

IRRECONCILABLE REGULATIONS: WHY THE SUN HAS SET  
ON THE CUBAN ADJUSTMENT ACT IN FLORIDA

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## I. INTRODUCTION

Just past midnight, four Cubans walked off the beach in the dark and began to wade through warm waves out into the Florida Straits.<sup>1</sup> They walked nearly a mile in waist-high water, carrying all of their possessions above their heads. They knew to stop when they heard the mile-marker bobbing in the water. Fidgeting and nervous, they waited there for hours afraid that they would be discovered by Cuban patrols or sharks. Finally, they could see the navigational lights of a fast-boat approaching. Twenty-nine other refugees were already aboard the boat and shifted to make room for them. Together, they lay huddled on the deck, praying that the vessel would go undetected by the United States Coast Guard (Coast Guard).

The successful smuggling expedition ended shortly after dawn, when the passengers walked ashore onto a Key Largo, Florida beach.<sup>2</sup> The group immediately sought out an immigration official and identified themselves as Cuban nationals. After receiving a meal and undergoing inspection according to the Cuban Adjustment Act of 1966, the refugees were paroled<sup>3</sup> into the United States by the end of the day. If the refugees were of any other nationality, or had in fact been interdicted at sea by the Coast Guard, they would have been repatriated immediately.

More appealing than the fabled sirens' song, the Cuban Adjustment Act (CAA) continues to call Cubans out to sea with the promise of "no questions asked" political asylum for those who reach the United States. In 1994, the CAA was modified by the counter-intuitive "Wet Foot/Dry Foot" policy, which reserves the preferential protections of the CAA for only those "dry foot" Cubans who reach United States soil. In contrast, the Coast Guard repatriates "wet foot" Cubans discovered at sea. Because those interdicted at sea are generally no less deserving of the safeguard of the CAA than those arriving undetected on shore, the Wet Foot/Dry Foot policy is essentially a tool to circumvent the automatic award of asylum under the CAA. Worse still, the policy incites smuggling by rewarding those who are able to evade the Coast Guard and make landfall but repatriating those discovered in transit. In addition to incentivizing smuggling, the contradiction of the CAA and the Wet Foot/Dry Foot policy creates both *actus reus* and *mens rea* defenses to the crime of smuggling a Cuban national. Notwithstanding immigration issues, the CAA creates a national security loophole, whereby terrorists might enter into and remain in the United States.

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1. This scenario is based on the story of Cuban refugee Miakiel Gonzalez, as reported on HavanaTimes.org. Kelly Knaub, *The Cuban Adjustment Act 44 Years Later*, HAVANA TIMES, May 15, 2010, <http://www.havanatimes.org/?p=24150>.

2. In the article, Gonzalez indicates that he was first taken to Mexico and then walked across the United States-Mexico border. *Id.* However, many cases demonstrate that the Florida Keys are a more typical smuggling destination. See *United States v. Garcia-Cordero*, 610 F.3d 613, 620 (11th Cir. 2010) (Loggerhead Key, Florida); *United States v. Perez*, 443 F.3d 772, 774 (11th Cir. 2006) (southwestern Miami-Dade County, Florida); *United States v. Zaldivar*, 615 F.3d 1346, 1348 (11th Cir. 2010) (Key Largo, Florida).

3. For a description of the parole function, see discussion *infra* Part III.A.

This Note analyzes the CAA and the Wet Foot/Dry Foot policy and assesses whether the justifications for enactment support the continuation of the policies today. Part II describes the history of United States-Cuban relations. Part III traces the evolution of United States-Cuban migration policy, including the enactment of the CAA and the signing of the 1994 Joint Communiqué, which gave rise to the current Wet Foot/Dry Foot policy. Part IV details how these policies incentivize smuggling. Part V demonstrates how together these policies create defenses to the crime of smuggling a Cuban citizen and examines whether Congress intended for such a result in drafting the smuggling statute. Part VI recounts the historical justifications for the CAA and considers whether these justifications have any place in modern United States-Cuban policy. Finding that the historical justifications do not outweigh the smuggling and national security issues created by the CAA, Part VII advocates for the repeal of the Act. This Note concludes that the CAA is no longer utilitarian and should be repealed in favor of a more pragmatic approach wherein Cubans migrate only through proper immigration channels.<sup>4</sup>

## II. HISTORICAL CONTEXT: U.S.-CUBAN RELATIONS

The relationship between Cuba and the United States spans just over one hundred years. In 1898, American soldiers liberated Cuba from Spanish colonialism.<sup>5</sup> For the next four years, the United States military continued to occupy Cuba.<sup>6</sup> In 1903, the United States acquired the infamous Guantanamo Bay Naval Base.<sup>7</sup> The perpetual military presence on the island made it easy for the United States to meddle in Cuban politics, invading Cuba in the years 1906–1909, 1912, and 1917–1923.<sup>8</sup> It was with the blessing of the American government that Fulgencio Batista seized power in 1933.<sup>9</sup> Batista won the Cuban presidency in 1940 and ruled until 1958, years which many Cubans consider a period of Cuban “democracy.”<sup>10</sup> Then, in 1959, there was revolution. Fidel Castro ousted Batista, bringing communism to Cuba.<sup>11</sup>

It was Cuba’s wealthy who first abandoned the new communist state.<sup>12</sup> Between 1959 and 1962, an estimated 248,070 Cubans fled the country.<sup>13</sup> The majority of these refugees were well-educated citizens, many of them

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4. 8 U.S.C. § 1151 (2006).

5. REESE ERLICH, *DATELINE HAVANA: THE REAL STORY OF U.S. POLICY AND THE FUTURE OF CUBA* 17 (2009).

6. *Id.* at 17.

7. Maria E. Sartori, *The Cuban Migration Dilemma: An Examination of the United States’ Policy of Temporary Protection in Offshore Safe Havens*, 15 *GEO. IMMIGR. L.J.* 319, 326–27 (2001).

8. ERLICH, *supra* note 5, at 19.

9. *Id.* at 19–20.

10. *Id.*

11. *Id.* at 20–21.

12. MARÍA CRISTINA GARCÍA, *HAVANA USA* 13 (1996).

13. *Id.*

doctors, lawyers, and professors.<sup>14</sup> Their exodus resulted in a “brain drain” on the Cuban workforce.

Shortly thereafter, rumors began to circulate the island that the new government intended to “nationalize” school children by sending them to the Soviet Union for “communist indoctrination.”<sup>15</sup> Frantic Cuban parents unable to obtain exit visas placed their children on commercial flights from Havana to Miami through “Operation Pedro Pan,” ultimately sending 14,048 Cuban children stateside.<sup>16</sup> The second great influx of immigrants occurred from 1962 to 1965, when many of those children’s families were able to join them in the United States.<sup>17</sup>

Desperate to prevent the spread of communism throughout the Western hemisphere, the United States government developed a policy to aid anti-Castro guerilla forces.<sup>18</sup> In 1960, the CIA began recruiting and training Cuban exiles to overthrow the Cuban government.<sup>19</sup> One year later, the trained refugees invaded southern Cuba at the Bay of Pigs in a covert American-supported operation.<sup>20</sup> The would-be heroes were defeated two days later.<sup>21</sup> It was a victory for communism, but a narrow one. The Soviets acted quickly to bolster Cuba by sending military artillery, including nuclear missiles.<sup>22</sup>

Fearing the nuclear threat, the Kennedy Administration suspended all flights to and from Cuba.<sup>23</sup> Castro retaliated in a speech on September 29,

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14. More than two-thirds of the University of Havana faculty immigrated to Miami by 1961. *Id.* at 28. The influx of lawyers was such that, in 1973, the University of Florida designed an eighteen-month program that enabled Cuban attorneys to graduate expeditiously with an American law degree. *Id.*

15. Yvonne A. Tamayo, *Cubans Without Borders: Finding Home*, 55 FLA. L. REV. 215, 221 (2003).

16. *Id.*

17. An estimated 74,000 Cubans entered the United States from 1962 to 1965. Roland Estevez, Note, *Modern Application of the Cuban Adjustment Act of 1966 and Helms-Burton: Adding Insult to Injury*, 30 HOFSTRA L. REV. 1273, 1274 (2002). For an account of “Operation Pedro Pan” by one who traveled to the United States as part of the program, see generally Francisco Valdes, *Diaspora and Deadlock, Miami and Havana: Coming to Terms with Dreams and Dogmas*, 55 FLA. L. REV. 283, 284–85 (2003) (recounting his travel from Cuba to an orphanage in Pueblo, Colorado and eventual reunion with his family in Miami).

