND COMMUNISM, 1959-1966 93 (1967).

130. This was the remainder of the sugar quota for the year; it amounted to more than 90 million dollars. DE LIMA DANTAS, *supra* note 4, at 40; see also SUAREZ, *supra* note 129, at 93 (arguing that Eisenhower reduced the Cuban sugar quota in retaliation for the confiscation of American oil refineries).

131. DE LIMA DANTAS, *supra* note 4, at 40; SUAREZ, *supra* note 129, at 97.

132. DE LIMA DANTAS, *supra* note 4, at 42.

133. BENDER, *supra* note 25, at 117. In 1959 and 1960, the Cuban government imposed few restrictions on citizens who wished to leave. From 1961 to 1963, departure from Cuba continued to be legal, but those emigrating had to abandon all their possessions. Emigration was unrestricted under Batista until the first year of the Revolution. *Id.* at 117-18; see also BACH, *supra* note 71, at 82.

134. MARTIN FERNANDEZ & ROMAN, *supra* note 64, at 23-24.

135. *Id.* at 24.

136. *Id.* at 24-25.

137. *Id.* at 24-25.

and large, the Cubans in Spain did complete the necessary processing and move to the United States.<sup>138</sup> In fact, during the early 1960s many Cubans managed to finish this process very quickly, in only two or three months.<sup>139</sup> While they were in Spain, the Cuban exiles received assistance from the Spanish government and charitable organizations.<sup>140</sup> They were provided food, clothing, shelter, medical assistance, English classes, and support for traveling to the United States or any other country that welcomed the Cubans.<sup>141</sup>

During the beginning of the 1960s, Cubans could immigrate to the United States relatively easily.<sup>142</sup> Neither the United States government nor those arriving in the United States viewed the Cubans as immigrants, people who were moving permanently to the United States. The situation appeared fragile and temporary, and there was precedent allowing Cuban political exiles, those who dissented from the regime in power, to live in the United States until the situation improved. As a result, the United States government adopted a temporary solution to allow Cubans legal entry and residence by relying on the parole power of the general immigration law,<sup>143</sup> a mechanism that had been used in

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138. *Id.* at 24. In 1959 and 1960, Cubans who satisfied the U.S. immigration laws could apply for visas in the U.S. embassy in Havana. Once the U.S. broke diplomatic relations with Cuba in January 1961, however, the U.S. embassy ceased to operate and immigrant visas to the U.S. could only be obtained in U.S. embassies in other countries, such as Spain. MASUD PILOTO, *supra* note 95, at 34. The U.S. later decided to waive the visa requirement for those seeking to migrate from "communist oppression" in Cuba to the U.S. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Although the United States immigration laws throughout much of the 19th century were welcoming, the national origin laws of the 1920s introduced drastic limitations on immigration, both numerically and by nationality, in addition to the prohibitions added earlier against undesirable groups such as criminals, prostitutes, polygamists, anarchists, vagrants, and those with contagious diseases. Cuban immigrants, however, faced no numerical or nationality-based restrictions because the quota laws did not apply to citizens of independent nations in the Western Hemisphere. This was the legislation in place in 1959 and in the early 1960s, when many Cubans came to the United States after Batista fled and Castro took over. For a more detailed account of the development of U.S. immigration law, see U.S. COMM'N ON CIVIL RIGHTS, *THE TARNISHED DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION* (1980). Although Cubans did not face numerical limitations on immigration to the United States, they did need to satisfy the requirements for obtaining immigration visas, which were available to those who did not fall into the disfavored categories and who possessed certain employment skills or whose close relatives lived in the U.S. See ELIZABETH J. HARPER, *IMMIGRATION LAWS OF THE UNITED STATES* 5-30 (3rd ed. 1975) (summarizing immigration requirements in effect in 1959-1960).

143. 8 U.S.C. §1182(d)(5). The text of the parole provision has been changed



prior circumstances to admit refugees. For example, the Attorney General had paroled more than 30,000 Hungarian refugees into the United States in 1957, after the Soviets had crushed the Hungarian Revolution.<sup>144</sup>

In relying on the Attorney General's decision to parole Cubans into the country, the United States, like Spain, utilized executive discretion to respond to the sudden migration from Cuba.<sup>145</sup> Similarly, the United States, like Spain, did not examine whether the Cubans qualified as refugees. The text of the parole provision makes no reference to refugees, persecution, or asylum. Therefore, unlike other groups seeking refuge in the United States, those admitted via the parole process do not have to prove that they have a well-founded fear of persecution based on political, religious, racial, or similar grounds.<sup>146</sup> Accordingly, the Cubans allowed to enter the United States as "parolees" were, and continue to be, privileged in comparison with all others seeking

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slightly since the 1960s, but the content remains the same: "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

144. Approximately 32,000 Hungarians were paroled into the United States, and 6,000 Hungarians were admitted under the short-lived Refugee Relief Act of 1953, Act of Aug. 7, 1953, 67 Stat. 400. See generally, RICHARD A. BOSWELL, IMMIGRATION AND NATIONALITY LAW (3rd ed., Carolina Academic Press, 2000). In 1958 Congress enacted legislation granting permanent legal status to Hungarian refugees who had been admitted via the parole power. Act of July 25, 1958, Public Law 85-559, 72 Stat. 419, 8 U.S.C. §1182. Later the U.S. used the same provision to admit 130,000 Vietnamese refugees in 1975. See CAROL DALGLISH, REFUGEES FROM VIETNAM 1 (1989). See also THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP 1000 (4th ed. 1998).

145. The statutory authorization for parole embodies a legislative decision to allow the executive to use almost unlimited discretion. The legislative standards for the use of this discretion are quintessentially indeterminate: "for emergent reasons" or "in the public interest." See *supra* note 143 and accompanying text. In 1996 Congress replaced these terms with "case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. §1182(d)(5)(A)(2000). It is debatable as to whether the new legislative standards significantly narrow the extent of discretion that the executive branch can exercise. See ALEINIKOFF ET AL., *supra* note 144, at 510.

146. The standard for those seeking admission to the U.S. as refugees or asylees requires that the applicant demonstrate a persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §1101(a)(42)(2000). See also 8 C.F.R. § 208.13(b)(1)(2003).

shelter in America. Through this preferential admission policy, more than 200,000 Cubans, many of whom were from the professional and upper classes,<sup>147</sup> arrived in the United States from 1959 through 1962.<sup>148</sup>

After the Cuban Missile crisis in late 1962, Cuba limited the transportation available for legal departures, which drastically curtailed the numbers of emigrants.<sup>149</sup> However, in the second half of the 1960s, the rhetoric became more muted and Cuba allowed large numbers of its nationals to leave.<sup>150</sup> Not coincidentally, increasing numbers of Cubans began arriving in Spain. There were 2,648 Cubans admitted in 1964.<sup>151</sup> The number more than doubled in 1965 to 6,431,<sup>152</sup> and swelled to 8,904 in 1968.<sup>153</sup> The numbers continued to grow in the late 1960s and early 1970s when the annual arrivals from Cuba exceeded 12,000, which was more than five times the number of those who had come to Spain in 1964.<sup>154</sup> These Cubans, popularly referred to as refugees by Spaniards even though their motives for leaving Cuba had not

147. MASUD-PILOTO, *supra* note 95, describes Cubans arriving in 1959 and 1960 as rich and those arriving in 1961 as professionals and technicians. *Id.* at 58, 33-34, 51-52; TRAVIESO-DIAZ, *supra* note 25, at 240; Miguel González-Pando, *Development Stages of the "Cuban Exile Country"* (Cuba in Transition: Volume 7—Papers and Proceedings of the Seventh Annual Meeting of the Association for the Study of the Cuban Economy), 1997, at 51, available at <http://lanic.utexas.edu/la/cb/cuba/asce/cuba7/gzlezpan.pdf>.

148. The statistics are sometimes reported by calendar year and sometimes by fiscal year (beginning July 1 and ending June 30). MASUD-PILOTO, *supra* note 95, at 3, Table I.1. Using fiscal year for 1960 and later, reports the following arrivals by year: 26,527 in the first half of 1959, 60,224 in 1960, 49,961 in 1961, 78,611 in 1962. *Id.* RIVERA, *supra* note 25, at 2, reports that 120,000 Cubans had arrived in the United States in 1959 and 1960, followed by 155,000 more in 1961 and 1962. The U.S. severed diplomatic relations with Cuba in January 1961. *Cuba, Country Study, supra* note 4, at 44.

149. Between November 1962 and November 1965, 29,962 Cuban refugees entered the U.S. BENDER, *supra* note 25, at 118. During these years the Cuban government, although not outlawing it, characterized emigration as "the abandonment of the homeland" or "immigration without return." Rolando Garcia-Quinones, *International Migrations in Cuba: Persisting Trends and Changes, International Migrations From 1959 (Sistema Económico Latinoamericano)* (2002), available at <http://lanic.utexas.edu/~sela/AA2K2/ENG/docs/Coop/migra/spsmirdi12-02/spsmirdi12-2.htm> [hereinafter *International Migrations From 1959*].

150. *Id.* These were the years of the *vuelos de la libertad*, or freedom flights, which brought approximately 50,000 Cubans per year to the U.S. *Infra* notes 157-162 and accompanying text.

151. Martin-Fernandez & Romano, *supra* note 64, at 24-25.

152. *Id.*

153. *Id.*

154. The following numbers show the increase of Cuban arrivals in Spain each year: 6,679 in 1966, 7,954 in 1967, 8,904 in 1968, 7,012 in 1969, 11,089 in 1970, 13,332 in 1971, 12,038 in 1972. *Id.*

been scrutinized in any government proceeding, totaled nearly 80,000 between 1964 and 1972.

