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ARTICLE

GERMANY’S YESTERDAY IS CUBA’S TOMORROW: COMPARING THE GERMAN DEMOCRATIZATION TO THE CUBAN TRANSFORMATION

Kayla M. Bramnick†

ABSTRACT

For the last fifty years, the effects of communism have taken their toll on the island of Cuba. The United States responded aggressively to the communist takeover by severing its relationship with and sanctioning Cuba. These sanctions have failed their purpose of punishing the communist regime for violating fundamental human rights. Instead, the sanctions have further harmed Cuban nationals. The United States has a responsibility to lift the embargo and allow travel and communication between the nationals in Cuba and the exiles in America. Only when the Cuban nationals understand the benefits of a free society and have the support of the free world will they be able to stand up to the communist regime.

The process of democratization is a difficult one. Many European nations have transitioned from communistic and socialistic systems to democracy. Germany was a nation that experienced this transition. Germany’s experience, however, was unique because half of the nation had already established a stable democracy. West Germany was able to assist East Germany’s transition from communism into a democratic state. Germany’s successes and failures provide an excellent case study and comparison for Cuba’s democratization.

In December of 2014, President Obama declared a policy change focused on building a new relationship with Cuba. These endeavors may prove to be successful if they are gradually implemented. The United States would be prudent to follow the German model and provide Cuban Americans with the opportunity to assist their Cuban relatives in the quest for a free Cuba.

† J.D., Liberty University School of Law, 2015. This Comment is dedicated to my parents, to whom I owe the credit for anything I achieve in life and for providing the inspiration for this topic. Thanks are due to Professor Tory Lucas for his support and guidance throughout this entire process. Finally, a very special thank you is due to Melanie Migliaccio, Benjamin White, Melinda Brewer, and the entire staff of the 2015 Liberty Law Review. Without their unfailing encouragements and unrivaled advice, this article would never have seen the light of day.
I. INTRODUCTION

Samuel Adams once opined, “Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can.” In the United States, some authors take the position that the right to property is a fundamental human right. Enemies of freedom, however, gravitate towards an oppressive ideology. One such ideology is communism. “[T]he theory of Communism may be summed up in one sentence: Abolish all private property.” The concept of property ownership is one of the most fundamental issues in a political system. Governments rely on either one of these two ideologies to either protect or deny their citizens these rights. A government that expropriates the right to own property violates the fundamental human rights of its citizens.

A certain mystique surrounds nations that abstain from developing alongside progressing nations. Oftentimes, nations are unable to advance culturally, technologically, or economically as a result of an oppressive ideology. The Republic of Cuba is an example of a state that has been at a cultural standstill since 1940 when communism encroached upon the Island. Communist leaders denied citizens’ rights, including the right to own private property. The Communist Party swiftly incapacitated Cubans’ attempts to regain their freedom. Insurgents, as they were called, were promptly arrested, tortured, and executed for daring to oppose the party line. The Islanders’ frustration with their immovable situation led to a mass exodus of Cubans and a pandemic of discouragement and passivity amongst the Cubans who could not escape.


5. Cubans who left Cuba at the beginning of Castro’s era will hereinafter be referred to as “exiles” and Cubans who stayed in Cuba will hereinafter be referred to as “nationals.”
A government only possesses the power granted to it by its citizens. When a government breaks its promises or takes action that harms the public, the people begin to doubt its legitimacy. In the early 1980s, President Reagan announced a policy towards communist and socialist nations known as the Reagan Doctrine. Under the Reagan Doctrine, if a nation’s people viewed their government as illegitimate, then the United States conferred upon itself a right to intervene on behalf of that nation’s people. The United States’ aggressive reaction to Castro’s takeover in many ways foreshadowed this doctrine.

Congress passed the Cuban Liberty and Democratic Solidarity Act, otherwise known as the Helms-Burton Act. The Act proscribed trade, communication, and travel between Cuba and the United States. These embargos were not limited to the relationship between the United States and Cuba, but rather extended to the entire international community. The consequences of this Act were swift and concentrated on the Cuban people rather than the Communist Party. As per the Act’s language, the United States refused to lift these bans unless Cuba became a democracy. However, the current social and economic status of Cuban nationals prevents them from pressuring their government to change. The Cuban problem has become a circular one and requires a different approach.

Eastern European countries have experience in evolving from oppressive regimes to democratic methodologies. As a result of the fall of communism and socialism in European countries, “the term ‘nationalization’ came to stand for imprisonment: the suspension of national history, severance from the world, poverty, loss of identity, and colonization . . . .” Numerous European nations embraced the Western view of freedom for all, which includes, inter alia, the right to private property. Embracing private

8. Id. at § 6032.
property rights is a fundamental tenet for any fledgling economy. The various Eastern European transitions furnish a multitude of rich case studies that provide guidance for a post-communist Cuba. Germany successfully transitioned from a controlled economy to a free-market society. This Article examines the potential Cuban response to its current governmental failure and to its potential democratization by analyzing the East German response as it transitioned to democracy. This Article will also analyze the various processes Cuba may utilize to restore expropriated property to its citizens.

II. BACKGROUND

A. Cuba

In the early 1800s, Cuba was under the ruthless control of Spanish colonials. In 1868, the Cuban people united against the Spaniards and drafted the Cuban Declaration of Independence. In this document, the emerging leadership “recognized the natural rights of all peoples and viewed slavery as incompatible with this principle.”

The United States supported Cuba’s attempts for independence, and freedom was attained in 1898 as a result of the Spanish-American War. Spain signed the Treaty of Paris relinquishing the Island to the United States. For the next three years, the United States played an active role in molding


15. For the purposes of this article, the term “transition” will refer to Cuba’s future democratization from communism.


17. Mills & Koslosky, supra note 12, at 1223.

18. Id.

19. Id.

In 1901, Cuba enacted its first constitution.22 The Constitución de la Republica de Cuba recognized the right to property as fundamental.23 Article 32 of the Cuban Constitution mandated that "no person could be deprived of property without a valid public purpose and due compensation."24 On May 20, 1902, Cuba declared its sole sovereignty and separation from the United States.25 In spite of Cuba's claim to sovereignty, however, the United States retained the right to intervene on Cuba's behalf in order to preserve its newfound independence.26

1. The Batista dictatorship

During the next forty years, Cuba failed to achieve a free democracy. Disputed elections in 1906 and 1924, as well as the United States' constant intervention, caused several revolts.27 In September 1933, Fulgencia Batista led a revolt, overthrowing the fledgling democracy. In 1940, Cuban legislators adopted a new constitution.28 The legislators of this revised constitution confirmed the original idea of owning property as a natural right.29 The legislators ratified Article 24, which stated that a government taking of private property would have to be for just cause and required that any individual whose property was taken by the government be compensated.30 This constitution was “a model for many Latin American constitutions,” because it also “guaranteed the rights to employment and collective bargaining and established a minimum wage, maximum work

21. Id.
23. Mills & Koslosky, supra note 12, at 1224. "All countries in Eastern Europe have acknowledged the fundamental right of private entities, domestic and foreign, to own property and they have provided legal protection to private property rights." Travieso-Diaz & Bleisteiner, supra note 16, at 187.
25. Dhooge, supra note 9, at 580.
26. Id.
27. SERGIO DIAZ-BRIQUETS & JORGE PEREZ-LOPEZ, CORRUPTION IN CUBA: CASTRO AND BEYOND 63 (University of Texas Press 2006).
30. Id.
week, [and] maternity leave . . . ." 31  The Constitution of 1940 is commonly viewed by Cuban exiles as “the last legitimate expression of the constitutional will of the Cuban people . . . .” 32

During this tumultuous time, Batista, a formidable figure, governed the Island. His first “term” in office was properly procured through a democratic vote. 33  After the end of his term, Batista continued to dominate Cuban politics for the next twenty-five years by controlling the presidents throughout that time. 34  In 1952, however, Batista staged a coup, repealed the 1940 constitution, and illegally enthroned himself as Cuba’s dictator. 35  Batista’s regime was corrupt. 36  Bribery was the method by which Cubans accomplished anything. 37  Poverty was a major problem and the middle class was kept small as a result of vast unemployment. 38  The restrictions of freedoms and the declining economy provoked frustration among the people.

2. Castro’s Communism

a. Fidel Castro: The Communist Dictator

In 1959, a young Fidel Castro led the people’s revolt against Batista’s dictatorship. 39  Castro promised freedom and equal opportunities for all and successfully overturned Batista’s governance. 40  Castro’s administration enacted the Fundamental Law in the same year. 41  This law reestablished Article 24 from the 1940 Constitution, thus affirming the government’s commitment to private property. 42  In contravention of the promises of

35. Interview with Carlos Feldman, Cuban Exile, in Miami, Florida (Dec. 21, 2014).
36. Id.
37. Id.
38. Id.
40. Id.
41. Mills & Koslosky, supra note 12, at 1226.
42. Id.
freedom, the bigger-than-life dictator launched a fifty-year reign of economic devastation.\textsuperscript{43} Due to his Marxist/Leninist political ideology, Fidel established an agenda for nationalization of all private property.\textsuperscript{44} In July of 1960, Fidel seized all United States property and Cuban businesses.\textsuperscript{45} Three months later, the Urban Reform Law “eliminated private sale and rental of homes, transferred property to homeless Cuban citizens, canceled mortgages, and made all rent and mortgage payments payable to the state.”\textsuperscript{46} Cuban law developed double standards with regards to small businesses.\textsuperscript{47} Individuals were restricted from forming corporations, although they were allowed to operate certain small enterprises.\textsuperscript{48} Additionally, Cubans were allowed to sell their houses or cars to other Cubans, but “local bank loans [were] limited.”\textsuperscript{49} The only way to succeed in Cuba was to have connections with Castro’s administration.\textsuperscript{50}

