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Cuban Claims: Embargoed Identities and the Cuban-American Oedipal Conflict (*El grito de la Yuma*)

José Gabilondo¹

In Spain, when someone has misplaced their keys, you may hear ‘más se perdió en Cuba,’ a tongue-in-cheek allusion to imperial Spain’s hand-over of Cuba to the United States (“U.S.”) in the Treaty of Paris, which ended (depending on where you stand) either the Spanish-American War or the Cuban War of Independence.² Losses over Cuba feel fresher in Miami, home to many Cuban exiles and emigrants and their children. Losses beg claims—to indemnity and to moral recognition. Whether in Miami, Washington, or Havana, the question of Cuba is fraught with many such claims. First to come to mind are property claims to restitution based on the Cuban government’s taking of property after the Cuban Revolution and the U.S.’s longstanding embargo against Cuba, which involves an analogous form of taking through political risk. Conjuring a tropical Bleak House, these claims belong to U.S. nationals, Cuban nationals, the Cuban government, the U.S. government, and others, and are subject to domestic law, foreign law, and public international law.

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². It means “More was lost in Cuba.”
Even more complex than these property claims are the competing truth claims about what happened in Cuba because of the Revolution, how it affected those who stayed and, more importantly for this essay, what it meant for those who left to start a new life in the U.S. According to psychoanalysis, a person copes with major losses through "economic" processes in the psyche by which the loss lives on as an unsettled psychic item.\(^3\) To me, it seems that many Cubans in diaspora remain engaged in these economic processes about their group losses after the Revolution. We Cuban-Americans have created an emotional memorial to these psychic losses. These claims have no formal settlement mechanism but they need airing and consideration too. It is of interest not only to Cuban-Americans but also to those concerned with how groups cope with collective losses and how the law and the losses interact.

The succession of Raul Castro to Fidel Castro as Cuba's President has left many wondering about the future of these claims, both the legal and the symbolic ones.\(^4\) Part I surveys the

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3. Losing a country and way of life involves the kind of trauma which Sigmund Freud argued got re-enacted in his patients:

> It is as though these patients had not finished with the traumatic situation, as they were still faced by it as an immediate task which has not been dealt with; and we take this view quite seriously. It shows us the way to what we may call an economic view of mental processes. Indeed, the term 'traumatic' has no other sense than an economic one. Sigmund Freud, Introductory Lectures on Psychoanalysis 340 (Norton, 1965) (1920) (showing how unresolved losses continue to operate dynamically in the psyche) (original emphasis, citation omitted). See also id. at 442-444 (explaining that "economic" refers to how mental energy is managed).

4. In February 2008, Raúl Castro was elected as President of Cuba by the National Assembly. Raul Castro tops Fidel in Cuba election, USA Today Jan. 30, 2008, A1. Fidel Castro had previously handed over power to his brother provisionally in August 2006. Proclama del Comandante en Jefe al pueblo de
major legal and truth claims and their internal conflicts. Part II discusses how these conflicts may have retarded certain forms of Cuban-American identity, which still remain latent. Admittedly subjective, this essay suggests one way to bring some of these latent claims of Cuban-Americans into the open.

I. The problem of claims

I start with some background about Cuban history to put these claims in context. This history stresses the uncertainty and instability which has characterized Cuban sovereignty. Against this provisionality, I discuss the competing legal claims, which seem crisp and definite because of their opposition to each other. The final section discusses how the truth claims over recent Cuban history similarly rest on dichotomies and binaries which leave little room for a nuanced accounting.

A. Setting the stage for claims-making

Cuba's three known original peoples present when Christopher Columbus "discovered" the island in 1492 – the guanahatabeyes, the ciboneyes, and the taína – probably emigrated from South America.\(^5\) Beginning in the mid-19\(^{th}\) century, coalitions of Creoles, Afro-Cubans, and others started organizing movements to break away from the Spanish crown.\(^6\) These armed conflicts would lead to the unsuccessful Ten Years War of 1868-1878 and matured into

\(^{5}\)CARLOS MARQUEZ ESTERLING & MANUEL MARQUEZ ESTERLING, HISTORIA DE LA ISLA DE CUBA 1-9, 17 (1975).

\(^{6}\)Id. at 76-101.
the Cuban War of Independence. Concerned about a conflict in its backyard, the U.S. sent a frigate, the Maine, to Havana in 1898 to monitor the hostilities. When the Maine exploded in Cuban waters for reasons which remain undetermined, the U.S. joined the conflict, converting a colonial struggle into the Spanish-American War between two then super-powers. After defeating Spain, the U.S. acquired rights in Cuba through the Treaty of Paris in 1898. Thus began the first U.S. military occupation of the island, as it prepared for its status as a republic. (A second U.S. military occupation would take place from 1906-1909.)

A constitution would have to precede any elections, so delegates were chosen to serve in the Cuban Constitutional Convention. By February of 1901, the delegates had agreed on a constitutional text for the new republic. Meanwhile, the U.S. Congress passed a bill stating that any future Cuban constitution would have to recognize the U.S.'s right to intervene in Cuba's internal and foreign affairs to protect U.S. interests; named after the Connecticut senator, Orville Platt, who introduced the federal legislation, the U.S. Platt Amendment took the form of a rider attached to a defense appropriation bill. After President

7. Id. at 102-114.
8. Id. at 143.
9. Id. at 148-156.
10. Id. at 156.
11. U.S. Secretary of War William Taft (later President) served as governor of Cuba in the second U.S. occupation, which lasted until the handover of power on January 28, 1909, to Cuban General José Miguel Gómez. INSTITUTO DE HISTORIA DE CUBA, LA NEOCOLONIA 24 (Félix Varela, Havana, 2002).
12. The Convention opened on November 5, 1900 after the election of 31 delegates. Id. at 25.
13. Id. at 28.
14. President McKinley signed the bill into law on March 3, 1901. INSTITUTO DE HISTORIA DE CUBA, LA NEOCOLONIA 29 (discussing how Platt terms
McKinley signed the bill into law, the U.S. advised the delegates that the military occupation would end only after adoption of the Platt terms; the delegates reluctantly agreed, making some formal reservations of sovereignty to the Platt terms. The U.S. rejected these reservations, reiterating that verbatim adoption of the Platt terms was a precondition for the withdrawal of the occupying forces. Faced with qualified sovereignty or none at all, the delegates accepted the Platt conditions 16-11, although the vote reflects the depth of opposition to this arrangement.

The Platt terms formalized U.S. hegemony over Cuba, putting in positive law what would later emerge as the Roosevelt Corollary, a rationale for more generic U.S. intervention in the hemisphere. During the Platt years, U.S. and Cuban export were added to the Army Appropriations Bill of 1901).

15. Each of these reservations reasserted Cuba’s prospective sovereignty over its internal and external affairs in the face of the Platt terms. Importantly, these reservations limited U.S. intervention in the island’s internal affairs only for the purpose of protecting the island’s sovereignty, clarified that the scope of the public health mandate would require the consent of both Cuba and the U.S., and restricted the constitutional legalization of the official acts of the U.S. occupation to those acts performed legally. Id. at 28-32. The Cubans passed the Platt conditions with reservations by a margin of only one vote. Id. (discussing 15-14 vote).

16. Id. at 24.

17. Brooking no reservations, U.S. Secretary of War Elihu Root advised the Cuban delegates that unless the Platt conditions were accepted verbatim, the occupation would continue. Id. at 30. The final vote complied with the U.S. demands by a vote of 16 to 11, attaching the terms to the Cuban Constitution as an appendix. Id. See also Emilio Roig de Leuchsenring, Historia de la Enmienda Platt (Cultural, S.A., Havana, 1935).

18. The Platt conditions ratified all official acts effected during the U.S. occupation, obligated Cuba to provide public health services to avoid infectious diseases, restricted Cuba’s ability to enter treaty obligations with other nations, imposed limits on public borrowing by Cuba, and obligated the country to cede land to the US for its military and other operations. See Roig de Leuchsenring, supra note 17, at 394-95. Importantly, these conditions also gave the U.S. the
markets merged through trade agreements giving Cuban sugar a tariff preference in the U.S. and U.S. products similar preferences in the Cuban market. Foreign direct investment, primarily from the U.S., increased, such that controlling interests in sugar, tobacco, mining, railroads, utilities, livestock, banking, and real estate came to rest in foreign hands.

The U.S. and Cuba abrogated most of the Platt terms in a treaty executed as part of Franklin Delano Roosevelt’s “Good Neighbor” policies in the hemisphere, although the new treaty preserved a U.S. military presence in Guantanamo. (Abrogated but not forgotten, plattista remains an epithet in Cuba to this day.) In 1940, another Constitutional Convention was held. Coming after the lifting of the Platt terms, the Constitution of 1940 holds a special place in Cuban legal history. (Reading the debates of the Convention you are struck by the civility between representatives of opposing factions.) This Constitution remained in effect until right to intervene militarily or otherwise in Cuba’s internal affairs to further U.S. interests. Id.


20. On May 29, 1934, Cuba and the US entered into a new treaty abolishing the treaty of 1903 and the U.S.’s power to intervene in Cuba militarily, while recognizing the US’s right to continue its military presence in Guantánamo. *Id.* at 339.

21. The single most complete reference work on Cuban constitutions is that of Dr. de la Cuesta. Leonel-Antonio de la Cuesta, *Constituciones Cubanas desde 1812 hasta nuestros días* (1974) (compiling 19 constitutions and organic laws, including pre-Republic constitutional texts).

22. I concur with the conclusion of one legal scholar that the debates of the 1940 Constitutional Convention are a “national treasure.” Néstor Carbó-Nell Cortina, *Grandes Debates De La Constituyente Cubana De 1940* 13 (2001).

23. *Id.*
March 10, 1952, when Fulgencio Batista successfully executed a coup against then President Carlos Prío Socarrás.\textsuperscript{24}

In 1959, Fidel Castro ousted Batista and began the island's longest period of political continuity since the tenure of the Spanish crown. In one of his first public statements after becoming the first President of revolutionary Cuba, Manuel Urrutia suggested the need to re-establish the Constitution of 1940.\textsuperscript{25} Between January 13 and February 7 of 1959, its text was amended five times to produce the Fundamental Law of the Republic of Cuba, the first constitutional document of the revolution.\textsuperscript{26}

Property expropriations began soon after the Cuban Revolution, starting with \textit{latifundios} and extending to businesses and urban real estate.\textsuperscript{27} (Still waiting to be written is a complete account of Cuba's efforts to settle these takings.\textsuperscript{28}) At first, President Eisenhower cut Cuba's sugar quota.\textsuperscript{29} In 1962, John F. Kennedy extended the embargo, imposing travel restrictions.\textsuperscript{30} Subsequent

\begin{itemize}
\item \textsuperscript{24} \textit{De la Cuesta}, supra note 21, at 61.
\item \textsuperscript{25} \textit{Id.} at 67.
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} Nicolas J. Gutierrez, Jr., \textit{The De-Constitutionalization of Property Rights: Castro's Systematic Assault on Private Ownership in Cuba}, \textit{5 U. Miami Y.B. Int'l L.} 51 (1997) (summarizing Castro's regime legal transition away from private property ownership).
\item \textsuperscript{28} For example, Dr. Timothy Ashby, who served in the U.S. Commerce during the administration of the first George Bush, reports that after these expropriations the Cuban government made overtures to indemnify the former owners of the expropriated property at the assessment values which had been used to assess property tax. Dr. Timothy Ashby, "U.S. Certified Claims Against Cuba – The Likely Settlement Outcome," comments made at \textit{Cuban Population and Capital Flows: Immigration, Investments, and Expectations}, College of Law, Florida International University (Feb. 23, 2008).
\item \textsuperscript{29} U.S. Dept. of State Dispatch Vol. 4, No. 8 (Feb. 22, 1993), at 102.
\item \textsuperscript{30} Proclamation No. 3447, 3 C.F.R. 4173 (1962).
\end{itemize}
regulations issued by the Treasury Department fleshed out the embargo.\(^3\) After losing the U.S. market for sugar, Cuba began to participate in the Soviet Union's autarchic economic block, the Council for Mutual Economic Assistance ("CMAE").\(^3\) Its terms of trade with CMAE netted Cuba a valuable foreign financing subsidy because Cuba exported sugar and nickel at a premium over the market price and imported oil at a discount. When the CMAE dissolved in 1991, Cuba lost this financing spread and its major trading partners, making its economy contract. Fidel Castro announced the 'periodo especial en tiempos de paz,' a period of painful structural adjustment as Cuba reckoned with its new place in the global trading order.\(^3\)

The economic crisis which resulted led Cuba to experiment with its own form of tropical *perestroika*. After the Fourth Congress of the Communist Party in 1991, Cuba relaxed some

\(^{31}\) Today, the embargo rests on a variety of legal statutes and regulations, but the verb in the action is the Cuban Assets Control Regulations – administered by the Office of Foreign Assets Control ("OFAC"). See 31 C.F.R. § 515.565 (2005). These regulations restrict transactions by U.S. citizens and permanent residents with Cuba, provide general licenses – including one for educational travel – which require no further OFAC approval, and set out the guidelines for requesting specific licenses for transactions with Cuba which OFAC may approve in its largely unappeallable discretion. My requests have sometimes been granted and sometimes not.

\(^{32}\) The Council for Mutual Economic Assistance was an autarchic trading block made up of the USSR, Hungary, Czechoslovakia, Poland, Romania, Bulgaria, East Germany, Mongolia, Vietnam and Cuba. Cynthia B. Schultz & Tamara Raye Crockett, *Economic Development, Democratization, and Environmental Protection*, 18 B.C. ENVTL. AFF. L. REV. 53, 55 n.9 (1990). Between 1972 and around 1991, Cuba's terms of trade with CMEA partners gave the island a foreign financing subsidy: Cuba exported sugar and nickel at a premium and imported oil at a discount. When the CMEA dissolved in 1991, Cuba lost this spread that had funded foreign exchange purchases. By 1992, Cuba's volume of international trading had dropped to 1974 levels.

\(^{33}\) The Cuban Assets Control Regulations are codified at 31 CFR Part 515.
of its economic orthodoxies, encouraging foreign investment, decriminalizing the U.S. dollar, and establishing a central bank. Cuban hard-liners objected, seeing these reforms as *diversionismo ideológico*, i.e., an objection that adopting capitalist culture would dilute revolutionary values.

Meanwhile, the legal structure of the U.S. embargo stayed essentially the same, but its meaning has changed as Cuban emigrants formed part of U.S. society. Adjusting to a host country means deploying its legal machinery and political culture and the Cuban political class has been adept at both. (Not that adjustment has been without its conflicts.) What started out as a tool of U.S. foreign policy has become an anchor for Cuban-American identity, even as many of the interest groups once behind the embargo have moved to oppose it. It is as though in exile the routine political conflicts which were expressed more cordially during the 1940 Constitutional Convention have been displaced onto U.S. foreign policy and, in that process, radicalized on both


36. Consider the resistance and hostility to which Cubans in Miami were subject because – bucking assimilation – many preferred the enclave to the melting pot. Alejandro Portes & Alex Stepick, *City on the Edge[: The Transformation of Miami]* (1993). Consider also the offensive dicta in Grutter v. Bollinger which essentializes Cuban-American identity in U.S. rather than Cuban or Cuban-American terms. One stereotyped identity comes up in dicta in the context of “deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans.” Grutter v. Bollinger, 539 U.S. 306, 393 (2003).
ends of the spectrum. For example, in 1996, the Helms-Burton Act mandated statutory requirements which the Cuban state would have to meet to qualify as a "transition" government as a precondition to lifting the embargo. (Not the Platt Amendment, but note the family resemblance.)

All the while, the question of Cuban sovereignty hangs in the air: a Spanish colony until 1898; a U.S. occupied territory until 1901 and then again between 1906 and 1909; a Platt dependency until 1934; an intermittent democracy until 1959; and, since then, a uni-personal regime during which the nation split in two – Cuba-island and Cuba-diaspora. The stage is set for legal claims, truth claims, and a combustible environment for contestation of both types.

B. Legal Claims

When the Cuban government expropriated property and when U.S. authorities imposed trading embargos on Cuba, both governments, in effect, injected political risk into the Cuban economy. It is the losses from this political risk that has given rise to legal claims against these governments. Cuba settled most

37. Recognizing the split, there have been efforts both in Miami and Cuba to bring together the two communities. See, e.g., Task Force on Memory, Truth, and Justice, Latin American and Caribbean Center, Florida International University, Cuban National Reconciliation (2003) (making recommendations for national reconciliation and drawing on comparative experience from other countries). By focusing on Cuban rights violations to the exclusion of adequately considering the human rights impact of the Cuban embargo, however, this project may not have garnered much support from island constituencies.

38. Unlike the vagaries of price fluctuations from market forces ("market risk"), political risk refers to the loss of value from unilateral government actions, including changes in taxation law, expropriation and other takings, and currency controls.
of its expropriation claims with citizens from other countries but not those of U.S. citizens whose property was taken. With respect to these claims, the Cuban Claims Program of the U.S. Foreign Claims Settlement Commission has conducted two Cuban Claims Programs, which have certified 5,913 restitutionary claims with a market value—including interest—of about $6 billion.\(^3\) Expanding the range of claimants, Congress in 1996 passed the Cuban Liberty and Democracy Solidarity Act ("Helms-Burton"),\(^4\) letting certain classes of claimants whose property was expropriated by the Cuban government sue in federal court against third parties who had acquired interests in the expropriated property.\(^4\)

In addition to these claims on Cuba, it has asserted claims of its own against the U.S. for embargo losses (imagine Cuba as a balance sheet with the expropriation claims on the liability-side and the embargo claims on the asset-side). For example, an international tribunal convened by the Cuban government to consider claims against the U.S. (including for embargo losses of over $100 billion) held that U.S. policy against Cuba constituted genocide.\(^4\) The enforceability of this judgment is doubtful, but U.S. authorities have considered the negative impact of the embargo on the Cuban economy, most recently in a 2001 report

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41. Id. at §§6082-83.
of the U.S. International Trade Commission on the economic impact of U.S. sanctions on Cuba.\textsuperscript{43}

\textbf{C. Truth claims}

As contested as these legal claims may be, they are definite and limited in scope. The truth claims are more complex because they are symbolic and serve several distinct functions at once: they offer an internally coherent account of the past as it relates to migration from Cuba; they provide moral justification for important parts of one's identity; and they predict part of Cuba's future.

On one side is the poignant account of the all too real losses which Cubans suffered after the Revolution and through emigration to the U.S.\textsuperscript{44} This account starts with the betrayal of the Cuban middle-class by Fidel Castro, as he restructured the Cuban state along the lines of a communist system, followed by purges and other persecutions of dissidents. Creating a surveillance state, he changed the texture of Cuban society, intensifying cleavages on the basis of class and ideology. Faced with this new Cuba, many Cubans fled to the United States, despite the hardships of emigration. Once here, Cubans overcame these hardships and

\textsuperscript{43} U.S. Int’l Trade Commission, the economic impact of U.S. Sanctions with Respect to Cuba (February 2001). Used a gravity model to simulate what Cuba's foreign trade would be were it integrated into the global system and, importantly, trading more freely with the U.S. Claudio E. Montenegro and Raimundo Soto, \textit{How distorted is Cuba's trade? Evidence and Predictions from a Gravity Model}, 5 J. INT’L TRADE & ECON. 45 (1996). The embargo increases Cuba's transportation costs. \textit{Id.} at 52. Moreover, since the U.S. is the largest buyer in the region for sugar, the embargo deprives Cuba of a natural market. \textit{Id.}

\textsuperscript{44} Cubans emigrated to many countries after the Revolution, but this essay focuses only on Cuban-Americans.
recovered a standard of living better than after the Revolution but not before, since there is no replicating in exile what was lost to the revolution. In this account, travel to Cuba helps underwrite Fidel’s despotism. Worse still, it is to turn one’s back on family suffering.

Sociologist Erving Goffman noted that “primary frameworks” comprehensively determine how people make sense of the world through a structure of interpretation.\textsuperscript{45} The foregoing account of loss operates as a primary framework not only for many Cuban-Americans but for others when debating the question of Cuba.\textsuperscript{46} In this view, Cuba’s problem is its democracy deficit, especially its persecution of political dissidents; its command economy is a fossil from a by-gone economic era. U.S. foreign policy furthers both U.S. and Cuban interests by fueling civil unrest by isolating

\begin{quote}
45. Just as a speaker can apply a grammatical rule whose content he may not be able to articulate fully, one may be in the grips of a primary framework without fully appreciating its impact:

Primary frameworks vary in degree of organization. Some are neatly presentable as a system of entities, postulates, and rules; others – indeed, most others – appear to have no apparent articulated shape, providing only a lore of understanding, an approach, a perspective. Whatever the degree of organization, however, each primary framework allows its users to locate, perceive, identify, and label a seemingly infinite number of concrete occurrences defined in its terms. He is likely to be unaware of such organized features as the framework has and unable to describe the framework with any completeness if asked, yet these handicaps are no bar to his easily and fully applying it. Erving Goffman, Frame Analysis: An Essay on the Organization of Experience 21 (1986).
\end{quote}

\begin{quote}
46. The framework rests on two premises. First, the framework assumes that democracy and open markets are mutually interdependent. In truth, though, exchange markets predate the relatively recent institution of democracy, which often leads to protectionist tariffs (not to mention economic embargos). Linked to the first premise, the second one posits that Cuba will undergo some kind of “big-bang” transition.
\end{quote}
the island economically. Then popular insurgents – supported by the United States – will put the country on the path to democracy. Democracy and markets will feed off each other and thrive.

Against this dominant frame of backward-looking loss, there is a counter-framing which goes something like this. Pre-revolutionary Cuba was no paragon of democratic values. Batista’s regime was corrupt and enjoyed little support with the middle-class which gave Fidel Castro a clear mandate for change. Besides, the romantic notions of middle-class émigrés about life before the Revolution conveniently overlook what life was like for peasants and the extent to which those with dark skin faced racial discrimination. On both class and race fronts, the Revolution has made huge strides. And the Revolution’s inclusion of women in senior government positions has helped to counter Cuban machismo. Moreover, Castro has singularly resisted U.S. hegemony, despite an economic embargo with no modern precedent. Granted, free speech in Cuba is not what it should be but it may be a price worth paying, especially for the sake of promoting economic equality. The government’s policies have gone a long way toward sharing what wealth Cuba has and, but for the embargo, Cuba would have done even better.

This view leads to a different conclusion about travel to Cuba: whatever your views about the Cuban government, travel to Cuba brings benefits to local Cubans, not only financial ones but psychic ones in the form of exposure to foreign views. Moreover, Cuba is – for the moment at least – a preserve from the consumer excesses of industrialized countries, so visit now before McDonald’s make its peace with revolutionary values (and vice-versa).

The stand-off between the dominant frame and the counterframe (or their derivatives) took root early on in the Cuban
migration to the United States. And its rhetorical oppositions have changed little, although the world has changed around them. The dominant frame and the counterframe may reflect the world views of some but certainly not all. Neither frame (or the claims which each frame produces) leaves enough room for Cuban-Americans to unpack what are likely more complex and ambivalent positions on these issues, the theme of the next Part.

II. The Latent Identity Claims of Cuban-Americans

This essay's methodological challenge is an example of what Russian literary critic Mikhail Bakhtin called "polyphony" in novels and in life: no single mind or statement can hold truth because it emerges through the conversation of speakers (characters in a novel) in what he called "carnival."47 The carnival does not lead to one normative conclusion or another.48 It is a rhetorical device that helps the text approximate the separate but interdependent relationships between characters and their interests. Carnival is a good model for competing truth claims about Cuba because it invites new voices into the conversation. As noted, the dominant frame and the counterframe are locked in a pointed, though sterile, opposition. Missing from this stale dialectic are the interests of those with crisscrossing affective and identity ties to both Cuba and the U.S. These ties defy tidy oppositions and, in so doing, create a field for the new. It is in the Cuban-American family where some of these voices get their start (and are stymied along the way) but it is only through contact with Cuba that the

47. Much of Bakhtin's early work was the literary analysis of Dostoyevsky but, mostly after his death in 1975, neo-Marxists, structuralists, and others have mined his ideas. See generally SUE VICE, INTRODUCING BAKHTIN (1998).
48. I think that in Spanish this use of "carnival" would be bochinche, a Venezuelan word for large, noisy gatherings.
speakers can actually hear their own voices and, then, get others to listen.

Cuban studies scholar Damián Fernandez suggests that Cubans have a tendency to mix their politics with sentiment and affection, which contributes to vulnerability to charismatic leaders.49 A similar blending of politics and emotion finds its way into the upbringing of children in Cuban-American families. This comes out in a manual written by Ruperto Carmenate for Cuban exiles raising their children in the United States, PROBLEMA DEL NIÑO CUBANO.50 Carmenate’s preoccupation is that Cuban-American children raised in the U.S. will lose their national culture of origin and become culturally stateless.51 In this view, childhood is the saddest part of exile because emigration robs the child of its natural history.52 Parents can keep this from happening by teaching about Cuban history and cultivating respect for Cuba’s past.53 To this end, the Cuban mother should use her tenderness to encourage the child to reflect on Cuba.54 Socializing the child away from communism and towards democracy is a central goal of this project.55 Carmenate reveals the family as a crucible for national identity and as a mechanism for the social reproduction of both loss and memory in children.56

49. DAMIÁN J. FERNÁNDEZ, CUBA AND THE POLITICS OF PASSION 1 (2000) (“Cuban politics have revolved around two poles: the politics of passion and the politics of affection.”).

50. RUPERTO CARMENATE, PROBLEMA DEL NIÑO CUBANO (1971).

51. Id. at 7.

52. Id. at 15.

53. Id. at 33.

54. Id. at 34.

55. Id. at 79-80.

56. Id. at 78.
I see this dynamic play out in my own life. I was born in the same year that President Kennedy imposed a formal economic embargo on Cuba. We lived in Vista Alegre, a Creole enclave of Santiago de Cuba in Oriente, the eastern-most part of the island, which has a predominantly Afro-Cuban population, more so after the post-revolutionary migrations. Oriente tends to be less well-known, although it has played a key role in Cuban history. Cuba's war of independence from Spain began there in 1868 when plantation owner Carlos Manuel de Céspedes, freeing his slaves and declaring independence from Spain, lanced el grito de Yara (for “Yara” my subtitle substitutes “la Yuma,” Havana slang for the U.S. suggesting “the promised land” with some irony). Ninety years later, Fidel Castro kicked off the Cuban Revolution in Oriente. And Oriente was a hotbed of doctrinaire objections in the 1990s to Cuban perestroika. Largely agricultural, the province is known not only for its contumacy but also for its poverty, especially since el período especial. Indeed, so many Orientales leave for Havana and other relatively more prosperous areas, their nickname has become los Palestinos.

In 1967, my family emigrated to the U.S. as part of the Freedom Flights program and we settled in Boston, no hub of Cuban-American culture. But the family is its own universe so, like many others, I grew up on a rich oral history of life in

57. The best history of Santiago de Cuba up to the Cuban War of Independence is Olga Portuondo Zúñiga's SANTIAGO DE CUBA DESDE SU FUNDACIÓN HASTA LA GUERRA DE LOS DIEZ AÑOS (1996).

58. Efforts to break away from Spain preceded this event and these efforts were spread throughout the island, but the Cry of Yara started the Ten Years War. CARLOS MARQUEZ STERLING & MANUEL MARQUEZ STERLING, HISTORIA DE LA ISLA DE CUBA 90 (1975).
Cuba—funny, poignant, and compelling. It would take more than a few paragraphs to do justice to these accounts, but let me trace their texture. Had Federico Fellini directed a film version of Roth's *Portnoy's Complaint*, that would be a better start because Fellini could have added joy to Roth's brilliant account of neurotic splitting in the assimilated (and libidinal) ethnic. Much of these accounts dealt with making ends meet under *la libreta* (the Cuban ration book) through black market entrepreneurship, including a subgenre about Soviet foodstuffs that was both funny and nauseating. Another line of stories dealt with Cuba’s surveillance culture and the *Comité de la Defensa de la Revolución*, the neighborhood watch committees that reported on private life and reminded Cubans that the state was always nearby. Most riveting are the stories about the emigration itself: how registering to leave Cuba changed one’s civil status, leading to more personal surveillance and being reassigned to hard agricultural labor until one’s departure number came up; how each step of the process was subject to the whim of petty officials with the power to alter the course of a family’s life; and how it was only after the plane had taken off that one felt a sense of relief.

What makes these accounts so gripping—indeed, they constitute the listener—is how they blend loss, nation, and one’s identity. My parents had never read Carmenates’ advice on how parents could give their children unsettling curiosity (it is a better word in Spanish—*inquietudes*) about one’s ethnic identity, but they hit the bulls-eye. Growing up, though, means giving one’s

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59. There is a small but important tradition of using oral histories to preserve memory of Cuban culture while in diaspora. See, e.g., Uva Aragón, Cuban Oral History Project, Florida International University (compiling video interviews of prominent Cuban emigrants in the U.S.); José B. Fernández, *Los Abuelos: Historia Oral Cubana* (1987) (using oral histories based on oral history interviews with Cuban-American elders).
own account of one's self, even if it breaks with family narrative. Put to an election between rival accounts of the past — a family narrative of loss and competing accounts — none of which sound in oneself, what is one to do? One person's individuation may be a crime of symbolic violence (and family betrayal) against a loved one. How, then, to honor a family's evergreen accounts of origins and losses and one's duty to self? Welcome to the Cuban-American Oedipal conflict. Finessing this conflict, when it is also a crucible for national identity, can be like threading sixteen needles.

Granted, island Cubans may have their own version of unresolved Oedipal conflict, not only in the family but, more widely, with Fidel Castro, as both a person and mythic father of statehood. Having lived most of my life in the United States, I speak only to what I know: the Cuban-American form of the conflict. A memorial to the evergreen losses from the Cuban revolution and our migrations is in order. But unmediated

60. Sigmund Freud, the father of the Oedipal conflict, writes:

From [adolescence] onwards, the human individual has to devote himself to the great task of detaching himself from his parents, and not until that task is achieved can he cease to be a child and become a member of the social community....For the son this task consists in ... reconciling himself with his father if he has remained in opposition to him, or in freeing himself from his pressure if, as a reaction to his infantile rebelliousness, he has become subservient to him. These tasks are set to everyone; and it is remarkable how seldom they are dealt with in an ideal manner — that is, in one which is correct both psychologically and socially. SIGMUND FREUD, INTRODUCTORY LECTURES ON PSYCHOANALYSIS 418 (Norton, 1965) (1920). Freud also addresses the conflict in girls. Id. at 413-14.

61. Others have framed identity conflicts in respect of Cuba in other ways too. See, e.g., Francisco Valdés, Diaspora and Deadlock, Miami and Havana: Coming to Terms with Dreams and Dogmas, 55 FLA. L. REV. 283 (addressing identity formation of those born in Cuba and raised in the U.S. in the context of a dialectic between Miami and Havana elites).
deference to the expectations of parents may let the dead hand of their past choke our present, for example, when we refuse to visit Cuba for fear of upsetting parents. Life belongs to the living, as unsentimental as that may sound. Jesus was even less patient: let the dead bury their dead.

To recapitulate: the losses of Cubans during the revolution and from emigration get internalized as trauma in the economic processes of the psyche which Freud named. When these parents raise children in diaspora, these internalized losses inform how parents transmit family history, leading children to ingest the parents' losses whole, without adequate filtering. These introjections by the child of the parent's own introjected loss then lay a foundation for the children's own views not only about its origins but, also, its future.

Impeding the process of individuation by Cuban-Americans is the way that the U.S. embargo limits the type of contact with Cuba which could lead to a more vibrant sense of our hybrid identities. Take the requirement in the Helms-Burton Act that there be a "big bang" transition in the island before this current form of U.S. interference in the Cuban state ends: to qualify as a transition government, a Cuban administration must meet several requirements, including taking steps to settle property claims. Unfortunately, this approach suspends active engagement with the question of Cuba until the apocryphal big bang is detonated. Besides, big bang approaches disregard the power of Cuba's local elites. Popular uprisings do occur, but it takes more than a tax on tea — or no tea at all — to start a revolution in Cuba. Cuba is more likely to change in a whimper rather than a bang, one piecemeal change at a time.

62. Rejecting the big bang models, I see shifts in U.S.-Cuba relations and in Cuba too happening incrementally, one deal at a time.
It was only by becoming a law professor that I escaped the embargo on Cuban-American identities. As an academic, I could take advantage of a general license in the Cuban Assets Control regulations which softens the restrictions on contact with the island.\footnote{17 CFR §515.564(a)(91).} My first professional trip to Cuba was in 2003 when Albany Law School (my first teaching job) funded a trip to the University of Havana Law Department to meet with university administrators and faculty and to finish the research for my first law review article.\footnote{José Gabilondo, \textit{Sending the Right Signals: Using Rent-Seeking Theory To Analyze the Cuban Central Bank}, 27 \textit{Houston J. Int'l. L.} 483-525 (2005).} Much Cuban law blends socialist and civil code elements, but the legal culture of the place felt very familiar to me. And conversations with law faculty followed the predictable lines of academic exchange, another reassuring fact. My later research trips built on this experience, as I met with practicing lawyers (including tax and finance lawyers), law students, bar association officials, and university officers.

This contact bred a feeling of coherence in me. Indeed, for the first time, I had experienced an entire country (or parts of it anyways) filled with people who, though strangers, had the same affect, culture, and way of being as my own family. This took the form of very ordinary experiences – intellectual exchanges, professional collaboration, shared self-discovery, and, of course, desire, with its startling power to make one feel at home anywhere. The mental binaries for what Cuba had been and about what emigration had meant – that dramatic churning which characterizes the question in the U.S. – slipped away. The experience brought me closer to my own family, but this time not through their accounts, but through my own. I had seen where they had lived and loved first hand. So it seemed ironic – and inevitable in that tragicomedy.
called "family" – that their reluctance to have me visit Cuba might have kept me from understanding just what it was that they had given up by leaving. And my experience vindicated Carmenate's advice about the importance of transmitting knowledge about Cuban history and culture. Granted, my experience was a hybrid of what Carmenate had in mind, but that would seem to be the point of Oedipal regeneration.

The same polarizing mental categories were there when I returned to the U.S., where I would have to shoehorn my account into the stale conflicts between the dominant frame and the counterframe. But now I had my own ground of being from which to dispute not only the content of the opposing claims but foundational move of setting up the dialectic. Convinced that others could benefit from the same kind of individuation, my efforts have me with only moderate success. Student and faculty interest has been there on both sides of the Florida straits but licensing problems have gotten in the way. The Treasury's Office of Foreign Assets Control ("OFAC") has denied my request to speak at a conference in Havana on legal education; the Cuban authorities failed to approve my request to speak at another legal conference; I canceled a scheduled seminar on Cuban legal studies because the most recent tightening of Cuban Assets Control regulations in June 2004 prohibited the fieldwork for the seminar; and attempts to include island counterparts in a book project and in panels planned for Law and Society, LatCrit, and the Latin American Studies Association have failed because of similar restrictions, as did my attempt to bring a Cuban historian

of sexuality as visiting professor to FIU.\textsuperscript{66} Hell is not just other people. It is transaction costs too, something that governments are all too aware of.

For the time being, promoting individuation on this question happens locally. In my first year at the College of Law, our Cuban-American Law Society organized a Town Hall Meeting on Cuban-American Identity, pairing our students with academics and lawyers interested in Cuban studies in a structured discussion about the sources of Cuban-American Identity. When I taught a Spanish-language law class here, I used many examples of Cuban law to teach language skills. In February of this year, the College of Law organized its first legal conference on immigration and capital flows from Cuba, including lawyers and law professors with professional experience in both the U.S. and Cuba.\textsuperscript{67} Part of the conference focused on a new wave of foreign investment

\textsuperscript{66} For instance, the U.S. State Department denied visas to each of the sixty-one Cuban academics and professionals who had been invited to participate in the October 2004 meeting of the Latin American Studies Association, whose academic conferences have included a Cuban delegation since 1977. See Syke Stephenson, \textit{Policy Winds and Exchange Flows: Forty Years of US-Cuban Academic and Educational Exchanges} (presented at the 2004 meeting of the Latin American Studies Association, publication forthcoming) (on file with the author). The embargo also limits the production of scholarship on Cuban legal studies. By limiting the access of U.S. academics to Cuban society, markets, and legal institutions, federal and state restrictions on travel to Cuba have seriously stunted the volume, range, and quality of legal scholarship in the U.S. about Cuba. Most of this scholarship deals with transition, foreign investment, or, to a much smaller extent, human rights. What is missing in nearly all of this scholarship is much empirical contact with actual legal institutions or adequate consideration of the views of Cuban jurists. And these restrictions also interfere with the formation of valuable intellectual networks between scholars and others in the U.S. and Cuba.

\textsuperscript{67} A second one is scheduled for the fall of 2008.
in the island.\textsuperscript{68} Despite these inroads and the privilege of being part of the closest thing there is to a Cuban-American law school, I cannot shake a nagging fractured feeling on the question of Cuba. It is not the neurotic splitting for which you turn to a good analyst. It is a felt reflection, in miniature, of a nation divided, the same divided nation to which our families belong.

Miami, in particular, can be the best and worst of places to do this kind of work because while resources and interest abound so too do legal restrictions.\textsuperscript{69} In addition to the federal embargo, a Florida statute of dubious constitutionality bans the use of public monies by academics to travel to "terrorist" countries, notably Cuba.\textsuperscript{70} Last year, the ban was extended to reach "non-state funds," a crucial source of funding for Cuba studies in the U.S. because federal funds for Cuban areas studies may come with research restrictions that compromise its scholarly integrity and evenhandedness.\textsuperscript{71} The ACLU and faculty from Florida universities (in-


\textsuperscript{70} \textit{See} Florida Statutes §110.1155.

\textsuperscript{71} \textit{See} Florida S.B. 2434, "Act Relating to Travel to Terrorist States," signed into law on May 30, 2006. \textit{See} Complaint, Faculty Senate of Fla. Int'l Univ., et al. v. Winn, et al., 477 F. Supp. 2d 1198 (S.D. Fla. 2006)(No. 06 Civ. 21514) (on file with author). The statute limits the academic freedom of faculty and speech interests of students and others:

By prohibiting a broad range of activities related to travel to certain foreign countries, the Travel Act violates the First and Fourteenth Amendments by materially interfering with the
including FIU faculty and our Senate) have challenged the ban in district court. In part a response to this statute, the Emergency Network of Cuban American Scholars and Artists for Change in U.S.-Cuba Policy ("ENCASA") formed and filed an amicus brief in support of the plaintiffs. (The idea for this essay came out of a declaration that I gave for the amicus brief.) Because the

right of academic freedom, public expression and free speech by students and university employees. The Act further constitutes impermissible viewpoint-based discrimination by singling out specific areas of study and restricting activities that are essential to conduct research and publish in those areas while continuing to fund study and research in other areas. Complaint at 12, Faculty Senate of Fla. Int'l Univ., et al. v. Winn, et al., 477 F. Supp. 2d 1198 (S.D. Fla. 2006) (No. 06 Civ. 21514).


73. ENCASA is a group of:

Cuban American scholars and artists who have coalesced as a network of U.S. citizens committed to promoting contact and dialogue between the United States and Cuba. Most of ENCASA's membership consists of academics based in 150 different universities across the United States, though the organization also includes independent scholars, writers, artists, attorneys, and other professionals. Many of ENCASA's members work in the field of Cuban studies, and many members were either born in Cuba, or have parents who were born in Cuba. The membership therefore has particular and deep interest in relations between the United States and Cuba. See Brief at vi. for Emergency Network of Cuban-American Scholars and Artists for Change in U.S.-Cuba Policy as Amicus Curiae Supporting Plaintiff Faculty Senate of Fla. Int'l Univ., et al. v. Winn, et al., 477 F. Supp. 2d 1198 (S.D. Fla. 2006) (No. 06 Civ. 21514) (on file with author).

74. One effect of the statute was that it contributed to a metaphorical embargo on certain Cuban-American identities:

At a more existential level, the Travel Act would keep students from experiencing the kind of structured contact with the culture of origin which would help them to make sense of their
court denied the plaintiffs' motion for summary judgment, the case now proceeds to trial. So it is not just the substance of truth claims about Cuba which are disputed. Whether one even has academic freedom to engage and dispute these questions must itself be contested, even if it means making a federal case out of it.

III. Conclusion

What then? As a Cuban-born and U.S.-raised law professor working at a public law school in Miami (its first, I am proud to say, and one founded in large measure by the efforts of Cuban-Americans), my advice is to start by recognizing the symbolic background of loss against which property claims are made. Also, frame all claims in the economics of the present, giving due consideration to changed circumstances and the selective need to keep the past in the past. I briefly expand on the two suggestions below.


76. My counterframe finds ample support in law, which often gives priority to the present, both because doing so is fair and because doing so is good, i.e. allocatively efficient. Statutes of limitations are a prominent example, but there are many others which place the present above past expectations (often long-soured): in contract – estoppel, impossibility; in property – the rule against
First, the settlement of legal claims must be situated in the wider context of reconciliation of the competing truth claims about Cuba. Because they have been reduced to a dollar value, property losses create the illusion that their meaningful settlement is possible. But restitution claims only “stand in” for the effective losses. No specific performance can bring back the Vista Alegre of my parents; but some type of symbolic recognition of the loss—in a collective and official form—might help. The U.S. Foreign Claims Settlement Commission cannot certify these claims of the present; but it is these claims which should frame how other claims are made with respect to Cuba. In any event, it is a mistake to open any serious discussion about Cuban national reconciliation (and market reconstruction) by starting with settlement of restitutionary claims. This issue locks people into unyielding oppositions like no other and emphasizes the private dimension of public, collective losses. So the next time that you hear “claims” and “Cuba” used in the same sentence, think of the claims of the present, a present trying to throw off the weight of the past and its claims.

Second, any meaningful settlement of property claims should be part of a more general market-clearing process that eliminates political risk with respect to the Cuban economy, including that from embargo losses. Only by clearing the political risk sourced by both Cuba and the U.S. can the Cuban economy hope to prosper. An extensive literature proposes settlement mechanisms for property claims, although legal obstacles remain, like determining a competent forum and applicable law.77 Much perpetuities; in equity—laches; and in constitutional theory—Jeffersonian ideals about usufructuary interests to name a few. In each case, the present trumps historic expectations.

77. For example, neither Cuba nor the U.S. recognize the compulsory jurisdiction of the World Court. See, e.g., Republic of Nicaragua v. The United
like a judgment-proof debtor, however, Cuba lacks the liquidity needed to fund settlement of any major claims. My goal here is not to suggest a legal theory for consolidated claims settlement but, instead, to trace an interest-convergence which could create demand for a legal solution and, with it, settlement liquidity. A properly designed mechanism could create an interest shared by various claimants in providing Cuba with this settlement liquidity. Candidates for these interest groups include current holders of certified claims, other claimants, commercial firms and trade lobbies interested in participating in the Cuban economy, the Cuban government, and others who want to engage with Cuba.

Little authority exists in public international law for a political-risk-clearing mechanism that would consolidate both property claims and those arising from embargo losses, but the peculiarity of the Cuban experience calls for a new approach. Consider the following: (i) the exceptional length and scope of the Cuban embargo has little precedent in public international law; (ii) the Cuban diaspora in the United States might lend support to consolidated claims liquidation, under the right circumstances; and (iii) unlike what was the case during the transitional experience of many Eastern European countries, the rise of a new left trading block in Latin America might induce the U.S. to consider an “equity payment” to redirect Cuban markets away from this trading block. Again, settling and funding the legal claims is only part of the solution but, combined with reconciliation of the

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States of America (1986). Both Cuba and the U.S. belong to World Trade Organization and Article 11 on the General Elimination of Quantitative Restrictions would seem to cover the kinds of economic harms produced by the Cuban embargo. The U.S. has, however, justified its economic sanctions against Cuba on the GATT's Article 22, which lets member countries impose sanctions for "essential security."
symbolic claims, consolidated claims settlement stands a better chance of shaking the past off for the sake of the present.

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The recent turn of events in Havana invites Cuban-Americans to think actively about this question: What is my real stake in Cuba? Resolving this question, on one's own terms, can help turn a tired dichotomy into an engine for personal coherence, so I urge Cuban-Americans to make their own account of Cuba's past and future. Can this be done while respecting family accounts of origins and loss? Yes, but gingerly. Again, that is the point of Oedipal regeneration. And isn't that what parents should want for their children? Transition begins at home, in the home.