With the upsurge of Cuban arrivals in the mid-1960s, the Spanish government established a Refugee Social Services program, which took responsibility for assisting needy Cubans who entered Spain.<sup>155</sup> The increase in Cubans arriving in Spain coincided with an increase in the time it took to satisfy the requirements to enter the United States.<sup>156</sup>

Several significant events occurred in the middle of the decade that had an impact on the admission of Cubans into the United States. In 1965, Castro announced that all those who wanted to leave Cuba to join their families in the United States could leave from the port of Camarioca.<sup>157</sup> In a preview of the 1980 Mariel boatlift, thousands hastily made their way to the port city, and more than 5,000 succeeded in buying, renting, or stealing boats, while others waited for family members to arrive from Florida to take them out of Cuba.<sup>158</sup> In an effort to create a more orderly avenue of migration, Cuba and the United States agreed on a series of ten weekly flights to the United States.<sup>159</sup> Soon, roughly 4,000 Cubans began arriving in the United States each month.<sup>160</sup> Flying 50,000 Cubans to Florida each year and integrat-

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155. *Id.* at 24.

156. *Id.* at 25. The change in U.S. immigration law in 1965 treated Cubans seeking to enter the U.S. from Spain as part of the immigrant quota for the western hemisphere, as opposed to merely paroling them into the U.S. Cubans coming directly to the U.S. from Cuba were not part of this quota. The labor certification requirement of the U.S. immigration law also posed additional difficulties for Cubans seeking to move to the U.S. from Spain. See *infra* note 173 and accompanying text.

157. BENDER, *supra* note 25, at 119. Castro announced this on September 28, 1965. See Fidel Castro, Speech Marking Fifth Anniversary of CDR, (Sept. 29, 1965), (transcript available at <http://lanic.utexas.edu/la/cb/cuba/castro/1965/19650929>).

158. TRAVIESO-DIAZ, *supra* note 25, at 241. Hundreds of boats arrived in Camarioca from the U.S. in October 1965, but it was hurricane season and the private boatlift was soon cancelled in favor of weekly air flights after only 5,000 of 200,000 Cubans managed to leave. MASUD-PILOTO, *supra* note 95, at 61. Although Castro's announcement specified Cubans could leave Camarioca for the United States and most of the Cubans who left headed directly to the United States, there was a simultaneous increase in the number of Cubans arriving in Spain. See *supra* notes 151-154 and accompanying text.

159. BENDER, *supra* note 25, at 117. The U.S. and Cuba agreed in a Memorandum of Understanding that Cuban nationals with immediate relatives in the United States would be given priority on the flights. Silvia Pedraza, *Cuba's Refugees: Manifold Migrations*, (Assoc. for the Study of the Cuban Economy) (1995) at 315, available at <http://lanic.utexas.edu/la/cb/cuba/asce/cuba5/FILE26.PDF> [hereinafter *Manifold Migrations*]. The airfare was \$800 per passenger.

160. The Cuban authorities required those who wished to join this exodus to register in Cuba; close to 300,000 applied before the registration period expired in

ing the new arrivals proved an expensive and politically controversial task,<sup>161</sup> but the United States did not waver in providing a home to all Cubans who wanted to leave their country. Although the United States continued to employ the general immigration laws to manage the migration from Cuba, President Johnson employed the rhetoric of refugee protection: "I declare this afternoon to the people of Cuba that those who seek refuge here in America will find it. The dedication of America to our tradition as an asylum for the oppressed is going to be upheld."<sup>162</sup>

Furthermore, as Fidel Castro remained in power and large numbers continued to flee, the lawful but temporary status of Cubans paroled into the United States became less satisfactory.<sup>163</sup> With the Cuban Adjustment Act of 1966,<sup>164</sup> Congress regularized the situation by providing that all Cubans paroled into the United States could become permanent residents of the United States after two years in the United States.<sup>165</sup> This act was another benefit awarded exclusively to Cuban nationals. As a result, any

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May 1966. The United States reviewed those who had registered to determine who were eligible to come to the U.S. *Id.* Although the Cuban government allowed hundreds of thousands to register, it prohibited certain groups from emigrating: professionals, technical workers, skilled workers, and young men of military age. *Manifold Migrations*, *supra* note 159, at 315-316. The annual arrivals of Cubans in the United States via these flights follow: 46,688 in 1966; 52,147 in 1967; 55,945 in 1968; 52,625 in 1969; 49,545 in 1970; 50,001 in 1971, and 23,977 in 1972, the year that Castro halted the flights. MASUD-PILOTO, *supra* note 95, at 3, Table I.1.

161. MASUD-PILOTO, *supra* note 95, at 61-68. The Cuban Refugee Program established by the President John Kennedy assisted more than 700,000 Cubans between 1961 and 1976 at a cost that exceeded \$1,000,000,000. *Id.* at 48-54. Many in Florida were concerned that an enormous increase in arrivals from Cuba would be burdensome on state and local agencies and would escalate racial tensions in urban areas within the state. *Id.* at 62-64.

162. Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill, Liberty Island, New York, Entry No. 546, (Oct. 3, 1965), in *Public Papers of the Presidents of the United States: Lyndon B. Johnson 1037-1040* (U.S. Government Printing Office ed., 1966), (transcript available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/651003.asp>).

163. U.S. immigration law admits immigrants, who plan to reside permanently in the U.S., and nonimmigrants, who plan to reside temporarily in order to accomplish a specific goal. See ALENIKOFF ET AL., *supra* note 144, at 273. The Cubans had not been formally admitted as immigrants, with the right of permanent residence, and the Attorney General, who had admitted them under the parole authority, see *supra* note 143 and accompanying text, could revoke their permission to remain in the United States at any time. *Id.* at 507-509.

164. Cuban Refugees: Adjustment of Status, Pub. L. 89-732, 80 Stat 1161 (1966), amended by Pub. L. No. 94-571, 90 Stat. 2706 (1976) & Pub. L. No. 96-212, §203(i), 94 Stat. 108 (1980), (codified as amended at 8 U.S.C. § 1255).

165. The requirement of two years of physical presence has since been reduced to one year. See ALENIKOFF ET AL., *supra* note 144, at 1173.

Cuban who could reach the United States — or reach the U.S. ships patrolling the seas just outside Cuba's twelve mile territorial limits<sup>166</sup>— could enter the United States legally and become a lawful permanent resident within two years,<sup>167</sup> even becoming a U.S. citizen within five more years.<sup>168</sup> There was no need to show family ties, employment skills, or any factor other than being Cuban. Again, the United States government,<sup>169</sup> while often referring to the Cubans as refugees, opted not to apply the recently adopted refugee legal standard to them.<sup>170</sup> Again, no other country's nationals had it so easy

In addition, the United States enacted a thorough overhaul of the general immigration legislation in 1965.<sup>171</sup> As a consequence, Cubans seeking admission to the United States from Spain became subject to the immigration procedure rather than the parole process.<sup>172</sup> Moreover, the new immigration law created a lengthy procedure for those seeking to enter the United States based on an offer of employment.<sup>173</sup>

All these measures had a significant impact on the Cubans waiting in Spain. Although generally successful in entering the United States, the average Cuban now spent more than a year in

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166. *Id.*

167. See *supra* notes 164-165 and accompanying text.

168. 8 U.S.C. §1427(a)(1)(1994) (5 year residence requirement for lawful permanent residents seeking citizenship).

169. The earlier decision, to parole Cubans into the U.S., had been made by the executive branch. The preferential treatment afforded by the Cuban Adjustment Act was a decision made by the legislative branch. See *supra* note 145.

170. In the Immigration and Nationality Act — Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C. (1994)), Congress had provided that 6% of the annual admissions of immigrants born outside the Western Hemisphere would be available to refugees, defined as those who "because of persecution or fear of persecution based on race, religion, or political opinion . . . have fled any Communist or Communist-dominated country or area or from any country within the general area of the Middle East. . . ." [formerly 8 U.S.C. §153(a)(7)]. See *infra* notes 171-173 and accompanying text. This provision was amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C. (2000)), which removed the reference to communist countries and the Middle East and added fear of persecution based on nationality and social group. See 8 U.S.C. §1101(a)(42).

171. Immigration and Nationality Act — Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C. (1994)).

172. MARTIN-FERNANDEZ & ROMANO, *supra* note 64, at 24-25.

173. The 1965 legislation required all applicants for visas based on employment, as opposed to family reunification, to comply with the labor certification process to ensure that they will not take jobs from U.S. workers or depress the prevailing wage. 8 U.S.C. §1182(a)(14). This procedure has since been modified by the Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, (codified in scattered sections of 8 U.S.C. (2000)).

Spain before making arrangements to leave for the United States.<sup>174</sup> By 1972 there were 25,000 Cubans in Spain waiting to arrange their visas and travel plans to the United States.<sup>175</sup> This backlog slowly diminished,<sup>176</sup> and most of the Cubans left Spain by the end of the decade.<sup>177</sup>

### 3. The Diplomatic Policy Toward Cuba

In light of Franco's anti-communism, granting refuge to those fleeing Cuba's communist revolution may not have been surprising. What is unexpected, however, at least to most Americans, is Spain's unbroken connections with Cuba. As Castro transformed the former Spanish colony into a communist society, Spain did not sever diplomatic relations with Cuba. Franco, himself a Galician like Castro and Fraga, as well as 150,000 residents of Cuba in 1959,<sup>178</sup> continued to maintain formal, political, and commercial ties with Cuba.<sup>179</sup>

When the United States recalled its ambassador and severed its diplomatic ties with Cuba in 1961,<sup>180</sup> Spain maintained diplomatic silence.<sup>181</sup> When Castro proclaimed himself a "Marxist-Leninist" in December 1961, Spain observed from the sidelines. When the Organization of American States (OAS) excluded Cuba from

174. MARTIN-FERNANDEZ & ROMANO, *supra* note 64, at 25.

175. *Id.* at 26.

176. There appear to be no reliable statistics showing which Cubans actually left Spain, but the Cuban Refugee Center in Miami recorded approximately 20,000 Cubans who arrived in Florida from Spain between 1973 and 1978. *Id.*

177. *Id.*

178. *Castro Visits His Father's Spanish Home*, N.Y. TIMES, July 29, 1992, at A3.

