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MAJOR LEAGUE PROBLEMS: BASEBALL’S BROKEN SYSTEM OF CUBAN DEFECTION

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Abstract: Since the 1991 defection of Cuban pitching star Rene Arocha, dozens of Cuban baseball players have defected in order to play professionally in the United States. The system of Cuban defection poses considerable humanitarian risks for defecting players and their families, including physical danger, family dissolution, and an entangling web of immigration and repatriation laws. Despite these dangers, Cuban ballplayers—boxed in by a complex combination of historical, political, and legal forces outside of their control—have no choice but to defect if they wish to play professionally in America. This Note argues that the prevailing system of Cuban defection clearly violates important humanitarian concerns and should be abandoned. It concludes, however, that defection by Cuban baseball players will likely continue until the fall of the Castro regime and end of the U.S. embargo of Cuba.

INTRODUCTION

The defections began on July 10, 1991, when Cuban pitching star Rene Arocha simply had to “find an exit sign” at Miami International Airport.1 Arocha made his daring, if unspectacular, escape during a layover after having played for the Cuban national team in an exhibition tournament in Tennessee.2 That day, Cuba’s third-best pitcher cast off more than just his teammates; he left behind his family, his homeland, and over 125 years of Cuban baseball history.3 Arocha had

* Note Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2004–2005). I’d like to offer my sincere thanks to the Journal staff for their invaluable editorial support; to the Boston Red Sox for an unforgettable 2004 season; to Red Sox Director of Player Development Ben Cherington for taking the time out of a busy spring training schedule to speak to me; and to Kate and the rest of my family for their unconditional love, patience, and support. I dedicate this paper to my father, Arthur Frankel, a lifelong baseball player and fan who not only prodded me toward this topic, but offered great advice along the way.


2 See Wulf, supra note 1, at 60.

3 See Robb, supra note 1.
become the first Cuban to defect from his country to play baseball in America.4

By defecting, Arocha single-handedly ended Castro’s monopoly on Cuban baseball talent and catalyzed a revolution on both sides of the Straits of Florida.5 In Cuba, young players, disgruntled by economic malaise and lured by the promise of American professional baseball, began to view defection as a viable option.6 The Cuban government, humiliated over Arocha’s defection, denounced the pitcher for committing “high treason against the revolution.”7 But the Cuban populace, especially aspiring baseball players, followed his career in the United States.8 After Arocha signed a contract with the St. Louis Cardinals of Major League Baseball (MLB)—and neither he nor his family were threatened with retribution—a wave of defection among Cuban ballplayers began that continues to this day.9

In America, the Arocha defection and those that followed forced MLB to develop, on the fly, a series of imperfect policies to govern the recruitment and signing of Cuban players.10 The defections also complicated the U.S. government’s policies regarding enforcement of the Cuban embargo, domestic immigration law, and repatriation treaties.11 MLB’s ad hoc approach and the longstanding policies of the United States have fostered a broken system that encourages Cuban players to abandon their families, risk life and limb, place themselves at the mercy of self-interested agents, and circumvent or even break immigration laws to play in America.12

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4 Kevin Baxter & Fernando Dominguez, Baseball Si, Cuba No, SPORTING NEWS, Mar. 21, 1994, at 12.
5 See id.
6 See id.; Barry Horn, Cubans Travel Long Road to Join Rangers, DAILY OKLAHOMAN, July 11, 1993, at 7.
7 See Baxter & Dominguez, supra note 4.
9 See id. at 76–101. Cuban sports journalist Gilberto Dihigo noted that after Arocha’s defection, “[e]mpieza el cosquilleo de ‘yo puedo’ [then the ‘I can do it too’ attitude began].” Id. at 77. Dihigo maintained that most defecting players were driven by a desire to compete at the highest level, rather than a desire to make a political statement. Id.
12 See Kevin Baxter, Throwing Cuban Players a Lifeline: Agent Joe Cubas Has Turned Paupers in Princes—But Not Without Raising a Sea of Disturbing Questions, SPORTING NEWS, Aug. 10,
There can be no doubt that the policies of the Castro regime are primarily responsible for the current dilemma. But there can also be no doubt that MLB rules and American foreign policy exacerbate an extremely complicated problem.

Perhaps the complexity of the issue is the reason that out of dozens of scholarly articles dealing with MLB’s relationship with Latin American countries, only four effectively tackle the intersection of

13 See Jamail, supra note 8, at 7 (noting that the “two main problems facing Cuban baseball are, ironically, Cuba’s abundance of players with little possibility of advancement and the unwillingness of the Cuban government to provide the necessary economic stimulus for players to remain in the country”). Cuba’s current economic crisis began in the early 1990s when the collapse of the Soviet Union portended the end of large amounts of economic aid from the communist superpower. See, e.g., Steve Fainaru & Ray Sanchez, The Duke of Havana: Baseball, Cuba, and the Search for the American Dream 42–44 (2001); Marifeli Perez-Stable, The Cuban Revolution: Origins, Course, and Legacy 174–201 (1999). Castro’s regime, though adept at sports development, has failed to ameliorate the dire economic conditions or find another significant source of foreign aid. See, e.g., What Follows Fidel?, ECONOMIST, Jan. 2, 1999, at 31 (“The [Cuban] economy is in a mess. Corruption is rife. Prostitution is rampant. . . . Crime is rising. The country’s infrastructure is crumbling.”); Steve Wulf, Running on Empty, SPORTS ILLUSTRATED, July 29, 1991, at 60, 60, 64 (“Cubans lack for certain things—foodstuffs, fuel, foreign friends—but pride is not one of them. . . . The fact that the government has chosen sports as its vehicle for survival is not surprising, given Cuba’s rich athletic tradition.”). The Cuban government legalized the circulation of U.S. dollars in 1993 to halt the economic free fall, which allowed those who could obtain dollars to spend them on valuable commodities such as food and medicine. Jamail, supra note 8, at 5–7. Yet, according to author Milton Jamail, the situation for most baseball players deteriorated further:

The bottom line is that since Cuba legalized dollars in 1993, the position of baseball players in Cuban society has gone from privileged to underprivileged. Cuban players receive only a small salary, less than the equivalent of $30 a month, but it takes at least $120 a month to sustain a basic level of comfort in Havana. Cuban musicians and artists are allowed to come and go—and to bring dollars back into the country. University professors and medical doctors can become waiters in tourist hotels, hawk wares to tourists on the street, or bake cookies to sell to neighbors—and earn dollars. Baseball players are effectively excluded from this sector of the economy, and if they receive money from the United States, they become suspect for fear they are planning to defect. They must remain poor and above suspicion.

Id. Lastly, the Castro regime’s policy of banning from baseball those suspected of wanting to defect actually increases players’ motivation to do so. See id. at 90. Since “a pitcher not able to pitch is like a sugar cane cutter without a machete,” banned players will almost always attempt to leave Cuba. See id.; see also Sue Anne Pressley, Five More Baseball Players Leave Cuba, WASH. POST, Aug. 15, 1998, at A3.  
14 See Cwiertny, supra note 10, at 391–93; Greller, supra note 10, at 1689–95.
MLB, American foreign policy, and Cuba. The first of these articles, by Jason Weiss, is a wide-ranging survey of baseball’s intersection with various legal issues pertaining to Cuban players. The second, by Matthew Greller, focuses primarily on “baseball diplomacy”—that is, changing the current framework of rules and laws governing Cuban ballplayers so as to improve diplomatic relations between the United States and Cuba. The third article, by Scott Cwiertny, argues that MLB must change its rules governing Cubans in order to avoid giving teams an incentive to violate American foreign policy and MLB regulations. And the fourth, by Professor Andrea Kupfer Schneider, discusses the political and legal ramifications of the March 1999 series between the Baltimore Orioles and the Cuban national team, and dissects a legal dispute involving the free agent status of a Cuban defector.

While all four articles deal with important questions and argue persuasively, none specifically or substantially address the visceral issue of defection. Several discuss the possibility of MLB adopting a worldwide draft, which would alter the system for Cuban players, and others discuss the proposed Baseball Diplomacy Act, House Bill 189, which would eliminate defection as a prerequisite for Cuban ballplayers to play in America. Only Greller calls decisively for a series of changes that, if enacted, would eliminate defection altogether, but limits his discussion to the context of better baseball diplomacy.

This Note, by contrast, frames the need to jettison the current defection system in humanitarian terms. It argues that the current defection system ignores the basic safety and welfare of young Cuban

16 See generally Weiss, supra note 15.
17 See generally Greller, supra note 10.
18 See generally Cwiertny, supra note 10.
19 See generally Schneider, supra note 10.
20 See generally Cwiertny, supra note 10; Greller, supra note 10; Schneider, supra note 10; Weiss, supra note 15.
21 See Cwiertny, supra note 10, at 425–27; cf. Greller, supra note 10, at 1702–05 (suggesting the incorporation of Cuban players into the domestic amateur draft, which would have a virtually identical effect on Cuban players as would implementing a worldwide draft).
23 See Greller, supra note 10, at 1708–10.
24 See infra Section II.
ballplayers and their families. Part I surveys the basic historical, political, and legal framework in which the current system operates, the evolution of that system, and how it functions today. Part II explains why the current system is irreparably flawed from both a humanitarian and immigration law standpoint. Part III examines the viability of possible alternatives to the current system, including the desirability and probable impact of both a worldwide draft and the Baseball Diplomacy Act. This Note concludes that until the Castro government falls and the Cuban embargo is lifted, there is little chance that the defection system will be materially altered or eliminated.

I. THE CURRENT DEFECTION SYSTEM

The current system of Cuban baseball defection is a direct result of the tumultuous relationship between Cuba and the United States in the post-Cuban Revolution era. This section traces the historical, political, and legal context of the defection system. Furthermore, this section analyzes the evolution of Cuban baseball defection and how it functions today.

A. The Historical, Political, and Legal Framework

1. The United States, Cuba, and Baseball: History and Politics

Despite the rancorous relationship between Cuba and the United States today, baseball served as a common tie between the two countries for nearly a century before the Cuban Revolution of 1959. Baseball was first played during the 1840s in the shadow of New York City, but it did not take long to reach Cuba. Over the next several decades, burgeoning sea commerce brought baseball to port cities throughout North America and the Caribbean. In Cuba, the game was primarily popularized by American sailors, both military and merchant, and Cubans returning from American universities. Key port

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25 See infra Section II.
26 See Greller, supra note 10, at 1685.
28 See Echevarria, supra note 27, at 82.
cities in Cuba’s sugar trade, Havana and Matanzas, became hotbeds for the new sport. In December 1874, clubs from the two cities squared off in what is thought to be the first recorded Cuban ballgame, with Havana winning 51-9.

Much like its American counterpart, Cuban baseball has always been tightly intertwined with history, politics, and social change. In the latter third of the nineteenth century, native Cubans, or criollos, used baseball to express discontent with the colonial Spanish authority and distinguish themselves as “a people apart and a nation distinct from Spain.” Through baseball, Cubans rejected the rigid class structures and pervasive racism of the colonial power. The sport became “a form of opposition to the ideas of Spain: to play baseball was to be criollo, to be criollo was to be Cuban.” Thus, since its inception, baseball has been considered “part of the nacionalidad cubana [Cuban national identity].”

In addition, baseball became a cultural bridge between Cuba and the United States, with ballplayers constantly in transit from one country to the other. From the 1870s and continuing until the Cuban Revolution, Cuban stars were free to leave their country to participate at all levels of American professional baseball. Between 1947 and the early 1960s, Cuba was the primary source of Latin-American

30 See ECHEVARRÍA, supra note 27, at 82–83.
31 See id. at 86 (noting that “[n]o big issue was made of the lopsided score”).
32 See id. at 3–9; Perez, supra note 29, at 494 (“[B]aseball has long served to give expression to Cuban nationality, both as a means to nationhood and as a metaphor for nation.”). In America, the 1919 “Black Sox” scandal and Jackie Robinson’s 1947 debut as the first African-American major leaguer, for example, both symbolized salient political and social issues extending far beyond the sport itself. See RADER, supra note 27, at 99 (noting that public response to the Black Sox scandal “offered conclusive evidence that baseball had achieved a prominent and special place in American life”); id. at 142 (asserting that Robinson’s entrance into the league “not only heralded the reversal of organized baseball’s long-term ban against black players but signified the beginning of a new era of white-black relations in the United States”).
33 Perez, supra note 29, at 509.
34 See id. at 505–09.
35 JAMAIL, supra note 8, at 15 (quoting Gilberto Dihigo, Cuban-born son of Martin Dihigo, widely considered the best Cuban ballplayer ever and the only Cuban in the National Baseball Hall of Fame in Cooperstown, New York).
36 Id. (quoting Dihigo).
37 See id. at 20–23.
38 See id. at 20. The first Latin-American player to play professionally in America was Cuban Estéban Bellán, who played for a team from Troy, New York, in 1871. Id. By 1946, thirty-nine Cubans had played in MLB. Id.
talent for the majors, producing such stars as Orestes "Minnie" Miñoso, Tony Oliva, and Tony Pérez.\textsuperscript{39} Concurrently, MLB organizations sent players to Cuba to participate in the professional Cuban League.\textsuperscript{40} Because the league operated during the winter, major leaguers were able to hone their skills during the off-season, and Cuba’s top players gained an opportunity to compete against America’s best.\textsuperscript{41} Some MLB teams also chose Cuban sites for their spring training camps, further exposing Cuba’s enthusiastic fans to America’s all-stars.\textsuperscript{42} 

But the symbiotic relationship between American and Cuban baseball came to an unfortunate halt with the Cuban Revolution of 1959.\textsuperscript{43} Guerilla leader Fidel Castro seized power after the collapse of the authoritarian Batista regime, which was weighed down by corruption, ineptitude, and popular opposition.\textsuperscript{44} Castro quickly implemented wide-ranging socialist policies, most notably agrarian reform, ostensibly geared toward empowering the \textit{clases populares}.\textsuperscript{45} But the United States, which opposed Castro’s nationalization of key industries and the appropriation of American property in Cuba, sought to replace the new regime with one friendlier to American interests.\textsuperscript{46} For the Cuban government—moving rapidly toward communism and faced with increasing hostility from the United States—aligning with the Soviet Union, America’s Cold War rival, was a natural next step.\textsuperscript{47} 

In this tumultuous Cold War context—typified by the Bay of Pigs fiasco and the near-disastrous Cuban Missile Crisis—baseball relations between Cuba and the United States effectively ended.\textsuperscript{48} Two major developments were, and continue to be, responsible for this breach: Castro’s ban on professional sports and the United States’ embargo of

\textsuperscript{39} Id.
\textsuperscript{40} See JAMAIL, supra note 8, at 22.
\textsuperscript{41} See id.
\textsuperscript{42} See id. at 18–22. The New York Giants trained in Havana in 1937, and the Brooklyn Dodgers trained there in 1941, 1942, and 1947. \textit{Id.} at 18. The 1947 trip was designed to provide Jackie Robinson a more relaxed and receptive atmosphere than he would have found in Florida. \textit{Id.}
\textsuperscript{43} See id. at 16–28.
\textsuperscript{44} See PÉREZ-STABLE, supra note 13, at 52–60; see also ECHEVARRÍA, supra note 27, at 302–304 (describing Batista as "a fairly ludicrous small-time populist dictator" who was not as corrupt as Trujillo in the Dominican Republic or the Somoza family in Nicaragua).
\textsuperscript{45} See PÉREZ-STABLE, supra note 13, at 61–81.
\textsuperscript{46} See id. at 79–80.
\textsuperscript{47} See id. at 80–81.
\textsuperscript{48} See JAMAIL, supra note 8, at 8–10, 20–28.
In 1961, as part of a wide-ranging sports reform program emphasizing socialist values, Castro abolished professional baseball in Cuba. Declaring el triunfo de la pelota libre sobre la pelota esclava—the triumph of free baseball over slave baseball—Castro began to develop the most successful amateur baseball system in the world. This highly developed system is now the symbolic centerpiece of the revolution, and Castro, master of propaganda, portrays the sport and its players as embodying the socialist ideal.

At roughly the same time, the United States instituted the Cuban embargo, driving another devastating wedge between Cuban and American baseball. In the years 1960–61, the Eisenhower administration imposed a partial embargo, prohibited American exports to Cuba, and severed diplomatic relations. The embargo’s chief purposes were to isolate the Castro regime economically so as to accelerate its demise and further American security interests by undermining Castro’s relationship with the Soviet Union. The Kennedy administration and subsequent administrations expanded and strengthened the embargo, prohibiting virtually all commerce and travel between the nations. MLB teams necessarily ceased all activities in Cuba, and by the end of the 1980s the number of Cuban players in the league had dwindled to a handful. Of course, since Rene Arocha’s trendsetting 1991 defection, the Cuban presence in MLB has grown. Yet, despite its failure to topple Castro and the end of the Cold War, the emb-

49 See id. at 129–30.
50 See Echevarría, supra note 27, at 355; Jamail, supra note 8, at 29.
51 See Jamail, supra note 8, at 29. Ironically, for all but the most ardent proponents of coercive state power, “free baseball” would certainly entail allowing a player to contract freely with any team willing to pay his price, whereas “slave baseball” might more accurately describe a system in which meagerly compensated players are compelled to play for their government. See id. at 141 (“Fidel is still stuck on la pelota esclava—only now the slaves are the players trapped on the island.”); cf. Echevarría, supra note 27, at 361–68 (discussing the advantages and disadvantages of the Cuban amateur system).
52 See Jamail, supra note 8, at 133–34.
53 Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6021–6091 (2003); see Jamail, supra note 8, at 129 (calling the embargo “the fundamental barrier impeding improved baseball relations between Cuba and the United States”).
54 See Peter Schweb, Cuba: Confronting the U.S. Embargo 15 (1999).
56 See id. at 2–3.
57 See Peter C. Bjarkman, Baseball with a Latin Beat 365–73, 394 (1994); Jamail, supra note 8, at 129.
58 See Echevarría, supra note 27, at 388–91 (listing players who defected after Arocha and played in MLB).
bargo is as strong and wide-ranging as ever, continuing to undermine
baseball relations between Cuba and the United States.59

Perhaps the most dexterous and durable dictator on the planet,
Castro has also used Cuban amateur baseball and the existence of the
embargo to further his political ends.60 The Castro regime fashions
national heroes out of its star ballplayers; they symbolize the "success"
of the revolution and are critical to government propaganda.61 Addition­
ally, the embargo provides Castro with a convenient excuse for his
failed economic policies.62 By using the embargo to stir up national­
ism and anti-American fervor, Castro "distracts the Cuban people
from their real problem: [his] authoritarian system."63

For Americans, perhaps the most visible effect of Castro's
authoritarian, economically failing system is the constant wave of Cu­
ban immigrants seeking a better life in the United States.64 During
and immediately following the revolution of 1959, many Cubans fled
to South Florida in response to the appropriation of their property
and the threat of persecution under the new regime.65 Since then,
thousands of Cubans have come to the United States each year.66 Be­
cause illegal immigration from Cuba to the United States is pervasive,
the federal government has implemented strict immigration controls
governing Cuban immigrants.67 Federal law imposes serious criminal
penalties for immigrant smuggling, a widespread practice, and trea-

59 See Jamail, supra note 8, at 129.
60 See id. at 150 ("Fidel, Cuba's owner-manager, understands how to use baseball to
achieve his political goals."); Schwab, supra note 54, at x-xii (noting that the "politically
astute and talented" Castro has "for 40 years ... stood against the United States in its very
own backyard").
61 See Jamail, supra note 8, at 93, 130, 141, 148-50.
62 See Lucien J. Dhooge, Fiddling with Fidel: An Analysis of the Cuban Liberty and Demo­
63 Id. (quoting H.R.REP.No.104-202, at 25 (1995)).
64 See Matthew A. Pingeton, Comment, United States Immigration Policy: Detaining Cuban
Refugees Taken from the Sea, 8 J. TRANSNAT'L L. & POL'Y 329, 329-31 (1999).
65 See James S. Olson & Judith E. Olson, Cuban Americans: From Trauma to Tri­
66 Id. at 93; see Matias F. Travesio-Diaz, Immigration Challenges and Opportunities in a Post­
67 See, e.g., Travesio-Diaz, supra note 66, at 238-51; Donald L. Brown, Comment,
Crooked Straits: Maritime Smuggling of Humans from Cuba to the United States, 33 U. MIAMI
INTER-AM. L. REV. 275-91 (2002); Pingeton, supra note 64, at 329-41; Read Sawczyn, Note,
The United States Immigration Policy Toward Cuba Violates Established Maritime Policy, It Does Not
Curtail Illegal Immigration, and Thus Should Be Changed So That Cuban Immigrants Are Treated
Similarly to Other Immigrants, 13 FLA. INT'L L. 346-52 (2001).
ties with Cuba limit the ability of Cubans to enter the United States legally and illegally. 68

Most Cubans who come to America settle in and around Miami, eagerly awaiting—and oftentimes working toward—the downfall of the Castro regime. 69 Miami’s stridently anti-Castro Cuban-American population is a powerful political voice, especially given Florida’s reputation as an important swing state in presidential elections. 70 The result is an American foreign policy toward Cuba that is largely beholden to the Cuban-American population in Florida, making reform controversial and extremely difficult to enact. 71

While Cuban Americans may loathe Fidel Castro, they love baseball defectors like Rene Arocha, who buck his repressive system to play baseball in America. 72 But for most defectors, politics is, at best, secondary. 73 Deciding to defect is always anguishing, and doing so is often physically dangerous. 74 Cuban baseball players who want to play in America are caught in a system—one rooted in historical, political, and legal forces far outside of their control—that offers no good choices.

2. U.S. Foreign Policy and Regional Treaty Law Affecting Cuban Players and MLB

The most salient aspect of U.S. foreign policy toward Cuba is the forty-five year old embargo, which tightly regulates virtually all com-

69 See Olson & Olson, supra note 65, at 92, 95–96 (noting that as of 1995, 60% of Cuban Americans lived in Florida, that 650,000 lived in Dade County, which includes Miami, and that “most Cuban Americans [are] opposed to the Castro regime but disagree[] over... how best to see that democracy is achieved in Cuba”).
70 See id. at 96–97; see also, e.g., Bush v. Gore, 531 U.S. 98, 100–03 (2000) (discussing the facts underlying the 2000 presidential election dispute in Florida); Ken Fireman, Presidential Campaign: Bush Returns to Florida Battleground, Newsday, Mar. 21, 2004, at A32 (calling Florida “the ultimate swing state”).
72 See George Diaz, Cuban Defector Testing the Majors, Orlando Sentinel, Oct. 4, 1991, at D1 ("There is... continued adulation from Miami's Hispanic community that embraced [Arocha] as a hero who embarrassed Castro.").
73 See Jamail, supra note 8, at 77.
merce between the United States and Cuba.\textsuperscript{75} From a U.S. policy perspective—in other words, putting aside Castro’s failed policies—the embargo is the primary reason for the preservation of the broken system of Cuban baseball defection.\textsuperscript{76} In its current, codified form, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1994—commonly known as the Helms-Burton Act, in reference to its chief sponsors—the embargo is more intense and sweeping in scope than ever.\textsuperscript{77}

The subject of withering academic criticism, the Helms-Burton Act seriously impacts MLB and Cuban defectors alike.\textsuperscript{78} The Act mandates strict enforcement of the Cuban Assets Control Regulations (CACRs), which provide the basic governing rules of the embargo.\textsuperscript{79} As they pertain to MLB clubs and Cuban players, the CACRs prohibit “transactions incident to travel to, from, and within Cuba” as well as any “payment or transfer” to any Cuban national.\textsuperscript{80} The broad terms of the embargo prohibit MLB organizations from conducting any business in Cuba, such as scouting or signing players.\textsuperscript{81} Cuban players who sign lucrative contracts in America are technically prohibited

\begin{itemize}
  \item See French, \textit{supra} note 55, at 1-4.
  \item See JAMAIL, \textit{supra} note 8, at 129-30.
  \item See JAMAIL, \textit{supra} note 8, at 129; see also Dhooge, \textit{supra} note 62, at 633 (arguing against the Helms-Burton Act because, among other reasons, it “jeopardizes the leadership role of the United States in various international institutions” and may “serve to prolong if not strengthen the very regime it is designed to topple”); French, \textit{supra} note 55, at 24-25 (arguing that the embargo is inappropriate from an ethical point of view and that the Helms-Burton Act likely violates international law); Andreas F. Lowenfeld, \textit{Congress and Cuba: The Helms-Burton Act}, 90 AM. J. INT’L L. 419, 433-34 (1996) (arguing that the Act “hampers the discretion of the executive branch; it purports to micromanage a transition whose contours no one can predict; it places too much emphasis on property issues almost two generations old; it perverts our immigration and travel laws; and it seeks to impose American policy judgments on nationals of friendly foreign states in a manner that is both unlawful and unwise”). \textit{But see} David M. Shamberger, \textit{Note, The Helms-Burton Act: A Legal and Effective Vehicle for Redressing U.S. Property Claims in Cuba and Accelerating the Demise of the Castro Regime}, 21 B.C. INT’L & COMP. L. REV. 497, 501 (1998) (arguing that the Act will “bring[ ] an end to Castro’s human rights abuses, and expedite[ ] the rise of democracy in Cuba”).
  \item 31 C.F.R. §§ 515.305, 515.309(a), 515.415(a)(1). An exception to this general rule allows Cuban emigrants and others to send $300 every three months to Cuban households. 31 C.F.R. § 515.570(a).
  \item See JAMAIL, \textit{supra} note 8, at 129.
\end{itemize}
from sending all but a small portion of their earnings back to Cuba.\textsuperscript{82} Because the embargo prevents MLB team officials from traveling to Cuba and transacting with any Cuban national, players must not only leave Cuba, but also defect—that is, renounce Cuban citizenship—to play for an MLB club.\textsuperscript{83}

Federal immigration policy also has serious implications for Cuban ballplayers who choose to defect.\textsuperscript{84} For Cuban defectors who establish residency in a country other than the United States and sign professional contracts—the most common scenario—the immigration process is relatively simple.\textsuperscript{85} With the aid of their new team, these players are able to apply for and obtain visas pursuant to immigration laws regulating foreign athletes who want to play in America.\textsuperscript{86}

For players who defect by sea, however, U.S. immigration law is considerably more entangling.\textsuperscript{87} At the heart of the United States’ Cuban immigration policy is the so-called “wet feet, dry feet” rule, by which the United States generally returns Cuban immigrants interdicted at sea to Cuba, while allowing those who reach U.S. soil to remain.\textsuperscript{88} This rule is enforced pursuant to a 1995 bilateral agreement between the United States and Cuba, prompted by the Cuban refugee crisis of 1994.\textsuperscript{89} The treaty requires the United States to allow 20,000 Cubans to immigrate legally each year, and to return to Cuba all illegal Cuban immigrants interdicted at sea.\textsuperscript{90} Given the repressive nature of the Cuban government, however, the United States allows Cubans plucked from the sea to apply for asylum if they credibly fear persecution upon their return.\textsuperscript{91}

\textsuperscript{82} See 31 C.F.R. § 515.570; JAMAHL, supra note 8, at 129. Cubans in MLB routinely violate the rule limiting remittance to $300 per three months. See FAI\textsc{naru} & SÁNCHEZ, supra note 13, at 111–12, 138–39 (noting that Livan Hernández, after revealing in a newspaper interview that he sent money in excess of the limitations back to Cuba, was directed to cease and desist by the U.S. Treasury Department). Those convicted of violating the embargo restrictions can face up to $100,000 in fines and/or ten years in prison. 31 C.F.R. § 515.701.

\textsuperscript{83} Cf. Greller, supra note 10, at 1661–66 (noting that a combination of U.S. immigration policies and MLB rules compel players to defect if they want to play in MLB).

\textsuperscript{84} See id. at 1655–61.

\textsuperscript{85} See id. at 1655–66.


\textsuperscript{87} See CI\textsc{wier}tu\textsc{ny}, supra note 10, at 415–19.

\textsuperscript{88} See Brown, supra note 67, at 276–78; Sawczyn, supra note 67, at 346–49.

\textsuperscript{89} See Joint Statement, supra note 68, at 327; Travieso-Diaz, supra note 66, at 243–44.

\textsuperscript{90} See Joint Statement, supra note 68, at 328, 330; Brown, supra note 67, at 276.

\textsuperscript{91} See Immigration and Nationality Act (INA) § 208, 8 U.S.C. § 1158 (2004); Brown, supra note 67, at 277.
Furthermore, because the “wet feet, dry feet” policy places a premium on reaching American soil, some illegal immigrants resort to professional smugglers for transport from Cuba to Florida.92 Recognizing this problem, in the 1995 agreement both the United States and Cuba pledged to take “prompt and effective action to prevent the transport of persons to the United States illegally.”93 Congress has instituted severe criminal penalties for engaging in or aiding an immigrant smuggling operation.94 Most Cuban ballplayers who defect by sea must confront and overcome these rigid U.S. immigration policies.95

Lastly, agreements between Cuba and its neighbors, particularly the Bahamas, the Dominican Republic, and Costa Rica, present possible problems for Cuban defectors.96 All three countries have repatriation treaties that generally require the return of Cuban refugees.97 If detained in any of these countries, a defector may face deportation to Cuba, where poverty and persecution usually await.98

3. MLB Rules Governing Cuban Players

Aside from the above legal constraints, MLB subjects Cuban players to a more complex set of rules than it does other foreign amateur players.99 Ballplayers residing within the United States, its territories

92 See id. at 278–82.
93 Joint Statement, supra note 68, at 329.
95 See infra notes 214–283 and accompanying text.
96 See Cwiertny, supra note 10, at 419–21.
97 See id.
99 See Schneider, supra note 10, at 480–81; see also MAJOR LEAGUE BASEBALL, THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK, R. 3, 4 (2003) [hereinafter MLB RULES BOOK]. The MLB Commissioner “has broad power to approve contracts; resolve disputes between clubs and between clubs and players; discipline players, clubs, and club owners; and make rules governing the administration of the baseball enterprise.” ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 96 (1998). Thus, the Commissioner’s office formulates and enforces all rules governing the entrance of players into the league, including Cubans and other foreigners. See Cwiertny, supra note 10, at 411–12. Federal judge Walter C. Lindley, in a 1931 case involving the Commissioner’s power of investigation, famously described the Commissioner as “a benevolent but absolute despot [with] all the disciplinary powers of the proverbial pater familias.” Milwaukee Am. Ass’n v. Landis, 49 F.2d 298, 299 (N.D. Ill. 1931). Legal challenges to the Commissioner’s actions rarely succeed, as courts generally do not disturb the Commissioner’s decisions absent a clear violation of his duties under the MLB charter. See ABRAMS, supra, at 113. See generally Matthew B. Pachman, Note, Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy, 76 VA. L. REV. 1409 (1990).
and possessions, and Canada are subjected to the June amateur draft.\textsuperscript{100} Once an MLB team drafts a player, that franchise holds exclusive negotiating rights to that player until just before the following year's draft.\textsuperscript{101} Usually, the team will sign the drafted player to a contract at the minor league level, where the player will have the opportunity to prove himself and, if he is good enough, to move up to the majors.\textsuperscript{102}

For players residing in a foreign country, however, the equation changes.\textsuperscript{103} Foreign players are not drafted; their entrance into the league is governed instead by a simple minimum age requirement.\textsuperscript{104} As long as this requirement is met, foreign ballplayers are free agents who can sign with any team willing to pay.\textsuperscript{105} Free agency tends to produce larger contracts for these players, a result of bidding wars between teams vying for their services.\textsuperscript{106} Therefore, agents advise foreign players to remain outside the United States until they are signed, as establishing U.S. residency would subject them to the amateur draft and generate less lucrative contracts.\textsuperscript{107}

In conjunction with the embargo, MLB policy further complicates this scenario for Cuban players hoping to play professionally in

\begin{itemize}
\item \textsuperscript{100} MLB Rules Book, supra note 99, R. 4(a).
\item \textsuperscript{101} Id. at R. 4(d)-(f); Geller, supra note 10, at 1662 n.59. A player who is eligible for the draft but is not drafted can negotiate with any team as a free agent. MLB Rules Book, supra note 99, R. 4(ii); Schneider, supra note 10, at 480.
\item \textsuperscript{102} See, e.g., Jerry Crasnick, Ordonez Is Off to Succeed the Wizard, Denver Post, Apr. 7, 1996, at C15 (discussing Cuban defector Rey Ordonez's path from Cuba, through the New York Mets minor league system, to his debut for the Mets on opening day, 1996); Horn, supra note 6 (discussing how two early Cuban defectors, Osmani Estrada and Alexis Cabrera, were drafted and signed to minor league contracts by the Texas Rangers).
\item \textsuperscript{103} See Geller, supra note 10, at 1662.
\item \textsuperscript{104} MLB Rules Book, supra note 99, at R. 3(a)(1)(B). The minimum age for a player to sign with a team is sixteen years, as long as the player turns seventeen "prior to either the end of the effective season for which the player has signed or September 1 of such effective season, whichever is later." Id.
\item \textsuperscript{105} See Geller, supra note 10, at 1662-63.
\item \textsuperscript{106} See Cwiertny, supra note 10, at 413-14; David Beard, 'El Duque,' Friends Get Visas, Sun-Sentinel (Fl. Lauderdale, Fla.), Jan. 7, 1998, at 12A. But see Diana L. Spagnuolo, Comment, Swinging for the Fence: A Call for Institutional Reform as Dominican Boys Risk Their Futures for a Chance in Major League Baseball, 24 U. Pa. J. INT'L ECON. L. 263, 264 (2003) (arguing that current rules encourage teams to "exploit[] Dominican boys to serve as a source of cheap labor for MLB"); Cwiertny, supra note 10, at 414 (explaining how the Dodgers used the foreign player free agency rule to "impose low-paying contracts on [two players residing in the Dominican Republic] by not giving the players the opportunity to retain agents").
\end{itemize}
America. An April 1977 letter from the then-Commissioner Bowie Kuhn to all MLB clubs, the so-called Kuhn Directive, sets forth the cornerstone of MLB’s Cuba policy. The directive forbids any club from recruiting or negotiating with any player in Cuba. Cuban players must therefore establish residency outside of Cuba if they wish to play in MLB. Thus, MLB rules work with the political and legal considerations discussed above to effectively compel Cuban players to defect if they want to play American baseball.

B. The Evolution of the Defection System

1. Early Defections: Draft Variants

Until December 1995, MLB dealt with the still relatively unusual dilemma of Cuban defection by subjecting the defecting player to the June amateur draft or some variant thereof, such as a special lottery. Thus, after Rene Arocha’s unprecedented 1991 defection, MLB formulated an ad hoc policy for Cuban nationals who had established residency in America. Rather than subject Arocha to the regular amateur draft, MLB held a special lottery open to any team interested in signing him.

MLB did not always follow this model, however, in dealing with the Cubans who followed Arocha’s lead. In 1992, Cuban national team shortstop Osmani Estrada and left fielder Alexis Cabreja defected while in Mexico and later walked across the border into the United States. Although both sought free agent status, MLB balked at the notion of allowing illegal immigrants to sign with the highest

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108 See Greller, supra note 10, at 1664.
109 See id. at 1664–65.
111 Greller, supra note 10, at 1665.
112 Id. at 1666.
113 See id. at 1668–73.
114 See Horn, supra note 6. After defecting in Miami, Arocha sought political asylum and established residency in the United States. Greller, supra note 10, at 1669–70.
115 See Horn, supra note 6. Eight teams expressed interest in signing Arocha, considered the third- or fourth-best pitcher on the Cuban national team. See id.; Wulf, supra note 1, at 60.
116 Greller, supra note 10, at 1671.
117 See Horn, supra note 6.
bidders. Instead, MLB subjected both players to the domestic amateur draft.

During this period, MLB vacillated between these two approaches when dealing with other defectors. When Rey Ordonez, a future star shortstop for the New York Mets, defected in 1993, MLB subjected him to a special lottery similar to Arocha's. Pitcher Ariel Prieto's entry in the 1995 amateur draft following his defection in April 1994 was the last instance in which a high-profile Cuban player came directly to the United States and was subjected to a draft or draft variant. By the fall of 1995, sports agent Joe Cubas, a self-described "enemy of the Castro Government," had begun to use a different approach for shuttling Cuban ballplayers from their homeland to the majors.

2. Current Defections: Joe Cubas' "New Route"

Cubas pioneered his technique while representing two highly-touted prospects, pitchers Osvaldo Fernandez and Livan Hernandez, who had defected in Tennessee and Mexico, respectively, during the summer and fall of 1995. Cubas, the American-born son of Cuban immigrants, realized that by assuming the role of agent and aiding players' defections, he could simultaneously exploit the market for Cuban talent in MLB and embarrass Castro. Instead of having his players seek residency in the United States as previous defectors had done, Cubas took the pair to the Dominican Republic for six months to establish residency.

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118 See Greller, supra note 10, at 1672.
119 See id. at 1672–73; Estrada and Cabreja were eventually drafted and signed by the Texas Rangers. See id. Similarly, pitchers Michael Tejera and Hanzel Izquierdo, both members of the Cuban junior national team, defected in Miami in 1994 and were subjected to the 1995 domestic amateur draft. JAMAIL, supra note 8, at 82.
120 See Greller, supra note 10, at 1668–73.
121 See Baxter & Dominguez, supra note 4.
123 See Baxter, supra note 12.
125 See id.
Cubas had discovered the foreign player "loophole" in MLB's rules. By establishing residency for Fernandez and Hernandez in the Dominican Republic rather than the United States, Cubas avoided subjecting his players to the amateur draft or a draft variant. MLB ruled that the Cuban-born players' foreign residency allowed them to sign with any team as free agents. Thus, the players could secure more lucrative contracts than had they been drafted and required to negotiate exclusively with one team.

Cubas' "new route" is now the model for Cuban baseball defectors and their agents. Whether the players defect in the United States or elsewhere, they invariably seek to establish residency in a Caribbean or Central American nation to obtain free agent status.

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128 See Chass, supra note 107; see also Cwierthy, supra note 10, at 412–16; supra notes 98–111 and accompanying text discussing MLB rules.

129 See Chass, supra note 107.

130 See id. Note that the Kuhn Directive did not apply to the players because they had established legal residence outside of Cuba and renounced Cuban citizenship. See Greller, supra note 10, at 1664 n.69.

131 See Chass, supra note 107. Naturally, the new route was a financial boon to Cubas as well, as he took at least five percent of both Fernandez's $3.2 million deal with the San Francisco Giants and Hernandez's $4.5 million deal with the Florida Marlins. See Berkw, supra note 126; Thomas Stinson, Baseball '96: National League: The Rookies: Cubans Will Make Contributions, ATLANTA J. CONST., Mar. 31, 1996, at 23F. Although there is no maximum percentage an agent is permitted to take, the Major League Baseball Players' Association (MLBPA) guidelines for registered player agents sets the average at four to five percent. See FAINARU & Sánchez, supra note 13, at 100; Berkow, supra note 126. After a bitter fallout between Hernandez and Cubas in July 1996, Hernandez claimed that Cubas had tried to charge him 25% of his earnings, an allegation that Cubas denied. See FAINARU & Sánchez, supra note 13, at 117.

132 See Greller, supra note 10, 1678–79. Although Cubas was widely credited for pioneering this new method of defection, then-director of Latin-American scouting for the New York Yankees, Rudy Santin, claimed to have been developing the method for years. See FAINARU & Sánchez, supra note 13, at 68. Santin and Cubas, childhood friends, entered into an unofficial agreement: Cubas would represent Cuban defectors, set up foreign residence for them, and then funnel the players through Santin to the Yankees organization. See id. at 65–68. Thus, the players would land big contracts, Cubas would make hefty commissions, and Santin and the Yankees would have a monopoly on Cuban talent. See id. Only the misguided intervention of infamous Yankees owner George Steinbrenner foiled the arrangement. See id. at 93. After the Yankees' stunning loss to the Seattle Mariners in the first round of the 1995 playoffs, Steinbrenner "launched a purge that was staggering even by his lofty standards," including the firing of scouting director Bill Livesey, Santin's boss. See id. Santin resigned, lamenting that his "whole plan went down the drain," but Cubas zealously continued to pursue Cubans interested in attempting this new method of defection. See id. at 93–94.

133 See, e.g., Richard Justice, New Nation, Old Feelings: Cuban Defector Arrojo Reflects on Previous Career, WASH. POST, May 2, 1999, at D10 (noting that Cuban defector Rolando Arrojo established residency in Costa Rica before signing with the Tampa Bay Devil Rays); Tyler Kepner, Mining for Riches on the Farm, N.Y. TIMES, Feb. 5, 2003, at D1 (noting that Jose Con-
Yet, the formidable financial benefits that some players reap from this method of defection do not necessarily offset the negative aspects of the current system.\(^{134}\) For defectors and their families, the system is fraught with anguish, danger, corruption, and legal landmines.\(^{135}\)

### II. Humanitarian Principles Violated

Although criticized on a number of grounds by other commentators, the defection system's negative effects on Cuban ballplayers and their families have received scant attention.\(^{136}\) Important humanitarian principles, however, may provide the most compelling incentives to overhaul the current system.\(^{137}\) Players who navigate the defection process are systematically denied protections afforded by international human rights law, which finds its modern basis in the Universal Declaration of Human Rights (Declaration).\(^{138}\) Moreover, the system undermines immigration agreements between Cuba and the United States which "seek to address safety and humanitarian concerns and to ensure that migration between the countries is safe, legal, and orderly."\(^{139}\)

Despite the Declaration's guarantee that "[e]veryone has the right to leave . . . and to return to his country," Cuban baseball defectors must relinquish this right if they wish to play baseball in America.\(^{140}\) Furthermore, despite the Declaration's assertion that the "fam-
ily is the natural and fundamental group unit of society and is entitled to protection by society and the State," every Cuban defector must abandon his family indefinitely—and sometimes forever.141

Additionally, the significant minority of defectors who can only escape by sea risk serious injury or death, as well as the possibility of repatriation to Cuba.142 In encouraging such action, the defection system runs counter to Cuba’s and the United States’ “common interest in preventing unsafe departures from Cuba which risk loss of human life.”143 Sea defectors, along with the families of all Cubans defectors, are also likely candidates for dangerous human smuggling operations from Cuba to the United States that can result in criminal sanctions.144 The current system’s encouragement of players and their families to take part in smuggling operations also cuts against the two countries’ “pledge[] ... to take prompt and effective action to prevent the transport of persons to the United States illegally.”145

A. Defection as Rejection of Patria

For most Cuban baseball players, the decision to defect is extremely difficult because “defection implies a rejection of patria,” or homeland.146 By forcing players with Major League dreams to leave Cuba forever, the current system places tremendous strain on the young men who confront the decision to defect.147 Cubans are undeniably fierce in both their nationalism and their love of baseball, yet

standard applied, Cuban defectors would technically have no right of return, since they voluntarily reject Cuban citizenship. See id. at 56–63. However, even if one accepts the narrower definition, the defection system still violates the underlying policy: to eliminate arbitrary limitations on freedom of movement, especially return to one’s home country. See id. at 56–67.

141 UDHR, supra note 138, at art. 16 § 3; see infra notes 165–213 and accompanying text; see also Gerassimos Fourlanos, Sovereignty and the Ingress of Aliens 87–117 (1986). This internationally recognized principle of family unity, as it is commonly known, may not technically be an individual right; rather, as the principle is generally understood, individuals benefit from the State’s duty to refrain from undertaking measures causing dispersion of families, and to facilitate reunification of already separated families. Fourlanos, supra, at 109–11. However, like the right of return discussed in note 140, supra, the defection system clearly violates the underlying policy of family unity. See id.

142 See infra notes 214–283 and accompanying text.

143 Joint Statement, supra note 68, at 328.

144 See infra notes 246–283 and accompanying text.

145 Joint Statement, supra note 68, at 329.

146 Jamail, supra note 8, at 78.

147 See id. at 73–78.
the system requires that these passions remain mutually exclusive. By even though a few Cuban players manage to secure multi-million dollar contracts once they defect, every defector must leave his homeland forever. By defecting, players relinquish their basic human right to return home, a right "fundamental [to] exercising one's personal autonomy."

The Cuban government reinforces the implication that defecting players have rejected all things Cuban by laboring mightily to create a public façade of intransigence, anger, and disgust. After the requisite denunciations of the defectors—who are labeled *traídos al béisbol*, or "baseball traitors"—the government acts as if the departed players no longer exist, never mentioning them again in the state-controlled press. In official record books, baseball defectors have asterisks by their name; the explanation reads, *abandonó el país*, or "left the country."

The government's public denunciations of defectors, however, have only a limited effect on the Cuban public's perceptions of departed players. Almost any Cuban citizen understands how deprivation could drive a ballplayer to seek a better life in America, and few begrudge the defectors' decision to leave. Most Cubans reject using the verb "to defect"—desertar—to describe departed ballplayers because of its negative military connotation. Many high-profile defectors have become folk heroes to Cuban fans, who follow their careers in America despite the dearth of MLB information in Cuba's official media outlets. Yet, some cases exist in which the circumstances surrounding a player's defection create animosity among Cuban fans

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148 See id. at 77–78; see generally Echevarría, supra note 27 (discussing Cuban baseball's illustrious history); Perez, supra note 29 (discussing baseball's relation to the birth of Cuban nationalism).
149 See Jamail, supra note 8, at 78.
150 See Hannum, supra note 140, at 4.
151 See, e.g., Fainaru & Sánchez, supra note 13, at 115 (describing how Castro denounced defector Rolando Arrojo as "a Judas who sold himself for twelve gold coins"); Jamail, supra note 8, at 78 (noting that government officials dubbed Arocha a traitor after his defection).
152 See Jamail, supra note 8, at 88; McKinley Jr., supra note 12.
153 Jamail, supra note 8, at 77.
154 See id. at 47 (noting that Cubans followed defector Liván Hernandez during the 1997 World Series despite a media blackout).
155 See id. at 55.
156 See id. at 77.
157 See id. at 47–48; see McKinley Jr., supra note 12.
and, to a greater extent, the player’s teammates.\textsuperscript{158} Players who defect while representing Cuba in a foreign tournament are often the targets of derision and scorn.\textsuperscript{159}

While no player has ever publicly expressed regret about his decision to defect, it is clear that rejecting the \textit{patria}—leaving Cuba forever—is tormenting for the young players who decide to do so.\textsuperscript{160} As Rene Arocha eloquently put it:

\begin{quote}
[Defecting] is a very difficult decision. . . . You have to have an inner strength—it’s incredible the strength you have to have to leave behind not only your family—although leaving your family is difficult—but to leave your roots, something that is yours, and to understand that you don’t know when you will be able to return.\textsuperscript{161}
\end{quote}

Until the system is altered, baseball defectors can never return to Cuba.\textsuperscript{162} And “the idea that they may never return home,” author Milton Jamail posits, is something that “Cuban defectors . . . don’t get over.”\textsuperscript{163} Worse yet, defection often leads to the prolonged separation of a player from his family.\textsuperscript{164}

\section*{B. Defection and the Separation of Families}

For Cuban defectors and their families, the most devastating aspect of the current system is that it forces virtually every player to abandon his family indefinitely.\textsuperscript{165} A select few are able to leave with

\textsuperscript{158} \textit{See, e.g.,} Fainaru \& Sánchez, \textit{supra} note 13, at 115 (quoting Cuban national team pitcher Lázaro Valle, criticizing Rolando Arrojo for defecting on the eve of the Olympics: “It was the way he did it. . . . He betrayed everyone. . . . Even if he makes a hundred million dollars, he’ll never be a hero in Cuba because he was like a Judas. He sold everybody out.”); Jamail, \textit{supra} note 8, at 55 (quoting Aurelio Alonzo, a member of an officially registered baseball fan organization in Cuba: “We do not question [Livan Hernandez’s) decision to leave. . . . That is his personal choice. We only question the method by which he chose to leave: while representing his country abroad.”).

\textsuperscript{159} \textit{See supra} note 158 and accompanying text.

\textsuperscript{160} \textit{See Jamail, supra} note 8, at 73–89.

\textsuperscript{161} \textit{Id.} at 78.

\textsuperscript{162} \textit{See id.} at 73–89.


\textsuperscript{164} \textit{See McKinley Jr., supra} note 12.

\textsuperscript{165} \textit{See, e.g., id.;} Wright Thompson, \textit{The Long Road from Las Martinas, Kan. City Star,} Mar. 30, 2003, at 122.
their family, often by boat. Among the rest, only a small proportion reunite with loved ones shortly after defecting, while others may be reunited after months or even years. For many Cuban defectors, however, the separation goes on indefinitely, with no way of knowing if, or when, it will end. Thus, the system egregiously violates the principle of family unity, a principle that requires countries to avoid implementing policies that cause the dispersion of families.

The tragic case of Chicago White Sox pitcher Jose Contreras, originally signed by the New York Yankees after his October 2002 defection, is instructive. Although news accounts at the time typically emphasized Contreras’ $32 million contract, his chief concern centered around reuniting with his wife and children. Throughout the negotiations during the fall of 2002 and winter of 2003, the pitcher “stressed the importance of his family” and “asked teams for help in getting [them] out of Cuba.” Contreras had left his wife, two daughters, ages ten and two, and an extended family. The Yankees, powerless to intervene in immigration matters, were unable to guarantee Contreras a family reunion.

Contreras kept secret his plan to defect from his family, and his wife was furious when he first called home after defecting. As spring training began in 2003, Contreras explained that his separation from his family had been “very difficult. . . . [T]he only time I don’t think about my family is when I’m on the mound.” Toward the end of spring training, the pitcher was informed that his father—a proud supporter of Castro—had been rushed to the hospital. Contreras’ subdued response was, “I can’t do anything about it. . . . I can only

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166 See Rafael Hermoso, Teams in the Majors Waiting for 2 Cubans, GRAND RAPIDS PRESS, Dec. 17, 2003, at C8 (noting that Maels Rodriguez and Yobal Duenas defected by boat with their wives).
167 See, e.g., FAÍNARU & SÁNCHEZ, supra note 13, at 113–14 (describing Arrojo’s reunion with his wife and daughters, who had been smuggled out of Cuba the same day Arrojo defected); id. at 299 (describing El Duque’s reunion with his mother and daughters in October 1998, approximately ten months after his defection).
169 See FOURLANOS, supra note 141, at 109.
170 See Kepner, supra note 133.
171 Id.
172 See Thompson, supra note 165.
173 See Kepner, supra note 133.
174 See Thompson, supra note 165.
175 Tayler, supra note 163.
176 Gordon Edes, For Contreras, a No-Decision, BOSTON GLOBE, Mar. 4, 2003, at F1; see Thompson, supra note 165.
confront American capitalism and the fast-paced world of professional baseball.\textsuperscript{198} These players, some only teenagers, must leave parents, siblings, and extended family at a particularly tumultuous and challenging time in their lives.\textsuperscript{199} They must make a wrenching choice: either remain with their families or pursue the increased freedom and prosperity of a professional baseball career.\textsuperscript{200} Often, those players choosing freedom and prosperity are ill-equipped to make the transition from their prior life in Cuba, which had neither.\textsuperscript{201}

Agents often compound this problem by enticing players to defect, inflating their capabilities, helping them sign a professional contract, and abruptly moving on to the next big catch.\textsuperscript{202} Few constraints exist to prevent agents from surrendering an unprepared player to the demanding world of professional baseball once they cash in on their commission—and some agents do just that.\textsuperscript{203} Many players have great difficulty adjusting to their new environment, and their inability to visit and draw strength from their families further hampers this process.\textsuperscript{204}

Family separation is even more tragic when one considers the high rate of failure among MLB prospects.\textsuperscript{205} Most Cuban defectors never play a game at the major league level, and those who do reach MLB can be hampered by injuries or, for older players, age-related decline.\textsuperscript{206} Thus, though every defector leaves his family behind for a chance at the big leagues, few actually cash in on that chance.\textsuperscript{207} And though the political and economic freedoms in America far surpass

\textsuperscript{198} See FAINARU & SÁNCHEZ, supra note 13, at 109-12.
\textsuperscript{199} See id.
\textsuperscript{200} See JAMAIL, supra note 8, at 78.
\textsuperscript{201} See FAINARU & SÁNCHEZ, supra note 13, at 111. Al Avila, scouting director for the Florida Marlins, explains Livan Hernandez’s period of adjustment:

\begin{quote}
It was very tough for him in the beginning…. People were trying to get him. It’s no easy task for a young man, twenty years old, when all you know is a fucking dictator, a country where there is practically no information, and all of a sudden you’re thrown into this big old world. I mean, imagine what it was like for this guy. He just left Cuba, and now he’s in the United States and he’s got nobody. It’s like, “Who the fuck do I trust?”
\end{quote}

\textit{Id.}
\textsuperscript{202} See FAINARU & SÁNCHEZ, supra note 13, at 109; JAMAIL, supra note 8, at 83.
\textsuperscript{203} See FAINARU & SÁNCHEZ, supra note 13, at 109-11.
\textsuperscript{204} See Kevin Baxter, For Cuban Athletes Who Defect, Success in Sports is Elusive, MIAMI HERALD, June 2, 2002, at 1A.
\textsuperscript{205} See id.
\textsuperscript{206} See, e.g., JAMAIL, supra note 8, at 73-80; Baxter, supra note 204.
\textsuperscript{207} See Baxter, supra note 204.
those in Cuba, it is questionable whether players would be as eager to leave Cuba if given a realistic assessment of their chances of success.208

Yet, asking whether or not the trade-off—giving up one’s family for a chance to play professionally in America—is worthwhile seems to be the wrong question to ask.209 A better question might be why Cubans are the only ballplayers on the planet who are forced to choose between their families and professional baseball.210 The very fact that young Cuban ballplayers must make this forced choice is ample evidence that the system is broken and needs to be overhauled.211

Even more soberingly for some Cuban defectors, choosing to leave their family behind is only the beginning of their travails.212 For those who defect by sea, the biggest obstacles still lie ahead.213

C. Defection by Sea: Danger in the Straits of Florida

Sea defections are notoriously fraught with danger, a fact evidenced by the numerous press accounts of desperate Cubans risking life and limb for a chance to reach Florida’s shores.214 For baseball fans, Orlando “El Duque” Hernandez’s defection is perhaps the best-known tale of a baseball player taking to the sea to escape from Cuba.215 Yet most defecting players do not resort to such drastic measures.216 Since most defectors play for Cuban teams who travel outside of the country, they need only find an opportune time to walk away.217 Consequently, only a select few of the approximately sixty Cuban baseball defectors have resorted to escape via boat or raft.218

208 See id.
209 Cf. JAMAIL, supra note 8, at 132 (noting Congressman José Serrano’s opinion that Cuban ballplayers ought not have to defect at all).
210 See id. North Korean athletes also must defect if they wish to play sports in America, but so far no baseball players have emerged from that country. See id. at 165 n.7.
211 See id. at 132.
212 See FAINARU & SÁNCHEZ, supra note 13, at 191–221.
213 See id.
215 See FAINARU & SÁNCHEZ, supra note 13, at 203–12 (recounting El Duque’s arduous voyage); see also Olney, supra note 133.
216 See JAMAIL, supra note 8, at 77.
217 See id. As discussed above, Rene Arocha walked out of an airport during a layover. Robb, supra note 1. Pitching star Rolando Arrojo escaped from his team’s hotel while playing in the United States. See Berkow, supra note 126.
218 See JAMAIL, supra note 8, at 77 (explaining that most Cuban ballplayers who wish to defect do not take to the sea, because most play for Cuban teams that frequently compete outside of the country); Baxter, supra note 204 (noting that approximately sixty baseball players have defected since Rene Arocha).
When the Castro regime bans those it suspects of planning defection from playing for traveling Cuban teams, however, it eliminates the "walk away" defection option. For the banned players who want a shot in professional baseball, the dangerous water route becomes their only escape from an impoverished life devoid of baseball. So long as the Cuban government maintains its strict policy of banning from baseball those suspected of defecting, there will be players willing to risk sea voyage.

Tales of defection by sea are harrowing. El Duque and his companions spent nearly four days on a remote deserted island in the Bahamas after a failed rendezvous with the boat that was supposed to transport them the rest of the way to Florida. The defectors subsisted on Spam, sugar, and boiled conch that had been peeled off of rocks before they were rescued by the U.S. Coast Guard and taken to a detention center in Freeport, Bahamas.

Alex Sanchez, the current centerfielder for the Detroit Tigers, was eighteen years old when he and ten others boarded a rickety raft

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219 See, e.g., Paul Gutierrez, They Have Found the Way Home, L.A. TIMES, Aug. 14, 2001, at D3 (describing how prominent Cuban players Evel Bastida and Mayque Quintero made their decision to defect by boat after being suspended amid suspicion they were planning to defect); Serge F. Kovaleski, Cubans Rescued By Fishing Crew in Nick of Time, WASH. POST, Mar. 24, 1998, at A12 (reporting on four Cuban baseball players in a Bahamian detention camp who had defected by boat after being banned amid suspicion they were planning to defect).

220 See Gutierrez, supra note 219 (explaining that Bastida and Quintero "left because they had no other options" after being suspended from baseball). Bastida is quoted as saying:

I played baseball since I was 9 years old and I had no other way to support my family. . . . My mother-in-law helped, but I was still feeling pressure. . . . It was painful, but it won't be in vain. I hope to have them here soon.

Id. The story of Bastida's and Quintero's voyage is not atypical, as they joined 25 strangers on an unreliable motor boat. See id. The boat's engine failed the first night, forcing the crew to paddle the rest of the way. See id. After almost three days, the boat landed safely in Key West, Florida. See id. Foiled by MLB in their attempt to sign contracts as free agents, the players established residency in Mexico while playing in the Mexican League. See id. They eventually signed with the Sonoma County (Cal.) Crushers, a professional team in the independent Western League. See id.

221 See JAMIL, supra note 8, at 90 (noting that El Duque "had no choice but to get out of Cuba" and remarking that the author was naive to think that "Cuban authorities might just give [El Duque] an exit visa and let him leave").

222 See, e.g., FAÍNARU & SÁNCHEZ, supra note 13, at 203-12 (recounting El Duque's voyage); Charles F. Gardner & Ana M. Menendez, Hope Floats, MILWAUKEE J. SENTINEL, Apr. 5, 2002, at 1C (recounting then-Milwaukee Brewers' centerfielder Alex Sanchez's journey).

223 FAÍNARU & SÁNCHEZ, supra note 13, at 203-12.

224 Id. at 206-11.
held together with tire tubes, bolts, and ropes.\(^\text{225}\) As Sanchez tells it, "We spent three days at sea, and it was a pretty dangerous trip. From there, the U.S. Coast Guard picked us up and took us to the base at Guantanamo, and I was there 16 months."\(^\text{226}\)

Cuban national team first baseman Jorge Luis Toca, along with three other players, a coach, and four crew members, were also lucky to have escaped disaster during their flight from Cuba.\(^\text{227}\) But for the keen eyes of some Bahamian lobstermen who noticed a small light several hundred yards away, the entourage likely would have been lost.\(^\text{228}\) When they were rescued in the darkness, the Cubans' dilapidated, single-engine boat was ankle deep in water and sinking fast.\(^\text{229}\) The defectors had brought little more than fresh water for provisions and had no navigational equipment.\(^\text{230}\) The lobstermen turned the nine Cubans over to Bahamian authorities the next day, who took the group to a detention center in Nassau.\(^\text{231}\)

The stories of El Duque, Sanchez, and Toca also highlight how repatriation treaties between Cuba and its neighbors often cause serious problems for sea defectors.\(^\text{232}\) Primarily, players that are interdicted or turned over to authorities are placed in notoriously unpleasant detention camps, sometimes for months on end.\(^\text{233}\) Moreover, because the Bahamas, the Dominican Republic, and the United States have each agreed to repatriate Cuban refugees that are denied asylum, such players may be returned to Cuba.\(^\text{234}\) This was precisely the fate of Toca's four companions after their detention in the Bahamas.\(^\text{235}\) After several months in a detention camp, the defectors—along with dozens of others—were denied asylum and returned to Cuba per the Bahamian repatriation agreement.\(^\text{236}\) After their re-

\(^{225}\) Gardner & Menendez, supra note 222.
\(^{226}\) Id.
\(^{227}\) See Kovaleski, supra note 219.
\(^{228}\) See id.
\(^{229}\) Id.
\(^{230}\) See id.
\(^{231}\) See id.
\(^{232}\) See, e.g., Fainaru & Sánchez, supra note 13, at 210–17; Jamail, supra note 8, at 95–96; Gardner & Menendez, supra note 222; see also Gwirtz, supra note 10, at 417–21.
\(^{234}\) See Fainaru & Sánchez, supra note 13, at 212; Gwirtz, supra note 10, at 419–20.
\(^{235}\) See Jamail, supra note 8, at 95–96. Because Toca had a Japanese wife, he was granted permission to leave the Bahamas and go to Japan. See id. His four companions were forced to remain in detention until they were repatriated. See id.
\(^{236}\) See id.
turn, the defectors were banned from playing baseball, allegedly threatened, and placed under surveillance.\(^{237}\) Only their daring "re-defection" several months later—by small boat, of course—allowed the group to escape further persecution by the Castro regime.\(^{238}\)

Repatriation, however, is not always a foregone conclusion.\(^{239}\) American authorities are more inclined to grant asylum to Cuban baseball players due to legal, political, and humanitarian motivations.\(^{240}\) Because Cuban baseball players have a prominent political role in their homeland, repatriated ballplayers are prime targets for post-repatriation persecution.\(^{241}\) Furthermore, the high profile of defectors in Florida's Cuban-American community ensures that any decision to deny asylum would subject the U.S. government to biting criticism.\(^{242}\)

As much as the current defection system complicates enforcement of regional immigration law, it weighs far more heavily on the impoverished Cubans who risk everything for a chance to play in America.\(^{243}\) There is no doubt that defection by sea poses significant risks for those who attempt it, and not all sea escapes end as success-

\(^{237}\) See Pressley, supra note 13.

\(^{238}\) See JAMAIL, supra note 8, at 97; Pressley, supra note 13.

\(^{239}\) See, e.g., FAINARU & Sánchez, supra note 13, at 210–17; Gardner & Menendez, supra note 222.

\(^{240}\) See FAINARU & Sánchez, supra note 13, at 215–16; Pressley, supra note 13; see also supra notes 7, 61 and accompanying text.

\(^{241}\) See Pressley, supra note 13; supra notes 7, 61 and accompanying text.

\(^{242}\) See FAINARU & Sánchez, supra note 13, at 215–16 (noting that while he was detained in the Bahamas, El Duque's predicament became a "cause célèbre" and that the Cuban-American community "mobilized its all-star team of anti-Castro hard-liners" to lobby the U.S. government to extend humanitarian parole immediately). Despite these considerations, the United States has repatriated Cuban ballplayers interdicted at sea. See Scorecard: Defector Sent Home: Cuban Throwback, SPORTS ILLUSTRATED, June 19, 2000, at 34, 34. Favorable treatment for ballplayers, even if they do face a greater risk of persecution in Cuba, raises difficult questions of fairness and partiality vis-à-vis "average" detainees. See Commentary, The Cubans Who Don't Play Baseball, WASH. TIMES, Mar. 25, 1998, at A20 [hereinafter Commentary, The Cubans Who Don't Play Baseball]; cf. FAINARU & Sánchez, supra note 13, at 217 ("Also looking on were dozens of other rafters who had drifted to the Bahamas in much the same fashion [as El Duque]. Many had been there for months. As television cameras filmed El Duque's exit [from the Bahamian detention camp], one refugee held up a towel bearing a hand-scrawled message: FREEDOM FOR ALL THE CUBANS.").

Dealing with Cuban baseball detainees is a very delicate issue for American authorities, who want to offer asylum but wish to avoid the appearance of a double-standard. See Commentary, The Cubans Who Don't Play Baseball, supra; cf. FAINARU & Sánchez, supra note 13, at 293–94 (noting how State Department officials were worried that if they allowed El Duque's family to come into the country, the press would "write how Mr. Six Million Dollars can get his kids into the United States and José in Miami can't").

\(^{243}\) See Cwiertny, supra note 10, at 419–20; McKinley Jr., supra note 12.
fully as those documented above. There is also little doubt that such defections will continue. But even if players avoid the physical dangers of sea defection and the possibility of detention and repatriation—other legal landmines, particularly those associated with immigrant smuggling, may await.

D. The Unique Problem of Immigrant Smuggling

Smuggling is an increasingly popular method of illegally transporting immigrants from Cuba to Florida. Instances of human smuggling have risen in conjunction with the growing failure of "amateur" boaters and rafters to evade American patrols in the Straits of Florida. To avoid repatriation under the United States’ "wet feet, dry feet" policy, Cuban emigrants resort to the only consistently reliable method for reaching dry land: professional smuggling. Professional smugglers have navigational expertise, underground logistical networks in both Cuba and Florida that allow for effective coordination, and superior vessels for avoiding the authorities.

Professional smuggling differs in many respects from amateur escape attempts via boat or raft. While amateur escapes carry a greater risk of repatriation, injury, or, at worst, death, virtually none result in prosecutions under federal law. The reverse is true of smuggling operations, which probably carry a lower risk of repatriation, injury, or death, but are blatantly illegal and often prosecuted.

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244 See Brown, supra note 67, at 273–74 (detailing the December 2001 capsizing of an overcrowded boat filled with Cubans that killed thirty); Pingeton, supra note 64, at 329 (noting that Cubans risk their lives to cross the "treacherous" Straits of Florida and that only an estimated one in four rafters survives the journey).

245 See Jamal, supra note 8, at 89; Hermoso, supra note 166 (describing how those who defected by boat with Mael Rodriguez and Yobal Duenas "asked that their exact route remain private to protect future Cuban defectors who might take a similar route").

246 See Joint Statement, supra note 68, at 328; Brown, supra note 67, at 279.

247 See id.

248 See Anne Pressley, Faster Boats Carry Cubans, Haitians to Florida, WASH. POST, Dec. 31, 1998, at A2 (noting that "fast-moving motor vessels" are replacing Cuban emigrants' "flimsy rafts" and discussing the implications of this change).

249 See Brown, supra note 67, at 278 (noting that "U.S. Forces efficiently detect, recover, and return most rafters to Cuba"); Pingeton, supra note 64, at 329.

250 See Brown, supra note 67, at 280 (noting that smuggling operations are "presumed to be very successful"); id. at 286–90 (discussing the prosecution of suspected smugglers); see also, e.g., United States v. Rodriguez-Lopez, 363 F.3d 1134, 1135 (11th Cir. 2004) (dis-
Moreover, despite the conventional wisdom that smuggling is safer and more likely to be successful than amateur defection, there are nonetheless serious physical dangers involved. Since maximizing profit is the only true concern of professional smugglers, boats are often overcrowded and lack basic safety equipment such as life jackets. Some smuggling operations have gone terribly awry, resulting in dozens of deaths.

Baseball’s defection system promotes the practice of human smuggling in two ways. First, touted Cuban ballplayers, financed by wealthy agents, are themselves candidates to be smuggled across the Straits of Florida. Second, a defector’s family may be smuggled into the United States for reunification purposes. Although aiding a player in his quest for freedom and reuniting families might seem like noble goals, the dangers and unregulated nature of human smuggling outweigh its benefits. Put simply, human smugglers “are not humanitarians. They’re criminals.”

Despite the unsavory nature of trafficking in human cargo, Cuban ballplayers—especially those who cannot or do not journey abroad with a traveling squad—remain prime candidates for a smuggling operation. Although the passage is by no means safe, traveling

253 See Brown, supra note 67, at 280.
254 See id.; Pressley, supra note 250 (quoting a Coast Guard officer: “A big concern we see quite often is when we stop them at sea and we notice grossly overloaded vessels. Most of those vessels do not have life jackets, and conditions can change so drastically out there”).
255 See Brown, supra note 67, at 273–74; Pressley, supra note 250 (noting that in 1998, three smuggling operations involved the loss of life, including one case in which at least eight passengers perished after an overcrowded boat capsized on December 17).
256 See Fainaru & Sánchez, supra note 13, at 106 (“As Cuba’s notoriety grew, the smugglers, recognizing a lucrative new market, began to come out of the woodwork to offer the agent deals to pull the valuable ballplayers out of Cuba.”).
257 See id. (noting that Cuba’s associate planned “to hire a smuggler to sail to Cuba, pick up Arrojo’s wife and children under the nose of the Cuban coast guard, and then ferry them to a drop-off point in the Florida Keys.”).
259 Cherfils, supra note 258 (quoting Elena Freyre, executive director of the Miami office of the Cuban Committee for Democracy).
260 See Fainaru & Sánchez, supra note 13, at 106. As discussed above, those who are banned from playing baseball in Cuba have virtually no option but to escape by sea. See supra notes 219–221 and accompanying text. Because these players are of great potential value to their agents, the agents are more likely to advocate and finance smuggling the player out of Cuba rather than allow the player to make a riskier, amateur escape. Cf. Fai-
with a seasoned smuggler who knows the route and claims to possess a reliable boat seems far less risky than the ad hoc escapes attempted by El Duque, Sanchez, and Toca. Furthermore, agents—who stand to benefit handsomely from prospective defectors’ contracts—will likely be willing to front the otherwise prohibitive cost of the smuggling operation.

The families of ballplayers are also likely candidates to be smuggled out of Cuba, since most defectors must leave their family behind. It is virtually impossible for players who have defected to get their families out of Cuba legally. Most players, therefore, have little choice but to turn to smuggling if they wish for their families to escape.

261 See supra notes 249-252 and accompanying text.
262 See FAINARU & SÁNCHEZ, supra note 13, at 106-08. According to interviews conducted by authors Steve Fainaru and Ray Sánchez for their book The Duke of Havana, the cost of smuggling is somewhere in the range of $3,000 to $20,000 per person. See id. at 107. Newspaper reports document a narrower range: $7,000 to $10,000 per person. See Cherfils, supra note 258; Pressley, supra note 250. By 1996, Joe Cubas was well known in Miami, allegedly receiving two to three calls a week from potential smugglers hoping to ferry one of his Cuban prospects to Florida. FAINARU & SÁNCHEZ, supra note 13, at 106. One such smuggler was even armed with the telephone numbers of references in case Cubas and his associates wanted to research the smuggler’s “great track record.” Id.
263 See FAINARU & SÁNCHEZ, supra note 13, at 106; see also, e.g., McKinley Jr., supra note 12 (describing how Rey Ordonez left his family behind to defect); Thompson, supra note 165 (describing how Jose Contreras left his family behind to defect).
264 See, e.g., FAINARU & SÁNCHEZ, supra note 13, at 286 (noting the difficulty of getting El Duque’s family out of Cuba, considering the pitcher’s highly publicized fallout with Cuban authorities and subsequent defection); Contreras Can’t Get Family, supra note 168 (reporting that Jose Contreras’ family had been refused permission to leave twice and would have to wait four more years before reapplying).
265 See FAINARU & SÁNCHEZ, supra note 13, at 286; Contreras Can’t Get Family, supra note 168. In the exceptional case of El Duque, the pitcher’s politically powerful allies managed to convince Castro to allow his family to come to America. See FAINARU & SÁNCHEZ, supra note 13, at 284-300. With the help of Professor Pamela Falk from the City University of New York, El Duque obtained the valuable aid of longtime Castro acquaintance Cardinal John O’Connor, the Roman Catholic archbishop of New York. See id. at 285, 287. Cardinal O’Connor wrote a formal request to Castro to allow El Duque’s ex-wife, two daughters, and mother to come to the United States. See id. at 289. After some prodding by the archbishop’s Hispanic liaison during a meeting in Cuba, Castro consented. See id. at 289-93.
266 See FAINARU & SÁNCHEZ, supra note 13, at 106, 114 (discussing the smuggling of Arrojo’s family); McKinley Jr., supra note 12; see also Brown, supra note 67, at 278-80 (discussing smuggling’s emergence as the preferred method of illegal immigration from Cuba to the United States).
Thus, ballplayers and their agents sometimes arrange and pay professional smugglers—operating almost exclusively out of Miami—to bring the players’ families from Cuba to Florida. The smuggling operation carries attendant dangers beyond the physical risk to those aboard the boat. By planning and providing payment for the activities, the players and their agents expose themselves to serious criminal penalties under federal law. Conspiring with or abetting an immigrant smuggler is punishable by a hefty fine and up to ten years in prison. If disaster strikes during the trip and results in death to any passenger, those responsible for arranging or funding the voyage could be punished by life imprisonment, or even death.

No baseball player has ever been charged for violating immigrant smuggling laws, nor is such a situation likely, for two principle reasons. First, recurring evidentiary dilemmas make smuggling prosecutions extremely difficult. Smuggling operations involving players and their families remain, for obvious reasons, concealed by a shroud of secrecy. Those privy to sensitive information almost invariably deny any knowledge of the operation. This is done as much to avoid the scrutiny of American authorities as it is to protect allies and sources in Cuba, where the possibility of detection, and the resulting penalties, are even more acute. Second, the United States Attorney’s Office for the Southern District of Florida usually pursues only cases of for-profit trips involving death or bodily injury. South Florida juries are notoriously more sympathetic to smugglers who are at-

267 See Brown, supra note 67, at 286 n.68; McKinley Jr., supra note 12.
268 See Cherfils, supra note 258.
271 See id. § 1324(a)(1)(B)(iii)-(iv).
272 Cf. Brown, supra note 67, at 286-90 (discussing the difficulty of prosecuting smugglers).
273 See id. at 287-88.
274 See McKinley Jr., supra note 12.
275 See Fainaru & Sánchez, supra note 13, at 114 (“Years later, Cubas and Arrojo, both aware of the criminal implications, would deny ever smuggling the pitcher’s family into the United States.”) Despite this official denial, Cubas—enamored with his delusional “007” image—never kept the smuggling operation much of a secret, spilling details to various journalists and associates. See id.
276 See id. at 114, 187 (describing alleged smuggler René Valle’s run-in with the Cuban authorities while he was attempting to transport members of his family, resulting in three years in a Cuban prison); McKinley Jr., supra note 12 (describing the Cuban government’s heavy surveillance and intense scrutiny of three defectors’ wives before they were successfully smuggled to Florida).
277 See Brown, supra note 67, at 286.
tempting to help Cubans flee from the widely detested Castro regime.\textsuperscript{278} Given this truth, it is extremely unlikely that a jury would convict a professional baseball player for arranging to reunify his family.\textsuperscript{279}

Yet, the mere improbability that a player or his agent will be charged for immigrant smuggling does not merit disregard of the problem.\textsuperscript{280} The law prohibiting human trafficking need not be systematically and vigorously enforced—especially against sympathetic ballplayers—for the safety-oriented policies underlying the law to have value.\textsuperscript{281} At the very least, the strong likelihood that professional baseball players have engaged in criminal behavior under federal law warrants MLB’s attention.\textsuperscript{282} MLB should feel compelled to attempt system-wide change for the physical safety of Cuban players and their families. The league’s failure even to begin to address this life-or-death issue further attests to its broken Cuban policy.\textsuperscript{283}

\textsuperscript{278} See id. at 287–88; see also David L. Marcus, Legal Chaos Leaves Cuban Refugees Adrift, BOSTON GLOBE, Aug. 2, 1998, at A1 (quoting a Miami-based federal prosecutor: “There are many cases that we know in our heart of hearts are good cases, but you pick these jurors and none of them want to convict. . . . Jurors say, ‘We’ve got violent crime, we’ve got drugs, we’ve got kilos of cocaine falling out of the sky, and you’re going to give me someone smuggling some poor people out of Cuba?’”).

\textsuperscript{279} Cf. Brown, supra note 67, at 287–88 (noting that South Florida juries are sympathetic toward Cuban immigrant smugglers).

\textsuperscript{280} Cf. id. at 287–90 (discussing the difficulties in prosecuting smuggling cases but also examining various methods for improving law enforcement efforts in this area).

\textsuperscript{281} Cf. id. at 289–90 (arguing in favor of a comprehensive program to reduce immigrant smuggling that would result in fewer “day-to-day interdictions, but more comprehensive prosecutions and substantial penalties in future cases”).

\textsuperscript{282} Cf. Cwiertny, supra note 10, at 409–11 (discussing MLB’s swift reaction to the Los Angeles Dodgers’ violation of the Cuban embargo law and MLB rules).

\textsuperscript{283} Cf. id. at 423–25 (asserting that MLB has been aware of violations of the Kuhn Directive and the embargo but has taken no action to resolve the problem). The most publicized violation of the embargo and the Kuhn Directive was the Los Angeles Dodgers’ involvement with Cuban prospects Juan Carlos Diaz and Josue Perez. See, e.g., Joe Christensen, Dodgers Lose Two Cubans, PRESS ENTER. (Riverside, Cal.), June 29, 1999, at C1; Steve Fainaru, LA Loses Minor Leaguers: Dodgers Punished for Holding Secret Tryouts, BOSTON GLOBE, June 28, 1999, at D1; Bill Plaschke, Liberty—And Justice—for All, L.A. TIMES, June 30, 1999, at B1. Dodgers’ officials held secret tryouts in Cuba for the two players, helped them to defect, and instructed them to lie about it if asked. Christensen, supra. MLB’s unprecedented punishment of the club included a $200,000 fine, a six-month ban on signing foreign players, and stripping the club of the two illegally scouted players, who were granted free agency. Hal Bodley, Selig’s Signing Ban Punishes Dodgers, USA TODAY, July 2, 1999, at 8C; see generally Cwiertny, supra note 10.

The Dodgers’ scandal is but one particularly egregious anecdote, but is by no means the only direct involvement by MLB teams in Cuba. See Wright Thompson, A Tough Out: Scouts Lead a Dangerous Life in Cuba, KAN. CITY STAR, Mar. 30, 2003, at I24. Among baseball officials, little doubt exists that undercover MLB scouts currently operate in Cuba. Id. Ac-
cording to sports agent Joe Kehoskie, "I've heard of 50 different scouts going to Cuba on the sly, still in violation of Major League Baseball rules . . . but I've never heard of a long-term payroll type of situation." Id. (noting that Cuban baseball expert and author Peter Bjarkman believes that while teams have no full-time scouts "who collect benefits and walk around with a stop watch," many have sources—so-called "bird dogs"—in Cuba).

Agent-affiliated scouts, or agents acting as scouts themselves, also scour the country-side to find the next player to bring in a multi-million dollar contract. See FAINARU & SÁNCHEZ, supra note 13, at 139 (explaining how a former associate of Cubas, Juan Ignacio Hernandez Nodar began to "explore his own business opportunities" in Cuba, meeting with players in their home, handing out money, and urging them to defect); Thompson, supra. These "agent-scouts," rather than those from MLB teams, attract the most attention from Cuban authorities because they often have ties to anti-Castro elements in Miami and are associated with players who have already defected. See FAINARU & SÁNCHEZ, supra note 13, at 150 (remarking that the judges' written decision convicting Nodar of tampering with baseball players noted his connection to anti-Castro agent Joe Cubas and defector Rolando Arrojo); Thompson, supra ("The Cubans do acknowledge that not all scouts are wannabe CIA. Authorities focus their attention on the scouts affiliated with agents, not a baseball man with a notebook and a radar gun."). Because agents stand to profit handsomely from their clients' contracts, agent-scouts more aggressively encourage players to defect, often resorting to more extreme forms of corruption, including falsification of official documents and bribery. See FAINARU & SÁNCHEZ, supra note 13, at 139 (describing Nodar's aggressive tactics); Id. at 119 (describing how Cubas and an associate bribed officials and prepared phony passports and birth certificates for players they were transporting from the Dominican Republic to Costa Rica).

Even if Cuban authorities deny any focus on MLB scouts, these scouts almost certainly continue to violate the Kuhn Directive and Cuban embargo. See Cwiertny, supra note 10, at 401; Thompson, supra. And because the Cuban authorities are infamously unpredictable and harsh, MLB scouts in Cuba risk imprisonment. See FAINARU & SÁNCHEZ, supra note 13, at 138–52 (recounting Nodar's arrest, trial, and conviction); Thompson, supra (quoting Cuban Commissioner Rodriguez: "[Scouts that come to Cuba] are violating our laws, and they end up in jail"). Nodar, the notoriously conspicuous cousin of Joe Cubas, was engaged in freelance scouting when the Cuban government arrested him. See FAINARU & SÁNCHEZ, supra note 13, at 138–42. He was tried for tampering with players, convicted, and sentenced to fifteen years in a Cuban prison. See id. at 145–60; Thompson, supra. Although the risks of scouting in Cuba seem to outweigh the possible benefits, rudimentary knowledge of the island's top prospects is indispensable for every MLB team, so as to prepare the team to compete for players' services if and when they escape. See JAMAIL, supra note 8, at 119–20; Thompson, supra. Ultimately, however, teams are anticipating the collapse of the Castro regime and the inevitable Cuban baseball "gold rush." See id. (quoting Fred Claire, the former general manager and executive vice president of the Dodgers: "If the talent was available in Cuba, and all clubs could go in and scout, and sign or draft, I can only envision a gold rush"); Thompson, supra. The extent and depth of the baseball talent in Cuba is staggering; although it is impossible to ascertain how many Cuban ballplayers would play professionally in America, Cuba could become the primary provider of foreign talent to American professional baseball. See JAMAIL, supra note 8, at 120. The Dominican Republic, with a population of nearly nine million, has about fifteen hundred players signed to professional contracts in America. U.S. CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK 155 (2004) [hereinafter WORLD FACTBOOK]; JAMAIL, supra note 8, at 120. Cuba, with its more highly-developed baseball system and population of over eleven million would, over time, almost certainly produce more professional ballplayers, WORLD FACTBOOK, supra, at 139; see JAMAIL, supra note 8, at 120. Therefore, as long as the defection system is operative, scouts will continue to circumvent, even break, league rules and
III. **CAN THE CURRENT SYSTEM BE FIXED?**

Most commentators agree that the defection system is flawed—albeit for different reasons—and some have offered suggestions for its cure.\(^{284}\) One critic, Cwiertny, suggests instituting a worldwide draft that would include players of foreign residency.\(^{285}\) Additionally, Greller proposes a four-part process that would: (1) end exclusionary practices by MLB, the United States, and Cuba; (2) include Cubans in the domestic amateur draft; (3) impose a contract tax on teams that sign Cuban players to support Cuban baseball infrastructure and scouting; and (4) change federal law to allow Cubans to play professionally in America without having to defect.\(^{286}\) Although creative and ably supported, neither proposal has a realistic chance of solving the defection problem in the near future.

**A. A Worldwide Draft: Implications for Cuban Defectors**

The rapid influx of foreign ballplayers into the MLB ranks during the 1990s prompted calls from team officials and outside commentators alike for the implementation of a worldwide draft.\(^{287}\) Theoretically, the plan would integrate foreigners into the domestic amateur draft, thus restricting eligible foreign players to negotiations only with the team that drafts them.\(^{288}\) Advocates typically promote the worldwide draft concept for its potential to improve parity by giving small-market teams an opportunity to draft and sign top foreign players. Federal law to ensure their competitiveness in the Cuban baseball market. Cf. Cwiertny, supra note 10, at 424–25 (noting how Joe Cubas has been accused of violating the Kuhn Directive and the embargo). For the scouts of MLB teams, the system creates incentives to cheat to corner the market on certain players and funnel them cheaply and directly into the organization. See *id.*, at 414. For agent-scouts like Joe Cubas and his associates, the system creates incentives to cheat to corner the market on certain players, move them to a third country to gain free agent status, and earn lucrative commissions on high-priced professional contracts. See *id.*, at 415–16. (redundant) Despite its knowledge of these circumstances, MLB has made no serious attempts to alter the current system. See *id.*, at 423–25.

\(^{284}\) See Cwiertny, supra note 10, at 425–27; Greller, supra note 10, at 1700–12; see also *JAMA*, supra note 8, at 131–41.


\(^{286}\) See Greller, supra note 10, at 1700–12.


\(^{288}\) See Cwiertny, supra note 10, at 426–27.
prospects.\textsuperscript{289} Cwiertny, however, advocates establishing a worldwide draft to reduce or eliminate incentives for teams and agents to violate the Kuhn Directive and the Cuban embargo.\textsuperscript{290}

A worldwide draft would greatly affect the current defection system.\textsuperscript{291} Under a worldwide draft, Cubans would have no cause to establish foreign residency because all players would be forced to enter the draft, regardless of residency.\textsuperscript{292} Eliminating automatic free agency for foreign ballplayers would have several important effects on Cuban defectors.\textsuperscript{293} First, the end of free agency would reduce the financial incentives for agents and scouts to aggressively and illegally pursue players in Cuba.\textsuperscript{294} Second, it would eliminate bidding wars for Cuban free agents living abroad, thus reducing incentives for agents to inflate players' capabilities so as to entice them to defect.\textsuperscript{295} Third, a worldwide draft would reduce incentives for MLB team scouts to violate the Kuhn Directive and the Cuban embargo.\textsuperscript{296} Since all clubs would have access to every foreign player, individual teams might not benefit from planning or aiding defection.\textsuperscript{297} Thus, a worldwide draft would make it more likely that players will defect entirely of their own volition.\textsuperscript{298} Without prodding by self-interested scouts or agents and their oftentimes dubious promises of glory and million dollar con-

\textsuperscript{289} See Madden, \textit{supra} note 287. As it stands now, big-market teams—such as the New York Yankees, the Los Angeles Dodgers, and the Boston Red Sox—have the financial ability not only to set up more sophisticated Latin American scouting operations, but also to outbid less wealthy teams when foreign players begin taking contract offers. \textit{See id.; see also} Greller, \textit{supra} note 10, at 1679–84 (describing how foreign free agency undermines competitive balance in MLB). Some experts, however, do not believe a worldwide draft would resolve the competitive balance issue. \textit{See Dave Shein, Player Draft Remains Unsettled, Wash. Post, June 3, 2003, at D4. According to Jim Callis, the executive editor of Baseball America, "[Now, a small-market team] could find a [Latin American future star] and sign him for cheap. [Under a worldwide draft], they'd have to draft him and negotiate a big signing bonus." Id. Because of the high profile of Cuban baseball defectors, however, it is nearly impossible for teams to sign Cuban prospects cheaply and "under the radar" without resorting to illegal tactics like those of the Dodgers. \textit{See Cwiertny, \textit{supra} note 10, at 401–11.}

\textsuperscript{290} See Cwiertny, \textit{supra} note 10, at 426–27.

\textsuperscript{291} \textit{See id.}

\textsuperscript{292} \textit{See id.} at 426; Sheinin, \textit{supra} note 289.

\textsuperscript{293} See Cwiertny, \textit{supra} note 10, at 426; Greller, \textit{supra} note 10, at 1702–05.

\textsuperscript{294} See Cwiertny, \textit{supra} note 10, at 426.

\textsuperscript{295} \textit{See id.; see also} JAMAIL, \textit{supra} note 8, at 83.

\textsuperscript{296} See Cwiertny, \textit{supra} note 10, at 426.

\textsuperscript{297} \textit{See id.}

\textsuperscript{298} \textit{See id.} at 427.
tracts, players might be better equipped to determine whether defection is the right choice for themselves and their families.299

But a worldwide draft could also cause negative consequences for Cuban ballplayers. From a humanitarian standpoint, a worldwide draft is not likely to improve the current system materially.300 Cwiertny aptly notes that under a worldwide draft system, MLB and the Major League Baseball Players’ Association (MLBPA) would have to regulate agents dealing with Cuban players more vigorously to reduce agent profiteering and corruption.301 Together, stricter agent regulation and reduced-value contracts302 will almost certainly deter agents from helping players to defect.303 Without the help of an agent—or, more specifically, his bank account—many players will lack the financial resources needed to defect successfully.304 Some players may attempt an “amateur” escape by sea, a far more dangerous option than alternative methods financed by a connected agent.305 Thus, by chilling agent involvement in Cuba, a draft might have the unfortunate effect of trapping more young ballplayers in their economically failing, authoritarian country. It is conceivable that a global draft will “create[] more problems than it solves.”306

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299 See JAMAIL, supra note 8, at 83; Baxter, supra note 204.
300 Cf. Cwiertny, supra note 10, at 426–27 (omitting any mention of humanitarian benefits to players that might flow from implementation of a worldwide draft).
301 See Cwiertny, supra note 10, at 426.
302 See supra notes 1087, 131 and accompanying text (noting that players signed as free agents typically sign more lucrative contracts than those who are drafted).
303 Cf. Cwiertny, supra note 10, at 427 (noting that his proposal would “allow Cubans to defect on their own, if they chose to take such a risk”) (emphasis added).
304 Cf. supra note 262 and accompanying text (noting that agents are willing to pay for smuggling operations which would otherwise be unaffordable for Cuban ballplayers).
305 See supra notes 222–231 and accompanying text.
306 Sheinin, supra note 289 (quoting Baseball America editor Jim Callis). Despite the possible benefits for MLB, it is highly questionable whether a worldwide draft will be implemented in the near future—or ever. See Gary Klein, Global Draft Is A Foreign Notion Still, L.A. TIMES, June 3, 2003, at D6. Strong pockets of opposition to a worldwide draft within the professional baseball world make the ultimate institution of the draft an uncertainty. See Sheinin, supra note 289. Many MLB officials, agents, and the MLBPA have registered their philosophical opposition to the implementation of a global draft. See id. Naturally, big-market teams oppose the change, fearing an erosion of their long-cultivated scouting advantages in Latin America. See John Delcos, Baseball Feels a Draft Coming on, JOURNAL NEWS (Westchester Cty., N.Y.), Mar. 31, 2003, at 8K; Sheinin, supra note 289. Also, many scouting directors question whether a worldwide draft would even resolve the competitive balance problems it is intended to address. See Sheinin, supra note 289; Telephone Interview with Ben Cherington, Director of Player Development, Boston Red Sox (Mar. 1, 2004) [hereinafter Cherington Interview]. Furthermore, agents and ballplayers represented by the MLBPA dissent on a restraint-of-trade basis, since the draft would inevitably deflate contract and signing bonus values. See Klein, supra.
B. The Four-Step Plan: Realism or Idealism?

As it stands, the defection system is primarily the product of two policies with origins on either side of the Straits of Florida: Castro’s ban on professional sports and the United States’ embargo on Cuba. Greller’s four-part plan calls for, among other things, the revocation of Castro’s ban and the modification of portions of the embargo affecting Cuban ballplayers. The plan certainly touches all the right bases, especially in light of recent Congressional actions that

A worldwide draft also faces serious logistical hurdles. Sheinin, supra note 289. For instance, owners and the MLBPA disagree over the appropriate number of rounds for a global draft. Klein, supra. MLB has also not decided whether, or how, it will reconcile different minimum age requirements for American, Canadian, and Puerto Rican players on the one hand and foreign players on the other, and experts question the feasibility of tracking and registering teenagers in developing countries that lack basic governmental and baseball-related infrastructure. See Sheinin, supra note 289 (quoting agent Andy Mota: “I think the logistics of trying to track these kids down, especially in the Dominican Republic, will make it hard to implement. . . . How are you going to keep track of all these 16-year-olds?”).

Even if MLB can overcome philosophical and logistical opposition to a global draft, the league must contend with the real question of whether the draft is legal and enforceable. See Delcos, supra. The United States already has a treaty in place with Japan, the Republic of Korea, and Taiwan that prohibits “roster raiding” between the professional baseball leagues in each country. Id. These three Asian nations believe the treaty’s provisions apply to amateur ballplayers, as well, making it likely that they would be excluded from any worldwide draft system. See id. With respect to those countries that would not be excluded from the draft by treaty, MLB would be treading on politically sensitive ground. Cherington Interview, supra. Various labor- and foreign policy-related conflicts could arise from drafting players in foreign countries, especially those with developed professional baseball leagues. Id. MLB would be hard pressed to extend the draft to countries such as Mexico and the Dominican Republic, where rules already closely regulate whether and how teams from outside the country can sign native ballplayers. See Jamail, supra note 8, at 139; Cherington Interview, supra. As Yankees Assistant General Manager Jean Afterman explains, “I don’t think there’s any country out there that believes it would be subject to a worldwide draft.” Delcos, supra. Thus, non-cooperation or outright hostility from other countries might be the most serious impediment to successfully implementing a global draft. See id. (quoting Afterman: “[T]he Dominican Republic . . . is pitching a fit [that] they would be subject to a draft.”).

Perhaps the strong philosophical opposition to, as well as the inherent logistical and legal problems of a new system explain why MLB has made little progress in moving toward a worldwide draft. See Delcos, supra; Klein, supra; Sheinin, supra note 289; MLB Weighs Expo Decision, Cincinnati Post, Jan. 16, 2004, at C3 (hereinafter MLB Weighs Expo Decision). Despite the August 2002 agreement between club owners and the MLBPA to explore the concept, as of spring training 2004 MLB was no closer to a new system, and MLB owners have abandoned attempts to implement a worldwide draft for now. See Klein, supra; Expo Decision, supra (quoting executive vice president for baseball operations in the MLB commissioner’s office, Sandy Alderson: “At this point, the clubs have indicated that they are not in a majority favoring a worldwide draft.”).

307 See Jamail, supra note 8, at 129–141.
308 Greller, supra note 10, at 1700–02.
indicate bipartisan support for relaxing the embargo’s restrictions on travel to Cuba. But even if the United States were unilaterally to alter the embargo in the manner that Greller envisions, it is highly improbable—the Castro regime’s public statements to the contrary notwithstanding—that Cubans will be allowed to play in America. Absent a stunning reversal of Castro’s long-standing socialist ideology and animus toward America—or, of course, his overthrow or death—Cuban baseball defection is not likely to become a relic of history anytime soon.

1. Changing MLB Policy to Accommodate Cuban Players

The first three steps of Greller’s plan consist chiefly of modifications of MLB rules with respect to Cuban players. Step one calls on MLB to revoke the Kuhn Directive, which prohibits teams from scouting and signing players in Cuba. Since the Directive is best viewed simply as MLB’s reiteration of the restraints imposed by the Cuban embargo, such action would be relatively ineffectual. That is, the Directive only prevents clubs from engaging in activities that would otherwise be prohibited by the Cuban embargo. Given the amount of untapped Cuban talent and the financial interests at stake for the league, MLB will almost certainly revoke the directive if and when Congress either alters the embargo to allow Cubans to play in America or lifts it altogether. Therefore, it would only be a sym-

310 See JAMAIL, supra note 8, at 131–37. Cuban Commissioner Humberto Rodriguez’s public comment that Cuba would be “receptive to any proposal by the major leagues as long as it respects the principles of Cuban socialist sports” caused speculation in the press of a new relationship between Cuba and MLB. Cubans May Play in Majors, SUN-SENTINEL (Ft. Lauderdale, Fla.), Oct. 31, 1998, at 7C. But Milton Jamail calls this claim “ludicrous,” noting that Cuban officials want to give the impression of flexibility, when in reality any kind of opening would undermine the government’s authoritarian grip on the country. See JAMAIL, supra note 8, at 131–32.
311 See JAMAIL, supra note 8, at 138 (“Those interested in the return of Cuban players to major league baseball need to look to a Cuba . . . without Fidel.”).
312 See Greller, supra note 10, at 1700–08.
313 Id. at 1700–02.
314 Cherington Interview, supra note 306.
315 See Cwiertny, supra note 10, at 401–09 (explaining how the Dodgers’ recruitment and signing of players in Cuba—the very actions prohibited by the Kuhn Directive—violated the embargo).
316 Cherington Interview, supra note 306; see supra note 306 and accompanying text.
bolic gesture to revoke the Kuhn Directive before the embargo is sub-
stantively altered to accommodate Cuban ballplayers.317

Step two proposes that MLB incorporate Cuban players into the
domestic amateur draft by amending the Official Professional Base-
ball Rules 3 and 4.318 Ostensibly, this would render the Cubans model
defection irrelevant, since Cubans would not be eligible to become
free agents by moving to another country.319 From a practical stand-
point, this reform would have an identical effect on Cuban ballplayers
as the worldwide draft, discussed above.320 While incorporating Cu-
bans into the domestic amateur draft would also reduce incentives for
teams and agents to violate the embargo, by itself it would do nothing
to end defection.321 And, like the worldwide draft, such a proposal, by
discouraging agent involvement in the defection process, may cause
players to choose more dangerous methods of defection, or not to
defect at all.322 As long as Cubans must defect to play in MLB, incor-
porating them into the domestic amateur draft might simply create
problems to replace those it solves.323

The third step calls for MLB to impose a “Cuban contract tax”
upon teams that sign Cuban players.324 A small percentage of the total
dollar value of each Cuban contract would be redirected to an MLB
fund designed to support Cuban baseball infrastructure and MLB
scouting and development in Cuba.325 Greller asserts that the resul-
tant funds would “not go to the Cuban government, but rather will
remain under the auspices of MLB while directly going to the Cuban
people through baseball.”326

Unfortunately, this tax plan would be impossible to enact in its
current form, because it ignores the dominance of the Castro gov-
ernment over Cuban baseball.327 Because the government exerts con-
tral over every sports academy, baseball field, piece of equipment—
and, sadly, every player and coach, as well—MLB could never operate a baseball-oriented fund independently of Castro. The idea of a Cuban contract tax, nevertheless, holds some promise. As Greller notes, by allowing Castro to divert money earmarked for baseball toward more important things, like food and medicine, the tax could be a boon for both Cuban baseball and Cuba’s people. In a post-Castro, post-embargo Cuba, such a tax might help baseball teams expedite the creation of necessary infrastructure to begin scouting and training more players. But so long as the Castro regime retains control, the imposition of a Cuban contract tax is an extremely unlikely scenario.

2. Changing U.S. Foreign Policy to Accommodate Cuban Players

Step four—changing U.S. foreign policy by eliminating defection as a prerequisite for Cubans to compete in MLB—is, as Greller acknowledges, integral to his plan’s success. As long as Castro remains in power, the United States is unlikely to lift the embargo in its entirety. Thus, with regard to U.S. policy, ending Cuban defection requires the passage of either of two bills currently under consideration

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328 See id.
329 See supra notes 69–71 and accompanying text.
330 See Greller, supra note 10, at 1707–08.
331 See id.
332 Cf. Cherington Interview, supra note 306 (commenting that it would take some time for clubs to get their Cuba operations up and running once the country opened to MLB).
333 See supra notes 327–329 and accompanying text.
334 See Greller, supra note 10, at 1708–09 (“These changes by MLB and Cuba [steps one through three] will not succeed unless efforts begin at home. The United States must change its immigration policies to ... illustrate that [it] no longer will force Cuban baseball players to defect in order to compete in MLB.”).
335 See RATLIFF & FONTAINE, supra note 71, at 3–4. The authors make an impassioned and well-reasoned argument to lift the embargo:

Too often today the main issues raised, particularly by the most militant politicians and political activists who support sanctions, seem to be driven by an understandable but misguided and counterproductive vendetta against Fidel Castro that smacks of hysteria and cold war politics. Those who urge the lifting of sanctions are often said to be “soft” on Castro. Too many embargo supporters seem to have studied strategy and tactics with Don Quixote; they simply brandish slightly updated versions of old leftist/rightist clichés to tilt with windmills guarded by straw men. The tragic commentary on U.S. policy toward Cuba is that Don Quixote invariably wins.

Id.
in the House of Representatives. The Baseball Diplomacy Act (BDA), last introduced by Representative José Serrano (D-N.Y) in January 2003, would allow Cubans to come to America to play professional baseball and return to Cuba with their earnings.336 Another of Rep. Serrano’s proposals, the Bridges to the Cuban People Act (BCPA), a wide-ranging embargo relaxation bill introduced 2003, incorporates language similar to the BDA.337 As of fall 2004, the BCPA had fifty-nine co-sponsors in the House and had been referred to the House Subcommittee on Immigration, Border Security, and Claims.338

If enacted, the BCPA or the BDA would exempt all Cuban nationals who come to the United States to play professionally from certain restrictions related to the embargo and relevant immigration law.339 Both bills would allow players to obtain visas for the duration of each season they are under contract, and to return to Cuba with their earnings.340

The chances of either bill’s passage are relatively poor, despite recent indications of support for reforming the embargo.341 The BDA and the relevant part of the BCPA, section 408, are specifically criticized for permitting professional athletes to return to Cuba with their earnings, while doing nothing to prevent the Castro regime’s seizure of those earnings.342 The mere possibility that Castro might seize millions of dollars from returning ballplayers is unpalatable to anti-

339 See H.R. 3422 § 408; H.R. 189.
340 See H.R. 3422 § 408; H.R. 189.
341 See JAMAIL, supra note 8, at 132 (discussing opposition to and failure of Baseball Diplomacy Act in 1996 and 1998); Susan Kepecs, Cuba Embargo on Its Last Legs?, CAPITAL TIMES (Madison, Wis.), Jan. 4, 2003, at 1B (quoting former House speaker Dick Armey: “If [the trade and travel restrictions] last a year, it will be the last year they last.”). In the fall of 2003, an amendment to a transportation appropriations bill, which would have lifted the ban on Americans traveling to Cuba, gained the support of a wide bipartisan majority in both houses of Congress. Young, supra note 309. President Bush’s threat to veto any bill that tinkered with the embargo, however, led the House Republican leadership to ditch the amendment in conference. Id. A similar showdown between the Bush Administration and Congress ensued in the fall of 2004, as the House voted to deny funding changes that would have tightened travel restrictions to Cuba, despite threats of a White House veto. See Bachelet, supra note 309. The restrictions promulgated by the White House in the summer of 2004, and rejected by the House, would limit visits to Cuba by immediate family members to once every three years—the current rule is once per year—and ban travel by more distant relatives such as aunts and cousins. See id.
342 See H.R. 3422 § 408; H.R. 189.
Castro politicians.343 Perhaps if the BDA or section 408 of the BCPA included guarantees that no player’s salary would find its way into Castro’s hands—how to guarantee such a thing is a difficult question—then Congress might be apt to adopt the proposed legislation.344 But unless these changes are made, or the political tenor in Washington changes drastically, neither the BCPA nor the BDA will garner enough support to solve the crisis of Cuban baseball defection.

3. “Fidel, Inc.”345—Would Castro Let Ballplayers Come to America?

The existence of the defection system is primarily attributable to the policies of Fidel Castro.346 Even if the United States unilaterally altered its policies to allow Cubans to contract with MLB clubs and travel freely back to Cuba, Castro’s long-standing practices make the demise of defection unlikely.347

Cuban ballplayers are essential to Castro’s propaganda.348 The regime trumpets the successes of the amateur system and the national team, declaring them victories for the revolution and the Cuban people.349 As Cuba’s economy falters, success in baseball is one of few accomplishments to which the government can cling.350 The high level of amateur competition in Cuba, goes the government’s myth, shows that baseball can succeed while it retains its socialist character.351 According to this myth, money is irrelevant—players compete for love of the game and, of course, their country.352

Castro’s need to maintain this myth further indicates that he will probably never permit Cubans to play in America.353 Cubans playing in MLB would be “symbol[s] of the freedom, the wealth and the pos-

343 See JAMAIL, supra note 8, at 132.
344 See Greller, supra note 10, at 1710 (“Admittedly, preventing the Castro government from seizing the salaries of [returning] players may prove difficult.”); cf. JAMAIL, supra note 8, at 132 (noting that opposition to the Baseball Diplomacy Act stemmed from fears that the Cuban government would confiscate player’s paychecks).
345 FAINARU & SÁNCHEZ, supra note 13, at 127.
346 See supra note 13 and accompanying text.
347 See JAMAIL, supra note 8, at 129-30 (quoting Gilberto Dihigo: “Until Fidel dies, I don’t see any way that would allow Cuban players to become professional.”).
348 See ECHEVARRÍA, supra note 27, at 362 (noting the revolution’s effect on Cuban baseball and the “relentless propaganda about its benefits in the Cuban press”); JAMAIL, supra note 8, at 133-34.
349 See JAMAIL, supra note 8, at 133–34, 141.
350 See id. at 133–34.
351 See id. at 133.
352 See id.
353 See id. at 133–34.
sibility for open-ended self-fulfillment that America has long represented to people under [Castro’s] totalitarian control.\textsuperscript{354} Wealthy players returning from America would intolerably challenge Castro’s communist system and anti-American worldview.\textsuperscript{355}

Most importantly, Castro’s anti-Americanism extends to the baseball field.\textsuperscript{356} Since the heady, early days of the revolution, Castro has believed in waging a battle between Cuban baseball and American baseball—between “la pelota libre” and “la pelota esclava.”\textsuperscript{357} “The Cuban people have invested [in their baseball players],” the Cuban baseball commissioner explains, “[a]nd no one has the right to take them away.”\textsuperscript{358} Considering the doggedness with which Castro has pursued the victory of “la pelota libre,” it is almost inconceivable that the dictator would grant permission for Cuban baseball players to play “la pelota esclava” in America.\textsuperscript{359} Castro’s longevity and unwavering devotion to his ideology ensure the continuation of Cuban baseball defection until the day he is overthrown or dies.\textsuperscript{360}

CONCLUSION

Since 1991, Cuban baseball players with dreams of playing Major League Baseball have been stuck in a system that offers no good choices. Longstanding policies of both the Cuban and United States governments have created a broken system that disregards the basic safety and welfare of Cuban ballplayers and their families. The defection system not only ignores these important humanitarian concerns, but also encourages dangerous and illegal immigration practices.

The plight of Cuban defectors exemplifies the untenable state of United States-Cuba relations. Midway through the first decade of the new millennium, Castro continues to rule impoverished, languishing Cuba with an iron fist; the embargo, more stringent than ever, remains in full force; and young baseball players from Cuba, wanting nothing more than the freedom to compete against the world’s best,


\textsuperscript{355} Cf id. (noting that the 1999 Baltimore Orioles trip to Cuba would expose Cubans to wealthy, fearless, free American ballplayers, inevitably eroding Castro’s grip on his country).

\textsuperscript{356} See Jamail, supra note 8, at 134.

\textsuperscript{357} See id.

\textsuperscript{358} Thompson, supra note 283.

\textsuperscript{359} See Jamail, supra note 8, at 134.

\textsuperscript{360} See id. at 129–35.
must choose between their dreams and their homes. The sorry state of baseball relations between the United States and Cuba is ample evidence of not only Castro’s failed revolution, but also the failure of U.S. foreign policy toward Cuba.

Despite the political demagoguery surrounding U.S.-Cuba relations, the plight of baseball defectors—who are, soberingly, among the most fortunate of all Cuban immigrants—should generate serious reconsideration of the United States’ Cuba policy. Initially implemented, in large part, to accelerate the downfall of the Castro regime, the forty-five year old embargo has undeniably failed to achieve that objective. Perhaps it is time for the United States to pursue a different policy aimed at ensuring a smooth, nonviolent transition to a more democratic and market-oriented post-Castro Cuba.361

For potential Cuban baseball defectors, any policy changes in the United States would be virtually irrelevant so long as Castro remains Cuba’s leader. The defection system will almost certainly last as long as Castro does. But the greatest travesty for Cuban ballplayers, MLB, U.S.-Cuba relations, and the Cuban people, would be to maintain diplomatic hostility between the two countries after Castro’s demise.

Today’s young Cuban baseball stars—having heard the stories of Rene Arocha and El Duque and José Contreras—wonder whether they, too, will soon confront the wrenching decision to leave behind their homes, families, and lives for a future in American baseball. This generation of Cuban defectors—from the World Series heroes to the rookie league flameouts—has confronted profound adversity with dignity. Hopefully, the next generation of Cuban baseball players, and their families, will not to have face the extremely difficult choices of their predecessors. Americans and Cubans alike must ensure that Cuban baseball defection soon becomes a mere relic in the history of baseball.