

2018

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Recommended Citation

Rick Su, *Making Room for Children: A Response to Professor Estin on Immigration and Child Welfare*, 17 WASH. U. GLOBAL STUD. L. REV. 633 (2018), https://openscholarship.wustl.edu/law_globalstudies/vol17/iss3/8

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MAKING ROOM FOR CHILDREN: A RESPONSE TO PROFESSOR ESTIN ON IMMIGRATION AND CHILD WELFARE

RICK SU

INTRODUCTION

Once again, we find ourselves fiercely divided over immigration. Yet the striking thing is how much the debate today is centered on children. Having abandoned comprehensive immigration reform, Congress now turns its attention to the more limited question of what to do with the approximately one million “Dreamers” who were brought to this country illegally as children.¹ As the scope of immigration enforcement efforts expand, public attention is increasingly being drawn to how deportation affects children who face separation from their parents.² Even on the issue of border security, the growing concern appears to be the recent wave of unaccompanied children coming to America to seek asylum.³

If children are increasingly the focus of immigration, then perhaps it is time that immigration focus on children. As Professor Estin reminds us, America has long been committed to the welfare and protection of children.⁴ This commitment is woven throughout American law.⁵ We affirm it as signatories to international accords.⁶ And when it comes to immigration, Congress has recognized the special challenges and vulnerabilities that children face—not only in getting to our country, but also in the immigration proceedings that follows. Nowhere is this more evident than the special protections and procedures in place for unaccompanied children in our immigration system.⁷

1 See Sherly Gay Stolberg & Thomas Kaplan, *Congress Struggles to Find Path Forward on Dreamers*, N. Y. TIMES, Feb. 17, 2018, at A11; Jorge G. Castañeda, Opinion, *It's Time for an Immigration Enchilada*, N. Y. TIMES, Feb 7, 2018, at A23.

2 See Haley Sweetland Edwards, “No One Is Safe.” *How Trump’s Immigration Policy Is Splitting Families Apart*, TIME (Mar. 8, 2018), <http://time.com/longform/donald-trump-immigration-policy-splitting-families/>.

3 See Nick Miroff, *Homeland Security Says Surge in Illegal Border Crossings is a “Crisis,” Warrants Military Deployment*, WASH. POST (April 5, 2018), https://www.washingtonpost.com/world/national-security/homeland-security-says-surge-in-illegal-border-crossings-is-a-crisis-warrants-military-deployment/2018/04/05/de4a496c-3903-11e8-b57c-9445cc4dfa5e_story.html?utm_term=.d8740e86565f.

4 See Ann Laquer Estin, *Child Migrants and Child Welfare: Toward a Best Interests Approach*, 17 WASH. U. GLOBAL STUD. L. REV. 593 (2018).

5 See *id.*

6 See *id.* at 596.

7 See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, 122 Stat. 5044 (2008) [hereinafter TVPRA]; Homeland Security Act of 2002 § 462, Pub. L. No. 107–296, 116 Stat. 2135 (2002).

But despite all this, Professor Estin is also right that “[w]e could and should do better.”⁸ My fear is that things may get a lot worse before they get better. Not only are protections for children in our immigration system limited, but the protections that exist seem increasingly at risk. The prospects for federal partnerships with state and local child welfare agencies and courts, which have more experience and expertise with child welfare issues, seem increasingly remote as federal-local clashes escalate over immigration enforcement. All the while, the federal agencies that Congress has tasked with looking after the best interest of children struggle to handle their growing numbers and political pressures to prioritize enforcement above all else.

Many of these problems are connected to President Trump and the policies and priorities of his administration. But I also want to suggest that the challenges go a lot deeper, and may be inherent in how the issue of immigration have traditionally been cast and the institutional manner in which it has historically been regulated. Overcoming these challenges, in my view, will require more than political will and zealous advocacy. It might also require us to rethink how our nation regulates immigration more generally.

I.