179. GABRIEL A. ONDETTI, *Western European and Canadian Relations with Cuba after the Cold War*, in 9 Cuba Briefing Paper Series. (Nov. 1995) available at <http://www.trinitydc.edu/academics/depts/Interdisc/International/caribbean%20briefings/WesternEuropean.pdf> (last visited June 5, 2003); see also JOAQUIN ROY, *España y Cuba: ¿Una Relación Muy Especial?*, Revista CIDOB d=Afers Internacionals, Issue no. 31 (1996) available at <http://www.cidob.org/castellano/Publicaciones/Afers/roy.html>.

180. The U.S. recognized the new government of Cuba in January 1959, only one week after Batista fled. The U.S. broke diplomatic relations with Cuba two years later in January 1961. *Cuba, Country Study*, *supra* note 4, at 44.

181. There was a diplomatic contretemps in 1960 when the Spanish ambassador to Cuba from 1952-1960 interrupted Castro's live television criticisms of the Spanish embassy's activities with the Catholic Church in Cuba. Castro ordered the ambassador to leave Cuba within 24 hours. *Telemundo Pregunta: Guest Dr. Fidel Castro* (TELEMUNDO television broadcast, Jan. 20, 1960) (transcript available at <http://www.lanic.utexas.edu/la/cb/cuba/castro/1960/196001200>). When the ambassador arrived in Spain, Franco criticized, rather than praised, him for causing the incident. ROY, *supra* note 50, at 61. Spain did not send another ambassador, but did not sever diplomatic ties. PAYNE, *supra* note 28, at 530-531.

participating in January 1962,<sup>182</sup> Spain merely took note. When the Federal Republic of Germany cut its ties with Cuba in 1963 to protest Castro's close relations with the communist government in East Germany, Spain kept its ambassador in Havana.<sup>183</sup> When Venezuela intercepted Cuban arms destined for anti-government forces and successfully sought OAS sanctions against Cuba in 1964,<sup>184</sup> and later called on all nations in the Americas to sever diplomatic and consular ties with Cuba,<sup>185</sup> Spain kept its counsel. When the OAS issued a general call to "western" allies to restrict trade to Cuba, Spain ignored the message.

Indeed, the Franco regime permitted commerce and tourism between Spain and Cuba to continue. As other European countries distanced themselves politically and economically from Castro's regime, Spain's right-wing government remained Cuba's most important trading partner.<sup>186</sup> Despite the tensions of the Cuban Missile Crisis in late 1962, Spanish commercial ties with Cuba proceeded normally in 1963.<sup>187</sup> The national airline, Iberia, continued to schedule direct flights between Havana and Madrid.<sup>188</sup>

None of these responses might have been surprising by any other European country, but no other European government was as staunchly anti-communist as Franco's.<sup>189</sup> Castro, in turn, expressed appreciation of the Spanish dictator: "Franco displayed great patience, infinite patience, with [Cuba]. . . Also, when the U.S. government wanted Spain to break diplomatic relations with

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182. Cuba has not been expelled from the OAS but its government may not vote or take action within the OAS. Final Act, 8th Meeting of Consultation of Ministers of Foreign Affairs, OAS Doc. OEA.Ser.X.12, Resolution VI, at 6 (1962) available at <http://www.yale.edu/lawweb/avalon/intdiplinteram/infam17.htm>.

183. ONDETTI, *supra* note 179, at 2-3.

184. Final Act, 9th Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser.F/II.9, Resolution I, at 2 (1964) available at <http://www.yale.edu/lawweb/avalon/intdip/interam/intam14.htm>.

185. *Id.*

186. ONDETTI, *supra* note 178, at 2.

187. PAYNE, *supra* note 28, at 531.

188. *Id.*

189. The Salazar government in Portugal was also an anti-communist dictatorship from 1932 to 1975. During the 1960s and 1970s, much of Portugal's attention and energy were consumed by lengthy anti-colonial wars in Guinea-Bissau, Mozambique, and Angola. *Portugal*, Encyclopedia Britannica Online at <http://www.search.eb.com/eb/article?eu=108423> (last visited Aug. 20, 2003).

Cuba, Franco refused to do so."<sup>190</sup> When Franco died in 1975,<sup>191</sup> most communist leaders shed no tears.<sup>192</sup> Castro ordered three days of mourning in Cuba.<sup>193</sup>

#### 4. The Post-Franco Transition

After Franco's death, Prince Juan Carlos, Franco's hand-picked successor and the grandson of Alfonso XIII, the last king to rule Spain,<sup>194</sup> was crowned as a constitutional monarch.<sup>195</sup> This conservative government gingerly took steps to establish democracy in Spain. When the new Spanish Constitution was ratified in 1978, it included a provision recognizing the right of asylum.<sup>196</sup> By the end of the decade, Spain adopted the major international refugee treaties and their definition of refugees as those who have a well-founded fear of persecution based on their race, religion, nationality, political opinion, or social group.<sup>197</sup> However, legislation implementing the treaty obligations was still years in the future. In the interim, the United Nations High Commissioner for

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190. ASUNCION MATEO, *Fidel Castro, In Depth*, TIEMPO, June 10, 1991 at 7 available at <http://www.lanic.utexas.edu/la/cb/cuba/castro/1991/19910605>. See also SANTIAGO PEREZ-DIAZ, *España-Cuba: Un Amor Tormentoso*, EL PAIS, Dec. 2, 1996 available at <http://www.udel.edu/leipzig/texts1/ela02126.htm> (last visited June 11, 2003) (stating that Castro ordered three days of mourning following Franco's death).

191. Franco died on November 20, 1975. *Francisco Franco*, Encyclopedia Britannica Online at <http://www.search.eb.com/ebi/article?eu=296306> (last visited Aug. 12, 2003).

192. Rather than eulogize Franco, communist countries denounced Franco, with the Soviet Union pausing at Franco's death to remember the "innumerable monstrous crimes" of Spanish fascists. *Juan Carlos Installed as King of Spain; Franco Buried*, Facts on File, Nov. 29, 1975.

193. PEREZ-DIAZ, *supra* note 190.

194. Alfonso XIII stepped down after the 1931 elections, in which the anti-monarchy voters had routed the opposition, in order to prevent a civil war. He left Spain when the Republic was declared in 1931; he abdicated the throne shortly before he died in 1941, still in exile. Hooper, *supra* note 60, at 87-88. Alfonso XIII's son, Don Juan, is the father of Juan Carlos. *Id.* at 88-89.

195. Juan Carlos was crowned King of Spain on November 22, 1975, two days after Franco died. Juan Carlos, Encyclopedia Britannica Online at <http://www.search.eb.com/ebi/article?eu=45067>. (last visited Aug. 12, 2003).

196. "The law shall establish the terms under which citizens from other countries and stateless persons may enjoy the right of asylum in Spain." CONSTITUCIÓN [C.E.] art. 13.4 (Spain), passed by the Cortes Generales, Oct. 31, 1978, ratified by referendum, Dec. 7, 1978, sanctioned by King Juan Carlos, Dec. 27, 1978 (B.O.E., 1978, 311).

197. Geneva Convention, *supra* note 29; Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. #606 U.N.T.S. 8791 [hereinafter Protocol]. Spain acceded to both the Geneva Convention and Protocol in 1978. *Instrumento de 22 de julio de 1978, de Adhesión de España a la Convención sobre el Estatuto de los Refugiados, hecha en Ginebra el 28 de julio de 1951, y al Protocolo sobre el Estatuto de los Refugiados, hecho en Nueva York el 31 de enero de 1967* (B.O.E., 1978, 252).



Refugees established an office in Spain and made efforts to protect refugees, including Cubans.<sup>198</sup>

### B. *The Gonzalez Era*

The 1980s marked heady change in Spain. In 1982, Felipe Gonzalez led the Socialist Party to a resounding victory in the general elections. Only four decades after the prior Socialist government had been overthrown by the Civil War, and only seven years after the death of Franco, Gonzalez took control of Parliament.<sup>199</sup>

Many expected the election of Gonzalez, who visited Cuba in 1979 as the leader of the opposition Socialist Party,<sup>200</sup> to herald warmer relations between Spain and Cuba.<sup>201</sup> Gonzalez did make an official visit to Cuba in 1986<sup>202</sup> and successfully pressed for the release of political prisoners and compensation for nationalized Spanish-owned property.<sup>203</sup> Furthermore, Castro made his first

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198. UNHCR established an office in Spain in 1979. Interview with Maria Angeles Siemens, Secretary-General, UNHCR Association in Spain, in Madrid, Spain. Siemens opened the first UNHCR office in Spain, Feb. 5, 2002.

199. Spain's Parliament, the *Cortes Generales*, consists of two chambers, the *Congreso de los Diputados* (Congress of Deputies) and the *Senado* (Senate). The Congress of Deputies, which Gonzalez and the Socialist Party (*Partido Socialista de Obrero Espanol*) [PSOE] controlled with 201 seats out of the total of 350, is the more important legislative branch. CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK (2003), available at <http://www.cia.gov/cia/publications/factbook/geos/sp.html>; Hooper, *supra* note 60, at 50.

200. Roy, *supra* note 50, at 83.

201. See generally *id.* at 81-111.

202. Gonzalez traveled to Cuba in November 1986, after visiting Ecuador and Peru. Will Ellsworth-Jones, *Castro Pins Hope on Gonzalez Visit*, TIMES (London), Nov. 16, 1986; Richard Wigg, *Gonzalez Claims Havana Success*, TIMES (London), Nov. 18, 1986. A prior Spanish Prime Minister, Adolfo Suarez, had visited Cuba in 1978. *Around the World, For the Record*, WASH. POST, Sept. 7, 1978, at A25. Roy, *supra* note 50, at 83.