As a result of the turmoil, some Cubans began to seek refuge in the United States while others attempted in vain to depose his government. Cuban exiles endeavored to defeat Fidel in the Bay of Pigs invasion.\textsuperscript{51} The exiles, however, failed miserably. While some exiles escaped, the rest were either killed or captured by Castro’s forces.\textsuperscript{52} The regime responded to these acts of rebellion by “systematically depriv[ing the people] of their fundamental rights to free expression, privacy, association, assembly, movement and due process of

\begin{itemize}
  \item[43.] Girona, supra note 39.
  \item[44.] Mills & Koslosky, supra note 12, at 1232. “The first nationalizations targeted the property of former officials in the Batista regime.” \textit{Id.} at 1231-32. However, the subsequent waves of nationalizations were targeted towards private citizens. \textit{Id.} at 1232.
  \item[45.] \textit{Id.}
  \item[46.] Espino, supra note 32, at 430.
  \item[47.] See generally Mills & Koslosky, supra note 12, at 1232-33. This was largely focused on the Cuban agriculture industry.
  \item[48.] \textit{Id.} at 1232 n.84.
  \item[50.] Interview with Carlos Feldman, supra note 35, at 1.
  \item[51.] \textit{Bay of Pigs Invasion,} HISTORY CHANNEL (2009), http://www.history.com/topics/cold-war/bay-of-pigs-invasion (last visited Nov. 21, 2015). After Fidel Castro took over, “officials at the U.S. State Department and the Central Intelligence Agency (CIA) attempted to push Castro from power . . . . [I]n April 1961, the CIA launched . . . a full-scale invasion of Cuba by sending 1,400 American-trained Cubans who had fled their homes when Castro took over.” \textit{Id.} Nevertheless, the invasion was not successful because “[t]he invaders were badly outnumbered by Castro’s troops, and they surrendered after less than 24 hours of fighting.” \textit{Id.}
  \item[52.] \textit{Id.}
\end{itemize}
Cuban nationals who rebelled were detained, imprisoned, tortured, and executed. Fidel used tactics such as police warnings, surveillance, and “politically motivated dismissals from employment” to coerce obedience. Speech was limited to government propaganda. The regime used constant surveillance to inhibit any dissent from the government. Mobile phones and computers were off limits to the average person. Television and radio programs were strictly monitored in order to promote the government’s message among the people. Insurgents were either imprisoned or murdered. Journalists were arrested because of their “work activities” in Cuba. Since 1990, minimum wage has dropped to the equivalent of three dollars per month and productivity has dropped forty-five percent.

In keeping with the socialistic ideology, Castro’s administration provided a variety of social entitlements to his people. These included free health care, day care for children, public education, low priced but strictly portioned food and clothing, low-cost housing and transportation, and free or low-cost access to sports and recreation. Such entitlements created a dispirited society that passively permitted the abuse of governmental power.

b. The Global Response

The international backlash to Fidel’s takeover of Cuba was swift and jarring. The United States severed its diplomatic relations with Cuba. Cuba’s dependence on the Soviet Union dissolved when Russia suffered its
own economic collapse. By mid-1993, the Cuban economy suffered such a deep depression that Cubans were restricted to eating one and one-half to two meals a day. In 1996, a Cuban military aircraft shot down two unarmed United States civilian aircraft, resulting in the deaths of three United States citizens and one permanent resident. The United States responded by codifying a trade embargo against Cuba.

(1) The Reagan Doctrine: The United States’ Right to Intervene

One of the dangers facing a transitioning nation occurs when the government faces questions of legitimacy from its citizens. Former President Reagan supported the notion that the United States should be able to provide economic and military support to rebels combating undemocratic governments. The Reagan Doctrine contended that defining a legitimate government “depends on the consent of the governed” and on its respect for the rights of citizens. The purpose of the United States’ aggressiveness was to show that communism was not invincible. Reagan’s goal was to “shatter the Marxist-Leninist myth of the irreversibility of proletarian revolution by helping anti-communist forces challenge the legitimacy of the totalitarian regimes.” According to the Reagan Doctrine, legitimacy is the foremost predictor of the success of a nation’s constitution-making process. While a nation-state may have characteristics of illegitimacy, it is not officially deemed so until that nation’s people doubt its legitimacy. “[T]he people of a country might perceive the policies of a government, the government itself, or even the entire state as illegitimate.”

64. See Dhooge, supra note 9, at 587.
65. Gridr, supra note 2, at 463-64.
66. Dhooge, supra note 9, at 575.
72. Fidler, supra note 69, at 105.
73. Roth, supra note 68, at 486; see also Mills & Koslosky, supra note 12, at 1236.
74. Mills & Koslosky, supra note 12, at 1236.
The communist parties of European nations such as Germany, Czechoslovakia, Poland, Latvia, and Hungary lost a level of legitimacy in the eyes of their people. Demonstrations were held on the streets of Warsaw, Riga, Prague, and Budapest as a result of the public’s revulsion towards government control of the constitution-drafting processes. The Reagan Doctrine provided the United States with various avenues for opposing illegitimate regimes. It permitted the United States to sanction governments that lacked "consent of the governed and depended on external supplies of armaments to maintain themselves in power."

Cuban citizens struggled with skepticism towards both the Communist Party and the Island’s oppressive government. Cubans never doubted the legitimacy of their state because "the Cuban revolution was not imposed by a foreign power; rather . . . [by] a phenomenon primarily conducted by Cubans." Cuban exiles view Castro’s Communist Party with great skepticism. This is similar to the skepticism experienced by citizens of Germany. Castro’s communism was an “organic” public movement that began as a result of Cubans’ frustration with Batista’s dictatorship. Although Cuba recognized at least fifty opposition groups in the early 1990s, “political

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76. Mills & Koslosky, supra note 12, at 1236.
77. Roth, supra note 68, at 485 (emphasis omitted).
78. Mills & Koslosky, supra note 12, at 1256. Latvia’s people doubted the legitimacy of their state when, at the end of World War II, Latvia was subjected to the terror of socialism. Mass demonstrations became commonplace and the Soviet regime refused to respond. Id. at 1240. “[T]he illegitimacy of the state became the constitution drafter’s biggest opportunity: establishing a distinct identity of an independent Latvia and, through that, political legitimacy." Id.
79. See Interview with Rigoberto Sotolongo, Cuban Exile, in Miami, Fla. (Dec. 21, 2014).
80. See John Feffer, The Costs of German Reunification, The WORLD Post (Nov. 12, 2014), http: //www.huffingtonpost.com/john-feffer/the-costs-of-german-reuni_b_6144764.html. Skepticism towards a socialist party was also present in parts of Europe such as Czechoslovakia. Mills & Koslosky, supra note 12, at 1245-46. In 1948, Czechoslovakia’s democratic government was superseded by a Stalinized system. Id. When the nation nationalized of property, a “cathartic revulsion” was triggered and the citizens perceived the Communist Party as illegitimate. Id. The people mobilized protests against the government believing that a new constitution would restore their rights. Id. at 1249. Eventually the Communist government surrendered to the will of the people. Id. at 1247-48. Unlike the people of Czechoslovakia, the people of Poland perceived the Communist Party’s role in the state as illegitimate. Id. at 1241. Poland allowed other political parties to be legally established even though the elections were rigged to "maintain[] . . . political supremacy." Id. at 1244. After various protests the government finally implemented political reforms of “pluralism and capitalism usher[ing] Polish communism into the chronicles of history with a stroke of a pen.” Id. at 1244.
activity outside officially-sanctioned channels has met consistent and fierce repression, including harassment, arrest, imprisonment, torture, executions, and targeted assassinations."

(2) Helms-Burton Act: The United States Response to Cuba

In 1996, President Bill Clinton signed the Helms-Burton Act into law. The purpose of the Act was to strengthen sanctions against Fidel’s regime, to support the initiation of a democratic process on the Island, to protect the United States from acts of Cuban terrorism, and to protect United States nationals from confiscation of property by the Castro administration. The Act, in essence, prevents the United States, or its allies, from fostering relationships with Cuba until its government meets certain criteria. The language of the Helms-Burton Act demands that Cuba must begin accepting democratic policies, evidenced by a transitional government, before the United States will restore its relationship with the Island.

The combination of the United States embargo, the termination of subsidies from Russia, and the sharp decline in export trade as a result of the collapse of the Soviet Union severely affected the Cuban economy. "Cuban nationals were asked to leave their manufacturing and office jobs to..."

81. Mills & Koslosky, supra note 12, at 1258. In 1995, the Concilio Cubano (Cuban Council) was composed of a coalition of 140 unofficial dissident groups. However, the Cuban government shut down the council.

If Cuba’s future leadership creates channels permitting dissenting opinions to play an influential role in Cuban politics, then the next step would be to see whether the "reform comes from within or outside the party." However, if such reform is triggered from outside the party, it becomes problematic because the nationals will view their own constitutional framework as illegitimate.

Another possibility is that Cuban nationals may perceive the policies of the regime as illegitimate, rather than the party itself. This is similar to the crisis in Hungary. "[D]issension [in Hungary] could be manifested within the party ranks, which allowed opposition to manifest within the government in addition to external to it." Id. at 1255. The crisis of legitimacy was limited to the policies of the Communist Party, thus resolution for Hungarians was easier in juxtaposition to other nations. The Hungarian government in the 1940s even allowed an opposition movement within the party, which allowed the dissenting party to maintain itself as a legitimate political party. Adopting a Hungarian model would require the Cuban leadership to amend the 1922 Constitution to "accommodate new political pluralism while remaining in force under a democratic Cuba." Id. at 1259. This amendment would allow a healthy and legitimate dissent to form within the party.

82. Dhooge, supra note 9, at 575. This statute was named after the two legislators who introduced it, United States Senator Jesse Helms (Republican, North Carolina) and United States Representative Dan Burton (Republican, Indiana).

83. Id. at 576.

84. See generally Mills & Koslosky, supra note 12.
‘volunteer’ in the fields.”

Unemployment rapidly became customary and rationing was introduced for such commodities and services as food, fuel, and electricity.”

Droves of Cubans immigrated to the United States and other nations to escape the corruption and injustice. For many unable to escape, life under Communism was unbearable, evidenced by the fact that “Cuba has one of the highest suicide rates in the Americas.”

c. Raúl Castro: The Brother of the Dictator

In 2006, after forty-seven years of uninterrupted governance, Fidel underwent surgery and temporarily delegated his authority to his brother Raúl. Two years later, Fidel resigned from office as President of the Council of State and Commander in Chief of Cuba. In 2011, Fidel resigned all of his state and political positions and never attempted to regain power. In the same year, Cuba’s Communist Party elected Raúl to succeed Fidel as head of the country’s highest political body and only legal party. Raúl introduced several significant changes. He “allowed unused state-owned land to pass over to private farmers and cooperatives in an attempt to boost domestic food production.” The effects of these changes were evidenced in the distinct rise in salaries and state pensions.