Children face many challenges in our immigration system. But one of the biggest is how infrequently their interests are accounted for in our immigration laws, and how often existing protections for children are undermined or rolled back.

One problem is that even as our nation’s preoccupation with immigration regulations grows, its scope remains narrow. Laws have been passed to account for the interest of children who are in federal custody or immigration proceedings. But little has been done to address the welfare of children who are affected by immigration enforcement actions, but who are not the targets themselves. Take, for example, what happens after immigration enforcement operations, especially large-scale raids common during the Bush administration and increasingly been used today.⁹ In the immediate aftermath, children of immigrants who are apprehended often find themselves abandoned at home or at school.¹⁰ At the same time,

⁸ See Estin, *supra* note 4, at 590.

⁹ See, e.g., Maria Sacchetti, ICE raids Meatpacking Plant in Rural Tennessee; 97 Immigrants Arrested, WASH. POST (April 6, 2018), https://www.washingtonpost.com/local/immigration/ice-raids-meatpacking-plant-in-rural-tennessee-more-than-95-immigrants-arrested/2018/04/06/4955a79a-39a6-11e8-8fd2-49fe3c675a89_story.html?noredirect=on&utm_term=.2cd4bc5bc16d.

¹⁰ See Claire S. Chiamulera, *Improving Protections for Children after Immigration Raids*, 26

school officials and local communities members are left scrambling to locate these children and make arrangements for their care.¹¹ Federal immigration officials took some steps to minimize the effect of their operations on children.¹² But by and large, these have been limited, and federal officials have largely been silent on the impact of these raids on children or developed regulations or guidelines addressing these concerns.¹³

Moreover, commitment to child welfare often fades when it comes into direct conflict with the goals of immigration enforcement. This is especially true when children are cast as a way for the undocumented to elude deportation. Throughout the twentieth century, Congress has repeatedly made it more difficult for immigration judges to grant discretionary relief to deportees on account of the best interest of children born and raised in the United States.¹⁴ The interests at stake here are those of American citizens. Yet their status as fellow citizens are obscured when they are derisively cast as “anchor babies.”¹⁵

Fear that children create “loopholes” in our immigration system continues to resonate in today’s political debates. Indeed, this fear is threatening to roll back the few protections that Congress has provided for the children themselves, and the agency practices developed to ensure their care. In 2002, Congress transferred jurisdiction over unaccompanied children to the Office of Refugee Resettlement (“ORR”) in the Department of Health and Human Services (“HHS”).¹⁶ In 2008 Congress instructed ORR to place these children “in the least restrictive setting that is in the best interests of the child.”¹⁷ In carrying out this charge, ORR typically releases these children to the care of family members while their

CHILD L. PRAC. 174, 174.

https://www.americanbar.org/content/dam/aba/administrative/child_law/clp/artcollections/immigrants/immigration_raids.authcheckdam.pdf.

11 RANDY CAPPS, ET AL., NATIONAL COUNCIL OF LA RAZA & THE URBAN INSTITUTE, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA’S CHILDREN, at 4-5 (2007), <https://www.urban.org/sites/default/files/publication/46811/411566-Paying-the-Price-The-Impact-of-Immigration-Raids-on-America-s-Children.PDF>.

12 *See id.* at 22, 34-36.

13 *See id.* at 68.

14 *See* William C.B. Underwood, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation*, 72 IND. L. REV. 885, 888-895 (1997).

15 *See* Patrick J. Glen, *The Removability of Non-Citizen Parents and the Best Interests of Citizen Children: How to Balance Competing Imperatives in the Context of Removal Proceedings*, 30 BERKELEY J. INT’L L. 1, 3 (2012).

16 *See* Homeland Security Act of 2002 § 462(b), Pub. L. No. 107-296, 116 Stat. 2135 (2002).