203. Gonzalez sought the release of 26 Spanish prisoners in Cuba, the most prominent of whom was Eloy Gutierrez Menoyo. Gutierrez had been taken to Cuba as a boy by his father, a prominent Socialist who fled Spain in the waning days of the Civil War. The son had joined in the fight against Batista and been awarded Cuban citizenship, but later broke with Castro and was imprisoned. After 21 years in prison, he was released to Spain shortly after Gonzalez's visit. Roy, *supra* note 50, at 82-89. (Recently, Gutierrez Menoyo announced his return to Cuba to support the dissident community against the current repression. David Gonzalez, *Cuba: Exile Figure Says He's Returned*, N.Y. TIMES, Aug. 8, 2003, at A6.) During the 1986 visit to Cuba, Gonzalez and Castro agreed that Cuba would pay 40 million dollars in compensation for nationalized property. This was far less than the 300 million dollars that had been claimed, but it brought this dispute to an end after a quarter of a century. Roy, *supra* note 50, at 89.

brief unofficial visit to Spain in 1984,<sup>204</sup> and returned for a longer stay in 1992.<sup>205</sup> Nonetheless, the Socialist government's attitude toward Cuba was ambivalent. The Spanish Socialists saw that the world had changed and were eager to emerge from their isolation beyond the Pyrenees and become part of Europe.<sup>206</sup> They felt free to criticize Castro, who, in turn, refused to accept the Spanish ambassador sent to Cuba.<sup>207</sup>

In addition to improving, though not perfecting, relations with Cuba, the Socialist government was extremely active and reform-minded.<sup>208</sup> Its many law-making initiatives included measures regulating the admission of foreigners, including Cubans. The most important of these was the 1984 legislation on asylum seekers and refugees,<sup>209</sup> whereby Spain incorporated the international refugee definition as a standard by which non-Spaniards fleeing persecution could enter Spain.<sup>210</sup>

By this time, the Cuban exodus to Spain had slowed. At the beginning of the decade, in 1980, the Mariel crisis sent 125,000

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204. Castro stopped in Madrid in 1984 on his flight home from the funeral of the Soviet leader Andropov. Roy, *supra* note 50, at 85. Nina Darnton, *Spain Bolsters Role in Latin America*, N.Y. TIMES, Feb. 26, 1984, at A3.

205. *Castro Visits His Father's Spanish Home*, N.Y. TIMES, July 29, 1992, at A3. During this visit Castro was feted by Manuel Fraga, the government head of Galicia, (see *supra* text accompanying notes 57-63), *supra*, who was pressing for the release of Galician political prisoners in Cuba, but ignored by Prime Minister Gonzalez. *Id.*

206. Roy, *supra* note 50, at 81-104.

207. Cuba rejected José Antonio San Gil, the Spanish ambassador, in 1994. Joaquin Roy, *España, la Unión Europea y Cuba: la evolución de una relación especial a una política de gestos y de presión*, Cuban Studies Association Occasional Paper Series, Vol. 1, No. 2, Sept. 15, 1996, at 2. *Madrid's Envoy Resigns*, SOUTH FLORIDA SUN-SENTINEL, Dec. 14, 1994, at 8A.

208. HOOPER, *supra* note 60, at 52.

209. Law 5/1984 Regulating the Right of Asylum and Refugee Status, *supra* note 124.

210. The 1984 legislation distinguished between refugee status and asylum, and provided that asylum could be granted to many who did not satisfy the refugee definition under international law. Maria Teresa Gil Bazo, *The Role of Spain as a Gateway to the Schengen Area*, 10 INTL. J. REFUGEE LAW 214, 219 (1998); Concepcion Escobar Hernandez, *Asylum and Refugee Status in Spain*, 4 INTL. J. OF REFUGEE LAW 57, 66-67 (1992). The 1994 amendment of the refugee law, *supra* note 124, abolished this distinction. Gil Bazo, at 220. Refugee legislation was followed by immigration legislation, Organic Law 7/1985 Concerning the Rights and Liberties of Aliens in Spain, *supra* note 124. This statute was passed in preparation for Spain's entry into the European Community, now called the European Union, which was due to occur in 1986. The legislation's target was foreigners who wanted to enter and work in Spain, not foreigners already in Spain. Interview with Pablo Santolaya Machetti, *supra* note 125. The 1985 Law on Aliens was amended twice in 2000 by Organic Law 4/2000 and Organic Law 8/2000, *supra* note 124.

Cubans to the United States<sup>211</sup> and Spain granted residence permits to 7,413 Cubans.<sup>212</sup> The numbers were much smaller in the next few years.<sup>213</sup> In 1984, the year in which the new legislation took effect, the number of Cubans arriving in Spain decreased to 4,145<sup>214</sup> and diminished even further in subsequent years, to 2,551 in 1985, and 1,241 in 1986.<sup>215</sup> Thus, by the time Spain moved from a regime of executive discretion to one of legislative standards governing the admission of non-citizens, the Cuban Revolution was more than 25 years old. The major Cuba - Spain migration was over.

This was not the case in the United States. The United States had ratified the international refugee treaty in 1967,<sup>216</sup> and Congress passed implementing legislation in 1980.<sup>217</sup> At that moment, Cuban emigration policy changed dramatically, when Castro announced that the port of Mariel was open to all who chose to go to the United States.<sup>218</sup> Within two weeks, 1,000 boats left from Mariel.<sup>219</sup> Between April 20th and May 20th alone, 65,000 Cubans departed<sup>220</sup> and during the next four months 65,000 more Cubans followed.<sup>221</sup> In less than six months, more

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211. See notes 218-231 and accompanying text, *infra*.

212. MARTIN FERNANDEZ & ROMANO, *supra* note 64, at 26.

213. There were 2,540 residence permits granted to Cubans in 1981, 3,879 in 1982, and 5,268 in 1983. *Id.*

214. *Id.*

215. *Id.*

216. The U.S. ratified the 1967 Protocol, *supra* note 197, to the Geneva Convention, *supra* note 29, but not the Convention itself. By ratifying the Protocol, the U.S. adopted the refugee definition in Article I.A.(2) of the Convention.

217. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C. (2000)). Under the prior statute, admission to the United States as a refugee was limited to those fleeing persecution from a communist country or from the Middle East. The Refugee Act of 1980 removed the ideological and geographical limitations, offering admission as refugees to those who could show a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a social group. 8 U.S.C. §1101(a)(42).

218. *International Migrations From 1959*, *supra* note 149, at 1. The crisis began in early April, when a bus of Cuban refugees crashed into the Peruvian Embassy compound in an attempt to seek asylum. During the next two days, 10,000 Cubans flooded into the Peruvian embassy in Havana. Close to 700 of the asylum seekers at the Peruvian embassy were flown to Costa Rica, but this was only the tip of the iceberg. In face of the large numbers still at the embassy and the unrest, Castro announced on April 23, 1980 that Cubans could leave for the United States. *Id.* at 6. John M. Goshko, *State Dept. Seeks to Halt Sealift*, WASHINGTON POST, Apr. 24, 1980, at A1.

219. RIVERA, *supra* note 25, at 6.

220. *Id.*

221. *Id.*

than one percent of the Cuban population left the country.<sup>222</sup>

Although the new statute regulating refugee admissions had taken effect,<sup>223</sup> President Carter decided not to apply the new legal standard requiring a well-founded fear of persecution to the *Marielitos*.<sup>224</sup> Instead, he welcomed all Cubans arriving in the United States, choosing to rely on the parole power to admit them to the country<sup>225</sup> and then allowing them to become lawful permanent residents via the Cuban Adjustment Act.<sup>226</sup> As a consequence, the 125,000 Cubans who arrived in a disorganized and irregular manner in five months in 1980 did not need to satisfy the asylum standards. So long as they were Cuban, they were welcome.<sup>227</sup>

The Mariel migration led to political problems in the United States. Common criminals, mental patients, and government agents were included in the boatlift.<sup>228</sup> Some committed serious crimes shortly after they arrived and were incarcerated.<sup>229</sup> Others rioted in the large camps in Florida and Arkansas where they were held while the government attempted to devise a plan to integrate them into the United States.<sup>230</sup> Although most of the Cuban emigrants who arrived in 1980 did not present problems,<sup>231</sup> the Mariel crisis created, for the first time, a negative public image of the unfettered Cuban migration to the United States.

The United States believed that some of the Cuban criminals

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222. *Id.* at 11.

223. *See supra* note 218.

224. RIVERA, *supra* note 25, at 12, 16.

225. The executive proposed a Cuban-Haitian Entrant status, and paroled all Cubans and Haitians who arrived in the U.S. between June 20, 1980 and October 10, 1980 into the country as "Cuban-Haitian Entrants (status pending)." RIVERA, *supra* note 25, at 15. While Cuban-Haitian Entrant status was not legislatively defined (or codified) in 1980, it was defined for purposes of the Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, 501(e), 94 Stat. 1799, 1810 (1980) (codified as amended at 8.U.S.C. §1522 note (1982)).

226. *See supra* text accompanying notes 164-165.

227. For the first time, Haitians who arrived in the U.S. in similar circumstances as the Cubans received the generous welcome given to Cuban arrivals. RIVERA, *supra* note 25, at 15; ALEINIKOFF ET AL, *supra* note 144, at 509.

228. *Manifold Migrations*, *supra* note 159, at 318-319; MASUD-PILOTO, *supra* note 95, at 85-86, 94-97, 100-101.

229. ALEINIKOFF ET AL, *supra* note 144, at 509.

230. *See Jo Thomas, Troops are Ordered to Arkansas Camp after Refugee Riot*, N.Y. TIMES, June 3, 1980, at A1; *Fort Chaffee's Unwanted Cubans*, N.Y. TIMES, Dec. 21, 1980, § 6 (Magazine), at 30; William L. Chaze and Paul Recer, *In the Last Days of Cuban Boatlift*, U.S. NEWS & WORLD REPORT, June 16, 1980, at 29; First Anniversary of Freedom Flotilla, UNITED PRESS INTERNATIONAL, Apr. 21, 1981.

231. MASUD-PILOTO, *supra* note 95, at 97.

imprisoned in the United States were too dangerous to release, but Castro refused to accept those who had emigrated from Cuba.<sup>232</sup> Desperate to return the unwanted *Marielitos*, the United States repeatedly sought diplomatic meetings with Cuban officials.<sup>233</sup> Finally, in 1984, the United States agreed to admit 20,000 Cubans each year, and Cuba agreed to allow the return of 2,746 Cubans who had been jailed in the United States since 1980.<sup>234</sup> Although the United States still adhered to a preferential parole policy for Cubans, for the first time the United States sent emigrants back to Cuba, a small but significant breach of the open-door policy.<sup>235</sup>

### C. *The Aznar Era*

After 14 years in power, the Socialist Party surrendered power to more conservative politicians in 1996. José Maria Aznar, leading the center-right Popular Party, became Prime Minister.<sup>236</sup>

232. ALEINIKOFF ET AL, *supra* note 144, at 509.

233. *Cuba, Country Study*, *supra* note 4, at xxvii, 222.

234. DEPARTMENT OF STATE BULLETIN, Feb. 1984, at 44-45. Joint Communiqué Between The United States of America and Cuba, Dec. 14, 1984, U.S.-Cuba, T.I.A.S. No. 11,057. MASUD-PILOTO, *supra* note 95, at 100.

235. The new arrangements did not work smoothly; the slow U.S. processing of Cuban admission applications resulted in far fewer than 20,000 Cuban immigrants per year. For example, only 2,700 Cubans were granted entry visas to the United States in 1993-1994, *see* U.S. Dep't of State, Migration-Cuba (Jan. 1, 2000), *available at* <http://www.state.gov/www/regions/wha/cuba/migration.html> [hereinafter *Migration-Cuba*], at 2, even though the U.S. visa allotment for Cubans had been increased to 27,845 in 1990. *Id.* *See also* Steven Greenhouse, *Flight From Cuba: The Policy; U.S. Will Propose Reducing Barriers to Cuba Migrants*, N.Y. TIMES, Aug. 30, 1994, at A1. By the summer of 1994, over 19,000 Cubans were waiting in Cuba for U.S. decisions on their visa applications. *Id.* *See also* Tim Golden, *Cuban Official Criticizes Lag by U.S. in Issuing Visas*, N.Y. TIMES, Sept. 22, 1994, at A8.

236. In the March 1996 general elections, the Popular Party won 39% of the vote, compared to PSOE's 38%. Two regional parties, the CC (the Canaries Coalition, a coalition of 5 parties in the Canary Islands) and the CiU (Convergence and Union, a coalition of the Democratic convergence of Catalonia and the Democratic Union of Catalonia), combined their representatives with the Popular Party's 156 seats to take control of the 350-seat Congress. Aznar, the leader of the Popular Party, became the Prime Minister, referred to in Spain as the President of the Government, *Spain Government—2003*, *available at* [http://www.theodora.com/wfb2003/spain/spain\\_gov.html](http://www.theodora.com/wfb2003/spain/spain_gov.html); *See also* John Hopper and Adela Gooch, *Catalonia Offers No Homage To Aznar*, THE GUARDIAN (London), Mar. 5, 1996, at 12 (for 1996 and 1993 general election results); Daniel Williams, *In Spain, an "Average" Politician Is Off to an Extraordinary Start*, WASH. POST, May 16, 1996, at A22. In the March 2000 elections the Popular Party won 44.5% of the vote and 183 seats to take an absolute majority in the Congress. Aznar, the leader of the Popular Party, remained President of the government. CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK 2003: SPAIN (2003), *available at* <http://www.cia.gov/cia/publications/factbook/geos/sp.html>.

While still in the opposition, the Popular Party had been vocal in its criticism of Cuba.<sup>237</sup> This rhetoric continued as Aznar denounced one party rule in Cuba.<sup>238</sup> Castro, in turn, refused to accredit the Spanish Ambassador for some months.<sup>239</sup> Despite the politics, Spanish investment in Cuba continued apace.<sup>240</sup> Moreover, Spain continued to view Cuba as special. As one observer commented: "Cuba is not just a communist country, 'a Poland' in the Caribbean. Castro isn't the leader of a distant Eastern European country: he's a Galician!"<sup>241</sup>

At the time the Popular Party came to power in Spain, Cuba was reeling from an economic crisis. The collapse of communist governments in Eastern Europe during 1989-1990, followed by the implosion of the Soviet Union,<sup>242</sup> led to drastic reductions in trade and in subsidies.<sup>243</sup> As living conditions plummeted, an increasing number of Cubans tried to leave on small boats, heading for the United States.<sup>244</sup> When anti-government demonstrations intensified in Cuba,<sup>245</sup> Castro announced that the Cuban government

237. ROY, *España, la Union Europea y Cuba*, *supra* note 207, at 1.

238. Pascal Fletcher, *Cuba and Spain Mend Fences*, THE FINANCIAL TIMES, Feb. 7, 1998, at 2.

239. Cuba rejected the Spanish ambassador in November 1996. Pablo Alfonso, *Spain Denies Cuban Asylum-Seekers are Hiding in Embassy*, MIAMI HERALD, Nov. 27, 1996. See also FLETCHER, *supra* note 238, at 2. In April 1998, Aznar named a new ambassador to Havana and he was accepted. *Spanish-Cuban Relations Thaw With Naming of Ambassador*, AGENCE FRANCE PRESSE, Apr. 2, 1998.

240. ROY, *España, la Union Europea y Cuba*, *supra* note 207, at 12-20.

241. *Id.* at 3.

242. On December 26, 1991, the USSR morphed into the Commonwealth of the Independent States (CIS). See Francis X. Clines, *End of the Soviet Union; Gorbachev, Last Soviet Leader, Resigns, U.S. Recognizes Republics' Independence*, N.Y. TIMES, Dec. 26, 1991, at A1.

243. The USSR contributed nearly \$3 billion in subsidies to Cuba (sources indicate subsidies from \$2-3 billion). See John Pearson et al. (ed.), *Gorbachev Will Soon Make Castro More of an Island*, BUSINESS WEEK, July 16, 1990, at 47; Thomas L. Friedman, *Soviet Turmoil: Gorbachev Says He's Ready to Pull Troops out of Cuba and End Castro's Subsidies*, N.Y. TIMES, Sept. 12, 1991, at A1; TRAVIESO-DIAZ, *supra* note 25, at 243.

244. The Coast Guard intercepted 63 Cubans in 1988, 368 in 1989, 430 in 1990, 1,936 in 1991, 2,336 in 1992, 3,687 in 1993, and 37,191 in 1994. USCG, *Coast Guard Migrant Interdictions at Sea, Calendar Year 1982-2000*, available at <http://www.uscg.mil/hq/g-o/g-opl/mle/amiostats1.htm#fy> [hereinafter *Coast Guard Migrant Interdictions at Sea*]; see also Susan Martin, Andy Schoenholtz, Deborah Waller Meyers, *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543, 556 (1998) (reporting that the U.S. Coast Guard picked up 8,500 Cubans from 1991-1993, which increased to 3,600 in 4 months in 1994).

245. Cubans forced their way into the Belgian, German, and Chilean embassies in Havana in order to seek asylum. They commandeered Cuban tugboats to try to escape. One such commandeered boat was rammed by the Cuban Coast Guard in Havana harbor on July 13, 1994, leading to the deaths of more than 40 trying to

would not enforce the exit restrictions.<sup>246</sup> Over 30,000 Cubans took to the sea in small boats and rafts.<sup>247</sup> They did not head for Spain, of course, but for Florida.

Determined to avoid a repeat of the Mariel situation, President Clinton announced that Cubans would not be allowed to land in the United States, but instead would be taken to the U.S. Naval base at Guantánamo Bay in Cuba.<sup>248</sup> To deter others from leaving Cuba, Clinton ordered U.S. ships to intercept the *balseros*, or rafters, and made arrangements to transport the Cubans plucked from the sea to facilities in other countries in the region.<sup>249</sup> Within a month, the United States housed 32,000 Cubans in tents at Guantánamo Bay and at a military base in Panama.<sup>250</sup> Facing a migration crisis, Cuba and the United States entered into a new pact.<sup>251</sup> Castro agreed to reinstate Cuban efforts to stop illegal and unsafe departures by sea.<sup>252</sup> The United States agreed to allow 20,000 Cubans to immigrate annually, based on processing that would take place in Cuba.<sup>253</sup>

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escape. See Amnesty International, *Cuba: The Sinking of the "13 De Marzo" on 13, July 1994*, AI Index AMR 25/013/1997, at 1; Mireya Navarro, *Flight From Cuba; Cuban Exiles Turn Funeral Into Protest*, N.Y. TIMES, Aug. 28, 1994; Steven Greenhouse, *Cuban Jitters: U.S. Takes A Hard Line*, N.Y. TIMES, Aug. 13, 1994; Masud-Piloto, *supra* note 95, at 137. Riots erupted in Havana on Aug. 5, 1994. *Id.* Bill Gertz, *Castro Ploy Has Double Edge* WASH. TIMES, Aug. 20, 1994; *Exodus Relieves Cuban Unrest, Embarrasses U.S.*, WASH. TIMES, Aug. 20, 1994, at A1; see also TRAVIEZO-DIAZ, *supra* note 25 at 243; NAVARRO, *supra* note 95, at 1.

246. Aug. 5, 1994. See Fidel Castro, *Comments While Touring Malecon*, Aug. 6, 1994, available at <http://lanic.utexas.edu/la/cb/cuba/castro/1994/19940806>; U.S. Picks Up Cuban Group Near Florida, N.Y. TIMES, Aug. 10, 1994, at A12; See also MASUD-PILOTO, *supra* note 95, at 137-138.

247. See *Migration-Cuba*, *supra* note 236.

248. Douglas Jehl, *Flight from Cuba*, N.Y. TIMES, Aug. 20, 1994. Presidential News Conference: Clinton Changes Policy on Cuba, 52 CONG. Q. WKLY REP. 2472 (Aug. 20, 1994); MASUD-PILOTO, *supra* note 95, at 140-141.

249. *Id.*

250. More than 8,000 Cubans were taken to Howard Air Force Base in Panama and more than 30,000 to Guantánamo Naval Base in Cuba. Maria Sartori, *The Cuban Migration Dilemma: An Examination of the U.S. Policy of Temporary Protection in Offshore Safe Havens*, 15 GEO. IMMIGR. L.J. 319 (2001).

251. *Joint Communique Between the United States and Cuba Concerning Normalizing Migration Procedures*, Sept. 9, 1994, 35 I.L.M. 327, 329 (1996) available at 1994 WL 621517 (last visited June 2, 2003).

252. *Id.* See Paul Lewis, *Cuba Vows to End Exodus in Return for a Rise in Visas*, N.Y. TIMES, Sept. 10, 1994, A1; Steven Greenhouse, *Critics Warn that Immigration Pact Leave Many Cuban Issues Unresolved*, N.Y. TIMES, Sept. 10, 1994, A4; Steven Greenhouse, *Freewheeling Ways Pay Off for the White House*, N.Y. TIMES, Sept. 11, 1994, A8.

253. *Joint Communique*, *supra* note 252. Six months later, the United States and Cuba announced a further agreement. *Cuba-United States: Joint Statement on Normalization of Migration, Building on the Agreement of September 9, 1994*, May 2,

For the first time, the United States treated Cubans as ordinary immigrants and thus refused to allow them to enter the country.<sup>254</sup> In an even more astounding shift in policy, the United States returned Cubans to the Castro government.<sup>255</sup> The 1994

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1995, 35 I.L.M. 327 (1996). Cuba, again, promised to halt illegal departures. The United States decided to admit the 21,000 Cubans already present at the U.S. Navy Base at Guantánamo Bay, but announced that in the future the United States would stop small boats and return the passengers to Cuba. *Migration-Cuba*, *supra* note 236, at 2.

In the 1995 Statement, Cuba agreed not prosecute or otherwise take reprisals against returnees as a consequence of their failed attempt to emigrate illegally, but Cuban returnees are often prosecuted for crimes, such as hijacking, committed during their departure. See U.S. Dep't. of State, Daily Press Briefing at 7-8 (Feb. 13, 1997), available at <http://secretary.state.gov/www/briefings/9702/970213.html>. Recently, Cuba convicted and executed three who had hijacked boats in efforts to flee Cuba. David Gonzalez, *Cuba Executes Three Who Tried To Reach U.S. in a Hijacking*, N.Y. TIMES, Apr. 12, 2003, at A2. See also, e.g., Abby Goodnough, *G.O.P. Legislators in Florida Criticize Bush On Cuba*, N.Y. TIMES, Aug. 13, 2003, at A16 (reporting on trial of Cubans who commandeered government boat, returned by U.S. to Cuba, on condition that they not face prison terms greater than ten years).

Pursuant to the agreement, the U.S. agreed to admit Cuban refugees who can demonstrate a well-founded fear of persecution, and other Cubans pursuant to two general U.S. immigration programs: family reunification and the lottery. Based on family reunification, Cubans who are close relatives of U.S. citizens can enter the United States to join their spouses, children, parents, or siblings who are legally residing there. Those with close relatives can immigrate quickly. Others, whose U.S. relatives are more distant relations, face much longer waiting periods. The Special Cuban Migration program, known as the "Cuban lottery," allows Cubans between the ages of 18 and 55 to apply to immigrate to the United States so long as they qualify on at least two of the following grounds: they have completed secondary education, they have three years of work experience, they have relatives living in the United States. *Migration-Cuba*, *supra* note 236, at 2-3.; U.S. Dep't. of State, Office of Cuban Affairs, Fact Sheet: The Cuban Adjustment Act (Mar. 16, 2000), available at [http://www.state.gov/www/regions/wha/cuba/cuba\\_adjustment\\_act.html](http://www.state.gov/www/regions/wha/cuba/cuba_adjustment_act.html) Together, these two programs select the 20,000 Cuban immigrants admitted to the United States annually. The numbers related to refugee protection are much lower. Thus far, the refugee processing unit in Havana has admitted nearly 4,000 refugees to the United States. U.S. Dep't. of State, U.S. Interests Section, Havana, available at <http://usembassy.state.gov/havana/www/href.html>. Although the U.S. does not have diplomatic relations with Cuba, there is a U.S. Interests Section in the Swiss Embassy in Havana. The "in-country" refugee program adheres to the refugee definition in the 1951 Refugee Convention except it does not apply the limitations that refugees must have already departed the country where they fear persecution.

254. See MASUD-PILOTO, *supra* note 95, at 140-141.

255. *Id.* at 143-144. Critics harshly denounced the new policy of returning Cubans to Cuba as a violation of international law and an immoral act of cooperation with an oppressive regime. *Id.* at 143. See, e.g., A.M. Rosenthal, *On My Mind; In Irons to Cuba*, N.Y. TIMES, May 5, 1995, at A31. In response, the United States asserted that all those stopped at sea or near the U.S. Naval Base at Guantánamo Bay would be interviewed to determine if they had a well-founded fear of persecution. Those determined to be refugees would not be returned to Cuba, but resettled in countries other than the United States. The United States further vowed to protect Cuban



agreement, supplemented by a further agreement in 1995,<sup>256</sup> substantially affected Cuban migration to the United States. U.S. government authorities intercept hundreds of Cubans at sea.<sup>257</sup> Rather than being taken to a welcoming American port and admitted to the United States as in the past, these Cubans are repatriated to Cuba.<sup>258</sup> Moreover, the United States, in accordance with the agreement, now processes 20,000 entry visas annually in Cuba.<sup>259</sup>

In conjunction with this dramatic shift in policy, the United States announced it would apply its refugee law to Cubans. Those intercepted at sea would have the right to an asylum interview.<sup>260</sup> If they could show a well-founded fear of persecution, rather than being returned to Cuba, they would be resettled in countries other than the United States.<sup>261</sup> Moreover, the United States further vowed to protect Cuban refugees by maintaining a refugee processing program in Havana.<sup>262</sup>

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refugees, as opposed to economic migrants, by maintaining a U.S. refugee processing program in Havana. ALEINIKOFF ET AL, *supra* note 144, at 1174.

256. *See supra* note 253.

257. Between May 1995 and Jan. 1997, the U.S. Coast Guard intercepted 656 Cubans at sea. ALEINIKOFF ET AL, *supra* note 144, at 1174. *See also* U.S. Committee for Refugees, *Cuba Imposes Stiff Prison Terms on Cubans Interdicted and Returned* (Feb. 1997), available at [http://www.refugees.org/world/articles/cuba\\_rr97\\_2.htm](http://www.refugees.org/world/articles/cuba_rr97_2.htm). The Coast Guard picked up 931 Cubans at sea in 2002 and close to 900 in the first half of 2003. Abby Goodnough, *G.O.P. Legislators in Florida Criticize Bush On Cuba*, N.Y. TIMES, Aug. 13, 2003, at A16.

258. *See Coast Guard Migrant Interdictions at Sea, supra* note 244. Those who display a "credible fear of persecution" have been taken to Guantánamo for further interviews, after which some of them have been resettled as refugees elsewhere. More than 85% of Cubans intercepted by the U.S. Coast Guard between May 1995 and Jan. 1997 were returned to Cuba, while fifteen individuals were brought to the U.S., ALEINIKOFF ET AL, *supra* note 144, at 1174. Simultaneously, thousands have been admitted to the US as refugees after processing in Cuba. *Id.* *See Refugee Reports*, Feb. 28, 1997, at 7. 1,587 Cubans were admitted as refugees directly from Cuba in 1998. U.S. Committee for Refugees, *Country Report: Cuba* (1999), available at [http://www.refugees.org/world/countryrpt/amer\\_carib/1999/cuba.htm](http://www.refugees.org/world/countryrpt/amer_carib/1999/cuba.htm)

259. *See supra* notes 251-253.

260. *See* Phyllis A. Coven, Director, INS Office of International Affairs, *Memorandum from the Office of International Affairs, INS, Shipboard Processing of Cubans* (Aug. 9, 1995), reprinted as appendix to *Cuban Update: INS Issues Shipboard Processing Guidelines*, 72 INTERPRETER RELEASES 1407 (Oct. 16, 1995); *Clinton Administration Reverses Policy on Cubans*, 72 INTERPRETER RELEASES 622 (May 8, 1995).

261. *Id.*

262. *Id.* Close to 4,000 Cubans were admitted to the US as refugees after processing in Cuba in FY 1996, *Refugee Reports*, Feb. 28, 1997, at 7, and 1,587 Cubans were admitted as refugees directly from Cuba in 1998. U.S. Committee for Refugees, *Country Report: Cuba* (1999), available at [http://www.refugees.org/world/countryrpt/amer\\_carib/1999/cuba.htm](http://www.refugees.org/world/countryrpt/amer_carib/1999/cuba.htm).

The new approach, although diametrically opposed to the assumptions underlying the prior laws regarding Cuban immigration, did not repeal the earlier legislation. As a consequence, Cubans now confront two wildly different policies known as the "wet foot, dry foot" phenomenon.<sup>263</sup> If intercepted at sea ("wet foot"), Cubans will not be allowed to enter the United States.<sup>264</sup> If they reach the United States ("dry foot"), Cubans are paroled into the country and after a short time are eligible for lawful permanent residence status. Those with dry feet need not show persecution, only Cuban origin.<sup>265</sup> Cuban exceptionalism still reigns in the United States, but it has been drastically limited.

The *balsero* exodus had little impact on the other side of the Atlantic in Spain. To provide a vivid example, as more than 30,000 Cubans set sail for the United States in 1994, only 830 Cubans applied for asylum in Spain.<sup>266</sup> The numbers grew steadily smaller for the rest of the decade.<sup>267</sup> Fewer than 500 arrived in 1995; fewer than 400 in 1996; fewer than 300 in 1997; barely 200 in 1998; around 300 in 1999.<sup>268</sup>

Suddenly, however, Spain experienced a surge in the number of Cuban asylum seekers. More than 800 applied for asylum in 2000.<sup>269</sup> The Aznar government, which had been applying the Spanish asylum statute that incorporated the international refugee definition to all those who requested asylum in Spain, continued to apply it to the Cubans. Almost all of the Cubans were deemed to lack a well-founded fear of persecution. Viewing the Cubans as migrants, not refugees, and in all likelihood remembering the effectiveness of Clinton's response to the Cubans seeking

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263. See, e.g., Roland Estevez, *Modern Application of the Cuban Adjustment Act of 1966 and the Helms-Burton: Adding Insult to Injury*, 30 HOFSTRA L. REV. 1273, 1290 (2002); David Cazares, *Tragedy at Sea Puts Spotlight on U.S. Policy*, SOUTH FLORIDA SUN-SENTINAL, Nov. 22, 2001, at 42A; Sean Garcia, *Cuban Boy's Ordeal Highlights Problems in Immigration Policies*, S.F. CHRON., Jan. 10, 2000, at A23.

264. The U.S. policy is that those fleeing persecution in Cuba will be resettled outside the U.S. See *supra* notes 260-263; see *infra* notes 224-266 and accompanying text.

265. The towering significance of evading U.S. ships patrolling the sea passages between Cuba and Florida reaching the U.S. coast has, of course, encouraged groups that charge to smuggle Cubans into the United States. Castro has often railed against smuggling operations that he claims are established by Cuban Americans. Cazares, *supra* note 263, at 2.

266. OAR Annual Report for 2000, *supra* note 8, at 47, *Figura* 3.18.

267. *Id.*

268. The precise numbers: 495 in 1995, 389 in 1996, 283 in 1997, 208 in 1998, and 280 in 1999. *Id.*

269. There were 801 Cuban asylum seekers in 2000. *Id.*

to reach the United States in 1994, the Spanish authorities threatened to send those Cubans whose asylum applications had been rejected back to Cuba.<sup>270</sup> In protest, angry Cubans went on a hunger strike, and the Spanish government backed away from the threats.<sup>271</sup>

Asylum seekers continued to arrive from Cuba. At the beginning of 2001, roughly 150 Cubans per month were requesting asylum in Spain. By the end of the year there were 500 Cuban asylum seekers per month. Indeed, on December 30, 2001, 100 Cubans requested asylum in a single day.<sup>272</sup> More than 3,000 Cubans sought asylum in Spain in 2001, almost four times as many as in the prior year.<sup>273</sup> By 2001, 90% of the asylum seekers who arrived at the Madrid International Airport were Cubans.<sup>274</sup>

Although the numbers of Cuban asylum seekers in Spain might seem minuscule by United States standards, these rapid increases put a strain on the Spanish asylum system and worried the government. No other European country faced an influx of Cuban asylum seekers, a phenomenon that was due to the confluence of Cuba's historical ties with Madrid and Cuba's more recent connection with Moscow. Cuban law, which requires those who wish to leave to possess both Cuban exit permits and entry permits for the destination country, generally prevents Cuban migration to Europe.<sup>275</sup> All European countries, including Spain, require Cubans to obtain a visa in order to enter and, as a general rule, the European consular officers in Havana do not provide entry visas to Cubans.<sup>276</sup> Spanish consular officials in Havana

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270. MIGRATION POLICY GROUP, MIGRATION NEWS SHEET, No. 229/2002-04, April 2002, at 17.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. COD. PEN. art. 216 (Cuba 1979) criminalizes illegal departure and provides for imprisonment for up to 3 years or a fine of 300 to 1000 pesos (\$12 to \$40), with greater penalties, imprisonment up to 8 years, if force or intimidation is used. See also COD. PEN. art. 217 (Cuba 1979), available at [http://www.gacetaoficial.cu/codigo\\_penal\\_l2\\_t4\\_h.htm](http://www.gacetaoficial.cu/codigo_penal_l2_t4_h.htm). Amnesty International, *United States/Cuba: Cuban "Rafters" — Pawns of Two Governments*, AI Index AMR 51/86/94, at 1, 8-9 (1994) [hereinafter *Amnesty*]. See U.S. Dep't of State, 2002, Country Reports on Human Rights Practices: Cuba 19 (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18327.htm> [hereinafter 2002 Country Report].

276. See E.U. Council Regulation 539/2001, 2001 O.J. (L 81/1) (listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement), available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l\\_081/l\\_08120010321en00010007.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_081/l_08120010321en00010007.pdf) (last visited Aug. 13, 2003). There are also financial barriers. The Cuban

generally deny Cubans entry visas as well.

Russia, however, does not impose a visa requirement on Cubans. Rather, a letter of invitation from a Russian citizen suffices.<sup>277</sup> Because a number of Russians married Cubans and made their homes in Cuba, there is a network for obtaining letters of invitation to Russia.<sup>278</sup> With such a letter of invitation in hand, many Cubans obtained an exit visa from Cuba.<sup>279</sup> They then boarded an airplane bound for Moscow, which generally made a stopover in Madrid, a long-standing connection between Havana and European destinations.<sup>280</sup> When the plane landed in Madrid, many passengers got off and requested asylum.<sup>281</sup>

Even though the Cuban asylum seekers lacked entry visas for Spain, the Spanish authorities housed them in the temporary living quarters at the airport and reviewed their applications in an expedited fashion. Many of the asylum seekers put forth economic reasons for their departure from Cuba, which do not satisfy the legal requirements for asylum in Spain.<sup>282</sup> Others alleged a fear of political persecution, but the circumstances of their departure from Cuba tended to undercut their statements. All of the Cuban asylum seekers at the Madrid airport had obtained exit visas from Cuba in order to be allowed to board the airplane in Havana. In light of the Cuban government's history of denying exit visas to political dissidents,<sup>283</sup> this suggested that asylum seekers disembarking in Madrid from the Havana to Moscow flight were unlikely to face persecution in Cuba. Although the Spanish

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government charges \$150 for an exit visa, \$50 for a passport, and \$400 for a medical exam that is sometimes required. The Cuban government requires round trip air tickets, which costs approximately \$1,000 for a trip to Europe. Armando Soler, *Lo que cuesta salir de Cuba*, CUBANET INDEPENDIENTE, available at <http://www.cubanet.org/CNews/y02/jul02/02a6.htm>. These fees are very high for Cubans, whose per capita GDP is \$1,700. *Nations of the World, Cuba*, WORLD ALMANAC AND BOOK OF FACTS 2003, 776-77 (2003).

277. *Migration News Sheet*, *supra* note 270, at 17.

278. *Id.*

279. There are financial costs here, too. The fee to "legalize" the letter of invitation is \$100. The fee for an exit visa is \$150. *Id.*; see also Armando Soler, *Lo que cuesta salir de Cuba*, *supra* note 277.

280. Interview with Pablo Santolaya Machetti, *supra* note 125.

281. Some fly to Moscow first, and seek asylum in Spain when their return flight stops in Madrid. *Migration News Sheet*, *supra* note 270, at 17.

282. *Id.*

283. Cuba denies exit visas arbitrarily, on occasion requires huge fees for exit visas, and prosecutes those apprehended leaving without exit visas. The recent prosecution of Pedro Riera Escalante for illegally leaving Cuba resulted in a six-year prison sentence. Human Rights Watch, World Report 2002: CUBA 141-142, available at <http://hrw.org/wr2k2/americas5.html>.

authorities did not invoke a formal presumption against the Cuban applicants and interviewed the Cuban asylum seekers individually, they denied asylum in almost every case.<sup>284</sup>

The negative decision was not the end of the story, however. Almost all the Cuban asylum seekers, even though they lacked citizenship in Spain, lacked visas to enter Spain, and lacked a substantial claim for asylum in Spain, still gained entry into the country.<sup>285</sup> Spain adopted an expedient approach: it denied asylum, but utilized the general immigration law to allow the rejected Cuban asylum seekers to enter the country for 60 days.<sup>286</sup> This permitted the Cubans to reside legally while they looked for work, which might provide the basis for obtaining a residence visa.<sup>287</sup> Those who managed to regularize themselves during that extremely short period could extend their 60-day residence permits.

It was impossible in practice, however, for almost anyone, including Cubans, to secure a valid residence or work permit in two months.<sup>288</sup> Even if the Cuban community in Madrid supplied housing, employment, and other assistance, the Spanish administration moves slowly in assessing and acknowledging legal residence.<sup>289</sup> Consequently, Cubans ended up as illegal immigrants

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284. Spain has a two-stage asylum procedure. First, asylum applications are reviewed to see if the applicant passes certain threshold criteria. Those whose requests do not satisfy the first stage proceed into the second stage of the asylum procedure. *Migration News Sheet*, *supra* note 270, at 17. Many officials and lawyers who worked with asylum seekers in Spain reported that the Cuban officials were unlikely to provide exit visas to those who might be targets of persecution. Furthermore, they noted that dissidents and opponents of the Cuban government were more likely to go to the United States if they could leave Cuba because the community of anti-Castro activists is much larger in the United States than in Spain. Interviews on file with the author. Interview with Pablo Santolaya Machetti, Professor of Constitutional Law, Complutense University, Madrid, Spain, (March 13, 2002).

285. *Migration News Sheet*, *supra* note 271, at 17.

286. *Id.* Art. 25.4 of the Aliens Law, Organic Law 8/2000 of Dec. 22, 2000, amending Organic Law 4/2000 of Jan. 11, 2000 (concerning the rights, liberties, and social integration of aliens in Spain), Santolaya Machetti, *supra* note 9 (foreigners who do not satisfy the entry requirements may be allowed to enter Spain based on humanitarian reasons).

287. *Migration News Sheet*, *supra* note 270, at 17.

288. *Id.*

289. For example, the author, as a citizen of one of the countries in the European Union, has a right under Spanish law to live and work in Spain, and applied promptly for a residence permit in Spain. It took more than five months for the ministerial process to grant the residence permit. It took more than one year for the author's son to receive his permit to reside in Spain, by which time he already completed the school year and departed.

within a few weeks. Once the Cubans' temporary residence permits expired, however, the Spanish authorities were unlikely to track them down.<sup>290</sup> Indeed, there is no known instance of deportation of a Cuban whose short-term entry visa has expired.<sup>291</sup>

Thus, throughout 2000 and 2001, Cubans continued to live in Spain, albeit in a precarious situation given their lack of legal status. An ability to speak Spanish and a familiarity with Spanish culture, however, allowed them to blend into society more effectively than many other illegal immigrants. For its part, Spain continued to maintain solidarity with Cubans who reached their borders. At the same time, the Spanish authorities avoided expanding the definition of those entitled to asylum, which would set a precedent that could be utilized by others.

The preferential treatment afforded Cubans led to great criticism. Refugee organizations loudly protested the rejection of asylum applicants from war-torn and dangerous countries, such as Nigeria and Colombia, and compared the expulsion of these rejected asylum seekers with the treatment given to Cubans.<sup>292</sup> Repeating the vociferous arguments made in the United States about the disparate treatment accorded the Haitians and the Cubans,<sup>293</sup> Spanish advocates demanded that their government extend the generous "Cuban" approach to rejected asylum seekers from countries where the risks to life and freedom upon return were greater than the risks likely to be faced by Cubans who had obtained exit visas from Cuban authorities.<sup>294</sup>

Spain's response was similar to that of the United States a decade earlier in two respects. Both governments reacted to the charges of discrimination by essentially extending the less protective approach to Cubans, rather than extending the less restrictive approach to other asylum seekers. Moreover, both governments essentially took action to stop Cuban asylum seekers at their source — in Cuba. Because Cubans came to the United

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290. *Migration News Sheet*, *supra* note 270, at 17.

291. *Id.*

292. *Id.*

293. See, e.g., Malissia Lenox, Note, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687 (1993); Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class and Reason*, 41 B.C. L. REV. 755 (2000); Rick Bragg, *Haitian Immigrants in U.S. Face a Wrenching Choice*, N.Y. TIMES, Mar. 29, 2000, at A1; Noah Isakson, *Immigration Inequity Cited: Cubans Welcome, Haitians in Limbo, Jackson Says*, CHIC. TRIB., Apr. 26, 2000, at N3; *States' Haitian Immigration Policy*, 45 STAN. L. REV. 687 (1993).

294. MIGRATION POLICY GROUP, *MIGRATION NEWS SHEET*, No. 226/2002-01, Jan. 2002, at 17.

States by sea, the United States began to interdict Cubans in boats and rafts as they left Cuban waters. Because Cubans arrived in Spain by air, Spain adopted a policy to prevent them from boarding the airplane in Havana. In the spring of 2002, Spain began requiring Cubans, as well as Colombians, to obtain a Spanish transit visa if they took a flight scheduled to stop in Spain.<sup>295</sup> More than 250 Cubans arrived at the Madrid airport in the two days preceding the implementation of the transit visa requirement.<sup>296</sup> None of them was turned away.<sup>297</sup>

Shortly after the transit visa regulation was imposed on Cubans, eight Cubans landed at the Madrid airport without transit visas and applied for asylum.<sup>298</sup> Two were allowed to enter Spain; one entry was based on family ties in Spain and one was based on dissident political opinion.<sup>299</sup> The others were refused entry.<sup>300</sup> After a short hunger strike,<sup>301</sup> they were deported but not returned to Cuba. Instead, Spain returned the Cubans to Russia, the destination of the flight they had boarded in Havana.<sup>302</sup>

## V. THE ANTI-MIGRATION USE OF ASYLUM PROCEDURES

My examination of the reception of Cuban asylum seekers in Spain and the United States has shown that there are, indeed, significant similarities. Both countries afforded special treatment to Cubans for decades. Both Spain and the United States essentially allowed Cubans to enter and remain, whether or not they could demonstrate a well-founded fear of persecution. The magnitude of the numbers seeking asylum varied between the countries, as well as the method of arrival, and, to some extent, the timing of the arrival of Cubans differed. Nonetheless, Cubans who could reach either Spain or the United States were assured entry. The

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295. The Transit visa requirement became effective for Cubans on March 15, 2002. *Migration News Sheet*, *supra* note 270, at 17. Earlier, Spain had imposed a transit visa requirement on nationals of other countries, but not on Cubans, that were required to have entry visas for Spain. This is another example of preferential treatment for Cubans. *Migration News Sheet*, *supra* note 294, at 18. Interview, Belén Wallisen, Director, CEAR Legal Services for Madrid, in Madrid, Spain (Apr. 22, 2002).

296. *Migration News Sheet*, *supra* note 270, at 17.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. They had flown from Havana to Moscow via Ireland and their return flight passed through Spain. *Id.*

governments admitted them and provided them with shelter, food, and substantial social services.

Some of the impulses behind the preferential treatment of Cubans were the same in both countries. During the tense middle decades of the Cold War, anti-communist emblems, such as refugees fleeing a Marxist-Leninist revolution in Cuba, were powerful in Spain, as well as the United States. More recently, Prime Minister Aznar's denunciations of Castro as a dictator in a one-party state have echoed the ideological responses to Cuba frequently heard in the United States.

An anti-communist explanation is too simple, however, for the preferential treatment Cubans have received in Spain. History weighs heavily on Spain and Cuba, with a totally different emotional force from that generated by United States - Cuba relations during the past century. The exceptionally large migration from Spain to Cuba in the twentieth century, the four centuries of colonial rule, and the political symbol that Cuba became — Spain's first and last colony— together make Spain's relationship with Cuba much more than a Cold War battleground. For the Spaniards, Cubans are family. They may be distant cousins. Their families may have been absent for several generations. They may not need protection from persecution, but they have fallen on hard times and Spanish society does not want to turn their Cuban relatives away.

In recent years, it is true that Spanish authorities have tried to deter and impede Cuban asylum seekers from entering Spain. As part of the European Union, Spain is likely to continue to maintain these new restrictive measures and perhaps even to intensify them. Those Cubans who do manage to reach Spain, though, are likely to find that Spanish officials remain hesitant in rejecting them.

This review of Cuban exceptionalism in Spain and the United States has revealed that Cubans arriving in both countries during the last forty years have received generous preferential treatment. It also has revealed that Spain and the United States have followed a similar pattern in responding to the Cubans who left after Castro came to power. Neither Spain nor the United States responded to these Cuban "refugees" by applying international refugee law. Instead, both countries relied on discretionary decisions by the executive to welcome the Cubans and to allow them to enter. The officials and the press called the Cubans refugees, but they responded to the Cubans as migrants.



In other words, the United States and Spain did not respond out of a sense of legal obligation to the hundreds of thousands of Cubans leaving Cuba. As many have shown,<sup>303</sup> the United States response was fueled in major part by ideology. As this article demonstrates, the Spanish response largely stemmed from historical and cultural, rather than political, reasons.

It is true, of course, that neither Spain nor the United States had ratified the major refugee treaty in 1959 when Cubans began to arrive at their borders. Although not bound by the 1951 Refugee Convention, they surely were aware of its terms and the international consensus on those entitled to refugee status. Moreover, Spain and the United States later did become parties to the refugee treaty and both adopted implementing legislation in the 1980s. Nonetheless, they essentially ignored refugee standards in dealing with Cuban asylum seekers. When Cubans reached its shores, the United States continued to use the immigration statute's parole provision to allow them to enter. There were no pesky questions about persecution. Spain, in contrast, did ask Cuban asylum seekers arriving in the last years of the twentieth century if they feared persecution. Those who did not, or whom Spanish officials thought lacked a well-founded fear, were still allowed to enter, pursuant to the humanitarian exception of the general law on foreigners.<sup>304</sup>

To be sure, international law does not require states to limit their responses to migration, or even to forced migration, to the standards and policies developed in the context of protecting refugees. Nations may generously accept non-citizens into their territories for any reason — political, cultural, economic, sentimental, moral, or some other rationale. Spain and the United States each had its own motives for its generous welcome to Cubans.

Then, after decades of referring to the Cubans as refugees but treating them like migrants, Spain and the United States both changed their policies. They called them migrants, but screened them to determine if they were refugees. In an ironic twist, Spain and the United States both adopted the standards of refugee law in order to curb a migration that they long had encouraged but now wanted to halt.

The 1951 Refugee Convention does not attempt to control migration; rather its purpose is more limited. It is an instrument that coexists with immigration laws and supersedes them only in

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303. See *supra* note 25.

304. See *supra* notes 282-285 and accompanying text.

those instances where there is an arrival of non-citizens whose life or freedom are threatened due to their race, religion, nationality, political opinion, or membership in a social group.<sup>305</sup> In that sense, it does not violate the refugee treaty to use it to shut off migration. So long as nations protect refugees, they have not violated the norms of international law, even if they turn others away. Therefore, it is not inconsistent with refugee law for Spain and the United States to move from a discretionary executive decision that allowed the entry of all Cubans to the application of legislative standards that prohibit entry to all Cubans except for those who can demonstrate a fear of persecution.

The use of the 1951 Refugee Convention standards in this context seems ironic, however. The spirit of the treaty is one of affording protection, of providing assistance to those who cannot depend on their own governments for support and sustenance. Instead, as Spain and the United States moved from discretionary decisions to the application of law, they relied on the treaty's legal standards to reduce the support offered to Cubans. The definition incorporated in the 1951 Refugee Convention became the major instrument of the policy decisions in both countries to withdraw support from Cubans who seek to escape their homeland.

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305. Geneva Convention, *supra* note 29. Although many states have enacted national legislation admitting into their territory those who satisfy the refugee definition contained in Art. I.A.(2) of the Geneva Convention, the Convention by its own terms does not require state parties to admit those who meet its refugee definition. The Geneva Convention does prohibit states from expelling or returning refugees to territories where their lives or freedom would be threatened due to their race, religion, nationality, political opinion, or membership in a social group.