Further, Raúl expressed the concern that “[m]any Cubans confuse socialism with freebies and subsidies, and equality with egalitarianism.” In 2010, the administration began to reassess the Island’s governmental structure and considered moving towards a model that allows for private commerce. A component of this process included the government’s plan to “reduce the size of the state.” Unfortunately, Raúl has not been able to

85. Gridr, supra note 2, at 463-64.
86. Id.
89. Id.
90. Id.
91. Id.
92. Profile: Raul Castro, supra note 60.
93. Id. Recently, Raúl also relaxed restrictions to own mobile phones and computers. Id.
94. Id.
95. Id.
96. Id.
97. Id.
substantially advance these objectives because the economy has steadily and substantially declined.

In comparison with people of other Latin American countries, Cubans have a low per capita income. “[Cubans] have fewer television sets, telephones, computers and cars relative to their population than most Latin American countries, and the lowest percentage of people with access to the Internet in the region, even below Haiti.”

The U.N. Human Development Report “lists the island’s per capita income at $6,000 a year.” Cuba’s current gross domestic product (“GDP”) is somewhere between Haiti’s and Nicaragua’s. “1.8 million pensioners [received] an average of $10 a month, equal to about three percent of the GDP.” Currently, Cuba’s trade deficit stands in excess of one and one half billion dollars annually.

As a result of the Island’s recent economic downfall, the government has truncated the entitlements originally promised to the Cuban nationals. Additionally, the Island has been unable to service its thirteen billion dollar debt to Western creditors.

In the midst of the despair and darkness, there is a glimmer of hope for the Cuban people. In April 2011, Raúl Castro opened the Communist Party congress with a declaration that “leaders should be limited to two five-year terms in office.” Two years later, in February 2013, Raúl was re-elected to a second five-year term. Later, “[d]uring a nationally televised speech, Castro announce[d] that he will step down from power in 2018 when his term is over.” Commentators on Raúl’s shocking speech mentioned that he “hinted at other changes to the constitution, some so dramatic that they will

98. Oppenheimer, supra note 87.
99. Id.
100. Grider, supra note 2, at 462-63. The real per capita GDP of Cuba is only $2,000 per year. Id. at 462. “In 1958, Cuba ranked third in Latin America, behind only Argentina and Venezuela, in [Gross National Product]. Today, Cuba ranks in the bottom quintile of GNP in Latin America.” Id. at 462-63.
102. Dhooge, supra note 9, at 588.
106. Id.
107. Id.
have to be ratified by the Cuban people in a referendum.”108 “The inevitable end to Cuban caudillismo109 . . . and a corresponding change in Cuba’s international political and economic relations may usher in a new era of Cuban constitutionalism.”110 Cuba’s relationship with the United States continues to be precarious.111 Until recently, the United States government refused to engage with the Cuban government under the leadership of Fidel or Raúl Castro.112 As for the people’s legitimacy crisis, analysts await Raúl’s response.113 The Cuban government has permitted neither a dissenting group to form nor a strong civil society to coalesce, independent from the state or the party.114 Most likely, the Cuban government has proscribed opposition movements because otherwise a new constitutional system would have to be developed.115

108. Cuba’s Raul Castro Announces Retirement in 5 Years, USA TODAY (Feb. 25, 2013, 12:09 AM), www.usatoday.com/story/news/world/2013/02/24/cuba-president-castro-parliament/1943365. See also Hannah Allam, Even if Raul Castro steps down in 2018, U.S.-Cuba relations may not thaw, MCCLATCHYDC (Feb. 25, 2013), http://www.mcclatchydc.com/news/nation-world/world/article24745387.html. (“The Castro brothers know by now that such moves also play well in the United States, where they just got a public relations boost with the remarks of a U.S. senator who led a delegation to Cuba this month to seek the release of Alan Gross, an American imprisoned on the island for illegally importing communications equipment while on a USAID-funded democracy-building program.”).

109. Mills & Koslosky, supra note 12, at 1234. In this context, the term “caudillismo” refers to the cult of personality of the political-military leader Fidel Castro.

110. Id.

111. Id. at 1264.

112. Id. Current developments will be discussed later in this comment. See Section III.C.

113. Id. at 1266. Some constitutional analysts anticipate that in the future, Cuba will choose not to reenact the 1901 or 1940 constitutions. Both constitutions guarantee “the right to possess property, without government interference.” Id. at 1266. Re-enacting these particular constitutions would not be sufficient to legitimize the government. However, “if a crisis of legitimacy is focused on Castro’s Communist Party rather than the state itself,” it is then foreseeable that Cuba will “adopt an entirely new document.” Id.

114. Id. If Castro’s party responds to the skepticism by permitting a “limited political pluralism,” then the Cuban leadership would have the opportunity to amend the 1976 Constitution and restore protections for property, political, and civil rights. Similar proceedings were successful in Hungary. Id. at 1267.

115. A healthy internal opposition will encourage private ownership, domestic entrepreneurship, and foreign investment.
3. Is the Cuban Culture Worth Saving?

The poet T.S. Eliot once described culture as “that which makes life worth living.”

116 The Cuban culture is no exception. Cuban culture is rich with history, diversity, and luscious traditions, from the distinct salsa music to the delicious Hispanic cuisine. Cubans are a conglomeration of individuals from Spanish, African, French, Asian, and Jewish cultures and are known for their lively and excitable personalities. 117 Education and hard work have always been critical aspects of the Cuban lifestyle. Cubans who have immigrated to the United States have experienced success and security as a result of their work ethic. Economically, Cubans enjoy greater security than other Hispanic groups in the United States. 118

Currently, Cuban Americans play an influential role in American culture, especially in the political sphere. 119 One reason for the fierce level of political engagement is that many former members of the Cuban government immigrated to the United States. 120 Another reason Cubans participate heavily in American politics is because they understand that “politics is a tangible thing that has real and deep consequences.” 121 “The driving ideological force behind most Cuban American political activity has been opposition to the Marxist regime in Cuba.” 122 In 1990, seventy-eight percent

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116. THOMAS S. ELIOT, NOTES TOWARDS A DEFINITION OF CULTURE 26 (1948).


118. Sean Buffington, Cuban Americans, COUNTRIES AND THEIR CULTURES, http://www.everyculture.com/multi/Bu-Dr/Cuban-Americans.html (last visited Nov. 21, 2015) (“In 1986, the median family income of Cuban Americans was $26,770 — $2,700 less than the median for all U.S. family incomes but $6,700 more than the median for all Hispanic American family incomes. Cuban Americans are also highly educated; fully 17 percent of the Cuban American population has completed college or college and some graduate schooling, compared with eight percent of Puerto Ricans, six percent of Mexican Americans, and 20 percent of the total U.S. population.”).

119. Id.


122. Buffington, supra note 118.
of Cuban Americans were registered to vote. Studies show that Cubans overwhelmingly vote for the Republican Party as a result of their conservative views. Cubans recognize that the United States plays a pivotal role in Cuba’s prospective democratization. In addition to the political involvement, Cubans have made distinct contributions to the fields of academia, medicine, business, science, arts, sports, and music.

Unlike cultures that encourage independence or private personalities, Cubans have a reputation for being lively and boisterous. It is customary to spot Cubans socializing around the domino table, smoking cigars, drinking Cuban coffee, and discussing politics. Freedom is an essential element of the Cuban way of life. Thus, when the people lost their rights to life and property they felt compelled to leave their beloved homeland. As a result of the forced exodus, there is a widespread desire, among the exiles, for the opportunity to return and recreate a free Cuba. However, these same individuals refuse to return until the government makes some permanent changes. Rigoberto Sotolongo and his son José escaped from Cuba twenty-two years ago solely to procure the freedom and opportunities they could never receive under Castro’s communism. Both men disclosed that they would not return to their homeland until the “current corrupt government . . . [is] removed” and democracy is established.

123. Id.


125. See id. “In times of economic hardships, this game was a resort used for entertainment to compensate for hard work and a way to forget economical problems. The preference for dominoes could have been influenced by the mild climate of the island and the open personality of Cubans.” Id.

126. See Amandi, supra note 120.

127. Portia Siegelbaum, Cuban-Americans Going Home for Christmas, CBS NEWS (Dec. 23, 2011, 11:30 PM), http://www.cbsnews.com/news/cuban-americans-going-home-for-christmas/. This is evidenced by the large number of Cuban exiles that return to the Island during the holiday season. In 1996, travel restrictions between the two nations were relaxed and in 2011 there were approximately 29 flights from the United States to Havana, Cuba in one day. Id.

128. Sotolongo Interview, supra note 79, at 1.

129. Id.
B. Germany

1. The Hitler Era

Like Cuba, Germany also endeavored to establish a free government but faced overwhelming barriers. In the 1920s, Germany was a republic. However, by 1932 the German Nazi party controlled Germany’s parliament. One year later, Adolph Hitler was appointed as Chancellor of the nation. Like Castro’s regime, Hitler introduced a reign of unbridled control and eventual terror.

Hitler began his reign of terror by enacting laws that effectively stripped rights from certain groups of people. Like in Cuba, the Nazis began by expropriating Jewish businesses. Jewish people were stripped of all property rights. Eventually, this injustice led to the “Wannsee Conference.” High-ranking Nazi leaders and German government officials met to discuss and formulate policies to answer the “Jewish Question.” The Nazis coined their answer to this question as the “Final Solution.”


132. *World War II in Europe, The History Place*, http://www.historyplace.com/worldwar2/timeline/ww2time.htm (last visited Nov. 21, 2015). In his quest to rule the world, Hitler’s Nazis invaded and annexed the following territories: Czechoslovakia, Poland, Denmark, Norway, France Belgium, Luxembourg, Netherlands, Greece, Yugoslavia, Minsk, portions of Russia, and Italy. Id.

133. Gabriel, *supra* note 131, at 149 n.93. These laws famously known as the Nuremberg Laws of 1933 articulated the Nazis’ “longer-term goal of promoting Nordic or Aryan racial purity, galvanizing the distressed German economy, and restoring the historic glory of both the German military and German territorial polity.” Id.


135. Id.


137. Lucy Dawidowicz, *The War Against the Jews, 1933-1945* xiii-xv (New York, 1975). The term “Jewish Question” has historically been used to characterize attitudes of anti-Semitism. Id. at xiv.

138. Id. at xiv.
implementation of this “solution” resulted in the massacre of millions of innocent men, women, and children.\textsuperscript{139}

The fact that the government and the nation were driven by an immoral creed does not automatically suggest that the Nazi regime was illegitimate.\textsuperscript{140} At that point in time, German citizens were desperate to follow someone who would promote change. They believed in Adolph Hitler; they believed in the Nazi doctrine and were willing to follow his lead.\textsuperscript{141} While the western world was shocked at the consequences of a nation led by Nazism, the Germans, as a whole, trusted their leader and his ideas. They did not view Nazism as illegitimate or doubt Hitler’s authority.\textsuperscript{142}

2. Life After Hitler

Nazism reigned in Germany until May 1945, when German armed forces were compelled to surrender.\textsuperscript{143} The nation was partitioned into four military occupation zones.\textsuperscript{144} The United States, France, and the United Kingdom controlled the western zones, and the Soviet Union had jurisdiction over the eastern zone.\textsuperscript{145} By 1949, the western zones merged to form the Federal Republic of Germany (“West Germany”).\textsuperscript{146} The eastern zone became the German Democratic Republic (“East Germany”).\textsuperscript{147} The division between the people of West and East Germany was similar to the division between the Cuban exiles and nationals. Like the Cuban exiles in the United States, West Germany fully embraced the democratic system of its benefactor nations.\textsuperscript{148}


\textsuperscript{140} Aditi Bagchi, \textit{Intention, Torture, and the Concept of State Crime}, 114 \textit{Penn St. L. Rev.} 1, 24 (2009) (“[I]nasmuch as popular support or consent is seen as the basis for legitimacy without any reference to the institutions or policies which are supported, bad governments supported by morally corrupt societies would be deemed ‘legitimate.’ We could not condemn as illegitimate brutal popular governments, such as Nazi Germany, which are ruthless and cruel but not necessarily perceived as such within the society governed.”).

\textsuperscript{141} See id.

\textsuperscript{142} See id.

\textsuperscript{143} See generally Richard J. Evans, \textit{The Coming of the Third Reich} (New York: Penguin 2003).


\textsuperscript{145} See id.

\textsuperscript{146} Stack, \textit{supra} note 16, at 1215.

\textsuperscript{147} Id.

\textsuperscript{148} See id. at 1249-50.
Conversely, similarly to the Cuban nationals, East Germany followed a trajectory leading the nation from Nazi fascism to Russian communism.\textsuperscript{149}

\textbf{a. The Communization of East Germany}

In 1952, East Germany passed a law providing for the dispossession of property for alleged misdemeanors and felonies.\textsuperscript{150} Eventually, that law transmogrified into “the transformation of private property into socialist property of a cooperative in which the original holders held nothing more than titular ownership.”\textsuperscript{151} This transmogrification was based on the ideology that property was best preserved for the collective good.\textsuperscript{152} This same ideology has perpetuated Cuban life throughout the Castro regime.

As the concept of private property is non-existent under a communist ideology, Communism had a devastating effect on East Germany. “Life under a communist system changed the East Germans. . . . [as] they lived under a different set of laws, with a different social system, a pattern of political oppression, a struggling economy, and a low standard of living.”\textsuperscript{153} Unemployment soared and restitution of property claims plummeted.\textsuperscript{154} East Germans experienced a violation of a fundamental right, as they could not own property. East Germany’s economic downturn, as a result of communism, resembled Cuba’s experience. The East Germans’ frustration with the economic stress and infringement of liberties led to the eventual crumbling of the regime along with the Berlin Wall in 1989 when the two nations were unified.\textsuperscript{155} However, forty-five years of separation vastly changed the personalities of the two nations, and this caused conflicts between the two identities.\textsuperscript{156}

\textbf{b. The Democratization of the Re-Unified Germany}

The treaties binding West and East Germany established a democratic form of government.\textsuperscript{157} The “marriage” between these two nations protected the newly formed nation from serious danger to its democracy and

\begin{itemize}
  \item \textsuperscript{149} See Dorothy Ames Jeffress, Note, Resolving Rival Claims on East German Property Upon German Unification, 101 YALE L.J. 527, 530 (1991).
  \item \textsuperscript{150} Frank, supra note 144, at 815.
  \item \textsuperscript{151} Id.
  \item \textsuperscript{152} Jeffress, supra note 149, at 527. The concept of State controlled property was commonly known as Volkseigentum. Id.
  \item \textsuperscript{153} See Stack, supra note 16, at 1249-50.
  \item \textsuperscript{154} Id.
  \item \textsuperscript{155} Id. at 1215.
  \item \textsuperscript{156} Id. at 1249.
  \item \textsuperscript{157} Id. at 1212.
\end{itemize}
East Germany had the unique advantage of [merging] with [its] western counterpart" which could support its transition from communism to democracy, unlike other countries in Eastern Europe. West Germany had already developed a strong market economy, a robust democratic government, a solid relationship with the Western world, and still had a history, personality, and culture identical to that of East Germany. Nations such as Czechoslovakia, Poland, and Latvia transitioned from socialism to a democratic state without that support. Similarly, Cuba has the opportunity to follow Germany’s lead since a large percentage of Cubans currently live in a democratic society. Instead of two nations merging, Cuban exiles could be allowed to return to the Island, and they would be in a position to assist the Cuban nationals in transitioning from communism to democracy.

Unfortunately, even years after the reunification, a “deep economic and emotional divide between east and west” remained. East Germans struggled to trust the representative process that was so quickly thrust upon them. “[T]he reunification . . . was an absorption of East Germany into the West German system, rather than a marriage of two equal states.” The reunified government left East Germans feeling “uninformed . . . and uninvolved in their new economy.” Furthermore, the East Germans' lack of ownership in privatized enterprises encouraged uncertainty and mistrust toward the new government. Dissension concerning the “foreign” western government prompted East Germans to perceive the new government system to be illegitimate.

158. Id. at 1213 n.15.
159. Id.
161. Id. at 1212 (quoting Matt Marshall, E. Germans Shut Out in Estate Deals; Privatization Halted for Review by Court, WASHINGTON POST (1995)). The relationship between East and West has been described as “divided still by what some call a spiritual and mental version of the Berlin Wall.” Id. at 1212 (quoting Alan Cowell, It’s Young vs. Old in Germany as the Welfare State Fades, THE NEW YORK TIMES (1997)).
162. Id. at 1212.
164. Id. at 1228.
165. Id. at 1212-1213.
166. See Bagchi, supra note 140, at 24.
As part of the reunification process, all East German courts were shut down, and the “West German system of specialized courts” superseded them.\textsuperscript{167} West German judges presided instead of East German judges.\textsuperscript{168} The rationale behind this decision was that the East Germans simply did not know West German law and procedure. The prevalence of West German judges was only supposed to be provisional, but instead “[m]any East Berliners . . . began to feel that they were being ‘colonized by the West . . . .’\textsuperscript{169}

Cultural values greatly differed between the two people. “East Germans have witnessed Western prosperity and are generally unsatisfied with their relative situation.”\textsuperscript{170} They viewed West Germans as “foreigners within[,]” and “feelings of animosity . . . have grown and a certain East German ‘nationalism’ has arisen.”\textsuperscript{171} Some viewed, and still view, Western democracy and the unmistakable economic disparity between Easterners and Westerners as an “occupation.”\textsuperscript{172} East Germans were inundated by the communist mindset for so long that they naturally mistrusted the western way of life and government. For example, citizens of two eastern states thwarted a vote to unite them, mainly because of their mistrust for the government and frustration over the reunification.\textsuperscript{173} Citizens cited their general mistrust of the democratic system as their reason for opposing the unification.\textsuperscript{174} They expressed intense frustration toward West German leaders who made promises of equality between the two groups and failed to keep those promises. East Germans felt discouraged as a result of the political and economic division gaping between them and their Western counterparts.

The East German cynicism towards the West German system of government resembled the legitimacy crises in Czechoslovakia, Poland, and Hungary.\textsuperscript{175} East Germans perceived the role of their party, the policies of their party, and possibly the Communist Party itself as illegitimate.\textsuperscript{176} The

\begin{itemize}
  \item \textsuperscript{167}. Kamali, \textit{supra} note 163, at 109.
  \item \textsuperscript{168}. \textit{Id}.
  \item \textsuperscript{169}. \textit{Id}.
  \item \textsuperscript{170}. Stack, \textit{supra} note 16, at 1250.
  \item \textsuperscript{171}. \textit{Id}.
  \item \textsuperscript{172}. \textit{Id} at 1213 (quoting Dan Van Der Vat, \textit{Freedom Was Never Like This}, 9 (1991)). East and West Germans hold deep prejudices against each other. East Germans “tend to see westerners as exploiters, and [westerners] . . . regard the east as an unworthy sinkhole for their tax money.” \textit{Id} at 1250 (quoting Alan Cowell, \textit{Kohl is an Iron Man, But the Price is High}, \textit{The New York Times} (1996)).
  \item \textsuperscript{173}. \textit{Id} at 1229-1290.
  \item \textsuperscript{174}. \textit{Id} at 1230.
  \item \textsuperscript{175}. See Travieso-Diaz & Bleisteiner, \textit{supra} note 16, at 187-90.
  \item \textsuperscript{176}. See id. at 189.
\end{itemize}
East Germans’ skepticism prevented them from embracing their rights to own private property and engage in civil politics under the new system. In spite of all the obstacles, the transition was an overall success.\textsuperscript{177} East Germany received freedom of speech, travel, and the right to own property.\textsuperscript{178} The entire nation experienced an economic boom.\textsuperscript{179} The United States was supportive of the reunification.\textsuperscript{180} Former Secretary of State Condoleezza Rice stated, “The United States—and President George H.W. Bush—recognized that Germany had gone through a long democratic transition. . . . Any issues that had existed in 1945, it seemed perfectly reasonable to lay them to rest.”\textsuperscript{181} While the president did not make a public statement, he “never tried in any way to prevent German unification.”\textsuperscript{182} Many years have passed since German reunification, and ample discussion has occurred on the subject. These discussions allow current and future leaders to analyze the success and failure of the German experience in order to prepare for a smooth transition. While the Helms-Burton Act was proposed to stop the communist agenda and support the Cuban nationals’ quest for freedom, the sanctions have not eliminated communism. Rather, these sanctions have worsened the nations’ plight. There are two significant problems still preventing Cuba from making a smooth transition into democracy: (1) Castro’s administration is still viable, and (2) the Helms-Burton Act prevents Cuba from making any substantive progress.

III. THE PROBLEM

A. The Viability of Castro’s Administration

Fidel understood the value of creating dissension, even within his own party. In order to ensure that his disastrous legacy continued, Fidel delegated his authority to a few of his most trusted followers.\textsuperscript{183} This action “resulted in the erosion of trust amongst Castro’s ‘inner circle.’”\textsuperscript{184}

\begin{flushleft}
177. See Feffer, supra note 80.  \\
178. See id.  \\
179. See id.  \\
180. Der Spiegel, "Condoleezza Rice on German Reunification: 'I Preferred To See It as an Acquisition'” SPIEGEL ONLINE (Sept. 29, 2010), http://www.spiegel.de/international/world/condoleezza-rice-on-german-reunification-i-preferred-to-see-it-as-an-acquisition-a-719444.html.  \\
181. Id.  \\
182. Id.  \\
183. Espino, supra note 32, at 426–427.  \\
184. Id. at 427.
\end{flushleft}
While the Castro government attempts incessantly to portray a united and strong government, dissention grows in the upper echelons of the Castro government as Fidel Castro withdraws from the political scene—dissention ‘created and fueled by Fidel himself to prevent alliances [that could] threaten his rule.’

When Fidel was no longer physically able to lead the Island, his brother became the “equivalent of President for life.” While some reports show that Raúl is redesigning the communist system, these changes have progressed at a sluggish pace. Many believe that true democracy will never be achieved in Cuba until Castro and the communistic ideology are permanently dethroned.

B. The United States Responds: The Helms-Burton Act

1. History of the Act

The United States established the Helms-Burton Act in response to a tempestuous relationship that had developed between the burgeoning Cuban communists and the United States. The United States’ hostile response was precipitated by the casualties from the Bay of Pigs invasion, the alarming relationship between Cuba and Russia, and the “uncompensated nationalization of American property valued at 1.8 billion dollars.” The expropriated property is currently valued at over seven billion dollars. In writing this Act, Congress relied on the Foreign Assistance Act of 1961 and the Trading with the Enemy Act to articulate a remedy for restitution of confiscated property. Prior to the establishment of the Helms-Burton Act, the United States government enforced a number of economic embargos that were already in place from the Foreign Assistance Act.

185. Id. at 426.
187. Id.
188. Dhooge, supra note 9, at 575-76.
189. Id. at 581-82.
190. Espino, supra note 32, at 435.
The Helms-Burton Act was introduced in 1995. The Clinton Administration rejected the bill, “until the February 24, 1996, shootdown of two unarmed U.S. civilian aircraft over international waters by Cuban military aircraft resulting in the death of four Cuban-Americans.” As a result of the incident, the bill quickly passed through the House and the Senate and was signed by the President. The Helms-Burton Act “take[s] proactive steps to encourage an early end to the Castro regime” and a transition to a “democratic process.” Title 1 of the Act “strengthens the U.S. embargo against Cuba and calls for the concomitant strengthening of international sanctions.”

The Act proscribed all trade with Cuba. Not a single product, technology or service from the United States could be exported to Cuba either directly or through a third party. An exception is allowed only for informational materials and limited humanitarian goods. All goods and services of Cuban origin are prohibited from being imported into the United States either directly or through a third party. This prohibition impacts offshore transactions as well as every Cuban national who has a product to sell. Vessels are banned from carrying goods or passengers to or from Cuba or even from “carrying goods in which Cuba or a Cuban national has any interest” into a U.S. port.

Cuban nationals are forbidden from owning property or other assets in the United States. The United States blocks all “payments, transfers, withdrawals or other dealings” unless the Treasury Department approves it. Additionally, “travel by U.S. nationals to Cuba is severely restricted.” Until recently, the only groups that were allowed to travel were “official government travelers, journalists and persons visiting close relatives in...

193. Dhooge, supra note 9, at 575.
194. Id. at 589-90.
195. Id. at 576.
196. Id.
197. Id. at 577.
198. Id. at 585.
199. Id.
200. Id.
201. Id.
202. Id.
203. Id. at 586.
204. Id.
205. Id.
circumstances of extreme humanitarian need.” Humanitarian travelers and persons traveling in connection with specific purposes were allowed to travel only if they acquired specific licenses from the Office of Foreign Assets Control.

The Act states that embargos will only be lifted if the government begins the process of democratization. The legislature intended to use this Act to protect national security interests of the United States. Lastly, this Act has language that protects United States citizens from “confiscation of and trafficking in property confiscated by the Castro government.” The Helms-Burton Act “affect[s] all U.S. citizens, permanent residents, persons and organizations physically located in the United States and branches and subsidiaries of U.S. organizations located throughout the world.” Violators of this Act are held accountable and could be imprisoned or have to pay “corporate and individual fines.”

The international community’s reaction to this Act “was universal, immediate and unequivocally hostile.” Canada and Mexico complained that the Act infringed upon the North American Free Trade Agreement, which guaranteed the free movement of business travelers between the United States, Canada, and Mexico. The European Union argued that the Act breached the Uruguay Round of the General Agreement on Tariffs and Trade. The majority of Latin American countries filed protests against this Act. Spain and Portugal “rejected the Act and urged the United States to reconsider its enforcement.” The United Nations adopted a resolution in

206. Id. (citation omitted).
207. Id. (citation omitted).
208. Id. at 576.
209. Id.
210. Id. at 585.
211. Id. The Act allows the President to suspend its effect “every six months if the President deems it necessary to serve national interests of the United States and to expedite Cuba’s transition to democracy.” Id. at 577.
212. Id. at 577.
213. Id. at 577-578. The repercussions of this Act went far beyond simply restricting trade between the U.S. and Cuba. As a response to the Helms-Burton Act, the Canadian Sugar Institute wrote a letter to the Canadian Prime Minister expressing its concern that this Act “would punish Canadian companies that had no relations with Cuba, and would regulate business activity taking place within Canada.” Jonathan R. Ratchik, Cuban Liberty and the Democratic Solidarity Act of 1995, 11 AM. U.J. INT’L L. & POL’Y 343, 354-355 n.73 (1996).
214. Dhooge, supra note 9, at 578.
215. Id.
216. Id.
November of 1996 “calling upon the United States to end its economic embargo against Cuba.” The Vatican also jumped into the conflict “by issuing a statement questioning the legality of the Act.”

2. How the Helms-Burton Act Affected Cuba

These embargos have had a profound effect on Cuba. For example, the survival of the Island hinges on the success of its sugar industry. Approximately fifty percent of Cuba’s export earnings are derived from sugar. Banning the sugar trade drove Cuba’s economy into a steep depression, one that impacted the lives of every Cuban national. On top of the economic devastation, the embargos severely restricted communication between Americans and Cubans. Families that were ripped apart due to the communist takeover were restricted from visiting or even communicating with their loved ones.

The lack of communication with the outside world is one reason why the Island is at a standstill. Castro has taken advantage of this by lying to his people about Americans. As they are cut off from the entire outside world, the Cuban nationals have no other choice but to believe the Communist propaganda and forfeit any dreams of freedom. Instead of pressuring the Cuban government, the embargos have caused the Cuban people to suffer. “Increasingly, the Cuban embargo seems like an outdated way to punish Fidel Castro when in actuality, the Cuban people are being punished. Economic policy towards a country of 11 million people needs to be based on more than a personal vendetta against the Castro family.”

217. Id. at 578-79.
218. Id. at 579.
219. Id. at 587.
220. Id. at 588.
221. Id.
222. Id. at 585.
223. See id.
224. See Grider supra note 2, at 461.
225. See Oppenheimer, supra note 87, at 324.
226. See id.
228. Id.
IV. THE LEGAL IMPLICATIONS OF THE HELMS-BURTON ACT IN THE UNITED STATES

There are a number of legal implications as a result of the Act. Instead of providing remedies for the victims of the illegal expropriation, this Act places numerous restrictions on what the legal system can do. American jurisprudence struggles with the issue of whether Congress delegated jurisdiction to courts to rule on these issues. Cuban nationals and exiles are unable to obtain justice because American courts have refused to interpret Congress’s acts. Many of these cases have been dismissed out of the consternation of overstepping Congressional boundaries. “[C]ourts should avoid interpreting acts of Congress as violating international law . . . .” The Helms-Burton Act limits courts from seeking justice for the Cuban Americans who are victims of Castro’s expropriation and prevents them from obtaining remedies.

V. THE SOLUTION

The ultimate Cuban dream is to create a democratic state purged of radical tenets and welcoming reunification between the nationals and exiles. While Cuba’s story is distinct from the German experience, it is prudent to analyze the German democratization process and apply the principles that were successful while preparing to overcome the ideas that failed. Germans faced various challenges as a result of the reunification. Some of these included the partition between the western and eastern people and the masses and the elites. Moreover, the pace of the transition and the information provided to the East Germans caused a general feeling of distrust and skepticism towards the new government.

229. Some of these questions surround the applicability of the Act of State doctrine. While the Act of State doctrine is not an international law principle, it is accepted that American courts “will not pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories.” Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 854 (2d Cir. 1962), rev’d on other grounds, 376 U.S. 398 (1964).

230. See Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967). The court chose to apply the Hickenlooper Amendment that allowed “cases arising out of foreign expropriations to be decided on the merits (unless of course the Executive Branch . . . intervene[s]).” Id. at 180. Even though “[t]he president could have vetoed the measure if felt it seriously threatened his freedom of action in the conduct of foreign affairs but he chose not do.” Id. at 182-83.

231. Rachik, supra note 213, at 363 n.118.

A. The Challenges Faced When Uniting Two Groups who are Culturally Similar but Have Irreconcilable Experiences

1. Germany Reunified: West and East Germans

West Germans were perceived as a “wealthy class of individuals who . . . came in and took all the best properties through their property claims and demand[ed] restitution.”233 In fact, in the 1990s, “only 21 percent of Easterners believe[d] the slogan ‘We are one people’ to be true. Instead, seventy percent [were] of the opinion that they [were] treated as ‘second-class Germans.’”234 “Westerners dominate[d] within the parties, the ministries, the courts, the bureaucracies and in the interest groups.”235 Thus, it was not surprising that communist groups resurfaced in eastern zones. During the time when the reunified government implemented privatization and restitution, the unrest was infectious. East Germans mistrusted their western brothers and endeavored to revert back to a communist society.236

2. The Cuban Diaspora: Cuban Nationals and Cuban Exiles

Initially, when Fidel Castro “liberated” the Island from absolute rule, Cubans followed his revolutionary notions. When Fidel launched his campaign against capitalism and began stealing freedoms, the Cuban people fought back. The government reacted harshly towards the insurgents. Some were imprisoned, some were executed, and many others escaped to neighboring nations.237 Nearly one million exiles escaped from Cuba and a diaspora transpired.238 Cuban exiles escaped for many of the same reasons East Germans escaped to the west side of the Berlin Wall. As a percentage of population, however, more Cubans escaped from Cuba than Germans

238. Gridner, supra note 2, at 464 (“Unlike other exile communities that suffered from diaspora, the Cuban exile community has remained comparatively intact, concentrated primarily in one country in only two geographic regions, greater Miami and New Jersey. Many in the community remain focused on events in Cuba.”); Antonio R. Zamora, Real Estate Development in Cuba: Present and Future, 15 ILSA J. INT’L & COMP. L. 605, 609 (2009).
escaped from East Germany. The majority of Cuban exiles are anti-Castro, while the average Cuban national “remains surprisingly loyal to the Revolution.” In fact, it is the result of the anti-Castro inclination that, until recently, persuaded the United States policies against Cuba. Unlike exiles in Germany, “the Cuban-American community has assimilated less than many other . . . exile groups . . . .”

In the same way that the East Germans perceived the West Germans as threatening towards their lifestyle, the Cuban nationals feel threatened by the Cuban exile community. Notwithstanding the fact that both Cuban exiles and nationals desire their island to revert back to a free society, there exists a great deal of friction. Cuban exiles possess a “position of strength and bargaining power” that nationals do not possess. Exile communities are wealthier and more affluent compared to their national brothers. Even in Cuba, the majority of individuals who escaped the island already had the necessary financial resources. At the time of Castro’s rise to power, racism was a constant problem. As evidence, the wealthy and affluent exiles are predominantly Caucasian, while the nationals, still on the Island, are chiefly from “African or mixed ancestry.” Any remaining Cuban nationals with influence are those in the Communist Party. Since the diaspora, the economic gap between the exiles and the nationals has grown. Exiles living in the United States have worked diligently and experienced considerable success. Meanwhile, the individuals living on the Island have lost hope of ever seeing the fruits of their labor.

239. See Grider, supra note 2, at 464. At least ten percent of Cubans left their homeland for political and economic reasons as opposed to a much smaller percentage of Eastern Europeans. Id.
240. Id. at 462, 464.
241. Id. at 464-65.
242. Id. at 464.
244. Grider, supra note 2, at 464.
245. Id.
246. Id.
247. Id.
248. Id. at 465.
249. Id.
250. Id. at 464.
251. Id.
252. See Sotolongo Interview, supra note 79, at 1.
In addition to the racial tension and inequalities, there exists a psychological divide between the exile and national communities. Similar to the divide between Eastern and Western Germans, Cuban exiles view the nationals’ loyalty to Castro as treasonous.253 Conversely, Cuban nationals feel apprehensive and suspicious about the exile community.254 The Cuban government has taken advantage of the public’s anxiety. In a radio broadcast to the Island, Castro warned the Cuban people that, “in Miami, they are already parceling out our country, and dreaming of getting everything back, but that won’t happen as long as there remains one single man or woman with a sense of dignity.”255 The nationals fear the idea of the exiles returning and prioritizing their interests to the detriment of their countrymen’s interests. Even though transition has not yet occurred, the nationals already feel entrapped and harbor distrust towards the exiles and the American way of life.256 Such feelings of distrust are strikingly similar to what the Eastern Germans felt towards the West Germans.

3. Understanding the Roles and Relationship Between the Cuban Masses and the Cuban Elites

Transition is impacted by the strength of the people, both the masses and the elites.257 Nations that have successfully transitioned from one type of government to another have faced issues involving both mass mobilization and political elites.258 Both groups have a direct impact on the constitutional drafting and implementation processes. Understanding the roles and relationships between these groups is crucial to a successful transition. “The masses serve as the spark for a transition. . . . [R]evolutions result where the masses can trigger a transition through the use of force.”259 Elites also play a significant role in a governmental transition. “[E]lite consent for this particular form of political change is absolutely necessary and, in some instances, sufficient for the long-term success of democracy.”260 Any transition Cuba makes from Communism toward Democracy “will likely arise when the [elite] members . . . see a free market democracy as a valid and
advantageous alternative to their current situation.”

261 Constitutional politics “are influenced . . . by constraints and opportunities facing political elites, the level of popular mobilization, and ‘regional contagion’ effects.”

262 This was true in Germany as well. “After the fall of the communist regime in East Germany, there were few viable alternatives and the voluntary election by East Germans to join [West] Germany legitimated the incorporation process.”

263 Some historians argue that the negative experience East Germans had with democratization came as a result of the accelerated speed of the transition.

Communism naturally prompts a contrasting divide between the rich and the poor. As a result of restricted contact with Cuban nationals, little is known regarding the specific relationship amongst the classes inside of Cuba. What is clear, however, is that Communism creates a sharp line between those with privileges and those without hope. The average Cuban national faces a permanent glass ceiling because they are restricted from any opportunities to better themselves.

“[M]any people who otherwise would do higher learning instead spend that energy leaving the country.”

The intense situation present on the Island “may produce a reaction within Cuba for change.”

Cuba’s civil society is currently weak because it has been a “hermetically sealed society” for the last fifty years. Arguably,

[w]hile the masses may play a role in provoking or exacerbating a crisis of legitimacy on the island, they are not as likely to play as important a role as members of the elite in dismantling the current regime—primarily because of the general weakness of civil society in Cuba.

261. Espino, supra note 32, at 427. However, it is axiomatic that if forced to make a decision, the elites will choose to remain loyal because they were “brought up through the ranks thanks to Fidel or Raúl Castro . . . their fates [are] tied to a continuity of policies that favor them.” Creighton, supra note 233, at 26.

262. Mills & Koslosky, supra note 12, at 1235-36.

263. Kamali, supra note 163, at 109 n.67.


265. Creighton, supra note 233, at 28.

266. See Sotolongo Interview, supra note 79, at 1.

267. Id.


270. Creighton, supra note 233, at 28.
The elites owe their position to their relationship with Castro’s administration. Even if they desire a democratic nation, the elites fear they would risk everything by speaking against the regime. Nevertheless, if any permanent change were to occur on the Island, it would have to be as a result of changes implemented by the wealthy elites and supported by mass mobilization.

B. Choosing the Best Speed for the Transition and the Most Effective Remedy for Restitution is Critical for a Successful Transition

Analysts scrutinize history to understand the process by which a nation transitions from one form of government to another. Often, nations in the process of transitioning eliminate one extreme ideology only to implement its rival. These transitions may be characterized, scrutinized, and formulized by a variety of methods. The speed of the transition and the type of remedy the government offers injured parties plays a crucial role in preparing for a smooth transition.

1. The Speed for the Transition

Privatization is the process by which property, formerly nationalized, is returned to the people. The speed by which the government chooses to transition both directly and indirectly affects its success. Historically, nations have employed a variety of timetables. A government may implement privatization gradually or rapidly.

273. See Section B for a discussion of East Germany’s transition from communism to democracy.


275. Creighton, supra note 233, at 91. Other types of transitions include the Russian implementation of the neoclassical theory and the generic big bang approach. These discussions go beyond the scope of this comment. Id. at 92.


277. Grid, supra note 2, at 460.
economy to be paralleled with the old.278 “[A] ‘gradualist’ approach to privatization is the only feasible solution as it allows the development of a market economy that incorporates the socio-cultural and socio-psychological order of the country.”279 “Asset values should be permitted to reflect the declining political risk and improving business climate before these companies are sold.”280 Under a gradual transition, Cubans will have the opportunity to reap the value of their property to avoid “seeing them squandered in hard currency sales to foreign speculators.”281

Supporters of a gradual method recognize the need for actual owners who have a “long term view” as this encourages a “strong measure of control.”282 Gradualists fear that a rapid transition would cause “danger of severe economic dislocation if too much change is attempted quickly.”283 Additionally, some scholars, such as prominent exile Antonio Jorge, argue that a gradualist transition is preferred to avoid the political and social tensions that accompany a quick transition.284

b. Shock Therapy

The antithetical approach to a slow and gradual change is rapid reform.285 Ideally, shock therapy would involve a “full range of reforms including: macroeconomic stabilization, price liberalization, currency convertibility, trade and banking reformation, labor deregulation, privatization, and legal and social reformation, [enacted] simultaneously and as quickly as possible.”286 Proponents of a gradual process argue that the historical

278. Hendrix, supra note 33, at 96 (citing Hearings before the Subcomm. on Select Revenue Measures and the Subcomm. on Trade House Comm. on Ways and Means, 103d Cong. 314, 29 (1994) (statement of Irene Philippi, Senior Economist, Polyconomics, Inc.) (“Hearing”)).


280. Hendrix, supra note 33, at 96.

281. Id.


283. Id. at 98.

284. Gridr, supra note 2, at 460.

285. The former Polish Finance Minister Leszek Balcerowicz described the benefits of employing a shock method during a “period of extraordinary politics.” Mills & Koslosky, supra note 12, at 1244 n.162. He said, “[t]his ‘special state of mass psychology’ is one whereby the public is more willing to make personal sacrifices for the greater good when foreign domination ends or domestic political liberalization occurs.” Id. Utilizing a rapid transition secures reform and avoids the otherwise high likelihood of complications. Id.

286. Creighton, supra note 233, at 91.
repercussions of rapid transition has often produced “mass public opposition and dissonance amongst the elite, complicating economic transition even more and possibly delaying further needed reforms.”

Rapid transitions, however, are best used during a “period of extraordinary politics.” Leaders utilize shock therapy to ensure that “the public is more willing to make personal sacrifices for the greater good . . . .” Examples of scenarios involving “extraordinary politics” include the end of foreign control or the beginning of a democratic system. The merger of East and West Germany was what some analysts describe as a successful example of shock therapy. “German leaders seized the opportunity created by the fall of Communism to make extraordinary changes, and the two Germanies were politically and economically unified in one swift motion.” Both sovereigns signed the Treaty of Unification, which infused the democratic political processes of the west into the east zones. An additional treaty was set in place to launch a marriage of economies. A market economy was created that “operate[d] on principles of private ownership and competition driven by free pricing and the free movement of labor, capital, goods, and services.” These treaties also allowed for the unifying of the currency.

Nevertheless, the dislocation that occurs when property is privatized before a market exists and before a stable process is established is inherently dangerous and sometimes fatal to a fledgling country. The treaties both

287. Id.
288. Mills & Koslosky, supra note 12, at 1244 n.162 (quoting LESZEK BALCEROWICZ, SOCIALISM, CAPITALISM, TRANSFORMATION 146, 160-61 (1995)). Shock therapy is also beneficial and arguably necessary in a situation of “macroeconomic instability.” Id. Moreover, “fast privatizers argue that the benefits of a rapid and irreversible shift to private production outweigh the costs of reduced state revenue.” Fischer & Gelb, supra note 282, at 99.
289. Mills & Koslosky, supra note 12, at 1244 n.162.
290. Stack, supra note 16, at 1215.
292. Frank, supra note 144, at 818. Poland was another nation that successfully utilized a shock method. The Polish government created a market economy through the immediate privatization of formerly stated owned assets without the prior construction of a market infrastructure. Grider, supra note 2, at 459. Poland effectuated shock therapy in “macrostabilization, convertible currency, and privatizations . . . alongside further political reforms.” Mills & Koslosky, supra note 12, at 1244.
293. The West German Mark became the currency of both lands while the East German currency was invalidated.
294. See Grider, supra note 2, at 460.
Germanies signed caused a shock to the economy. In order for that
government to fulfill its goal of privatizing quickly, it “disassembled many
to displace high unemployment rates and disengagement with the
which led to high unemployment rates and disenchantment with the
new market system.” Jobs were drastically cut and East Germans had
almost no ownership in the newly privatized enterprises.

Likewise, the East Germans were not prepared for the shock of a new
economic system. As one observer noted, the “morale and attitudes of the
[East German] people are almost beyond repair.” Some critics maintain
that the “the psychological scars displayed by the East Germans are so deep . . .
that they have put the east into a worse position—for all its newfound
economic potential—than Eastern Europe’s other former Communist
states.” Thus far, shock therapy in European nations has proven to
“exacerbate[] the dislocations inherent in the transformation process.” If
not done correctly, rapid transitions can generate instability and mistrust
between a citizenry and its vulnerable government.

2. The Spectrum of Remedial Possibilities

Former socialistic and communistic nations have taken measures to
restore property expropriated by the state. Legislators recognize that their
ultimate goal in enforcing restitution is to ensure that “establishing historical
juridical justice will [not] beget new injustice.” “Restitution [of property] is
‘the natural law’ and should be the general rule with respect to previous

296. Id. at 1234-35.
297. Id. at 1238. As hindsight is always 20/20, analysts now offer a variety of suggestions
that might have eased the awkward transition of communist East Germany into a democratic

298. Id. at 1238. As hindsight is always 20/20, analysts now offer a variety of suggestions
that might have eased the awkward transition of communist East Germany into a democratic
system. Some suggest that a “better strategy would have been ‘to subsidise unnecessary jobs
temporarily [rather] than to support large numbers of unemployed in east Germany’. . .
Easing people out of employment more gradually would have allowed more time for adjustment.
Also, warning the East Germans in advance would have helped them to prepare.” Id. at 1235
(quoting Judy Dempsey, No Work, Little to Believe in: Popular Pressure for Politicians to Find
Solutions to East German Unemployment, FIN. TIMES, Jan. 28, 1994, at 17).
299. Id. at 1238.
300. Id. (quoting Mary Williams Walsh, National Agenda: Going Private—the Profit and
the Pain, L.A. TIMES (Jan. 10, 1995) at H1).
301. Gridre, supra note 2, at 460.
302. David Stark, Path Dependency and Privatization Strategies in East-Central Europe, 6
E. EUR. POL. & SOC’YS 11, 35-38 (1992). Rapid transitions do not allow for flexibility for the
differing traditions or respect for the varying cultures present.
303. Foster, supra note 160, at 651 (quoting Arvo Junti, cited in Radio Tallinn Network,
A number of these nations experimented with various forms of privatization, thus producing a spectrum of possibilities for restitution. Natural restitution and monetary compensation are the most effective remedies.

a. Natural Restitution

The concept of privatization is the process by which property, illegally expropriated by the state, is reverted back into private hands. Some analysts view the process of privatization as a natural result of a nation attempting to move past its communistic roots. One of the goals of privatization is “the equitable redistribution of property rights.” Stripping property out of the hands of a small group of elites and transferring it back to the public can arguably assist a transitional government in breaking its ties to the former government. Natural restitution is a term that “refers to [the] return of the actual property expropriated during the communist era.”

Historians and analysts supporting restitution of property have found three rationales for natural restitution. First, restitution promotes rapid and efficient transition to a market economy by transferring state and collective property to private owners. Simultaneously, restitution “restor[es] the value of property” in the minds of citizens. Second, analysts argue that restitution “is ‘morally the right thing to do’ to remedy past [wrongs].” Third, restitution “serves ‘as a vehicle for the construction of post-communist national identity.’”

However, the sovereigns that deployed a mass privatization, which involved natural restitution, faced concerns that these actions “would interfere with the country’s advanced privatization process, jeopardize

303. Freer, supra note 13, at 192. “The issue of privatization in Cuba is closely intertwined with the resolution of claims for compensation or restitution by property owners who suffered expropriation by the Cuban government.” Travieso-Diaz & Bleisteiner, supra note 16, at 195.
305. Id. at 189-90.
308. Gridér, supra note 2, at 456.
309. Id.
310. Foster, supra note 160, at 633-34.
311. Id. at 626.
312. Id. (quoting Estonian Prime Minister Mart Laar).
313. Id. (citation omitted).
314. Id. (citation omitted).
foreign investment, and increase the foreign debt which was already the highest in the region. The two German governments opted to restore stolen property to its former owners. East Germany’s experience with natural restitution demonstrated the difficulty of transitioning property rights from state controlled to a privatized system.

The Marxist philosophy that dominated East Germany held that “private ownership of the means of production, including property, is the primary means of oppression.” This ideology derived from the Communist Manifesto, in which Karl Marx wrote, “[Communism] may be summed up in the single sentence: Abolition of private property.” East Germans were responsible for the property they lived on and farms they operated. Yet, these responsibilities did not constitute legal property ownership.

In reunified Germany, privatization took the form of sale of property and restitution of expropriated property. The first step Germany took was to create a Trust Agency that assumed ownership of all state-owned enterprises and then privatized them by sale to investors. This idea proved to be difficult and slow as claims poured in and overwhelmed the Agency. “[I]n many instances, the law favored a current property holder over a restitution claimant.” This, along with the fact that most East Germans lacked ownership, caused an unbelievable number of complications, thus resulting in East Germans’ frustration and mistrust of the democratic government. “East Germans . . . reacted to privatization with feelings of disbelief and betrayal. Many East Germans believed that the [Trust Agency] sold off property as quickly as it could, paying little attention to the effect it would have on life in East Germany.”

315. Gelpen, supra note 11, at 371.
316. Jeffress, supra note 149, at 528.
317. Id. at 529-30.
318. Id. at 530.
319. Marx & Engels, supra note 3, at 27.
320. Jeffress, supra note 149, at 531.
321. Id.
323. Id. The Trust Agency is known as the “Treuhand.” Id.
324. Id. at 1226.
325. Id. at 1237.
326. Id. at 1230.
327. Id. at 1212.
328. Id. at 1228-29. Germany’s restitution program was only successful because of West Germany’s strong economy and previously established system. No other Eastern European
b. Monetary Compensation

Compensation is yet another method to provide a remedy to jilted property owners. Many European restitution systems “guarantee ‘compensation’ to former owners who decline other forms of restitution and/or are ineligible to receive natural restitution.” In cases where restitution is not available, “where current holders of the property are exempt from claims under the laws . . . or where the property serves exempted public purposes,” compensation becomes the remedy of choice.

In cases that required monetary compensation, the state paid “a lump sum to itself based on some percentage of the overall estimated total value of the claims, and then pa[id them] out in the form of benefits to its citizen claimants.” “[C]ompensation strategies are usually far easier to expedite than is restitution and can take into account the political interests of a transitional regime in avoiding alienating populations fearful of losing their homes or jobs.” In Germany, the Trust Agency first attempted to provide in-kind compensation. However, when approximately 1.2 million claims were filed, compensation was seen as too expensive. Germany continued to use it “in the case[s] of good faith purchasers, property used for residential purposes that [were] currently occupied, property dedicated to the public interest, and property involving a joint commercial enterprise.”

In Cuba’s case, a pure monetary compensation strategy may not be the most effective remedy. “Domestically, the Cuban treasury is drained, the resources of the citizens are nominal, and the government is on the verge of bankruptcy.” “A transitional government in Havana . . . is not liable to have access to adequate financial resources to pay compensation.” Thus, unless the Island’s economy drastically improves, compensation cannot be the primary remedy for expropriated property.

country had a structure similar to Germany. In Cuba’s scenario the only party with the necessary “financial and administrative resources” is the United States. Grider, supra note 2, at 489. However, the United States does “not have the political legitimacy, much less [the] domestic mandate, to do so. It is therefore beyond hope that a restitution program as extensive as the German program could be replicated in Cuba.” Id.

329. Foster, supra note 160, at 635.
330. Gelpen, supra note 11, at 338. Examples of rationales to exempt property from privatization include public health and recreation, natural reserves or national heritage. Id.
331. Creighton, supra note 233, at 73.
332. Id. at 89.
333. Id. at 86.
334. Id.
335. Freer, supra note 13, at 187.
336. Creighton, supra note 233, at 78.
Natural restitution may be the Island’s remedy of choice, as it allows for a decisive break from the previous regime, while compensation does not.\textsuperscript{337} Compensation strategies are likely to be more costly than natural restitution.\textsuperscript{338} Natural restitution establishes the priority and validity of property rights and provides a clear title for owners while compensation opens the question of who eventually gain control of the contested property.\textsuperscript{339} Generally, compensation\textsuperscript{340} is paid at a small percentage of any value that might be placed on the property, while natural restitution tends to stimulate markets, thus affecting higher economic efficiency.\textsuperscript{341} Since both strategies pose problems, a balanced combination of the two strategies might be the best solution.\textsuperscript{342} At the very least, “restitution should be the rule and compensation should be the exception.”\textsuperscript{343}

3. Cuba’s Best Choice

Fidel Castro’s administration took every opportunity to expropriate property from innocent Cubans. The three main justifications for these illegal actions were as follows:

(1) Expropriation of . . . land, industries, and businesses for economic reform purposes; (2) confiscation of property from alleged . . . individuals and corporate entities found “liable for offenses against the national economy or public treasury;” and (3) seizure of property “voluntarily” “abandoned” by Cuban citizens who travelled abroad and failed to return within a specified time period.\textsuperscript{344}

\textsuperscript{337} Id. at 88-89.
\textsuperscript{338} Id. at 89. For the same reasons, compensation strategies may be more costly than substitutionary restitution.
\textsuperscript{339} Id. at 88-89.
\textsuperscript{340} Regarding compensation for Cuban exiles, many have received compensation for their property losses “by the American government, which allowed exiles meeting specific tests both business and personal federal income tax deductions for property seized by the Cuban government.” Grider, supra note 2, at 493.
\textsuperscript{341} Creighton, supra note 233, at 88-89.
\textsuperscript{342} Id. at 89.
\textsuperscript{343} Freer, supra note 13, at 190. “Compensation will probably need to be paid for residential, small commercial, and agrarian properties to avoid social and political dislocation and discontent, and to avoid lengthy and costly legal deliberations.” Creighton, supra note 233, at 89.
\textsuperscript{344} Foster, supra note 160, at 651 (quotation omitted).
“With the rapid deterioration of the Cuban economy and rising international concern, resolution of this issue has become a matter of great urgency.” Economic analysts argue that it is in Cuba’s best interest to enact “a rapid macroeconomic change to a market economy.” This system, while needed to ensure restitution to or compensation of former owners, must also encourage long-term investment commitments. Such an environment would prevent capital depletion or a destabilization of economic markets. Thus, shock therapy is the best choice for speed.

As for a remedy, restitution of Cuban property is not only the most effective remedy, but also has powerful symbolic value, as it would mark the rise of a new era. Such a symbol “would provide a moral as well as legal condemnation of the past” and thus “establish legitimacy in the eyes of the world community.” An added benefit to a natural restitution process is that it has the potential to accelerate the restoration of ties between Cuba and the United States.

C. The United States’ Role in Cuba’s Tomorrow

The first question to address is whether the United States should get involved in the Cuban situation. The answer to this question would be more complex if the United States wasn’t already involved. However, the United States has already intervened in Cuban affairs by enacting embargos with the

345. Id. at 623-24.
346. Freer, supra note 13, at 204.
347. Id. at 205.
348. Id.; Espino, supra note 32, at 436.
349. Foster, supra note 160, at 649.
350. Id.
351. Id. Substitutional restitution is a remedy afforded to a former owner when either total or partial return of the actual property is not possible. Cases that require substitutionary restitution occur in situations “where the claimant’s property no longer exists in its original form or is formally excluded from the natural restitution process.” Id. at 635. In these situations, restitution comes in the form of “replacement property” that is equivalent to the property illegally expropriated. Id. One kind of substitutional restitution is known as voucher privatization. These vouchers are awarded in situations “where people owned land the government was unwilling or unable to return or where owners themselves did not claim actual or substitutional restitution.” Id. at 644. Some analysts argue that because of Cuba’s “low monetary reserves,” the Island is a prime candidate for this approach. Id. at 655. These analysts argue that such a system “would speed enterprise restructuring and privatization and preserve Cuba’s limited assets and resources for investment in national modernization rather than settlement of outstanding restitution and compensation claims.” Id. at 655-56. Inversely, because of Cuba’s uncertain future, it is unlikely that former owners will be satisfied by this remedy. Id. at 656.
romantic hopes that the Communist Party would surrender. This fantasy has had a harrowing effect on Cuban nationals, who have suffered for over fifty years. Historically, embargos have caused more harm than actual progress towards freedom.\footnote{352 See generally Mills & Koslosky, supra note 12.} Due to the United States’ history of imposing embargos, the United States has the responsibility to make some changes in its policy that would further the interests of the Cuban people.

Obtaining freedom for Cubans while retaining the trust of nationals is a delicate but crucial process. Exiles need the opportunity to express their ideology and nationals need the opportunity to hear and understand their Cuban brothers. In order to do this, the United States must lift the embargos that limit communication and travel on both sides, thus allowing information to reach Cuban nationals. Permitting exiles to build relationships with nationals will prevent the difficult situation that occurred in Germany, and allow for a smoother transition. Additionally, authorizing importation of technology will aid nationals in their quest to understand the dangers of communism and the benefits of democracy.

In April 2009, U.S. President Barack Obama announced his plan to ease restrictions on travel and remittances to the Island by Cuban-Americans, but the U.S. trade embargo remains.\footnote{353 Memorandum from the White House Office of Press Secretary to the Secretary of State, the Secretary of the Treasury, and the Secretary of Commerce, Promoting Democracy and Human Rights in Cuba, paras. (a)-(b) (Apr. 13, 2009), http://www.whitehouse.gov/the_press_office/Memorandum-Promoting-Democracy-and-Human-Rights-in-Cuba/.} In the official White House Memorandum, the President recognized that promoting communication between Cuban-Americans and their relatives, as well as “increasing the flow of remittances and information” is vital to “decrease dependency of the Cuban people on the Castro regime . . . .”\footnote{354 Id. at para. 1.} The President’s order authorized and licensed U.S. telecommunication service providers, as well as satellite, radio, and television service providers, to link with and engage in transactions in Cuba.\footnote{355 Id. at paras. (c)-(e).} “The order authorized the export of “mobile phone systems, computers and software, and satellite receivers” to Cuba.\footnote{356 Id. at para. (g).} Additionally, the ban on humanitarian exports was removed. The order allowed for donations of “clothing, personal hygiene items, seeds, veterinary medicines and supplies, fishing equipment and supplies, and soap-making equipment” for humanitarian needs.\footnote{357 Id. at para. (h).}
The President’s executive order triggered a debate as to whether he overstepped his authority by avoiding the Act’s restrictions. No one expects Raúl or any Cuban leader to swiftly transition from one style of government to another. President Obama is simply responding to Raúl’s gradual policy changes. The executive order combined with Raúl’s decision to allow more access to the internet enables Cubans to communicate with the outside world and receive necessary humanitarian aid. The opportunity to obtain information is the first step in completely transforming the Cuban way of life.

On December 17, 2014, President Obama and his administration released a proposal creating a new plan for Cuba. Thus began the first conversation between the leaders of the United States and Cuba since the 1959 Cuban Revolution. The Obama administration described the decision by stating that “President Obama is taking action to cut loose the anchor of failed policies of the past, and to chart a new course in U.S. relations with Cuba that will engage and empower the Cuban people.” In response, “President Raúl Castro . . . thank[ed] President Obama for ‘a new chapter’ while also reaffirming that restored relations with the United States did not mean the end of communist rule in Cuba.” The gradual implementation of these changes, if done correctly, can empower the Cuban nationals to fight for their freedom.

IV. CONCLUSION

Change is inevitable for Cuba. The United States should support Cuba as it did Germany. The United States supported the German reunification as well as the democratization of Eastern Germany even though the United States did not take an active role in Germany’s democratization. Unlike the

358. Street, supra note 186.
359. Id.
360. Memorandum from the White House, Charting a New Course on Cuba (Dec. 17, 2014), http://www.whitehouse.gov/issues/foreign-policy/cuba. The above link contains the key components and details of the President’s updated policy approach towards Cuba.
362. Memorandum from the White House, supra note 360 (emphasis added).
passive role the United States took with Germany, the United States chose to take an active role by sanctioning Cuba’s communist regime. The sanctions the United States imposed have harmed nationals, rather than protected. For this reason, the United States has a duty to change course. If done properly, President Obama’s decision to restore relations may provide nationals with the support they need to overturn the communist regime. While these changes are exciting, the United States must carefully weigh the possibility that this newfound relationship may further solidify Castro’s communism, and thus further hurt the Cuban people.

When Cuba embarks on its transition from communism to a free society, its leaders must show their commitment to legitimize the government and to protect private property rights. This commitment can manifest itself in the form of privatization and remedies for individuals and corporations with expropriated property. Privatization is a tricky process and success can only be achieved when "people accept, understand, and participate in the resulting market economy and where political stability thereby remains." 364

Germany had the ideal situation; the governmental system did not need to be recreated. The two nations simply merged and implemented the already-established Western structure. Despite these ideal circumstances, transformation in Germany was arduous. A more gradual process, with Western Germans educating East Germans, would have provided East Germans with a smoother transition. Unlike the East Germans’ experience, Cuban nationals will have to construct a Cuban democratic system from the ground up. Democratizing gradually would provide Cuban nationals time to adjust, allow the economy to develop, as well as incorporate the socio-cultural and socio-psychological aspects of the Island. 365

Regarding a remedy, natural restitution is the best choice for resolving claims of property expropriation. The Cuban administration, responsible for prioritizing claims, should emphasize claims from nationals rather than those of exiles. If factors exist that impede natural restitution, then appropriate authorities should be given the jurisdiction to turn to other remedies. These remedies would consist of either allocating other properties to serve as a substitute for restitution or monetary compensation.

Cuba’s future is in the hands of Cuban nationals, exiles, and the United States government. Although predicting the Island’s fate is impossible, it is possible to appreciate that all Cubans desire peace and prosperity for their

365. Espino, supra note 32, at 424.
home. Ultimately, “the strength of the human spirit and the character of the Cuban people” will determine Cuba’s future.\footnote{Mills & Koslosky, supra note 12, at 1270.}