17 *See* §§235(a)-235(d) of TVPRA; 8 U.S.C. §1232(b)(2)

immigration claims are adjudicated.¹⁸ Part of the reason for this is that ORR lacks the capacity to maintain custody of the growing number of unaccompanied children under their jurisdiction, especially in a setting that is appropriate for their care and development. Yet it is also in accordance with their statutory obligation to provide the “least restrictive setting” and account for the children’s “best interest.”

Despite these reasons, ORR’s practice has come under intense attack in recent years. And like the debate over “anchor babies,” this practice has also been given a catchy and derisive name: “catch and release.” As a candidate, Donald Trump railed against this practice, especially the way it is used by growing wave of immigrant children and families from Central America.¹⁹ Soon after taking office, he took immediate action by issuing an executive order instructing the Department of Homeland Security (“DHS”) to immediately terminate “the practice commonly known as ‘catch and release,’ whereby aliens are routinely released in the United States shortly after their apprehension for violations of immigration law.”²⁰ While this order covers many of the “accompanied” children who are under DHS jurisdiction, it did not mention ORR or HHS. That omission seems to have been corrected by a memorandum issued by the President in April of 2018 that specifically instructs the Secretary of HHS to coordinate with the Secretary of DHS to end release in favor of detention.²¹ As of this writing, it still remains to be seen whether this memorandum is meant to expand the 2017 executive order beyond DHS to include ORR’s own practice of placing unaccompanied children with relatives or other sponsors. It is also not clear that ORR or HHS has the institutional capacity or legal authority to completely eliminate this practice without further Congressional action. But as criticism of “catch and release” mounts, it may be that if Congress does act, it will be to erode or eliminate the limited protections that are already in place.

My biggest concern, however, is not that existing protection for children in our immigration system might go away. Rather, it is that as a nation, we may be increasingly willing to *impose* harms on children for the sake of immigration. There are now growing reports that federal

18 See WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43599, UNACCOMPANIED CHILDREN: AN OVERVIEW 10 (2017), [HTTPS://FAS.ORG/SGP/CRS/HOMESEC/R43599.PDF](https://fas.org/sgp/crs/homesec/R43599.pdf).

19 See Transcript of Donald Trump’s Immigration Speech, N.Y. TIMES (Sep. 1, 2016), [HTTPS://WWW.NYTIMES.COM/2016/09/02/US/POLITICS/TRANSCRIPT-TRUMP-IMMIGRATION-SPEECH.HTML](https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html).

20 Exec. Order No. 13767, 82 Fed Reg. 8793 (Jan. 25, 2017) (Border Security and Immigration Enforcement Improvements, available at <https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/>).

21 See Julie Hirschfeld Davis, *Trump Signs Memo Ordering End to “Catch and Release” Immigration Policy*, N.Y. TIMES (Apr. 6, 2018), [HTTPS://WWW.NYTIMES.COM/2018/04/06/US/POLITICS/TRUMP-IMMIGRATION-POLICY.HTML](https://www.nytimes.com/2018/04/06/us/politics/trump-immigration-policy.html).

immigration officials are intentionally separating families that are taken into custody—taking children away from their parents.²² The goal appears to be to dissuade other families from making the journey, and to convince those that have to abandon their immigration claims and accept deportation in order to be reunited with their children. The rationale is deterrence. But the means are punitive. I understand why some feel that children are used by undocumented parents to try to elude deportation. But I think it is even more troubling that, as a nation, we have come to the point where we are willing to exploit the suffering of children in order to enforce our laws.

II.

Another problem lies in the federalism structure of the United States. Immigration is a federal issue. Child welfare, however, is handled primarily by the states. As Professor Estin observed, it is at the state level—specifically courts and child welfare agencies—where much of the expertise and experience on this matter are held.²³ State and local officials are also in a better position to track the well-being of children, especially in the households and communities in which they live. Given this, it would appear that some form of “cooperative federalism” is needed.²⁴ To ensure the best interest of immigrant children, federal, state, and local officials would need to work together.

But when it comes to immigration, prospects for cooperation and partnership seem increasingly remote. