

## Denver Law Review

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Volume 78  
Issue 4 *Latcrit V Symposium - Class in LatCrit:  
Theory and Praxis in a World of Economic  
Inequality*

Article 11

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January 2001

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#### Recommended Citation

Berta Esperanza Hernandez-Truyol, On Becoming the Other: Cubans, Castro, and Elian - A LatCritical Analysis, 78 Denv. U. L. Rev. 687 (2001).

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## On Becoming the Other: Cubans, Castro, and Elian - A LatCritical Analysis

# ON BECOMING THE OTHER: CUBANS, CASTRO, AND ELIAN -- A LATCRITICAL ANALYSIS

BERTA ESPERANZA HERNÁNDEZ-TRUYOL\*

## I. INTRODUCTION: THE DREAM—CUBANS' ARRIVAL IN THE UNITED STATES

The course traveled towards becoming an “other” is necessarily culturally relative, sometimes individualized, and always complex. Finding out who we are, where we belong - or as Paula Gunn Allen articulates it, the journey to ascertain “who is my mother?” - is an arduous task. The “othering” path depends on our original location. The journey will differ if we are born into a designated minority within the majority culture or if we are born into a majority culture that becomes a minority when its members migrate across culturally, linguistically, racially, and/or ethnically identified geographic borders.

The discovery of “othering” is an experience that varies greatly not only among individuals but also among groups; it differs in time and space. For me, realizing my “otherness” has been a work long in progress.<sup>1</sup> I was born in Cuba and raised in Puerto Rico. Culturally I was raised as the normative.<sup>2</sup> Within *mi cultura latina*, however, I am/was a second class citizen with limited privilege because I am female.<sup>3</sup> So

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1. See Berta Esperanza Hernández-Truyol, *Borders (En)gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U.L.REV. 882, 892-96 (1997) [hereinafter *Borders (En)gendered*] (explaining my need to weave my conflicting worlds, my professional (English-speaking) realm and my *familia, mi mundo cubano*); Berta Esperanza Hernández-Truyol, *Building Bridges I - Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 370, 369 (1994) [hereinafter *Building Bridges I*] (describing how moving to the United States to attend college shocked me with the realization that I was “other”); Berta Esperanza Hernández-Truyol, *The LatIndia and Mestizajes: Of Cultures, Conquests, and LatCritical Feminism*, 3 THE J. GEN. RACE & JUST. 63, 75 (1999) [hereinafter *The LatIndia*] (describing the hurdles and harsh realizations I encountered in my professional life as a Latina lawyer, and stating “it was not until after I had completed law school that I got my first inkling that the majority’s perception of me was that I was outside ‘normal.’”).

2. See *Borders (En)gendered*, *supra* note 1, at 894 (describing my lack of “otherness” in Puerto Rico). “Growing up in Puerto Rico, I was, except for my sex, *normativa*. Speaking Spanish was normal. Being brown (all shades) was not only normal, it was the goal of those NLW [Non-Latina/o Whites] (and other foreigners) who visited the island.” *Id.* See also *Building Bridges I*, *supra* note 1, at 370 (explaining that “[g]rowing up I never felt *different* . . . . As to the possibility that somewhere, someone might consider me ‘different,’ I was simply clueless”).

3. See *The LatIndia*, *supra* note 1, at 71. I was raised in a traditional extended family in which I was the only girl-child. *Id.* at 72. In this household, I learned that female identity meant a lesser class citizenship. *Id.* at 71. For stories about my early encounters with the issue of sex/gender, see *Borders (En)gendered*, *supra* note 1, at 911-20; *Building Bridges I*, *supra* note 1, at 403; Berta

when I traveled north to go to college, I was clueless that I would be an “other”—a racialized and ethnicized “other”—simply because I am Latina.

My knowledge or understanding of that status was not immediately apparent; indeed, the experiences that have led me to awareness and comprehension of my “other” status have spanned decades. My awareness started taking root in college when a career counselor told me that I should not be a lawyer, but rather should be a teacher so I could help my people.<sup>4</sup> It continued in law school when after the first year, friends would not call, presuming that I, like the rest of the minorities in our section, would not be back. My full awareness of my *latinidad* making me an “other” took place when I took a job at the Justice Department, and was quickly placed on the recruitment committee, and it grew more rapidly when I learned that I was the twofor that the “regular” committee members were anxiously and curiously waiting to meet.<sup>5</sup> Much more recently, I became aware that in identifying my otherness as my *latinidad* I was also effecting erasures of my native origins.<sup>6</sup> Thus, this discovery process is ongoing.

In this context of self-identification, Cuban peoples’ lack of awareness of being “others” within these *fronteras estado únidenses* has become an increasingly interesting phenomenon to me. I have resolved the conundrum with various possible explications. For one, the Cuban migration to the United States was initially a rather economically privileged, educationally accomplished, and racially light one.<sup>7</sup> Facilitating this socio-economic and racial acceptability, the migration took place in

Esperanza Hernández-Truyol, *Building Bridges II: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69 (1996); Berta Esperanza Hernández-Truyol, *Indivisible Identities: Culture Clashes, Confused Constructs, and Reality Checks*, 2 HARV. LATINO[A] L.REV. 199, 210-11 (1997) [hereinafter *Indivisible Identities*]; Berta Esperanza Hernández-Truyol, *Latina Multidimensionality and LatCrit Possibilities*, 53 U. MIAMI L. REV. 811 (1999).

4. See *Building Bridges I*, *supra* note 1, at 403.

5. See *The LatIndia*, *supra* note 1, at 75.

6. See *id.* at 76-78. Luz Guerra encouraged a group of progressive scholars, myself included, to deconstruct the meaning and conceptualization of *latinidad*. See *id.* at 76. See Luz Guerra, *LatCrit y La Des-Colonización Nuestra: Taking Colón Out*, 19 CHICANO-LATINO L. REV. 351, 351 (1998). I came to realize that using the term *latinidad* affirms the social order imposed by the Spanish colonists and erases our indigenous history. See *The LatIndia*, *supra* note 1, at 76-78. As I struggle to discover and name my great-great-grandmother who my family simply calls “La India,” I reclaim the *India* in my heritage. See *id.* at 81.

7. See Alejandro Portes and Alex Stepick, *City on the Edge: The Transformation of Miami* 104, 207 (1993) (describing the effects of Latina/o migration on Miami); DAVID RIEFF, *THE EXILE: CUBA IN THE HEART OF MIAMI* 26 (1993) (explaining that the Cubans who came to Miami in the first wave of immigration were the most privileged members of the Cuban population); *Building Bridges I*, *supra* note 1, at 391; Thomas Weaver, *The Culture of Latinos in the United States*, in 2 HANDBOOK OF HISPANIC CULTURES IN THE UNITED STATES: ANTHROPOLOGY 15, 52 (Nicolás Kanellos et al. eds., 1994) [hereinafter HANDBOOK OF HISPANIC CULTURES] (stating that the first wave of Cuban immigrants to the United States were largely light-skinned).

the context of the Cold War's anti-communist fervor.<sup>8</sup> These super educated, highly motivated, and hard working people were arriving in this country as proof of the desirability of freedom over exploitation, civil rights over economic rights (after all they were leaving material well-being behind in order to have freedoms like speech, travel, and vote), and capitalism over communism.

The rule of law in the United States dovetailed the socio-economic, political, and racial ambients that facilitated acceptance of *cubanas/os* within these shores. Favorable immigration laws were crafted so as to render the Cubans' abandonment of their homeland—for this land of the free—possible.<sup>9</sup> Indeed, the privileges afforded *cubanas/os* are reflected in the preferential immigration treatment they have received.<sup>10</sup> Significantly, the preferential embrace of *cubanas/os* has occurred in an environment of antipathy and disdain for other Latinas/os and *caribeñas/os* seeking entry. This general disfavor of Latina/o migration is reflected in laws—both local<sup>11</sup> and national immigration<sup>12</sup> norms—crafted to exclude Latinas/os and other groups, but that nonetheless do not apply to *cubanas/os*.

8. See *Building Bridges I*, *supra* note 1, at 391. Cuban immigrants to the United States were used to bolster the war against communism, and, thus, they received assistance from the United States government and were not subject to quotas. *Id.* See PORTES, *supra* note 7, at 29, 104. "The daily spectacle of these refugees had political value: what better indictment of Caribbean-style communism?" *Id.* at 104.

9. See Joyce A. Hughes, *Flight from Cuba*, 36 CAL. W. L. REV. 39, 40-41, 54-58. For a brief history of Cuban migration to the United States, see *Building Bridges I*, *supra* note 1, at 391-93.

10. The United States Government has made it relatively easy for Cuban citizens fleeing Castro's communist government to migrate to the United States. In 1966 the Cuban Adjustment Act gave Cuban immigrants the option of applying for and receiving United States residency after living in the United States for only two years. See Cuban Adjustment Act, Pub. L. 89-732, 80 Stat. 1161 (1966) (codified in part at 8 U.S.C. § 1255 (1988)). In 1980, the residency requirement was lowered to one year under the Refugee Act. See Refugee Act, 8 U.S.C. § 1521 (1988). This policy changed significantly, however, in 1994, when President Clinton ordered that Cuban refugees intercepted at sea should be returned to Cuba (commonly known as the "wet feet/dry feet" policy). See President's Press Conference, 30 WEEKLY COMP. PRES. DOC. 1682-3 (August 19, 1994). "Today, I have ordered that illegal refugees from Cuba will not be allowed to enter the United States. Refugees rescued at sea will be taken to our naval base at Guantanamo, while we explore the possibility of other safe havens within the region. To enforce this policy, I have directed the Coast Guard to continue its expanded effort to stop any boat illegally attempting to bring Cubans to the United States. The United States will detain, investigate, and, if necessary, prosecute Americans who take to the sea to pick up Cubans." *Id.* For more information on Cuban immigration laws, see Berta Esperanza Hernández-Truyol, *Out in Left Field: Cuba's Post-Cold War Strikeout*, 18 FORDHAM INT'L L.J. 15, 39-44, n.139 (1994).