18. GARCÍA, *supra* note 12, at 30–31.

19. *Id.* (“The CIA recruited close to fifteen hundred exiles to take part in the invasion force—or Brigade 2506, as the regiment came to be known—and over the next year trained these men at secret bases in Panama, Guatemala, and Nicaragua.”).

20. *Id.*

21. *Id.* For a more detailed account of the “fiasco” at the Bay of Pigs, see generally *id.* at 30–35.

22. Note, *The Cuban Adjustment Act of 1966: ¿Mirando por los Ojos de Don Quijote o Sancho Panza?*, 114 HARV. L. REV. 902, 903–04 (2001).

23. *Id.* at 904. Though the general ban on travel to Cuba is still in force, President Barack Obama lifted the ban on family travel into Cuba in 2009. MARK P. SULLIVAN, CONG. RESEARCH SERV., CUBA: ISSUES FOR THE 111TH CONGRESS 27 (2010), available at <http://www.fas.org/sgp/crs/row/R40193.pdf>. There are now “no limitations on the frequency or duration of family visits.” *Id.* President Obama is expected to make travel even less restrictive in the

1965, by announcing to Cuban citizens with relatives in the United States that their American relatives were free to retrieve them from the shores of Cuba without penalty.<sup>24</sup> That October, a flotilla from Miami descended upon Cuba to carry hordes of new immigrants to the United States.<sup>25</sup> Within months, the number of Cuban exiles residing in the United States nearly doubled from 211,000 to 411,000.<sup>26</sup> At first, the United States coped sufficiently with the influx of refugees.<sup>27</sup> But when the boatlift gained momentum, the administration realized the need for an orderly immigration procedure. By November of 1965, Cuban and American officials settled on United States funded air transportation for Cuban citizens immigrating to Florida.<sup>28</sup> These “freedom flights” carried almost 300,000 Cubans to Miami in what is still the “largest airborne refugee operation in American history.”<sup>29</sup> In response to the prolific number of Cubans coming over in the “lifts,” Congress enacted the CAA in 1966.<sup>30</sup> Over time, the preferential CAA would become the albatross of U.S.-

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near future. *Id.*

24. During the celebration of the fifth anniversary of the Committees for the Defense of the Revolution at the Plaza de la Revolución, Castro addressed the crowd, using the occasion to “laugh a little at [his] enemies”:

[T]he imperialists are making a campaign with those who go, when it is they who close all the ways. . . .

. . . .

. . . . It is said that we machinegun those that want to go and that we do horrible things against them. Well, we must put an end to this once and for all. How? Well, we think that there is a good method. It is not we who are opposed to the departure of those who want to go, but the imperialists, and since this is the fact, we are even ready to fix up a little place somewhere so that all who have relatives here will not have to run any risks, will not have to expose their relatives to any kind of risk.

Premier Fidel Castro, Live Speech at Ceremonies Marking Fifth Anniversary of the CDR (Sept. 29, 1965) (transcript available at <http://lanic.utexas.edu/project/castro/db/1965/19650929.html>).

25. Note, *supra* note 22, at 904.

26. *Id.*

27. *Id.* In a speech on October 3, 1965, President Lyndon B. Johnson declared, “[T]o the people of Cuba that those who seek refuge here in America will find it. . . . [W]e Americans will welcome these Cuban people.” President Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill, Liberty Island, New York (Oct. 3, 1965), *available at* <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/651003.asp>. President Johnson used the Attorney General’s parole authority, designed to allow for temporary admission of aliens, to allow the Cubans immediate legal entry into the United States. *See* Ira J. Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 870–71 (1982).

28. GARCÍA, *supra* note 12, at 38.

29. Note, *supra* note 22, at 905 & n.22. By the time Castro finally ended the freedom flights in April 1973, “3,048 flights had carried 297,318 refugees to the United States.” GARCÍA, *supra* note 12, at 43.

30. Note, *supra* note 22, at 905.

Cuban policy.

### III. EVOLUTION OF CUBAN-AMERICAN MIGRATION POLICY

Under the United States Constitution, Congress enjoys plenary authority to establish and enforce immigration policy.<sup>31</sup> With this authority, Congress provides refugees with two options to establish permanent residence in the United States: refugee programs in the applicants' home countries or political asylum once inside the United States.<sup>32</sup> Refugee programs are conducted entirely overseas, with the applicant submitting a petition for admission that demonstrates a "well-founded fear of persecution."<sup>33</sup> If the petition is approved, the applicant "may enter the United States through one of the admission slots set aside for refugees from [their] region of the world."<sup>34</sup> For example, the United States has promised to accept at least 20,000 Cuban immigrants per year through legal immigration channels.<sup>35</sup>

Refugees already present in the United States may file an application for political asylum to prevent deportation but must likewise show a "well-founded fear of persecution."<sup>36</sup> However, as one article points out, that claim is extremely difficult to demonstrate, and applicants are successful only 15%–30% of the time.<sup>37</sup> But there is a loophole for Cubans. The protection of the CAA allows Cuban nationals to remain in the United States without applying for political asylum, a "preferential treatment" not afforded to any other nationality.<sup>38</sup>

#### A. *The Cuban Adjustment Act of 1966*

The CAA originated as a coping mechanism for the inordinate influx of Cuban immigrants in the 1960s. Prior to 1966, the majority of Cubans who entered the United States came without virtue of visas, background checks, or employment authorizations.<sup>39</sup> Once within the United States, the process of obtaining an immigrant visa became a near impossible feat.<sup>40</sup> Cubans seeking permanent United States residency, like all other nationalities, were required to leave the United States and apply for an immigration visa

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31. *Id.* (citing U.S. CONST. art. I, § 8, cl. 4).

32. *Id.* at 905–06.

33. *Id.* at 906 (quoting Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(42)(A) (2006)).

34. *Id.*; see also U.S.-Cuba Joint Communiqué on Migration, Sept. 9, 1994, 35 I.L.M. 327, 330 [hereinafter Joint Communiqué] (indicating the number of spots allocated for Cuban immigrants).

35. Joint Communiqué, *supra* note 34, at 330.

36. Note, *supra* note 22, at 906.

37. *Id.*

38. *Id.* at 906–07.

39. John Scanlan & Gilbert Loescher, *U.S. Foreign Policy, 1959-80: Impact on Refugee Flow from Cuba*, 467 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 118 (1983).

40. Javier Talamo, Note, *The Cuban Adjustment Act: A Law Under Siege?*, 8 ILSAJ. INT'L & COMP. L. 707, 709–10 (2002).

at a United States consulate.<sup>41</sup> Only after obtaining the immigrant visa could a Cuban return to the United States as a permanent resident, able to legally work and enroll in school.<sup>42</sup> Congress, at least with respect to Cuban immigrants, found this process unjust because it created a “great personal hardship to, and impose[d] financial burdens upon, people who are already impoverished by force or circumstances.”<sup>43</sup>

In an effort to hasten the resettlement of the ever increasing, unemployable Cuban population, Congress drafted the Cuban Refugee Act, later called the Cuban Adjustment Act.<sup>44</sup> The CAA essentially alters immigration practice and procedure for Cubans alone. Typically, an alien<sup>45</sup> who enters the United States without being inspected and admitted or paroled<sup>46</sup> by an immigration officer<sup>47</sup> and who is later discovered is subject to immediate removal or detention pending formal removal proceedings.<sup>48</sup>

Parole is intended as a “temporary, unofficial entry into the United States pending the resolution of [an] application[.]”<sup>49</sup> However, parole for

41. *Id.* at 709 (citing H.R. REP. 89-1978, at 3793–94 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3792).

42. *Id.* at 709–10.

43. H.R. REP. 89-1978, at 3798 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3792.

44. Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified at 8 U.S.C. § 1255n (2006)). The Act was amended by the Immigration and Nationality Act Amendments of 1976. Pub. L. No. 94-571, § 9, 90 Stat. 2703, 2707 (codified as amended at 8 U.S.C. § 1153 (2006)).

45. “Alien” is defined as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (2006).

46. Rather than instituting removal proceedings, the Attorney General may:

[I]n his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit 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.

8 U.S.C. § 1182(d)(5)(A) (2006). For a fuller discussion of parole and adjustment of status, see generally Jeffrey A. Bekiaries, Note, *In Country, On Parole, Out of Luck—Regulating Away Alien Eligibility for Adjustment of Status Contrary to Congressional Intent and Sound Immigration Policy*, 58 FLA. L. REV 713, 718–20 (2006).

47. An alien who is not admitted is deemed an “applicant for admission.” 8 U.S.C. § 1225(a)(1) (2006).

48. “An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.” 8 U.S.C. § 1182 (a)(6)(A)(i). However, no alien will be returned to his country of origin if the United States does not have “full diplomatic relations” with that country. 8 U.S.C. § 1225(b)(1)(F).

49. *Benitez v. Wallis*, 337 F.3d 1289, 1296 (11th Cir. 2003), *overruled on other grounds sub nom Clark v. Martinez*, 543 U.S. 371 (2005).

Cubans means something quite unique because the CAA gives the Attorney General the discretion to award permanent residency to any Cuban who is paroled into and physically present for one year in the United States.<sup>50</sup> It is perhaps disingenuous to say that the Attorney General “has discretion” because, in fact, “[m]ost of the undocumented Cubans who arrive in the United States are allowed to stay and adjust to permanent resident status under the [CAA].”<sup>51</sup> Therefore, once stateside, Cubans typically remain in the United States permanently.

In practice, a Cuban entering the United States is ordinarily inspected and paroled within the same day.<sup>52</sup> Thereafter, the Cuban will enjoy the majority of benefits reserved for citizens, including permission to work within the United States and access to government-provided healthcare.<sup>53</sup> After two years of residence in the United States, the Cuban may apply for an adjustment of status to that of permanent residence.<sup>54</sup> This is a privilege afforded to no other nationality and has been understood “by generations of Cuban-Americans and many politicians to be an open-ended entitlement [to permanent residence] for all Cubans . . . .”<sup>55</sup>

#### B. *The Mariel Boatlift and the Joint Communiqué of 1994*

During the late 1970s, Cubans desperate to leave the island began hijacking boats in order to make landfall in Florida where they would

50. Cuban Adjustment Act, Pub. L. No. 89-732, § 1, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255 (2006)). The Act reads:

That notwithstanding the provisions of section 245(c) of the Immigration and Nationality Act the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least [one year], may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

*Id.*

51. RUTH ELLEN WASEM, CONG. RESEARCH SERV., CUBAN MIGRATION TO THE UNITED STATES: POLICY & TRENDS 2 (2009), available at <http://www.fas.org/sgp/crs/row/R40566.pdf>.

52. Telephone interview with the Honorable Keith Williams, retired Immigration Judge (Nov. 3, 2010). If a Cuban alien is deemed inadmissible, typically because of a criminal record, the alien is given a “supervisory order” and paroled into the United States just the same. *Id.* This is because the United States has no diplomatic relationship with Cuba. See 8 U.S.C. § 1225(b)(1)(F).

53. Telephone Interview with the Honorable Keith Williams, *supra* note 52; see also WASEM, *supra* note 51, at 6–8.

54. Cuban Adjustment Act, Pub. L. No. 89-732, § 1, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255n (2006)).

55. Note, *supra* note 22, at 907 (internal quotation marks and external citation omitted). See generally *id.* at 907 (noting that Cubans who “arrived on American soil [were] in effect guaranteed permanent-resident status”).

immediately be paroled into the United States.<sup>56</sup> Following the hijackings, there were several attempts by asylum-seeking Cubans to force their way into Latin American embassies. In March of 1980, six frustrated Cubans drove a bus through the gates of the Peruvian embassy in Havana, Cuba.<sup>57</sup> When this public unrest finally threatened the stability of the Cuban government, Castro used immigration to rid the island of malcontents and simultaneously wage war with Washington.<sup>58</sup>

Castro felt that the United States government encouraged such political dissention with an open immigration policy and its failure to publicly admonish the dissidents for their illegal acts.<sup>59</sup> He responded by sending the United States all the Cubans it could handle. On his orders, the Cuban government opened the port of Mariel, and Castro invited his exiles to return for their relatives.<sup>60</sup> Between April 1980 and October 1980, nearly 125,000 Cubans were picked up on the shores of Cuba and brought by boat to the United States in what became known as the “Mariel Boatlift.”<sup>61</sup> The Carter administration welcomed this “Freedom Flotilla”<sup>62</sup> to America with “open hearts and open arms.”<sup>63</sup>

If Castro thought he could rid himself of the troublemakers in one mass exodus, he was much mistaken. In 1994, food shortages, electrical blackouts, and government attempts to stop defection led to massive anti-Castro demonstrations.<sup>64</sup> Castro allayed the rioters this time by allowing those who wanted to leave Cuba to do so freely, with no threat of interdiction by Cuban authorities or “illegal exit” penalties.<sup>65</sup> Approximately 25,000 refugees left the shores of Cuba in the summer of 1994, many floating away on makeshift rafts.<sup>66</sup> But unlike the Mariel Cubans, these migrants were not embraced with President Carter’s open arms—they were instead pushed away by the Clinton administration.<sup>67</sup> On August 18, 1994, Attorney General Janet Reno announced from the White

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56. See LARS SCHOULTZ, *THAT INFERNAL LITTLE CUBAN REPUBLIC: THE UNITED STATES AND THE CUBAN REVOLUTION* 354 (2009).

57. GARCÍA, *supra* note 12, at 55.

58. *Id.* at 54.

59. SCHOULTZ, *supra* note 56, at 354 (“The United States ‘encourages illegal departures from Cuba, the hijacking of boats, and it receives the hijackers almost as if they were heroes’ . . .” (quoting Fidel Castro)).

60. GARCÍA, *supra* note 12, at 46.

61. *Id.* During this period, the Coast Guard rescued 124,776 Cuban refugees at sea and brought them into the United States. *Mariel Boatlift*, U.S. COAST GUARD, <http://www.uscg.mil/hq/cg5/cg531/AMIO/mariel.asp> (last visited Mar. 11, 2011).

62. The participants of the Mariel Boatlift were often described as the “Freedom Flotilla.” See *United States v. Garcia-Cordero*, 610 F.3d 613, 619 (11th Cir. 2010) (Korman, J., concurring).

63. FELIX ROBERTO MASUD-PILOTO, *FROM WELCOMED EXILES TO ILLEGAL IMMIGRANTS* 83 (1996) (quoting President Jimmy Carter).

64. Donald Brown, Comment, *Crooked Straits: Maritime Smuggling of Humans from Cuba to the United States*, 33 U. MIAMI INTER-AM. L. REV. 273, 275–76 (2002).

65. Talamo, *supra* note 40, at 713.

66. Note, *supra* note 22, at 907.

67. *Id.*

House press room that new measures would be taken to stop the rafters.<sup>68</sup> Without exception, the Coast Guard would collect immigrants found at sea and deliver them to Guantanamo Bay Naval Base.<sup>69</sup> It was important that the Cubans not reach United States soil where they would be entitled to the protection of the CAA.<sup>70</sup>

This was because the Clinton Administration, tired of being bombarded with Castro's castoffs, refused to take in more Cubans.<sup>71</sup> Castro could not have been happier. For years, Castro had urged the United States government to repeal the CAA, insisting that the Act was a "murderous" and "terrorist" law.<sup>72</sup> In September 1994, Clinton and Castro came together

68. ROBERTO SURO, *STRANGERS AMONG US: HOW LATINO IMMIGRATION IS TRANSFORMING AMERICA* 27 (1998). President Bill Clinton met with a delegation of Cuban-American leaders to persuade them to endorse his new internment policy. *Id.* at 172. Clinton worried about mass demonstrations or interference with Coast Guard actions from Miami Cubans. *Id.* at 173. Among the group was Jorge Mas Canosa, leader of the Cuban-American Foundation. Mas Canosa gave his blessing to the policy, effectively approving the end of thirty-five years of preferential treatment for Cubans. *Id.* In fact, Miami Cubans as a whole barely objected at all. *Id.*

69. Talamo, *supra* note 40, at 713.

70. The Guantanamo Bay Naval Base is not United States territory. *See* Cuban Am. Bar Ass'n. v. Christopher, 43 F.3d 1412, 1424–25 (11th Cir. 1995) (discussing the status of Guantanamo Bay).

71. In a speech on June 27, 1995, President Clinton declared:

We simply cannot admit all Cubans who seek to come here. We cannot let people risk their lives on open seas in unseaworthy rafts. . . .

. . . .

Regularizing Cuban migration also helps our efforts to promote a peaceful transition to democracy on the island. For too long, Castro has used the threats of uncontrolled migration to distract us from this fundamental objective. With the steps I have taken, we are now able to devote ourselves fully to our real, long-term goal.

William J. Clinton, U.S. President, Remarks to the Cuban-American Community (June 27, 1995), <http://www.presidency.ucsb.edu/ws/index.php?pid=51547&st=&st1=#axzz1Lsormmak>.

72. Fidel Castro, Address at Mass Rally in the "José Martí" Anti-Imperialist Square, City of Havana 12 (Nov. 27, 2001) (transcript available in the University of Florida Library West). Responding to the death of thirty Cubans attempting to immigrate to the United States via a smuggler's fast-boat, Castro told his "compatriots":

For many years we have been advising the U.S. Administrations that the Cuban Adjustment Act, in force since November 2, 1966, and the incentives to illegal migration are the cause of great hazards and take a high toll in human lives.