11. See Berta Esperanza Hernández-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URB. L.J. 1075, 1094-97 (1996) (hereinafter *Natives*). An example of local laws designed to exclude Latinas/os is California's Proposition 187, which denies health, education and welfare benefits to illegal entrants. *Id.* This xenophobic law is aimed at illegal immigrants from Mexico and blames them for California's economic problems. *Id.* Ironically, California proposes to resolve its economic problems by depriving this racial group of vital benefits. *Id.*

12. See *id.* at 1083-86.

Because Cubans were entering the United States as refugees there was no limitation on the numbers that could make this country their new home.<sup>13</sup> Coming from communism, no one told us that there were too many of us migrating into this country, or that we were undesirable because of our different customs, language, color, and religion.<sup>14</sup> No one ever suggested that if we did not like it here we should go back home. How could we be sent back? After all, we were confirmation of the evils of communism; we were the *cause célèbre* of the cold war, we were proof that communism sucks and capitalism rocks.

The *cubanas/os* settled mostly in Miami, though sizable populations also settled in New Jersey and Puerto Rico (where the language and cultural roots were similar to Cuba's and thus the "othering" process would not take place in the same dimension).<sup>15</sup> The clustering effect actually allowed *cubanas/os* to hold on to our cultural tropes and pass them down through the generations; the clusters were large enough that we could entail the virtual entirety of the newcomers' civil society—the larger exceptions being the workplace and schools.<sup>16</sup>

To the outside (non-Cuban) world—the majority within these borderlands—the results were desirable. *Cubanas/os* worked hard and did well—educationally and economically—in our new home. Former professionals would take whatever jobs were available and would do them well. There was dignity in all work. The world saw doctors and lawyers arrive and be industrious cleaning floors and toilets with the ultimate aspiration of joining the ranks of professionals once again.<sup>17</sup>

The majority embraced this particular version of the "American dream." *Estado unidenses* offered what appeared to be an unprecedented

13. See *Building Bridges I*, *supra* note 1, at 391.

14. See *id.* See PORTES, *supra* note 7, at 29. "[F]or twenty years, the exile community had been the United States government's most resolute partner in the struggle against Castro communism and that dictator's attempts at expansion in Latin America. For Washington, the Miami exiles were not an 'ethnic' group, but an important ally in the fight for Cuba and Latin America." *Id.*

15. "[B]y 1979, on the eve of Mariel, close to 80 percent of Cubans in the United States were living in Miami, making it, in effect, Cuba's second-largest city and the refugees the most concentrated foreign-born minority in the country." See PORTES, *supra* note 7, at 104 (quoting Sergio Diaz-Briquets and Lisandro Perez, *Cuba: The Demography of Revolution*, 36 POPULATION BULLETIN 2-41 (April 1981)). See also RIEFF, *supra* note 7, at 15 (describing the Cuban settlement in Union City, New Jersey, as "that other great center of the Cuban diaspora in the United States"); Weaver, *supra* note 7, at 41 (explaining Cuban-American demographics); Edna Acosta-Belén, *From Settlers to Newcomers: the Hispanic Legacy in the United States*, in THE HISPANIC EXPERIENCE IN THE UNITED STATES: CONTEMPORARY ISSUES AND PERSPECTIVES 81, 95 (Belén et al. eds. 1988) (listing Puerto Rico as a significant settlement place for Cuban immigrants).

16. See PORTES, *supra* note 7, at 107. Cubans in Miami tried to recreate the atmosphere of Cuba and fostered Cuban values and a "moral community" within their enclave. See *id.*

17. For more literature on the Cuban presence in the United States, see PORTES, *supra* note 7, and RIEFF, *supra* note 7.

acceptance of *cubanas/os* who were viewed as a “model” minority.<sup>18</sup> Our achievements were reflected in statistics that showed our income and educational attainments as being the highest among Latina/o groups in the country—almost on par with the statistics for the Angla/o majority that was judging them.<sup>19</sup> Indeed, Cubans were so well tuned in to the *americanismo* of law and order, a version of justice at all costs, that we derided the poorer, darker *marielitos*<sup>20</sup> who arrived during a supposed purge of Castro’s jails; convinced *el barbudo* had sent this crop of misfits—*ladrones y sinvergüenzas*—just to get even, to disgrace us, to ruin our hard earned reputations as new, deserving, grateful “Americans.”<sup>21</sup>

Thus, the image of *cubanas/os* was formed: a hard working people who followed the rule of law, had strong family values, and had conservative political leanings.<sup>22</sup> In short, *cubanas/os* behaved well, marched to the tune of *estado unidense* values, were productive,<sup>23</sup> and were settled in limited geographic enclaves.<sup>24</sup> Thus, *cubanas/os* were not viewed as much of a threat to majority society. From the transformation of Miami from a sleepy town of old retirees to a thriving cosmopolitan metropolis<sup>25</sup> to our higher than Latina/o average levels of income and education,<sup>26</sup> we seemed to be living the (brown) “American” dream.

18. Berta Esperanza Hernández-Truyol, *Building Bridges III: Personal Narratives, Incoherent Paradigms, and Plural Citizens*, 19 CHICANO-LATINO L. REV. 303, 327-28 (Spring 1998) [hereinafter *Building Bridges III*]. See PORTES, *supra* note 7, at 30; *Natives*, *supra* note 11, at 1085.

19. See Steven F. Arvizu, *Latinos in Higher Education: Undereducation vs. Empowerment*, in HANDBOOK OF HISPANIC CULTURES, *supra* note 7, at 282, 289 tbl. 6. In 1989, 21.9% of non-Hispanic Whites over age twenty-five had completed four years of college. *Id.* Out of all Hispanic groups polled, Cubans came closest to this number, with 19.8% of Cuban adults over age twenty-five having completed four years of college. *Id.*

20. See *Building Bridges I*, *supra* note 1, at 392.

21. See RIEFF, *supra* note 7, at 17. For more history of Mariel refugees in Miami, see PORTES, *supra* note 7, at 18-37.

22. See PORTES, *supra* note 7, at 137-40 (describing the Cuban enclave in Miami as a “moral community,” characterized by its distinct political beliefs, militant loyalty, and strong moral values); Robert R. Alvarez, Jr., *Changing Patterns of Family and Ideology among Latino Cultures in the United States*, in HANDBOOK OF HISPANIC CULTURES, *supra* note 7, at 147, 159-60 (explaining the traditional family values that remain strong within the Cuban-American culture).

23. See PORTES, *supra* note 7, at 43-46. The Cuban community in Miami experienced a “rapid entrepreneurial advance,” as compared with other Latina/o groups and African-Americans. *Id.*

24. See *supra* note 15, and accompanying text. See also Weaver, *supra* note 7, at 53 (explaining that Cuban-Americans tend to maintain a culture separate from other Latina/o cultures).

25. See PORTES, *supra* note 7, at 207-10.

26. See *Building Bridges I*, *supra* note 1, at 395 (explaining that, compared to all Latina/o groups, Cuban-Americans came closest to the median family income of \$32,274 for non-latinas/os, with a median family income of \$27,294 in 1987) (citing STATISTICAL HANDBOOK ON U.S. HISPANICS 36, 197 (Frank L. Schick & Renee Schick eds., 2d ed. 1991)). For a comparison of educational levels, see *supra* note 19, and accompanying text.

It is difficult to imagine that a cute, little, six-year-old boy<sup>27</sup> would be able to change these favorable socially constructed images of *cubanas/os* virtually overnight. But that is precisely what happened with Elian and the *comunidad cubana en Miami en estos estados unidos*. The story is sad and poignant, heart-wrenching and surreal, human and political, civil and social, cultural and economic. It reaches into the souls of all who have fought and lost after having thought that they had fought and won.

The following sections of this essay explore the transformation of the Cuban community in the eyes of the *estado unidense* majority in the context of the Elian experience. Following this introduction, the piece develops the Elian facts and explores the impact of the case on Cuban-United States relations in Miami. Next, the work reviews the law—the complex of norms we call the “rule of law”—that applies to the Elian facts. Finally, the piece engages in a LatCritical analysis of the application of the rule of law. It directly engages the reality that our personal experiences influence, and indeed may well control, how we read the law and apply it to the facts. This analysis reinforces critical scholars’ attacks on normativity and its *faux* objectivity.

## II. FRAMING THE CONVERSATIONS

I remember the first time I had to face the reality that I did not agree with the popular narrative of the Cuban party line, i.e. that there is no way an innocent child should be returned to Cuba to live under communism. I had received a call from a national newspaper for an interview. Were I to speak with them, my position would be public. Mind you, I was not at all naïve about the fact that my position as one of the few Cuban law professors in the United States, who left Cuba when she was Elian’s age, offered a bit of the sensationalism that the media seeks these days. But mostly I wondered how *mi mami y papi* would react to my public comment on the case.

So, upon receiving a heads up on the media call, I telephoned my parents (who habitually are both on the phone for 3-way conversations) to ascertain their take on Elian and to let them know my position--which I will develop more fully below as the “rule of law.” But I am getting ahead of myself in two respects. With respect to the conversation with *mami y papi*, I was not initially so forthcoming. In regard to my position, the above statement that I follow the so-called “rule of law” is an oversimplification considered in the context of the LatCrit project.

First, before getting to my chat with *mami y papi*, it is important to set the time framework. All of the disruption started not at the moment

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27. Elian was born in Cuba to Juan Miguel González and Elizabeth Gonzalez. See Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000).



of the boy's rescue by two fishermen from a boat (makeshift raft) wreck, but later.<sup>28</sup> The rescue was heroic. The boy, whose mother had not survived the wreck, was taken to a hospital for medical treatment.<sup>29</sup> While he was in the hospital, his Miami relatives, specifically Lazaro Gonzalez, a great-uncle, contacted the Immigration and Naturalization Service (INS).<sup>30</sup> Upon Elian's release from the hospital, the INS, having deferred his immigration inspection, paroled the boy into the care and custody of his distant Miami relatives.<sup>31</sup> All was well until the conflict arose.

Shortly after the parole, the relatives in Miami decided to file an asylum application with the INS on Elian's behalf, which was followed by a second application that was signed by the boy.<sup>32</sup> In the meantime, the family requested and obtained custody of the boy in the state family court—a grant of custody that was subsequently dismissed.<sup>33</sup> The relatives filed a third asylum application after the award of temporary custody.<sup>34</sup>

All of the applications were virtually identical and reflected the political position of the relatives,<sup>35</sup> which dovetails the popular Cuban community narrative: they did not want the boy growing up in communism when he could be free in the United States.<sup>36</sup> In fact, they claimed that the father, who had been divorced from the now-deceased mother, wanted the child to stay in the United States and had suggested as much to them.<sup>37</sup> Their assertion was based upon an alleged conversation with the father who supposedly asked that they take care of Elian, a conversation which they understood as expressing a desire that the boy not return to communism.<sup>38</sup>

More formally, however, the asylum applications claimed that Elian had "a well-founded fear of persecution."<sup>39</sup> To support this claim, the

28. When Elian was first rescued, the Miami relatives planned to return the boy. *See id.* at 1344. Juan Gonzalez did not realize until later that the Miami relatives planned on keeping Elian. *See* Nancy Gibbs, *I Love My Child*, TIME, Apr. 17, 2000.

29. *See Gonzalez*, 212 F.3d at 1344.

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.* n.2 (citing *In re Lazaro Gonzalez*, No. 00-00479-FC-28, 2000 WL 492102 (Fla. Cir. Ct. 2000)).

34. *See id.*

35. *See Gonzalez*, 212 F.3d at 1344-45.

36. *See generally* Rick Bragg and Lizette Alvarez, *Miami Family Told to Turn Over Boy After Talks Fail*, N.Y. TIMES, Apr. 13, 2000. "The boy's Miami relatives and much of the Cuban exile population in South Florida oppose sending him back to a communist dictatorship that his mother died to escape." *Id.*

37. *See Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1172 (S.D. Fla. 2000).

38. *See id.*; *Gonzalez*, 212 F.3d at 1345, n.3. *See generally* Gibbs, *supra* note 28.

39. *Gonzalez*, 86 F. Supp. 2d at 1171, n.4. Under 8 U.S.C. § 1158(b)(1), the Attorney General has discretionary authority to grant asylum to an alien who fits the definition of a refugee in 8 U.S.C. § 1101(a)(42)(A). *See* 8 U.S.C. § 1158(b)(1) (1952). The definition includes "any person . . . who is

applications recited that family members had been persecuted by Castro, including not only incarceration of some relatives for political acts but also harassment of the now-deceased mother.<sup>40</sup> The applications also suggested that Elian would be used as a pawn by the Castro government and “would be subjected to involuntary indoctrination in the tenets of communism.”<sup>41</sup>

The father in Cuba, on the other hand, while grateful that the relatives had cared for his son after Elian’s near-drowning experience, wanted his child back.<sup>42</sup> In fact, after the rescue, the father sent Cuban officials a letter requesting Elian’s return—a request that was forwarded to the INS.<sup>43</sup> Because of the conflicting narratives regarding Elian’s desire to remain in the United States, the INS engaged in a factual investigation, which included interviewing both Lazaro, the Miami great-uncle, and Juan Miguel, Elian’s dad.<sup>44</sup>

In their interview with the INS, the Miami relatives challenged Elian’s father’s credibility in requesting his son’s return on various grounds.<sup>45</sup> First, in order to challenge the father’s request that Elian be returned to him, the Miami relatives reiterated the father’s request that they take care of the child.<sup>46</sup> Second, the Miami relatives, joined resoundingly by the self-appointed *portavoces* (mouth-pieces/representatives) of the Cuban community, claimed that the father was being coerced by the powers that be in Cuba to say that he wanted his child returned to him.<sup>47</sup> They insisted that in Cuba’s totalitarian environment, the father had no right, ability, or freedom to speak his mind, implying of course that no father in his right mind would opt to raise his child in communism when the opportunity existed for the child to be free.<sup>48</sup> They also focused on the boy’s life that, they contended, would be impoverished and unfree if he returned to Cuba.<sup>49</sup> Finally, the Miami relatives suggested that the father, who had been divorced from the

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unable or unwilling to return to . . . [the country of his or her nationality or of last residence] because of persecution or a well-founded fear of persecution . . .” 8 U.S.C. § 1101(a)(42)(A) (1952).

40. See *Gonzalez*, 212 F.3d at 1344-45.

41. *Id.* at 1345.

42. See *id.*

43. See *id.*

44. See *id.*

45. See *id.*

46. See *Gonzalez*, 212 F.3d at 1345, n.3. See generally Gibbs, *supra* note 28.

47. See *Gonzalez*, 212 F.3d at 1345.

48. See Jay Weaver & Elaine De Valle, *Kin Say Elian’s Father Wanted to Live in U.S.*, THE MIAMI HERALD, Feb. 25, 2000.

49. See *Gonzalez*, 212 F.3d at 1345. Lazaro Gonzalez, Elian’s great-uncle, told the INS, “During the time he’s been here, everything he has, if he goes back, it’s all changed. His activities here are different from those that he would have over there.” *Id.*

mother when the child was only three years of age, was not involved in the boy's life and was not an appropriate custodian.<sup>50</sup>

As it turned out, contrary to claims that after the divorce the father had not been involved in Elian's life, he had "significant" contact with his son who often stayed with him overnight.<sup>51</sup> Moreover, during his interview, the father insisted that the relatives had no right to seek asylum on behalf of Elian, refused to consent to an attorney, denied that he was being coerced into his position, and confirmed that he wanted Elian back home.<sup>52</sup>

At a second meeting with an INS agent, Elian's father reiterated his free and uncoerced desire to have his child returned to Cuba.<sup>53</sup> After this meeting, the INS determined that Juan Miguel, in fact, "genuinely desired his son's return to Cuba."<sup>54</sup>

Subsequently, on January 5, 2000, INS Commissioner, Doris Meissner, rejected the asylum applications filed by the relatives, explaining that Elian, as a six-year-old child, lacked the capacity to file on his own behalf against the wishes of his parent.<sup>55</sup> Given that a minor needs an adult to file for asylum on his/her behalf, the Commissioner cited to "the custom that parents generally speak for their children" and found "that no circumstance in this case warranted a departure from that custom."<sup>56</sup> Therefore, she "concluded that the asylum applications submitted by [Elian] and Lazaro were legally void and required no further consideration."<sup>57</sup> Janet Reno, the Attorney General, declined the Miami relatives' request that she overrule the Commissioner's decision.<sup>58</sup> After this refusal, Elian, through his Miami relatives, filed a complaint in federal district court attempting to compel the INS to decide Elian's asylum application on the merits.<sup>59</sup>

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50. See Marika Lynch, *Miami Relatives Suggest Elian Gonzalez's Father is Unfit Parent*, THE MIAMI HERALD, Apr. 3, 2000. "[T]hree of the family's attorneys went on national television shows Sunday and suggested Juan Miguel Gonzalez was an unfit parent." *Id.* "Miami relatives . . . insist that Elian's father has been abusive and misleading in recent telephone conversations -- at one time telling the boy his mother was alive and waiting for him in Cuba." *Id.*

51. *Gonzalez*, 212 F.3d at 1344.

52. See *id.* at 1345. The father also denied that the great uncle "was authorized to seek asylum for [Elian and] refused to consent to any lawyer representing [Elian]. Juan Miguel assured the INS official that his desire for [Elian's] return to Cuba was genuine and was not coerced by the Cuban government." *Id.*

53. See *id.*

54. *Id.*

55. See *id.*

56. *Id.* at 1346.

57. *Gonzalez*, 212 F.3d at 1346.

58. See *id.*

59. See *id.* The bases of the claim, both of which were rejected by the district court, were a violation of 8 U.S.C. § 1158 and of the due process clause of the Fifth Amendment. See *id.*

This is the background against which that first conversation with *mami y papi* took place. After our usual hellos and catching up on our lives in minute detail (our last call had been at most three or four days before), I popped the question: "Oye vieja/viejo, que es lo que piensan ustedes de esto de Elian?"<sup>60</sup> "Bueno, mi'ja, te voy a decir lo que pienso," said *papi*. "Ambas partes se estan portando mal."<sup>61</sup> "But," he continued, "I agree with what President Clinton has said: it is important to follow the rule of law, so we will be patient and wait and see."

After my initial shock that *papi* would ever agree with anything President Clinton said, let alone admit it out loud, I smiled and said to dad, "Well, *papi*, I agree with you. The important thing is that we follow the rule of law." At that point I proceeded to share with him my view of the rule of law. As the next section will detail, my analysis is likely not what he wanted to hear. Nonetheless, after sharing with them my views, I felt much more comfortable returning the media calls I was receiving.

But before going to the rule of law, it is important to underscore two ostensible ironies of the Elian case vis-à-vis the Cuban community's popular narrative about the boy. First, this is a community that came to this country because it religiously followed the rule of law, a condition that after the Castro revolution was, at least in the exiles' eyes, wholly missing.<sup>62</sup> With the Elian developments, while still seeking to couch their arguments within the parameters of "fear of persecution," the community's position was plainly that it wanted to keep the boy from Castro's claws regardless of what the law ostensibly says.<sup>63</sup> The community rebelled against the rule of law as it was being pronounced, in the name of, and for the sake of, living under the rule of law in this country. Second, the community is one deeply committed to family and family values.<sup>64</sup> In Elian's case, the community's position was one that sought to break up the family—separate a little boy from his father—not because of *who* the dad was, but because of *where* the dad was. Politics seemed to trump family values.

### III. THE RULE OF LAW

Given my agreement with *mami y papi* that it was appropriate to follow the rule of law, ascertaining what that rule is becomes the next

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60. Author's translation: "Hey listen old lady/old man (mom/dad), what is it that you think about this Elian thing?"

61. Author's translation: "Well my dear/daughter, I will tell you what I think. Both sides are behaving badly."

62. PORTES, *supra* note 7.

63. *Gonzalez*, 86 F.Supp. 2d at 1171, n.4; Bragg & Alvarez, *supra* note 36.

64. PORTES, *supra* note 7.

building block in analyzing this case. That analysis, however, is nothing less than complex.

#### A. *The Legal Norm*

The intersection of local custody laws and federal immigration laws—both of which are pertinent to the analysis of the Elian case—creates intractable tensions in the analysis. In the end, the INS focused on the immigration and asylum questions while the relatives focused on the quality of the boy's life. These conversations then were in parallel, non-intersecting planes. The result: the parties were talking at or around each other rather than communicating with one another. It was as if they were having separate and quite different conversations.

First, the federalism issue has to be resolved. This requires making the threshold decision concerning what the case is really about. Is it a question of custody, a question properly relegated to the courts of a state (here the state of Florida) and its norms regarding family?<sup>65</sup> Or does the case posit an issue of immigration, which presents a federal question?<sup>66</sup>

The plenary power doctrine provides a window for resolving this federalism issue because the doctrine effectively insulates executive immigration determinations, made pursuant to Congressional dictates, from judicial review.<sup>67</sup> The plenary power of the federal government over immigration matters renders any issue arising in the context of an immigration matter subsidiary to the immigration issue itself.<sup>68</sup> Thus, jurisdiction

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65. State law governs domestic relations. See generally, Florida's Domestic Relations Law, FLA. STAT. ANN. vol. 21A tit. XLIII §§ 741-59 (West 1997 & Supp. 2001); *Polovchak v. Meese*, 774 F.2d 731, 734 (7th Cir. 1985) (explaining that "[f]amily disputes are usually handled at the state level").

66. U.S. CONST. art. I, § 8, cl. 4 (Congress is authorized "[t]o establish a uniform Rule of Naturalization."); see also *Chae Chan Ping v. United States*, 9 S. Ct. 623 (1889) (federal government alone can act on questions of immigration).

67. Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (Winter 2000); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1364 (Fall 1999) (stating that the plenary power doctrine "severely limits judicial review when a government decision regarding a noncitizen's entry or continued presence in the United States is challenged on constitutional grounds").

68. It is a well-established principle that the president has plenary power over foreign affairs. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 223 (3d ed. 1999). Article II of the United States Constitution grants the president the power to negotiate treaties and nominate and receive ambassadors. See U.S. CONST. art. II, §§ 2,3. In *U.S. v. Curtiss-Wright*, the Supreme Court granted an implied presidential foreign affairs authority greater than the affirmative grants of power in the constitution, recognizing the president as the sole constitutional representative of the United States in the realm of foreign relations. See CARTER & TRIMBLE, *supra* at 224-27 (quoting *Curtiss-Wright*, 57 S. Ct. 216 (1936)). According to the groupings established by Justice Jackson in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, the president's authority is at a maximum when using the constitutional power over foreign affairs. See *id.* at 235 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863 (1952)). The president's plenary power over immigration was solidified in *Garcia-Mir v. Meese* when the Eleventh Circuit Court of Appeals

to resolve the issues raised by the Elian case must lie in the federal system, notwithstanding the existence of issues that, standing alone, would fall within the province of state courts' decision-making authority.

Once it is settled that federal jurisdiction is proper, it becomes relevant to examine the separation of powers issues that arise in the case, particularly with regard to the standards of review of the administrative decision (i.e. Commissioner Meisner's rulings that are pertinent to this dispute). In essence, the court claim filed by the Miami relatives sought a reversal of the administrative decision concerning the propriety of filing an asylum application on behalf of a six-year old child by anyone other than his sole surviving parent.<sup>69</sup> To reach her decision, Commissioner Meisner cited custom that provides it is solely the father who should have the right to speak for the minor before the INS.<sup>70</sup> This cited custom, however, takes us in a circle as it is derived from state law providing a strong presumptive claim in the biological parent's ability to speak for their child, which, significantly, is a uniform presumption in various states in the United States<sup>71</sup> as well as around the world.<sup>72</sup>

deferred to the executive pronouncement (via the Attorney General) in an immigration affair. *See id.* at 268-270 (quoting *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986)).

69. *Gonzalez*, 212 F.3d at 1349-51. The INS administrative decision or policy on unaccompanied young children was formed through pre-trial administrative procedures, not formal rulemaking, but the Eleventh Circuit found that it "is entitled to, at least, some deference . . . and that deference, when we take account of the implications of the policy for foreign affairs, becomes considerable." *Id.* at 1351.

70. *Id.* According to the court, the INS policy of respecting the parents' wishes regarding a six-year-old child "comes within the range of reasonable choices." *Id.*

71. *See Parham v. J.R.*, 99 S. Ct. 2493, 2504-05 (1979) (upholding Georgia law permitting parents to commit their children to a mental hospital, thereby asserting that parents are the primary decision makers on behalf of their child. The Court stated, "Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."); *see also Wisconsin v. Yoder*, 92 S. Ct. 1526-42 (1972) (striking a Wisconsin state statute requiring high school attendance as unconstitutional when applied to Amish parents, thereby recognizing Amish parents' primary authority in decisions about their children's education); *Prince v. Massachusetts*, 64 S. Ct. 438, 441-42 (1944) (describing parental authority over children as a sacred, private interest, although limited by the state's power to act in the best interests of the child); *Pierce v. Society of Sisters*, 45 S. Ct. 571, 573 (1925) (invalidating Oregon mandatory school attendance law because it unreasonably interferes with the liberty of parents to raise their children, saying "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *Meyer v. Nebraska*, 43 S. Ct. 625, 626 (1923) (holding that Nebraska law regulating teaching of foreign languages infringes on parents' due process rights to "establish a home and bring up children . . . according to the dictates of [their] own conscience[s]").

72. *See, e.g., Wendell H. Holmes & Symeon C. Symeonides, Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law*, 73 TUL. L. REV. 1087, 1093 n.22 (Mar. 1999) *Codice civile* [Italy C.c.] art. 320 (Italy); *see also*, §1626 *Bürgerliches Gesetzbuch* [BGB] (F.R.G.) ("By virtue of the parental authority the father and the mother have . . . the right and the duty to take care of the person and property of the child . . . [this] includes the representation of the child."); Greek Civ. Code art. 1501 ("The father represents the child in any juridical act relating to [the

Beyond local laws, international laws also presume that, absent exigent circumstances, biological parents have the right to speak for their child. Both the Convention on the Rights of the Child<sup>73</sup> and the Hague Convention on the Civil Aspects of International Child Abduction<sup>74</sup> set up norms, with respect to who has a right to custody of a minor child, that confirm the strong presumptive preference for a biological parent to have custody.<sup>75</sup> The only exception exists where the parent is unfit.<sup>76</sup>

Also, both local and international laws adopt the best interest of the child standard which requires that the best interest of the child be served in reaching decisions on custody, presumptively by granting custody to a fit biological parent.<sup>77</sup>

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child's] personal status or . . . patrimony."); accord art. 152 Allgemeines Burgerliches Gesetzbuch [Aus. ABGB] (Aus.);Codigo Civil [Spain C.C.] art. 154 (Spain) (Julio Romarach, Jr. trans., 1984);Codigo Civil [Arg. Cod. Civ.] art. 308 (Arg.); Code civil suisse [Switz. C.c.] art. 304 (Switz.);Minpo, art. 884 (Japan).

73. U.N. High Comm'n on Human Rights, *Convention on the Rights of the Child*, available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm>; see Multilateral Protocols to the Convention on the Rights of the Child, July 5, 2000, U.S.T. LEXIS 58 Doc. 106-37 (Two optional protocols to this Convention, the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, were signed by the President of the United States on July 5, 2000 and transmitted to Congress on July 25, 2000).

74. See Multilateral International Child Abduction, Oct. 25, 1980, 1980 U.S.T. LEXIS 107, T.L.A.S. No. 11670 (The Hague Convention on the Civil Aspects of International Child Abduction was ratified by the United States on November 10, 1986, and entered into force for the United States on July 1, 1988).

75. United Nations: Convention on the Rights of the Child, 28 I.L.M. 1448, 1459-60 (1989) (Article 5 of the Convention on the Rights of the Child requires States Parties to "respect the responsibilities, rights and duties of parents," and article 9 ensures that "a child shall not be separated from his or her parents against their will."); see also, Hague Conference on Private International Law: Final Act, 19 I.L.M. 1501 (1980) (The entire goal of the Hague Convention is to facilitate the return of an abducted child to his or her biological parent.).

76. 28 I.L.M. 1448, 1459 (1989) (Article 9 of the Convention on the Rights of the Child explains that "competent authorities subject to judicial review [may] determine . . . that [separating the child from the parents] is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents.").

77. The best interest of the child standard is almost impossible to define. See Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11 (Spring 1994). The standard is a "political construct" which was developed "in order to avoid disposing of children like any other marital asset." *Id.* at 53, 55. Determinations about a child's best interest are "inherently political," as the standard is "a vessel which judges and legislatures may fill with their own changing definitions." *Id.* at 56. According to Fitzgerald, the weightiest factor in making a best interest determination is the psychological health of the child. *Id.* Determinations are also affected by discrimination against women. *Id.* at 59. For an example of the "best interest" standard, contrast *DeBoer v. DeBoer*, 114 S. Ct. 1, 2 (1993) (refusing to overturn a decision by the Michigan Supreme Court to return an adopted child to her natural parents, implying that the advantages she experiences in her adopted home are not enough to overcome her "best interests"), with *DeBoer*, 114 S. Ct. at 11 (Blackmun, J. and O'Connor, J. dissenting) (lamenting the court's decision to return the child to her biological parents in violation of her best interests). The majority opinion in *DeBoer* stated, "Neither Iowa law, Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education." *Id.* at 2. See generally

Plainly, these norms uniformly appear to require that Elian go to his dad. But if so, what is the possible explanation for a community of law-abiding citizens who have a firm commitment to the rule of law nevertheless seeking to retain the boy, thus depriving his father of custody and giving it to distant relatives whom the boy did not even know until the fated day when the makeshift boat sank? The circuit court's decision-making process discussed below provides insight into the answer.

### B. *The Eleventh Circuit Decision*

In presenting and evaluating the Eleventh Circuit's decision, it is important to pay close attention to the recitation of facts, as well as to both the evidence proffered and the myths crafted to save the child from a fate perceived to be worse than death: a return to an island where there are no civil or political freedoms. For example, presumption of custody by the father was contested by lawyers who asserted the status and voice of the deceased mother,<sup>78</sup> stating that her testimony—her story—should be heard and respected.<sup>79</sup> They claimed that she spoke loudly by risking and ultimately giving her life so that Elian could live in freedom.<sup>80</sup> Because she was the legal guardian and custodian of the child, her voice clamoring for Elian's liberty should be given primacy, even above that of the surviving father.<sup>81</sup>

The lawyers also argued that the father was not free to speak.<sup>82</sup> They argued that Juan Miguel lives in a communist, repressive state, where there is no such thing as freedom of speech or association (two of the reasons Cubans were offered refuge in the United States). Thus, Juan Miguel's request that his son be returned, and his assertion that he was making such a request free from governmental pressure or intervention, were simply neither credible nor plausible.<sup>83</sup>

It is at this juncture that the executive policy, which was reviewed by the Eleventh Circuit court, came into play. In order to reach its decision on who was the proper person to speak for Elian, particularly in light of the relatives' claims that the father could not speak freely in Cuba and

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*Palmore v. Sidoti*, 104 S. Ct. 1879 (1984) (refusing to give effect to public racial biases against child's biracial parents, even though acknowledging that the biases might impair the child's best interests); *Santosky v. Kramer*, 102 S. Ct. 1388, 1392 (1982) (summarizing the procedure for a judicial best interests determination in the state of New York).

78. Jay Weaver, *Elian Judges Challenge Legal Angles*, THE MIAMI HERALD, May 12, 2000 at A1. During Eleventh Circuit panel's consideration of the case, Gregory Craig, an attorney for Juan Miguel, claimed "that within days of the boy being placed with his Miami relatives, they said that his mother died for him to live in freedom." *Id.*

79. *Id.* Craig quoted one Miami relative as telling the Herald, "Heaven has brought him to freedom, we will not let him go back." *Id.*

80. *Id.*

81. *Id.*

82. See *Gonzalez*, 212 F.3d at 1345, n.3.

83. *Id.*



that the father had asked them to care for the boy, the INS twice interviewed the father in Cuba.<sup>84</sup> During the first interview, on December 13, 1999, the father stated that, while he was grateful for the immediate assistance his son received when in need of medical and other attention, he now wanted Elian returned to Cuba, to his custody.<sup>85</sup> Juan Miguel insisted that a child of Elian's age did not have the capacity to make an asylum decision on his own, that the Miami relatives were not authorized to make such a claim for Elian, and that he, as the father, would not allow the child to file any petition on his own behalf.<sup>86</sup> During that interview, "Juan Miguel assured the INS official that his desire for [Elian's] return to Cuba was genuine and was not coerced by the Cuban government."<sup>87</sup>

The Miami relatives, however, insisted that Juan Miguel lacked freedom to decide the matter without governmental coercion and cited a conversation with Miguel before Elian was found at sea in which the father allegedly asked that the great-uncle take care of Elian. The father's change of tune, the Miami relatives suggested, occurred after the rescue when the father found himself under intense governmental pressure.<sup>88</sup>

The INS visited the father in Cuba a second time and interviewed him at the residence of a United Nations official in order to ascertain whether the father was freely requesting the return of his son or whether his request "had been coerced."<sup>89</sup> At that December 31, 1999 meeting, the father reiterated that he wanted Elian returned to him in Cuba and that he was not being forced by anyone to articulate his position.<sup>90</sup>

After the interviews, in which the INS also considered the father's conduct, the Commissioner concluded that Elian, as a six-year-old, lacked the capacity to seek asylum on his own against the wishes of his parent who would "generally speak for [his] child[ ]."<sup>91</sup> Consequently she "concluded that the asylum applications submitted by [Elian] and Lazaro were legally void and required no further consideration."<sup>92</sup> The Attorney General declined a request to overrule the Commissioner's decision.<sup>93</sup> At that point, Elian, by and through his Miami relatives, filed a complaint in

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84. *See id.* at 1345.

85. *Id.* (Juan Miguel told the INS, "I'm very grateful that [Elian] received immediate medical assistance, but he should be returned to me and my family.")

86. *Id.*

87. *Id.*

88. *See Gonzalez*, 212 F.3d at 1345, n.3.

89. *Id.* at 1345, n.4. (To alleviate any coercion by the Cuban government, this meeting took place inside the house of a United Nations employee. To reduce the possibility of eavesdropping, Juan Miguel was also given the opportunity to write some of his responses.) *Id.*

90. *Id.* at 1345.

91. *Id.* at 1345-46.

92. *Id.* at 1346.

93. *See id.*

federal district court seeking to compel the INS to rule on the merits of the application.<sup>94</sup> However, the district court dismissed the complaint.<sup>95</sup>

The Eleventh Circuit court's review of the district court's dismissal of plaintiff's claim under 8 U.S.C. §1158 is an integral part of the rule of law discussion. In this case, part of the problem arose from the fact that the statute was silent with respect to the validity of Elian's application as a minor whose sole surviving parent wanted him returned and did not consent to the filing of the application.<sup>96</sup> Thus, the court first reviewed the statutory language to evaluate its application to Elian.<sup>97</sup> The Eleventh Circuit concluded that the plain meaning of the statute was clear, and that Elian was covered by the statutory language providing that "[a]ny alien . . . may apply for asylum."<sup>98</sup> Next, the court articulated the issue it needed to resolve in light of this conclusion.

The important legal question in this case . . . is not whether [Elian] may apply for asylum; that a six-year-old is eligible to apply for asylum is clear. The ultimate inquiry, instead, is whether a six-year-old child has applied for asylum within the meaning of the statute when he, or a non-parental relative on his behalf, signs and submits a purported application against the express wishes of [his] parent.<sup>99</sup>

In its analysis, the court noted that although the statute was clear on its face, Congress left numerous gaps, including the way to resolve the question before it.<sup>100</sup> Listing the existing statutory gaps, the court explicitly observed:

[T]he statute does not command how an alien applies for asylum. The statute includes no definition of the term "apply." The statute does not set out procedures for the proper filing of an asylum application. Furthermore, the statute does not identify the necessary contents of a valid asylum application. In short, although the statute requires the existence of some application procedure so that aliens may apply for asylum, section 1158 says nothing about the particulars of that procedure.<sup>101</sup>

Following the litany of gaps, the court concluded that "[a]s a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute (here, the INS), to choose how to fill such [statutory] gaps."<sup>102</sup>

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94. See *Gonzalez*, 212 F.3d at 1346.

95. See *id.*

96. See *id.* at 1347.

97. See *id.* at 1346-47.

98. *Id.* at 1347.

99. *Gonzalez*, 212 F.3d at 1348.

100. See *id.* at 1348.

101. *Id.*

102. *Id.* at 1348-49.

The court further explained what the context of this case meant with respect to the court's role of review. On the one hand, the circuit court recognized that the executive agency's authority was particularly great in this instance because the subject matter was immigration policy, an area in which the executive agency has plenary power because of its primacy in matters dealing with foreign affairs.<sup>103</sup> On the other hand, the court observed that while it needed to show deference to the executive agency, that deference did not translate to the executive agency having "unbridled discretion in creating and in implementing policy."<sup>104</sup> Rather, executive agencies must comply with statutory and constitutional procedural requirements, and must select a policy that is reasonable in light of the statutory scheme.<sup>105</sup> Thus, the court noted it had the authority to evaluate the agency's compliance with procedural mandates as well as its reasonableness.<sup>106</sup> However, the court "[could] not properly reexamine the wisdom of an agency-promulgated policy."<sup>107</sup>

Having journeyed through the morass of legality, the court was ready to evaluate the INS policy that had led to the decision that Elian be returned to his father in Cuba.<sup>108</sup> Significantly, there was no issue as to whether the policy choice was the INS's to make, only whether it was arbitrary.<sup>109</sup> Central to the court's evaluation of INS policy were the four findings made by the INS in "its gap-filling discretion":

(1) six-year-old children lack the capacity to sign and to submit personally an application for asylum; (2) instead, six-year-old children must be represented by an adult in immigration matters; (3) absent special circumstances, the only proper adult to represent a six-year-old child is the child's parent, even when the parent is not in this country; and, (4) that the parent lives in a communist-totalitarian state (such as Cuba), [footnote omitted] in and of itself, does not constitute a special circumstance requiring the selection of a non-parental representative.<sup>110</sup>

Finding that, although the above-stated policy does not "harmonize perfectly with earlier INS interpretative guidelines (which are not law) [footnote omitted]," the court concluded that "no statutory provision, no regulatory authority, and no prior agency adjudication . . . flatly contradicts the policy."<sup>111</sup> Having so found, the court "accept[ed] that the INS

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103. See *id.* at 1349.

104. *Id.*

105. See *Gonzalez*, 212 F.3d at 1349 (interpreting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 104 S. Ct. 2778, 2782 (1984)).

106. See *id.*

107. *Id.*

108. See *id.* at 1349-50.

109. See *id.* at 1350. "Our duty is to decide whether this policy might be a reasonable one in the light of the statutory scheme." *Id.*

110. *Id.* at 1349-50.

111. *Gonzalez*, 212 F.3d at 1350.

policy . . . [came] within the range of reasonable choices."<sup>112</sup> Interestingly, the court's language explicitly noted that the court was not wholly comfortable with the INS's choices, even though bound by rules of procedure to accept the agency's rulings as a matter within the realm of reasonableness.<sup>113</sup>

The court analyzed each of the four policy points in order to ascertain its reasonableness. First, it accepted the reasonableness of the finding that six-year-olds lack the sufficient capacity to file for asylum on their own.<sup>114</sup> Next, and flowing from the first point, the court similarly accepted the reasonableness of the holding that such a child needs adult representation.<sup>115</sup>

The third policy point, establishing that a parent, even a parent not present in the United States, is the appropriate person to act for his/her six-year-old child, seemed to trouble the court greatly.<sup>116</sup> In the end, however, the court was resigned to accepting the reasonableness of the INS's determination.<sup>117</sup> In the court's analysis of this difficult proposition, it noted that it is "critically important" that the agency policy accounts for the reality that a child may have an "independent and separate interest . . . apart from his parents, in applying for asylum. [citation omitted] . . . [S]pecial circumstances may exist that render a parent an inappropriate representative for the child."<sup>118</sup> If such circumstances exist, the agency policy allows for someone other than the parent to represent the child's interests.<sup>119</sup>

The court's discomfort in this case was so great that it felt compelled to expressly note that it was "not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction."<sup>120</sup> Yet, in the end, while clearly stating its disagreement with and disaffection for the INS's conclusions, the court felt constrained by its role in judicial review of administrative decisions: "we cannot invalidate the policy—one with international-relations implications—selected by the INS merely because

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112. *Id.* at 1351.

113. *See id.* at 1352-53. The court remarked, "[C]onsidering the well-established principles of judicial deference to executive agencies, we cannot disturb the INS policy in this case just because it might be imperfect." *Id.* at 1353.

114. *See id.* at 1351.

115. *See id.* "Because six-year-old children must have some means of applying for asylum . . . and because the INS has decided that the children cannot apply personally, the next element of the INS policy--that a six-year-old child must be represented by some adult in applying for asylum--necessarily is reasonable." *Id.*

116. *See id.* at 1352-53.

117. *See Gonzalez*, 212 F.3d at 1351.

118. *Id.* at 1352.

119. *See id.*

120. *Id.*

we personally might have chosen another. [citation omitted] Because we cannot say that this element of the INS policy . . . is unreasonable, we defer to the INS policy."<sup>121</sup>

The court's analysis of the fourth policy point—that the condition of the parent living in a communist-totalitarian state does not constitute a special circumstance requiring the selection of a non-parental representative—reveals that, in the court's view, this fourth factor is even more troubling than the third.<sup>122</sup> The court, tacitly agreeing with the position of the Miami relatives and the Cuban community, confessed that it was worried about the INS's conclusion of the irrelevance, as a special circumstance, of the parent living in a communist-totalitarian state.<sup>123</sup> The court seemed particularly troubled by the overwhelming evidence—the reality—of ongoing human rights violations in that country.<sup>124</sup> Within that framework, the court recognized that persons may be unable to assert their own or others' legal rights.<sup>125</sup> Indeed, the court tied this political reality to the third consideration and suggested that political climate may well create a tension between the interests of a child and his/her parent.<sup>126</sup> It expressly fretted over the reality of little Elian being sent "to a country with little respect for human rights and basic freedoms."<sup>127</sup>

In the end, however, the procedural rules reigned.<sup>128</sup> The court resigned itself to its role of adjudicating reasonableness and, in upholding the plausible reasonableness of the INS actions, lamented that "we [could] not properly conclude that the INS policy is totally unreasonable in this respect. The INS policy does take some account of the possibility of government coercion."<sup>129</sup> Finally, and most significantly, in reluctantly accepting the INS policy, the court returned to the plenary powers of the executive in international relations and concluded "in no context is the executive branch entitled to more deference than in the context of foreign affairs. . . . We are obliged to accept that the INS policy, on its face, does not contradict and does not violate section 1158, although section 1158 does not require the approach that the INS has chosen to take."<sup>130</sup>

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121. *Id.* at 1353.

122. *See id.*

123. *See Gonzalez*, 212 F.3d at 1353.

124. *See id.* (citing U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000), which states "[The Cuban Government] continues systematically to violate fundamental civil and political rights of its citizens.")

125. *See id.*

126. *See id.* The court suggested that a "substantial conflict of interest" might arise when a child is ordered by his/her parent to leave the United States for a totalitarian state. *Id.*

127. *Id.*

128. *See id.*

129. *Gonzalez*, 212 F.3d at 1353.

130. *Id.* at 1353-54

With the rule of law explicated in detail, the court then applied the norms to the Elian facts.<sup>131</sup> While noting the likelihood that it would not have reached the same conclusion as the INS, the court concluded that the rule of law mandates that it accept the INS policy and conclusion as it is not "arbitrary, capricious, [or] an abuse of discretion."<sup>132</sup> The court was quite (and uncommonly) forthcoming with its view: "whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here."<sup>133</sup>

Thus, with respect to the rule of law, the Eleventh Circuit's opinion paints a rather clear picture of the Elian case. The court was candid about federalism and separation of powers issues.<sup>134</sup> It accepted the limitations imposed by the scope of its power of review of an administrative decision in the context of its plainly stated views that, in setting policy, it would have traveled a road vastly different from that chosen by the INS.<sup>135</sup>

The basis of the divergence of views between the INS and the court lies in the third and fourth INS factors: the weight to be given to the type of government that exists in Cuba in making the initial policy determination with respect to a six-year-old child's rights—his independent agency—to seek asylum that involved the capacity of the child, the best interests of the child, and the congruence of the child's and the non-resident parent's interests. The INS said that the nature of the government where the father lived was not a special circumstance.<sup>136</sup> The court plainly would have held otherwise.<sup>137</sup>

In this regard, one observation about international policy that is relevant to this case, but not discussed, is noteworthy. The Estrada Doctrine plainly holds that in foreign relations one government should not interfere with the forms of government existing in other states.<sup>138</sup> To be sure, every state has the sovereign prerogative to deal or not with a state be-

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131. See *id.* at 1354.

132. *Id.* This standard is set out in 5 U.S.C. § 706(2)(A) (2000).

133. *Id.*

134. See *id.* at 1353-54.

135. See *Gonzalez*, 212 F.3d at 1353-54.

136. See *id.* at 1353.

137. See *id.*

138. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 472 (3d ed.1999). Under the Estrada Doctrine, states change the recognition status of other states only when a new state is formed and do not change recognition status when new governments assume power. See *id.* "The Estrada Doctrine embraces the principle of unfettered national sovereignty and rejects interference with the domestic affairs of one state by another through the granting or withholding of recognition." *Id.*

cause it approves or disapproves of the form of government.<sup>139</sup> However, it is well settled that the form of government a state adopts is a purely domestic, not an international, matter.<sup>140</sup>

As such, it appears that, absent some fear that the child would face serious harm, the form of government should have been irrelevant to the consideration of whether the strong presumption that exists both domestically and internationally favoring a fit biological parent as custodian should have been applicable. Significantly, while initially some issues of fitness as a father were raised with respect to Juan Miguel,<sup>141</sup> the fact finding revealed that he was a loving, caring dad who was involved in his son's life.<sup>142</sup>

Nonetheless, this "irrelevance" of the form of government represents a shift in attitude towards Cuba. For example, the Helms-Burton Act, a draconian law expressly aimed at strangulating Castro's government, suggests that the court's and not the INS's position would have been the prevailing view of the United States government and the Anglo/o peoples.<sup>143</sup> But this case shows how putting family rather than trade in the middle of that equation made a difference.

In the end, of course, the issue of the type of government was anything but irrelevant. The decision to return Elian to his father, who had come from Cuba to claim his son with plans that they return together to Cuba, turned on the court deferring to the INS's decision because of standards of review.<sup>144</sup> However, the door is open for a later executive to vary the policy or apply it differently, with the court having already stated that a different interpretation would have been within the zone of reasonableness that it could not disrupt.<sup>145</sup> Such a different outcome would have been based on the form of government, a decision that pursuant to foreign relations notions is not an international, but rather a domestic, matter.<sup>146</sup>

As the following section will show, the tension between the INS viewpoint and the court's viewpoint is not surprising; rather it is predictable. It crystallized the reality of the norms in general and the norms as they apply to Cuba and Cubans. While the court's position reflects the

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139. See *id.* For example, "many states depart from the doctrine whenever they perceive a major political advantage in using the recognition instrument." *Id.*

140. See *id.*

141. See Lynch, *supra* note 50.

142. See *Gonzalez*, 212 F.3d at 1344.

143. See Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996).

144. See *Gonzalez*, 212 F.3d at 1353.

145. See *id.* at 1353-54. The court would also defer to a decision that a parent living in a totalitarian state does not have "sufficient liberty to represent and to serve the true, best interests of his own child in the United States." *Id.*

146. See *id.*

historical reality of accommodations being made for Cubans, the INS analysis incorporates no such preferential model. This juxtaposition, as it arose in the context of an unseemly battle over a little boy, that came to symbolize the correctness of choices made—to stay in or try to leave Cuba—not only fractured families, it also recast the image of *cubanos/os* from law-abiding, model minorities to fanatical freaks seeking to keep a father and son apart.<sup>147</sup>

#### IV. THE TRANSFORMATION: BECOMING THE OTHER

Cuban exiles, since Cuba's passing to the zone of Soviet influence during the Cold War, have always been treated somewhat differently—a climate that still prevails with respect to the island. In matters of immigration specifically, Cubans have historically enjoyed preferential treatment.<sup>148</sup> The value of this preferential treatment to the United States in the days of the bipolar world was to have affirmation that capitalism is better than communism.<sup>149</sup> Cubans were then rewarded by being allowed into these borderlands, and being provided with programs that allowed us to become part of this better nation and better way of life.<sup>150</sup>

That Cold War tensions persist in Cuba's relations with the United States is reflected in the Helms-Burton Act, which has as a preambular aspirational purpose the toppling of the Castro regime.<sup>151</sup> Notwithstanding the consistent opposition in the UN to the ongoing embargo, which started in the early 60s, the United States stands fast in seeking to isolate Cuba.<sup>152</sup> This differential treatment has been starkly exposed. While in-

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147. Compare *supra* notes 18, and 22, with text accompanying *supra* notes 36, 63, and 64.

148. See *supra* note 10 and accompanying text.

149. See *supra* note 18.

150. See *supra* note 8.

151. The preamble to the Helms-Burton Act states that its purpose is "to seek international sanctions against the Castro government in Cuba, to plan for support of a transition government leading to a democratically elected government in Cuba, and for other purposes." Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996). Section 3(1) of the document lists several purposes of the Act, including "to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere." *Id.* at § 3(1).

152. Some recent examples of UN opposition to the embargo include Press Release, United Nations GA/9654, As Assembly Reiterates Call for End to "Extraterritorial Measures," Cuba Announces \$100 Billion Damage Suit Against United States (Nov. 19, 1999); Press Release, United Nations GA/9479, Assembly Urges States to Repeal or Invalidate Laws With Extraterritorial Effect on Sovereignty, Free Trade, Navigation of Other States (Oct. 14, 1998); Press Release, United Nations GA/9349, Assembly Again Seeks Repeal of Extraterritorial Measures Like United States Helms-Burton Act Against Cuba (Nov. 5, 1997); Press Release, United Nations GA/9164, Assembly Again Calls for End of United States-Imposed Embargo Against Cuba, by 137-3-25 Vote, Urges Repeal of Laws Such as Helms-Burton Act (Nov. 12, 1996); Press Release, United Nations GA/8983, General Assembly Adopts Draft on Need to End United States Embargo Against Cuba (Nov. 2, 1995).



sisting on a Cuban embargo, the United States recently passed a law granting China permanent trade status notwithstanding its communist regime and its dismal human rights record.<sup>153</sup> Thus, with respect to Cuba, regardless of the general irrelevance of forms of government, the Cuban community in the United States is accustomed to having the form of government be not only significant, but also outcome determinative with respect to their desires. With the Elian decision, that all changed. It also changed the *estado unidenses*' majority view of Cubans.

#### A. *Changed Expectations*

With respect to the majority's perception of Cubans within these borders, the Elian experience was transformative, affecting not only the individuals directly involved, but also the entire community. The Elian experience—the story of a small six-year-old whose own short life has been marred by tumult and tragedy—effected a large-scale transformation.

The Elian narrative—that of a young and severely dehydrated survivor of a boat wreck in which he lost his mother, indeed possibly saw her drown, who was found by two fishermen off the coast of Florida in an almost unconscious state<sup>154</sup>—has disrupted the convivial relationships formed over a forty-year period between the Cuban community and Angla/o majority. A palpable consequence of the political battle over Elian is the othering of *cubanas/os*. Unlike our *chicana/o*, *mejicana/o*, *puertorriqueña/o* counterparts, *cubanas/os* until now have not even been aware that within these United States borderlands we are “others”—racial and racialized, ethnic and ethnicized others—simply because we are Latina/o.<sup>155</sup> With Elian, Cubans for the first time felt the pain of press references which label us members of the “banana republic,” “zealots,” and people infused with a “fanatical hatred of Fidel Castro.”<sup>156</sup> For the first time we are being told to go back where we came

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153. See Nick Anderson, *Permanent Trade Status for China Clears Congress; Legislation: Senate Votes, 83 to 15, to Grant Normalized Relations with Beijing and End Lengthy Debate. The Measure Now Goes to Clinton, Who is Expected to Sign It*, L.A. TIMES, Sept. 20, 2000, at A-1. This extension of permanent trade status may have been required by the fact of Chinese membership in the WTO. See Greg Mastel, *Commentary: China's Trade Status is Not a Magic Bullet*, L.A. TIMES, Oct. 2, 2000, at B-7.

154. See *Gonzalez*, 212 F. 3d at 1344. In November 1999 Elian's mother left Cuba along with 12 other Cuban nationals. *Id.* Their small boat capsized and only Elian survived. Fishermen rescued him two days later. *Id.*

155. See *Borders (En)gendered*, *supra* note 1, at 904-05 (telling a story of the author's *papi* checking a form box indicating that he was “White” because he did not understand himself to be Latino); *Indivisible Identities*, *supra* note 3, at 208-09 (telling a story of the author's Cuban-Chinese student who was shocked to discover some people considered her non-White).

156. Andres Oppenheimer, *Media Bias, Dismissive Labels Anger Cuban Exiles*, MIAMI HERALD, Apr. 6, 2000, at 6A; see also Rick Bragg, *Cuban Boy Stays in U.S. for Now, a Court Decides*, N.Y. TIMES, Apr. 20, 2000, at A1 (describing the backlash against the Cuban community after the Eleventh Circuit granted Elian a stay of deportation, including a plane which flew over

from if we don't like it here. To be sure, we have heard such comments about our *puertorriqueña/o* and *chicana/o-mejicana/o* and other Central and South American, African and Asian brothers and sisters,<sup>157</sup> but it has never before been leveled on *cubanas/os*.<sup>158</sup> Indeed, in the past such "go back home" comments were inconceivable with respect to *cubanas/os* who, it must be recalled, were welcomed from our homeland because communism made it undesirable; because we were capitalism's trophy in the war against communism.

In this context then, it is appropriate to interrogate why *cubanas/os* have fallen from grace with the Angla/o majority. The answer appears relatively simple. This time the majority did not perceive the exercise of political will by *cubanas/os* as consonant with the majority's interest. Rather, the perceptions of the majority group and the *cubanas/os* were wholly divergent. The *cubana/o* narrative was consistent with our past political activity, which had been warmly embraced and strongly supported by the majority: flex political muscle against the evil Castro regime.

The majority, on the other hand, perceived this as a different story: the incoherent, incongruous, unstable, and misplaced desire to keep a boy away from his family. *Cubanas/os* could not have been prepared for the result—a total rejection of their position, mind you an overt and wholesale abandonment of their fight against communism. They still viewed their narrative as the same one that had for forty years garnered the support of the majority. In short, for the first time the flexing of their anti-Castro political muscle offended the majority in the United States polity who viewed the Elian case as a family concern.<sup>159</sup>

Little Havana with a banner saying "Send Elian Home - The Taxpayers"); Rick Bragg, *Judge Upholds Plan for Return of Boy to Cuba*, N.Y. TIMES, Mar. 22, 2000, at A1 (explaining the anger at the Cuban community's activism which "[m]any Miamians, including some Cuban-Americans, [say] damaged the sophisticated, cosmopolitan image to which Miami aspired").

157. See *supra* notes 11 and 12; Kevin R. Johnson, "Melting Pot" o "Ring of Fire"?: *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1269-77 (1997) (describing racial discrimination leveled on the author's Mexican-American family as a painful "ring of fire"); Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 122-23 (1997) (detailing public hostility toward Mexican-Americans, especially as evidenced through California's Proposition 187).

158. Cuban-Americans have been generally understood to be a "model minority." *Building Bridges III*, *supra* note 18. Many Latinas/os have not considered Cuban-Americans to be Latinas/os, perhaps because they are seen as more privileged. See *Building Bridges I*, *supra* note 1, at 411. Similarly, many Cuban-Americans do not consider themselves to be Hispanic. See Alice G. Abreu, *Lessons From LatCrit: Insiders and Outsiders, All at the Same Time*, 53 U. MIAMI L. REV. 787, 797 (1999) (telling the author's understanding as a young woman that "being Cuban didn't count as being Hispanic -- only Mexicans and Puerto Ricans count").

159. See Rick Bragg, *Court Upholds I.N.S.'s Rejection of Asylum Efforts for Cuban Boy*, N.Y. TIMES, June 2, 2000, at A1. After the Eleventh Circuit panel ruled for the INS, David Abraham, a law professor at the University of Miami, said, "The case demonstrated that the overwhelming majority of Americans were not prepared to have distant relatives kidnap a child from his relatives as

One should not underestimate the trickle-down effects of this conflict. There have been internal fissures within the Cuban community.<sup>160</sup> Families have been torn apart. I, for example, received an urgent e-mail from a devastated student pleading for help. He was faced with a previously inconceivable family rupture: an aunt and uncle were going on national television to take opposing sides in the debate. Others have been ostracized at their health clubs or jobs by members of the majority who view the entire community as having acted badly.

### B. *Personal Narratives*

In pondering the *why's* of these developments, I decided to try to find insights in the views that other Cuban law professors hold concerning the Elian saga.<sup>161</sup> I opted to explore the theme with this group because we share the axis of Cubanness as well as the axis of the rule of law. Whether we are critical or traditional scholars, we are familiar with, perhaps even experts at, legal analysis. Thus, it seemed to be an ideal group with whom to explore the Elian puzzle.

My informal conversations with Cuban-American law professors, some of which were in person and others of which were by e-mail, sought to ascertain two matters: first, the circumstances surrounding their and their families' departures from Cuba and second, how they felt about the Elian events. My thesis, not surprising in a critical legal context, was that individually our personal experiences would play a major role in informing our perspective on the Elian story and its development. I was not disappointed in my expectations.

Before I embark on presenting the several variations that emerged in these explorations, I should note that the process was not rigidly empirical or scientific. The conversations were just that: conversations. I make no judgment about the different possibilities nor do I seek to critique them in any way. I did not question, nor do I intend or desire to question, aspects of anyone's story. I simply wanted to hear the stories and ascertain what effect, if any, that the personal migration experience had on perception and analysis.

In that regard, I found one consistent thread: personal experience is outcome determinative. Interestingly, similar to my own experience, two respondents who are internationalists, and whose personal experience, coincidentally, was to leave Cuba with their nuclear families intact, are the strongest proponents of the view that Elian should have been returned

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a way of continuing a 40-year-old struggle that means less and less to them everyday." *Id.* See also Nancy Gibbs, *I Love My Child*, TIME, Apr. 17, 2000, at 24 (stating that the majority of Americans want to see Elian returned to his father in Cuba).

160. See Rick Bragg, *Judge Upholds Plan for Return of Boy to Cuba*, N.Y. TIMES, Mar. 22, 2000, at A1.

161. This was a matter of self-identification and included persons born in the United States

to his father. The thread on the rule of law proposed by these respondents included a strong international strain. For example, one respondent specifically noted, and disagreed with, the differential treatment Haitian children are receiving in the United States as a strong reason to adhere to the rule of law in the Elian case.

It quickly became evident in this “rule of law” group—as it was a consistent theme among all of the respondents—that the intactness or separation of the family in the migration experience significantly influenced views and perceptions. As one respondent explained, “I left Cuba at about Elian’s age because my parents made that decision for me. It is sad his mother died, but given he has a surviving parent who is a fit parent and involved with Elian’s life, [the father]—like my parents did for me—should be the one deciding Elian’s fate.” To be sure, although the outcomes varied between groups of Cuban law professors, experience was paramount in all of our decision-making processes.

Another response, much along the “rule of law” stream but without the internationalist angle, generally supported the parent’s right to make such decisions for a minor child, but strongly and specifically questioned the ability of Elian’s father to speak freely as to his real wishes. Once the father was on United States soil, however, this respondent’s concerns were alleviated and the primacy of the parent’s right to speak for the minor child became the paramount consideration. A fifth respondent, who left Cuba with an intact nuclear family, also focused on the rule of law. This professor’s succinct conclusion is telling; it confirms the value placed on the rule of law, notwithstanding personal feelings or beliefs:

Regarding Elian, under my value system (I value freedom of speech, capitalism, private property ownership, democracies versus dictatorships), the U.S. could provide Elian with choices denied him in Cuba. However, it is not my value system that counts in this instance – it is that of Juan Miguel, who apparently is a good father and who under our laws decides what is in Elian’s best interest. His decision was that a return to Cuba was in Elian’s best interest. And so it goes . . . .

The views embraced by the above-discussed respondents, to which I will refer as the “rule of law” group, can be explicated by their personal experiences. Their families left their homeland together; the family unit remained intact. The respondents’ migration experience was one determined by their parents at a time they were about Elian’s age. The parental decision to migrate kept the family—the most significant structure in a young child’s life—together. Thus, each of these law professors’ migration experiences meant that as children they had continued stability in an unstable change in environment. Unquestionably, a move to a new country, in which a different language was spoken and in which there are different customs, religious practices, and foods, is a dramatic change for any child to endure. Therefore, it is not surprising that this group, whose

experiences included the constant of their nuclear family, most strongly embraced an approach that viewed the family, in the Elian case the father, as the proper location for decision-making with respect to the destiny of the child. As the rule of law approach supports this outcome, it stands to reason that persons, who could place themselves in Elian's shoes and whose experience was family unity, would support the approach that makes family unity the proper result.

However, other respondents, whose family did not remain intact, but rather whose family life was ruptured, reached the same conclusion—that Elian should go back to his father. In this instance however, the desire for family unity stems from the emotional costs leveled on the respondents by the separation from family. For example, one respondent left ahead of the family with all expectations that family reunification would take place within a few weeks of departure. This respondent was to stay with relatives whom s/he “barely knew” for the short time until family reunification. However, the anticipated reunification did not occur for over five-years, by which time the respondent had suffered through the “culture shock” of migration and its attendant tropes—new language, customs, basic “different ways”—and had come to know distant relatives as a new family.

Compounding the trauma, when the respondent's family did arrive in the United States, they had become virtual strangers. In fact, the much anticipated family reunification never took place as the father passed away merely fifteen-days after his arrival in the United States. The dad never again recognized his child. Under these circumstances too, it is easy to understand why this respondent favored Elian's reunification with his dad. In the response, this professor plainly stated:

[m]y position from the start was that Elian should be returned to his father. The break-up of my family had an indelible effect on my life . . . [Elian] is still very young. Despite the nature of the government he will grow up with his father. This, I always believed, was the paramount issue. From a legal perspective, I didn't see any other options.

There was one noteworthy matter with respect to the six respondents whose view was that Elian should be with his father: all agreed both sides acted badly. The examples offered of such “bad conduct” included the unseemly early morning raid to rescue Elian from his relatives and the manifestations in Cuba led by Castro who was making the little boy a *cause célèbre*. One respondent, summarizing many of our thoughts, poignantly said “I thought that the Elian saga was a tragedy all the way around.”

Another common observation from these respondents was incredulity at the reactions of the Cuban community with respect to the legal process. One observed, “I was troubled by the widespread ignorance among Cuban-Americans. The undue outbursts of emotion were so

transparently political. In particular I was stunned that as many lawyers were missing the point . . . or appearing to!" Similarly, another respondent in the "rule of law" group recalled being told, in reaction to the position that the rule of law requires Elian's return, that the respondent "just doesn't understand communism [since you] didn't live it." Accordingly, that respondent lamented that some Cubans "[j]ust do not understand the sacrifices (and possible injustices) that come along with the rule of law."

Another group of respondents' views focused on the failure of the system to recognize, acknowledge, or give effect to Elian's agency. Those taking this position believe that this plainly was an asylum case and that Elian should have been granted a hearing on the merits. The justifications for this perspective included the Eleventh Circuit reading of the statute which included Elian as a person covered under the "any alien" language of the statute, and the INS's sidestepping its own guidelines on interviewing for the purpose of determining the propriety of granting asylum. Interestingly, although this focus on asylum could also be deemed as a "rule of law" approach—albeit one that differs from the emphasis on custody—the respondents who shared this view all had personal migration experiences that influenced the desire for acknowledging a child's agency.

Two of these respondents had experiences in which their families did not remain intact upon departure from Cuba. Indeed, in both of these cases the father did not join the family for some time. Although ultimately the paternal presence was re-incorporated into the family unit, the respondents had formative years without a father figure. Perhaps as a result, these respondents—reflecting on their own experience—felt the paternal voice should not be deemed as the sole relevant voice in deciding Elian's fate. Rather, these respondents focused on Elian's agency as the primary axis on which to ground the determination of his destiny.

Although motivated by different experiences than the two non-intact family situations discussed above, two other respondents, who also focused on the child's agency and voice, had experiences that also explain their view. In these two instances, respondents spent time alone in the United States—without either of their parents. Both scenarios were the result of the parents' decision to do what was best for their children—a decision with which the children had disagreed but in which they were not allowed to participate. Having been deprived of agency in the initial decision-making process (which resulted in their being located alone and away from their parents in the United States) caused their subsequent experience within the United States to be one in which they had *only* their own voice to advance their positions. Ready or not—based on both their age and on political and familial developments beyond their con-

trol—they, as small children, were in positions in which they had to exercise their own agency in order to have a voice at all.

Having been denied their own voice, it is perfectly logical that their paramount consideration be that Elian not be denied his voice. One of these respondents, in a powerful assessment, lamented the perniciousness of denying Elian his own voice: “[m]y impression is that neither Elian’s father nor mother were acting at any point out of his best interest . . . Elian himself could be the only true arbiter of his own destiny. He should have been interviewed and honored as a participant in his own life.” Significantly, it is the outcome urged by the “agency” group’s position that is universally identified as the position of the Cuban community.

Certain commonalities are apparent in the views of these two groups—the “agency” group and the “rule of law” group. Both groups deplored the early morning raid. In addition, while agency is the axis of the “agency” group’s analysis, they also focused on the law—although their emphasis was on asylum, and on Elian’s right, as per the INS regulations, to speak for himself.

In the end, what is patently apparent in both groups is that the migration experience itself had an indelible impact on the way respondents perceived, analyzed, and related to the Elian saga. In this regard then, it is not surprising that a schism emerged between the popular voice deemed representative of the Cuban community and the voice representative of the Angla/o majority view. That gap in perspective can well be attributed to the sense and sensibility of the migration experience.

Like the “agency” group, those of us from the “rule of law” group had a migration experience that informed our views. In our case however, our parents made the choice to take us away from communism to a land of freedom—civil and political; so too, should Elian’s dad speak for him. Significantly, a few of the respondents in the “rule of law” group emphasized that our position, regarding the proper person to speak on behalf of Elian, was just that: a view that a fit parent of a child of tender years is the proper person to speak for that child. We underscored that our view did not mean that we believed Elian would be better off in Cuba, or that the Miami family members were unfit caretakers. Rather, our position was that absent extraordinary circumstances—and we did not consider the form of government of the father’s domicile to be such a circumstance—Elian’s destiny should be articulated by his parent, just like our destiny was determined by our parents.

Although the Angla/o popular view coincided with the conclusion of the “rule of law” group, it was not informed by the migration experience, but rather by a domestic family values concept. Unlike the “rule of law” group, the Angla/o majority did not contemplate the meaning of the child’s return to his father—a life of unfreedoms in a repressive, human

rights violating country. Those of us in the “rule of law” group struggled mightily with, as one respondent articulated it, the “sacrifices” the rule of law requires at times. It is these very sacrifices on which the “agency” group centered its analysis to reach a different legal conclusion. Certainly the “agency” group’s position is validated by the Eleventh Circuit’s disagreement with the INS dismissal of the form of government of Cuba as a relevant concern in the inquiry regarding who should speak for Elian. It is the varied migration experiences of the “rule of law” and “agency” law professors that can be used to explain their divergent viewpoints. Similarly, it is the difference between having the migration experience of the “rule of law” group and the absence of such an experience in the Angla/o majority that explain their different routes to the same result.

## V. CONCLUSION

While both groups of Cuban law professors had the migration commonality, the Cuban community and the Angla/o community did not have a similar experience or commonality. Their differences resulted in dramatically different narratives on the Elian case. Once this schism emerged, given historical reality in United States society, it was inevitable that the othering of *cubanas/os* would take place . . . as it did. A sense of civility was lost when the name-calling started. Such othering permitted deploying against the *cubanas/os* of the us-versus-them paradigm from which race dynamics in this country have evolved.

It is noteworthy that this othering of Cubans took place at a time, when politically, it was convenient for various reasons. Primarily, we are supposedly beyond the Cold War era, and communism is no longer perceived to be the threat it once was. Also, flowing from living in the so-called post Cold-War era, is the presence of interest groups within the United States—such as farmers and inventors—who, based on their own economically motivated interests, favor opening up relations with Cuba.

With respect to the wisdom or desirability of the reestablishment of relations with Cuba, the perception of those who have not experienced loss related to communism differ vastly from the perception of those who have been devastated by it. When considering the changes in United States policy towards other communist states such as China, Vietnam, and now even North Korea, it is easy to see how, with respect to Elian’s fate, the nature of the receiving government was likely not an issue for the Angla/o majority. However, the nature of the Castro government was central to persons who have been devastated or somehow affected by the ravages of communism. It is those persons, whose lives have been critically altered by Cuba’s form of government, who reacted vocally and emotionally against sending the six-year-old boy to live in a repressive and oppressive state.



To be sure, the Cuban community has been historically vocal and emotional in opposition to Castro's desires and policies. However, for the forty-years prior to the Elian saga, this view was consistent with, even reflective of, the Angla/o majority view. Therefore the Cuban anti-Castro sentiments were heard and embraced. With Elian, however, the Angla/o community reacted differently. The Cubans' excitement was dismissed as zealotry and their displays condemned as irrational. Now, because of the difference in views, with respect to the damnability of Castro's government, we became the unpopular minority, "others" if you will, tidily packaged as a lesser brand of citizen.

These observations show LatCrit in action. The Elian saga and its interpretation by Cuban-American law professors reveal that perspective is a major influence in analysis. Experience informs perspective in an outcome-determinative manner. In the Elian case, experience and perspective informed the popular narratives of both the Cuban community and the Angla/o community—narratives that were polar opposites. Significantly, as the informal conversations I conducted show, some *cubanas/os* do not agree with the position attributed to the community, just as certainly some in the Angla/o community feel that Elian should not have been returned to Cuba. Nonetheless, the positions of the groups are essentialized and homogenized and then conveyed to the masses as wholly representative.

However, a review of the Elian case elucidates the value and utility of critical review with respect to both facts and law. Indeed, the expressly articulated difference in approach between the Eleventh Circuit and the INS exposes that, but for that court strictly adhering to procedure-review standards, the same constellation of facts and law would have resulted in a vastly different outcome. In turn, a different outcome from the application of the rule of law that followed the vision of the Eleventh Circuit would have validated the Cuban community's position, rather than "othered" the community.

This observation reveals the value of critical interrogations. Outcomes are dependent on more than procedural and substantive legal pronouncements and contexts. They are inextricably intertwined with experiences—personal, social, educational—and beliefs—religious, civil, and political—that influence both perspective and analysis. And here, each group, unabashedly affected by personal experience, formed essentialized narratives that resulted in the "othering" of the entire Cuban community. And so it goes, the image of a previously model minority was changed, almost overnight, by the struggle over the destiny of a six-year-old boy.