. . . .

The Cuban Adjustment Act is not only a murderous law but it is also a terrorist law, one that fosters the worst kind of terrorism since it deliberately and

to carve out an exception to the CAA in a bilateral migration agreement dubbed the Joint Communiqué.<sup>73</sup> The Joint Communiqué states that Cuban “migrants rescued at sea attempting to enter the United States will not be permitted to enter the United States . . . .”<sup>74</sup> This language has become known as the “Wet Foot/Dry Foot” policy, so coined because the policy rewards those Cuban refugees who reach American soil (those with “dry feet”) with adjustment under the CAA but calls for the repatriation of those interdicted at sea (those with “wet feet”).<sup>75</sup> In effect, the Wet Foot/Dry Foot policy circumvents the deliverance of the CAA by preventing would-be applicants who do not reach United States soil from completing the first requirement: to be inspected and paroled into the United States.<sup>76</sup>

*C. Illegal Immigration Reform and Immigrant Responsibility Act & the Meissner Memorandum*

The Clinton Administration went even further to alter migration policy. In 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act (IIRA).<sup>77</sup> Under IIRA, “An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.”<sup>78</sup> The Act created confusion among immigration officials as to whether Cubans entering the United States at a place other than a designated port (as was often the case) were “inadmissible” and therefore, not entitled to an adjustment of status under the CAA.<sup>79</sup> Many speculated that IIRA amounted to President Clinton’s *de facto* repeal of the CAA.

Doris Meissner, the Immigration and Naturalization Service (INS) Commissioner, was not prepared to let the CAA fall by the wayside. In April 1999, Meissner issued a memorandum clarifying eligibility for permanent residence under the CAA despite having arrived at a place other than a designated port.<sup>80</sup> The memorandum reads, in pertinent part:

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remorselessly kills innocent children.

*Id.* at 2, 12.

73. Joint Communiqué, *supra* note 34, at 329.

74. *Id.*

75. Note, *supra* note 22, at 907.

76. Cuban Adjustment Act, Pub. L. No. 89-732, § 1, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255 (2006)).

77. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

78. 8 U.S.C. § 1182(a)(6)(A)(i) (2006).

79. Talamo, *supra* note 40, at 718.

80. Memorandum from Doris Meissner, Comm’r, Eligibility for Permanent Residence Despite Having Arrived at a Place Other than a Designated Port (Apr. 19, 1999), *available at* <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26005/0-0-0-31369.html> [hereinafter Meissner Memorandum].

The policy of the [INS] is that the inadmissibility ground that is based on an alien's having arrived at a place other than a port of entry *does not* apply to CAA applicants. All [INS] officers adjudicating CAA applications will do so in accordance with this policy. So long as the applicant meets all other CAA eligibility requirements, it is contrary to this policy to find the alien ineligible for CAA adjustment on the basis of the alien's having arrived in the United States at a place other than a designated port of entry.<sup>81</sup>

In her memorandum, Meissner indicated that a finding of inadmissibility would be contrary to legislative intent and noted that the United States government had in fact "recently reaffirmed the availability of this adjustment provision, by enacting that the CAA is to continue in force until there is a democratic government in Cuba."<sup>82</sup> Indeed, the privileges of the CAA remain intact today.

#### IV. SMUGGLING AN ILLEGAL ALIEN

Despite travel restrictions imposed by both the Cuban and United States governments, Cuba is one of the top five "immigrant-sending" countries.<sup>83</sup> Immigration has increased since 1995.<sup>84</sup> In fiscal year 2008 alone, nearly 50,000 Cubans became legal permanent residents of the United States.<sup>85</sup> Currently, Cuban nationals may legally migrate to the United States through (1) the issuance of an immigrant visa; (2) admission as a political refugee; (3) winning the diversity lottery; or (4) selection through the Special Cuban Migration Program, generally known as the Cuban lottery.<sup>86</sup> For those who will not wait their turn, there is yet another way to the United States: a clandestine boat ride through the Florida Straits.

The immediacy of the CAA continues to lure Cubans to the coast of Florida.<sup>87</sup> And because current United States policy requires "dry feet" for a shot at the good life, smuggling<sup>88</sup> has emerged as the only feasible

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81. *Id.*

82. *Id.* (citing Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 606(a), 110 Stat. 3009, 3009-695).

83. WASEM, *supra* note 51, at 15. The other top five countries in 2008 were Mexico, China, India, and the Philippines. *Id.*

84. *Id.*

85. *Id.* at 9.

86. *Fact Sheet: The Cuban Adjustment Act*, U.S. DEP'T. OF STATE (Mar. 16, 2000), [http://www.state.gov/www/regions/wha/cuba/cuba\\_adjustment\\_act.html](http://www.state.gov/www/regions/wha/cuba/cuba_adjustment_act.html). For a more thorough discussion of legal methods of migration, see *id.*

87. For current statistics on the rate of Cuban migrant interdiction at sea, see United States Coast Guard's Web site. *Alien Migrant Interdiction Statistics*, U.S. COAST GUARD, <http://www.uscg.mil/hq/cg5/cg531/AMIO/FlowStats/FY.asp> (last updated Apr. 5, 2011).

88. The Eleventh Circuit defines smuggling as "'bringing into or tak[ing] out of a country []merchandise, forbidden articles, or persons contrary to law and with a fraudulent intent . . .'" *United States v. Zayas-Morales*, 685 F.2d 1272, 1277 n.4 (11th Cir. 1982) (quoting WEBSTER'S

method of migration for many.<sup>89</sup> To illuminate, 13,019 Cubans arrived at ports of entry without documents in fiscal year 2007.<sup>90</sup> The Coast Guard was able to intercept another 2,868 Cubans before they reached land.<sup>91</sup> An untold number entered the country at a place other than a designated port of entry. Immigration policy specialist Ruth Wasem has observed that of the 49,000 Cubans who became legal United States residents in 2008, “very few . . . arrived in the United States through the legal immigration avenues proscribed by the [Immigration and Nationality Act].”<sup>92</sup>

#### A. *Wet Foot/Dry Foot Policy Incentivizes Smuggling*

A survey of recent case law demonstrates the technicality of current policy and the practicality in employing the assistance of a professional smuggler to enter the United States with truly “dry feet.” For example, as noted by Javier Talamo in 1999, the *Miami Herald* reported that the Coast Guard apprehended three Cuban refugees in Key Largo, Florida, but only one was permitted to stay in the country.<sup>93</sup> This is because of the three, only one Cuban landed on the beach.<sup>94</sup> The other two were taken into custody while walking in the surf some 100 yards off shore.<sup>95</sup> Technically, they were each standing on United States soil, but the two with “wet feet” were prevented from coming ashore.<sup>96</sup> The reporter interviewed an INS spokesman who defended the decision to repatriate the “wet foot” Cubans stating, “‘Everybody knows you have to make landfall,’ . . . . ‘There are unique circumstances around every landing. . . The strict interpretation of the wet-foot policy is that other alien was still in the water. The interpretation found that one had made landfall.’”<sup>97</sup>

Later, in February 2004, eleven Cuban nationals were discovered floating on the sea in a makeshift raft fashioned from a 1959 Buick automobile.<sup>98</sup> The migrants boarded a Coast Guard vessel while approximately twenty-five miles offshore of Vaca Key, Marathon, Florida.<sup>99</sup> While the passengers were interviewed as to whether they could establish a credible fear of persecution in Cuba, the vessel came within

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THIRD NEW INTERNATIONAL DICTIONARY 2153 (1966)).

89. See generally Brown, *supra* note 64, at 278–80 (discussing the rise in the professional smuggling of Cubans.)

90. WASEM, *supra* note 51, at 11.

91. *Id.* at 9.

92. *Id.*

93. Talamo, *supra* note 40, at 717 (citing Yves Colon, *Touching Land Defines Who Stays, Goes*, MIAMI HERALD, June 30, 1999, at 15A).

94. Colon, *supra* note 93.

95. *Id.*

96. *Id.* There are reports of the Coast Guard using pepper spray and even water cannons to prevent Cubans from making landfall. WASEM, *supra* note 51, at 16.

97. Colon, *supra* note 93 (quoting Dan Geoghegan, Assistant Chief of Border Patrol in Miami).

98. *Rodriguez v. Ridge*, 310 F. Supp. 2d 1242, 1243 (S.D. Fla. 2004).

99. *Id.* at 1243.

twelve nautical miles of the United States coastline three separate times.<sup>100</sup> Three of the passengers were able to establish a credible fear of persecution and were scheduled for a transfer to Guantanamo Bay Naval Base to undergo a detailed examination.<sup>101</sup> Aware of the “discrepancy in the percentage of petitions for asylum that are granted for interdicted passengers compared with the percentage granted for those who have successfully reached United States soil,” the Cubans sought judicial review of their repatriation while still onboard a Coast Guard vessel in international waters.<sup>102</sup> They based their request for an injunction, *inter alia*, on the fact that they entered United States territorial waters three times aboard the Coast Guard vessel.<sup>103</sup> However, the court found that “mere entry into United States waters” was not sufficient “to accord the status of applicant for admission” and denied the Cubans’ request for injunction.<sup>104</sup>

More recently, in 2006, the Coast Guard discovered fifteen Cuban migrants on the old Seven Mile Bridge in the Florida Keys.<sup>105</sup> Originally built in 1912, the bridge was dilapidated and completely unconnected to land in some places.<sup>106</sup> The migrants landed on such an unconnected portion.<sup>107</sup> The Coast Guard deemed the bridge “analogous to a buoy moored to the bottom of a channel by chain,” and therefore reasoned that the Cubans were not on United States soil and were “feet wet.”<sup>108</sup> Under Wet Foot/Dry Foot policy,<sup>109</sup> all fifteen Cubans were immediately returned to Cuba.<sup>110</sup>

Those who make the treacherous journey across the Florida Straits just to fail so close to the finish line serve as a lesson to all. Today, more and more Cubans (or their exile families) are willing to pay upwards of

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100. *Id.*

101. *Id.* at 1244.

102. *Id.* at 1243–44.

103. *Id.* at 1244.

104. *Id.* at 1245–46 (internal quotation marks omitted).

105. *Movimiento Democracia, Inc. v. Chertoff*, 417 F. Supp. 2d 1343, 1345 (S.D. Fla. 2006).

106. *Id.* at 1348.

107. *Id.*

108. *Id.* (internal quotation marks omitted).

109. The court noted that the Wet Foot/Dry Foot Policy entitles Cubans to remain in the United States just by virtue of setting foot on shore. “If [Cubans] reach land, they are allowed to stay, apply for political asylum and eventually residency. If they are picked up at sea, they are repatriated to Cuba.” *Id.* at 1344–45.

110. *Id.* at 1345. Back in Cuba, all fifteen migrants filed suit “seeking (1) a declaratory judgment for a ‘Judicial definition of the term ‘territory’ of the United States’ including whether a bridge or structure equals presence within the United States, and (2) a declaratory judgment ordering the return to the United States of the fifteen individuals who were erroneously returned to Cuba on January 9, 2006.” *Id.* The court denied the defendant’s motion for summary judgment, finding that the Coast Guard’s determination and subsequent repatriation was “unreasonable” and that “the migrants should have been considered ‘feet dry.’” *Id.* at 1349–50. Despite the favorable ruling, the migrants, now back under Cuban jurisdiction, would not be permitted to leave the island legally. *Id.* at 1345.

\$15,000 to be securely placed on United States soil by smugglers.<sup>111</sup> It is a small price to pay for access to the American dream.

B. *The Smuggling Statutes—A Congressional Conundrum*

The existence of the CAA creates quite the legal quagmire. Congress has bestowed upon Cuban immigrants the unparalleled right to enter and remain in the United States.<sup>112</sup> But Congress curiously criminalizes the act of bringing them here.<sup>113</sup> Specifically, any person who:

Knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien [commits a felony offense.]<sup>114</sup>

Similarly, a person commits a misdemeanor who,

knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien.<sup>115</sup>

The smuggling statutes and the CAA stand in conflict. In practice, the contradiction of the two policies creates absurd results. Under the current law, Cubans are welcomed into the country while the boat captains go straight to jail.<sup>116</sup> The outcome is hardly logical. Consider the case of Miguel Perez (Perez).<sup>117</sup>

111. Knaub, *supra* note 1.

112. Cuban Adjustment Act, Pub. L. No. 89-732, § 1, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255 (2006)).

113. 8 U.S.C. § 1324(a)(1)–(2) (2006).

114. *Id.* § 1324(a)(1)(A)(i).

115. *Id.* § 1324(a)(2).

116. Following the Mariel Boatlifts, the Eleventh Circuit dismissed indictments against 336 defendants for substantive violations of 8 U.S.C. § 1324, holding that the defendants lacked the requisite general intent of the smuggling statute and finding “[n]otably, the defendants in this case are not the aliens, but rather those owners, captains, and crew members responsible for transporting the Cuban nationals to the United States.” *United States v. Zayas-Morales*, 685 F.2d 1272, 1274 (11th Cir. 1982); *see also United States v. Perez*, 443 F.3d 772, 774 (11th Cir. 2006) (discussed more fully *infra*).

117. *Perez*, 443 F.3d at 774–75.

## V. PROSECUTION UNDER THE SMUGGLING STATUTE

In July of 2004, Perez and his fishing buddy Juan-Carlos Valdez happened upon a stalled boat off the coast of Miami.<sup>118</sup> The frightened passengers hailed Perez and told him that their boat was experiencing engine problems.<sup>119</sup> As explanation, they told Perez that they too were on a fishing trip and lived in Miami.<sup>120</sup> Then, they asked if he would take them to shore—just “to leave [them] on land.”<sup>121</sup>

Two hours later, when Perez docked his boat at Matheson Hammock Marina in Miami-Dade County, he and Valdez caught the attention of a Miami-Dade police officer.<sup>122</sup> The officer requested to inspect the boat registration.<sup>123</sup> When Perez opened the cabin to retrieve the registration, the officer spotted the six passengers that Perez had rescued earlier that day.<sup>124</sup> Perez and Valdez were each charged with six counts of bringing aliens into the United States illegally<sup>125</sup> and one count each of conspiring to bring aliens into the United States illegally.<sup>126</sup>

Because the officer discovered the Cuban nationals on United States soil, they were able to avail themselves of the CAA, be paroled into the country, and were eligible for adjustment to permanent resident status by July of 2005.<sup>127</sup> In fact, during Perez’s trial, the government presented the testimony of Yamisleidy Estevez-Galindo, one of the six Cuban nationals Perez recovered from the stalled boat.<sup>128</sup> She testified that she had first traveled to the Bahamas from Cuba in order to arrange passage to the United States by boat.<sup>129</sup> When the hired smuggling boat broke down, she and her fellow nationals were able to convince Perez and Valdez to allow them aboard the fishing boat and bring them ashore.<sup>130</sup> Estevez-Galindo even admitted to carrying her mother’s Florida driver’s license, to offer as proof that she resided in Miami.<sup>131</sup> Despite her illegal actions (and the fact that she tricked Perez into bringing her ashore), Estevez-Galindo was free to go, and Perez was convicted on all counts.<sup>132</sup> It is a ludicrous result.<sup>133</sup>

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118. *Id.* at 776.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 775.

123. *Id.*

124. *Id.*

125. *Id.* at 774; *see also* 8 U.S.C. § 1324(a)(2)(B)(iii) (2006).

126. *Perez*, 443 F.3d at 774; *see also* 8 U.S.C. § 1324(a)(2)(B)(iii).

127. *Perez*, 443 F.3d at 775.

128. *Id.* at 776.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 774.

133. In fact, the Perez conviction for recklessly disregarding the aliens’ immigration status mirrors the ludicrous result Judge Peter Fay envisioned in *United States v. Zayas-Morales*, where the Eleventh Circuit considered whether a conviction under the Immigration and Nationality Act required a general criminal intent showing.

Suppose instead that Perez did know that the stranded Cubans were trying to make their way to the United States to take advantage of the CAA. However, he mistakenly thought that current policy renders Cubans *de facto* legal immigrants by virtue of stepping onto United States soil and understood Cubans, and Cubans alone, to be authorized to seek asylum in the United States. This notion is entirely plausible and a rather common misconception amongst the Cuban-American community of South Florida.<sup>134</sup> Because of the ambiguity created by the CAA and the Wet Foot/Dry Foot policy, the result of a trial with those facts would likely be just as ludicrous. Consider the possible defenses created by the confusion.

#### A. *Actus Reus Defense*

There is no question that Perez brought a group of aliens to “a place other than a designated port of entry or place other than as designated by the Commissioner” in violation of the felony smuggling statute.<sup>135</sup> What is significant here is that the aliens are Cubans, and there is no designated port of entry for Cubans. In fact, the INS Commissioner has stipulated that essentially *all places* are valid entry ports for Cubans.<sup>136</sup> According to the Meissner Memorandum, “The policy of the [INS] is that the inadmissibility ground that is based on an alien’s having arrived at a place other than a port of entry *does not* apply to CAA applicants.”<sup>137</sup> Quite simply, the rules are different for Cubans. Therefore, Perez could not commit the actus reus of smuggling a Cuban under 8 U.S.C. § 1324(a)(1)(A) because he did not bring them to an invalid port of entry.

#### B. *Mens Rea Defense*

Suppose instead that Perez is charged under the misdemeanor statute.<sup>138</sup> Arguably, his belief about the CAA and the Wet Foot/Dry Foot policy might negate the requisite mens rea of the crime. Perez certainly did not *know* that his passengers were not already United States residents. Rather, the government might argue that he acted with *reckless disregard*

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Were we to hold that criminal intent is not required, anyone who might rescue an alien from the sea, bring them to our shores, and deliver them to immigration officials for proper processing would be subject to prosecution under this statute. We cannot conceive such an illogical application of this statute.

United States v. Zayas-Morales, 685 F.2d 1272, 1277 n.5 (11th Cir. 1982).

134. See *supra* Part III.A. It is important to distinguish mistake of law from mistake of fact in this context. Where knowledge of the law is included as an element of the offense, it is a defense to that charge that the accused did not understand the law. See *Liparota v. United States*, 471 U.S. 419, 425 & n.9 (1985) (finding that the statute in question required “a showing that the defendant knew his conduct to be unauthorized by statute or regulations”). This should not be confused with a mistake of law defense. *Id.* at 426 n.9.

135. 8 U.S.C. § 1324(a)(1)(A)(i) (2006).

136. See Meissner Memorandum, *supra* note 80.

137. *Id.*

138. 8 U.S.C. § 1324(a)(2).

of the fact. Under Eleventh Circuit precedent, a person charged under 8 U.S.C. § 1324 acts with reckless disregard if he is “‘aware of, but consciously and carelessly ignore[s], *facts and circumstances* clearly indicating that the person transported was an alien who had entered or remained in the United States in violation of law.’”<sup>139</sup>

In his defense, Perez offers the CAA and the Wet Foot/Dry Foot policy as evidence that he understood the policies to grant Cubans official authorization to legally enter and remain in the United States. What he is arguing is, in essence, a mistake of fact, and one that negates the requisite mens rea to convict him of the crime. If Perez’s belief is correct, the Cubans have prior authorization to enter the country. If his belief is incorrect, the prosecution bears the burden of proving whether Perez acted with reckless disregard by considering the possibility that his understanding could be erroneous. Anything short of a flawless execution of this burden would leave the jury with reasonable doubt, enough for Perez to escape conviction.

Certainly, the government will move to keep the jury from hearing about the policies, but a court is likely to let the evidence come in. This is because the evidence is highly relevant<sup>140</sup> to the issue of whether Perez acted with “reckless disregard of the fact that [the aliens had] not received prior official authorization to come to, enter, or reside in the United States . . . .”<sup>141</sup> The evidence is therefore admissible, subject, of course, to the court’s discretion to exclude it should the court decide that either the prejudicial nature of the evidence substantially outweighs its probative value or that it will confuse the jury.<sup>142</sup> In this case, the probative value is in demonstrating to the jury that Perez’s subjective belief that the Cubans were here lawfully had some basis in the law and policy of the United States. A court is likely to find the evidence admissible because it is material to an enumerated element of the crime, and there is no other available evidence which might be offered in place of the policies. Ultimately, the overall probative value of the evidence cannot be outweighed by the chance that a jury might become confused as to when Cuban immigrants are “legally present” in the United States. In fact, any potential confusion might be remedied with a limiting instruction.<sup>143</sup> In all likelihood, the court would allow the evidence to be presented during trial.

Once admitted, the evidence will likely be presented to a sympathetic jury.<sup>144</sup> Alleged smugglers are typically tried in the jurisdiction in which they are arrested.<sup>145</sup> Because most interdictions occur off the coast of Miami or the Florida Keys, smuggling trials occur almost exclusively in

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139. *United States v. Perez*, 443 F.3d 772, 781 (11th Cir. 2006) (external citation omitted).

140. Under the Federal Rules of Evidence, relevant evidence “means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” FED. R. EVID. 401.

141. 8 U.S.C. § 1324(a)(2).

142. FED. R. EVID. 403.

143. FED. R. EVID. 105.

144. *Brown*, *supra* note 64, at 287–88.

145. *Id.* at 288.

South Florida, right in the heart of the Cuban exile community.<sup>146</sup> A jury of the defendant's peers selected from this demographic is likely to be rather sympathetic.<sup>147</sup> Once the jury hears about the policies, it will have an excellent excuse to find that the fisherman did not act in reckless disregard because he would not have considered that the conventional wisdom might be legally inaccurate.<sup>148</sup> The policies are, after all, rather confusing, and presently, rather useless.

### C. *Intent: The Legislative History of the Smuggling Statute*

The defenses created by the contradicting policies stand in contravention to congressional intent. The current misdemeanor smuggling statute originated in 1986 as a response to the “Freedom Flotilla” that “carried more than 125,000 undocumented Cuban nationals to the United States and presented them to INS officials at Key West, Florida, so that the aliens could apply for political asylum.”<sup>149</sup> The government charged over three hundred boat owners and crew members with willfully or knowingly “bring[ing] into’ the United States any alien ‘not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States.’”<sup>150</sup> The Eleventh Circuit Court of Appeals found that the defendants did not possess the requisite mens rea because they never intended to commit an illegal act.<sup>151</sup>

Citing *United States v. Zayas-Morales* as the catalyst for the amendment, the House Judiciary Committee noted, “Of crucial significance was the fact that the defendants in the case made no effort to land any undocumented Cubans surreptitiously or evasively, but instead brought them directly to immigration officers in Key West.”<sup>152</sup> This ruling opened the figurative floodgate for Cuban-Americans to retrieve their relatives from Cuba at will. Congress was unsettled by the implications and worried that, “As happened during the Mariel episode, the United States would be forced to expend extraordinary amounts of money and human resources in processing, monitoring, caring for and giving hearings to exorbitant numbers of people.”<sup>153</sup> Recognizing that “[w]ithout the threat of criminal prosecution, there is no effective way to deter potential

146. *Id.*

147. *Id.* at 287. “Prosecutors must also contend with issues over whether South Florida juries may be overly sympathetic to smugglers given the high level of criticism of the Government of Cuba expressed by the community at large.” *Id.*

148. “As part of its case, the government must prove the defendant conducted himself ‘knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States.’” *United States v. Perez*, 443 F.3d 772, 780 (11th Cir. 2006) (quoting 8 U.S.C. § 1324(a)(2)(B)(iii) (2006)).

149. *United States v. Garcia-Cordero*, 610 F.3d 613, 619 (11th Cir. 2010) (Korman, J., concurring).

150. *Id.* (Korman, J., concurring) (quoting 8 U.S.C. § 1324(a)(1) (1976), amended by 8 U.S.C. § 1324(a)(1)–(2) (1988)).

151. *United States v. Zayas-Morales*, 685 F.2d 1272, 1277–78 (11th Cir. 1982).

152. H.R. REP. NO. 99-682(I), at 66 (1986).

153. *Id.*

transporters from inundating U.S. ports of entry with undocumented aliens,”<sup>154</sup> Congress enacted 8 U.S.C. § 1324(a)(2), which criminalizes “conduct of the kind at issue in the Mariel ‘Freedom Flotilla’ cases.”<sup>155</sup>

Thus, it is clearly the intent of Congress to dissuade illegal Cuban migration. The American system simply cannot withstand another influx of Cuban immigrants. Yet current policy continues to incentivize smuggling by rewarding Cubans who make it to shore with a green card,<sup>156</sup> despite the erosion of any justification for the policy’s existence.

## VI. HISTORICAL JUSTIFICATIONS AND MODERN APPLICATIONS OF THE CAA

### A. *Historical Justifications of the CAA*

Congress enacted the CAA to accomplish four main objectives: (1) to destabilize the new Communist dictatorship in Florida’s backyard; (2) to allow Castro’s political refugees to enter America with minimal administrative burdens; (3) to expedite the rate at which new refugees could enter the American workforce; and (4) to allow Cuban refugees to apply for permanent residency from within the country.<sup>157</sup>

#### 1. Cold War Objectives

Castro’s successful revolution left many “fear[ing] that Cuba would undermine the U.S. cold war sphere of influence.”<sup>158</sup> As Soviet weapons and soldiers poured into Cuba, President John F. Kennedy warned, “We shall not allow men whose hands are covered with blood from the streets of Budapest to teach us a lesson in noninterference. Communism in this hemisphere is not negotiable.”<sup>159</sup> The promised interference would be achieved through immigration policy.

By opening its doors to exile Cubans, the United States began a “brain drain” of the Cuban labor force.<sup>160</sup> The majority of initial immigrants were well educated and wealthy, among them physicians, professors, and engineers.<sup>161</sup> The world saw the well-publicized “departure from Communist Cuba to the democratic United States by refugees . . . [as] a vote against Communism and a vote for democracy.”<sup>162</sup> The United States government sought to foster this “oppressive regime” propaganda to “build the anti-Communist public sentiment necessary to support expensive Cold War programs.”<sup>163</sup>

154. *Id.*

155. *Garcia-Cordero*, 610 F.3d at 619.

156. ERLICH, *supra* note 5, at 64.

157. Note, *supra* note 22, at 908.

158. *Id.* (internal quotation marks and external citation omitted).

159. ERLICH, *supra* note 5, at 25 (quoting President Kennedy).

160. Note, *supra* note 22, at 909.

161. *Id.*

162. Estevez, *supra* note 17, at 1280.

163. Note, *supra* note 22, at 909–10.

## 2. Reducing Red Tape

Once the refugees arrived in the United States, they needed legal employment. The legislative history of the Act indicates that the CAA was a necessary device to facilitate the self-sufficiency of the exiles.<sup>164</sup> Indeed, many of the Cubans arriving in the United States were well-educated and had the potential to contribute to American society.<sup>165</sup> Congress reasoned that if those Cubans were permitted to become permanent residents, “the talents and skills of many of the refugees, particularly in the professional field, which are now going to waste because of State licensing laws will be put to use in the national interest.”<sup>166</sup>

The impediment to permanent residency at the time was an “awkward procedure” that required applicants living in the United States to leave the country, apply for an immigrant visa at a United States Consular office abroad, and then return to the United States after approval as a permanent resident.<sup>167</sup> Because the United States had terminated diplomatic relations with Cuba, Cuban refugees were obliged to travel to a third country to apply for their visas.<sup>168</sup> In 1966, nearly 165,000 Cubans were living in the United States without permanent resident status.<sup>169</sup> The CAA allowed those refugees to apply for an adjustment of status without leaving the country.

### B. Modern Applications of the CAA

#### 1. The National Security Loophole

One could hardly imagine that Cuba, with its devastated economy, continues to be a threat to United States security.<sup>170</sup> Having been abandoned by Soviet troops in 1993, Cuba’s Revolutionary Armed Forces is capable of only minimal military endeavors.<sup>171</sup> In 1998, a Pentagon report emerged that concluded that the island “does not pose a significant military threat to the United States or other countries in the region.”<sup>172</sup> In fact, the only threats that the Cuban government currently poses to American national security are the threats of illegal migration and drug trafficking,<sup>173</sup> both of which might be remedied with a new immigration policy.

Of note, however, is the threat posed by foreign terrorists who enjoy

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164. See H.R. REP. NO. 89-1978, at 4 (1966), *reprinted in* 1966 U.S.C.A.N.N. 3792, 3794.

165. GARCÍA, *supra* note 12, at 20.

166. S. REP. NO. 89-1675, at 4 (1966).

167. Estevez, *supra* note 17, at 1277.

168. *Id.* at 1277–78.

169. *Id.* at 1278.

170. Note, *supra* note 22, at 911–12.

171. *Id.* at 912.

172. MELANIE M. ZIEGLER, U.S.-CUBAN COOPERATION: PAST, PRESENT, AND FUTURE 142 (2007).

173. *Id.*

the support of the Cuban government.<sup>174</sup> In 1982, Congress added Cuba to the State Department's list of states sponsoring international terrorism.<sup>175</sup> Cuba remains on that list today because many argue that there is "ample evidence that Cuba supports terrorism," including "supporting terrorist acts and armed insurgencies in Latin America and Africa" and harboring "members of foreign terrorist organizations and U.S. fugitives from justice."<sup>176</sup> For example, Cuba openly shelters and supports the "members of three terrorist organizations—Basque Homeland and Freedom (ETA), the Revolutionary Armed Forces of Colombia (FARC), and Columbia's National Liberation Army (ELN)."<sup>177</sup>

In a report issued in 2010, the State Department claimed that the "Cuban government . . . publicly condemned acts of terrorism by al-Qa'ida . . .," but admitted that Cuban officials "remained critical of the U.S. approach to combating international terrorism."<sup>178</sup> While there is no evidence that Cuba has been used to "organize, finance, or execute terrorist acts against the United States,"<sup>179</sup> it is quite possible, most of all because of the CAA. A terrorist need only infiltrate—or be invited into—Cuba, obtain fraudulent Cuban identification, and then make his way to the United States where, under the CAA, he would be permitted to remain indefinitely.<sup>180</sup>

After the terrorist attacks on September 11, 2001, the United States implemented new security measures that resulted in a significant drop in the processing and admission of Cuban nationals. Because of the difficulties in executing security clearances and background checks, only 305 Cubans legally arrived stateside in 2003.<sup>181</sup> Another 7,213 circumvented the security measures by coming to the United States without documentation and thereafter invoking the CAA.<sup>182</sup> Any one of those thousands of people could have been a terrorist claiming to be a Cuban refugee. The CAA creates a national security loophole that needs to be closed.

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174. SULLIVAN, *supra* note 23, at 39.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 40.

180. In describing the shortfalls of the CAA, Fidel Castro himself pointed out that:

[T]hose who set foot on [American] coasts are automatically welcomed and not asked to meet any requirements. Individuals with tainted personal records, who would never receive a visa if they applied, then get the right to immediately start working and living in that country. Thus, the spirit and letter of the Migratory Agreements are breached and the assets and safety of Americans are placed in jeopardy.

Fidel Castro, *supra* note 72, at 5.

181. WASEM, *supra* note 51, at 13.

182. *Id.* at 12 fig.3.

## 2. Decline of Political Refugees

Gone too are the hordes of political refugees seeking asylum from Castro's regime. Between 1966 and 1973, an average of 38,000 Cubans entered the United States annually.<sup>183</sup> From 1973–1979, those numbers fell to a mere 5,000 Cuban refugees per year.<sup>184</sup> By the early 1970s, Congress came to realize that the emergency situation that prompted the enactment of the CAA “no longer existed.”<sup>185</sup> In opposition to the continued American-funded airlift program, Senator Allen Ellender, Appropriations Committee chairman, argued, “It is time to halt the program, not because we are against the Cubans, but because they ought to come through the regular channels. I really believe that we have done enough.”<sup>186</sup>

When the Cuban government began to allow exiles back into the country in 1979, many Miami Cubans returned to their homeland with gifts for their relatives, symbols of “the affluence available in the United States.”<sup>187</sup> As historian Melanie Ziegler speculates, it was perhaps this opening of the island that reminded Cubans of the “American dream” and became the catalyst for the Mariel exodus of 1980.<sup>188</sup> Within four months, over 125,000 *Marielitos* arrived in the United States through the Mariel Boatlift.<sup>189</sup> In contrast to the first two waves of refugees, over 70% of the Mariel Cubans were “blue-collar workers.”<sup>190</sup> These were not the same well-educated Cuban refugees who Congress sought to integrate into the American labor force.<sup>191</sup> Many of them, and their successors, would become a burden to the American welfare system.<sup>192</sup> Moreover, it was immediately apparent that the *Marielitos* did not come to the United States “to escape political persecution or to reunite with their families, but simply to try their luck in the land of opportunity.”<sup>193</sup>

In fact, many of the Mariel Cubans were more criminal deviants than political dissidents. Castro seized upon the occasion to rid himself of “undesirables,” by opening up prisons and insane asylums so that the patients and prisoners could make it to a boat.<sup>194</sup> Then-Miami Mayor

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183. ZIEGLER, *supra* note 172, at 45.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 45–46.

189. *Id.* at 48.

190. *Id.*

191. *See supra* Part VI.A.2.

192. Note, *supra* note 22, at 914. Editorials published in the *Miami Herald* during the late 1970s indicated America's frustration with the continuing onslaught of Cuban immigrants. GARCÍA, *supra* note 12, at 45. According to García, “While the editors celebrated the rapid economic adjustment of the Cuban exiles—whom they called the ‘cream of the nation’—they voiced the widespread concern that Cuba's cream had already been skimmed, and that the continuing influx of lower-class Cubans presented an economic burden to the United States.” *Id.* Forty percent of the Mariel Boatlift-era Cubans made less than \$15,000 a year in 1990. SURO, *supra* note 68, at 172.

193. Note, *supra* note 22, at 912–13 (internal quotation marks and external citation omitted).

194. ERLICH, *supra* note 5, at 33.

Maurice Ferre wrote in a letter to the editor of the *Miami Herald* that the Cuban government had “flushed these people on to us.”<sup>195</sup> The sentiment was not unfounded. Crime rose 66% in Miami in 1980.<sup>196</sup> These undesirable “refugees” released by Castro made a mockery of the CAA. The *Marielitos* could hardly be considered political refugees and neither can most current CAA applicants.

### 3. Immediacy of Immigrant Integration

Much of the red tape that existed at the time that Congress enacted the CAA is likewise no longer an issue. In 1966, there were over 165,000 Cuban refugees living in the United States without permanent resident status and in need of legal documentation to obtain employment.<sup>197</sup> Most of these refugees had no opportunity to obtain an immigrant visa before leaving Cuba.<sup>198</sup> The current generation, however, is entitled to 20,000 immigrant visas annually through the Joint Communiqué and may apply for the visa in person in Havana, Cuba.<sup>199</sup> This system puts to rest any panic about integrating large numbers of invited Cubans into the United States.

### 4. Current State of U.S.-Cuban Relations

In 1996, Congress enacted the Cuban Democracy Act (CDA), which stipulates that the CAA will be repealed only when Cuba becomes a democracy.<sup>200</sup> This is nothing more than an expression of excessive ideological idealism. Congressional decisions, especially those with international implications, ought to be pragmatic. Rather than preserving the CAA until a perfect political system comes about in Cuba, Congress should look to degrees of improvement within Cuba. Factors such as the independence of the judiciary, the softening of the administration, and the toleration of enterprise are just as indicative of progress as a transition to democracy.

Since the passing of power from Fidel Castro to his brother Raúl Castro, Cuba has made significant changes. As Latin American Affairs specialist Mark Sullivan points out, in 2008 Cuba signed two United Nations human rights treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.<sup>201</sup> In March of the same year, the Cuban government

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195. GARCÍA, *supra* note 12, at 70 (quoting Maurice Ferre, Letter to the Editor, *MIAMI HERALD*, Apr. 2, 1983, at 16A).

196. *Id.* at 71.

197. *See supra* Part VI.A.2.

198. Note, *supra* note 22, at 913.

199. Joint Communiqué, *supra* note 34, at 330.

200. Illegal Immigration Reform and Immigrant Responsibility Act of 1966 (IIRIRA), Pub. L. No. 104-208, div. C, § 606(a), 110 Stat. 3009-546, 3009-695 (codified in scattered sections of 8, 18, and 28 U.S.C.).

201. SULLIVAN, *supra* note 23, at 7.

began allowing Cubans to stay at tourist hotels.<sup>202</sup> Just recently, the Cuban government began allowing the Ladies in White (*Damas de Blanco*), a group of women who rally for the release of political prisoners, to conduct weekly demonstrations in Havana.<sup>203</sup> On March 23, 2011, the Cuban government released the last two remaining imprisoned members of the “Group of 75,” a faction of democracy activists arrested in 2003.<sup>204</sup> In fact, there has been a sharp decline in the number of political prisoners since 2006 when Raúl Castro came to power.<sup>205</sup> That year, there were 333 prisoners, 283 by 2007, 205 in 2009, and 167 in July 2010.<sup>206</sup> There are now reportedly only sixty political prisoners remaining.<sup>207</sup>

Just this March, Fidel Castro stepped down from his position as leader of the Cuban Communist Party.<sup>208</sup> This momentous occurrence may signify the end of the Castro era. In further effort to cleanse the Cuban political system of the old guard, President Raúl Castro proposed in the same month that elected officials serve no more than two five-year terms.<sup>209</sup> Blaming his generation for failing to cultivate young leaders, President Castro recognized the need for a “systematic rejuvenation of the whole chain of party and administrative posts” during his opening speech at the Sixth Communist Party Congress.<sup>210</sup> Days later, Fidel Castro endorsed his brother’s speech, writing in the Cuban state-run newspaper *Granma*, “The new generation is called upon to rectify and change without hesitation all that needs to be corrected and changed . . . .”<sup>211</sup> Also notable is the recent expansion of private enterprise. By late 2010, over 157,000 Cubans were self-employed and by early 2011, approximately 113,000 had received licenses to work independently.<sup>212</sup> At the April Congress meeting, President Castro reported that his government had licensed 180,000 small businesses “with tens of thousands more expected to be issued in the coming months.”<sup>213</sup> The *New York Times* heralded this progress as possibly

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202. *Id.*

203. *Id.* at 9.

204. MARK P. SULLIVAN, CONG. RESEARCH SERV., CUBA: ISSUES FOR THE 112TH CONGRESS 9–10 (2011), available at <http://www.fas.org/sgp/crs/row/R41617.pdf>. During a crackdown in March 2003 (a period sometimes referred to as *Primavera Negra*, or Black Spring), the Cuban government imprisoned seventy-five democracy activists, a group which included independent journalists, leaders of labor unions and opposition parties, and librarians. *Id.* at 9. The majority of the group remained incarcerated until mid-2010. *Id.*

205. SULLIVAN, *supra* note 23, at 10.

206. *Id.*

207. SULLIVAN, *supra* note 204, at 10.

208. Randal C. Archibold, *Cuban Leader Proposes Term Limits in Sign of New Era*, N.Y. TIMES, Apr. 16, 2011, <http://www.nytimes.com/2011/04/17/world/americas/17cuba.html>.

209. *Id.*

210. *Id.* (quoting Raul Castro).

211. Sara Miller Llana, *As Fidel Castro Steps Down, a Political Shakeup in Cuba?*, CHRISTIAN SCI. MONITOR, Apr. 19, 2011, [http://news.yahoo.com/s/csm/20110419/wl\\_csm/377988\\_1](http://news.yahoo.com/s/csm/20110419/wl_csm/377988_1) (external citation omitted).

212. SULLIVAN, *supra* note 204, at 15.

213. Archibold, *supra* note 208.

“the most significant changes [in Cuba] since businesses were nationalized in 1968 . . . .”<sup>214</sup>

The Bush Administration indicated in May 2002 that Congress would consider lifting the embargo “if Cuba was prepared to free political prisoners, respect human rights, permit the creation of independent organizations, and create a mechanism and pathway toward free and fair elections.”<sup>215</sup> It would seem that much of this has already occurred, and the time has come for the United States government to consider a moderated policy. Indeed, many argue that if the United States would alter current policy, “then the seeds of reform would be planted, which would stimulate and strengthen forces for peaceful change on the island.”<sup>216</sup> Sanctions against Cuba, which include an immigration policy designed to cripple the government, must give way in order for Cuba to effect change.

## VII. CONCLUSION

As Congress noted in 1971, the emergency that prompted the CAA is over.<sup>217</sup> But rather than repeal the antiquated and gratuitous Act, the United States government sought to circumvent the windfall of the CAA by making access to its benefits contingent upon location. Thus, the Wet Foot/Dry Foot policy stands in contravention to the CAA. If Cubans are entitled to automatic political asylum, it is irrational that receipt of that asylum should be contingent on whether an applicant is standing on United States soil or on a Coast Guard vessel. The fact that Wet Foot/Dry Foot policy even exists demonstrates that the CAA is merely a Cold War vestige and no longer needed.

“[T]he contradictions inherent in the ‘wet-foot, dry-foot policy’” are directly responsible for the “increase in human smuggling” cases since 1995.<sup>218</sup> Today, nearly all Cubans who enter the United States via boat are “doing so as part of human smuggling rings.”<sup>219</sup> Worse still, the confusing policies create defenses to the crime of smuggling a Cuban national that are in conflict with Congress’ intent to stop illegal Cuban immigration. This is not news to Congress. In 2009, Senator Richard Lugar, the ranking member of the Committee on Foreign Relations, circulated a staff report suggesting an executive branch review of the Wet Foot/Dry Foot policy.<sup>220</sup> According to the staff report, that “review should assess whether [the] policy has led to the inefficient use of U.S. Coast Guard resources and assets as well as the potential to redirect these resources to drug interdiction efforts.”<sup>221</sup>

Despite awareness, no action has been taken. As the 1986 House

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214. *Id.*

215. SULLIVAN, *supra* note 23, at 22.

216. *Id.* at 18.

217. ZIEGLER, *supra* note 172, at 45.

218. *Id.* at 60.

219. *Id.*

220. WASEM, *supra* note 51, at 19.

221. *Id.*

Report warned, failure to deter migration will result in the United States being “forced to expend extraordinary amounts of money and human resources in processing, monitoring, caring for and giving hearings to exorbitant numbers of people.”<sup>222</sup> Furthermore, the CAA results in a very real threat to national security by creating a loophole for terrorists to enter into and remain in the United States. To avoid these results, Congress should sunset the CAA and Cubans “ought to come through the regular channels.”<sup>223</sup>

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222. H.R. REP. NO. 99-682, at I (1986), *reprinted in* 1986 U.S.C.A.N.N 5649, 5670.

223. ZIEGLER, *supra* note 172, at 45.

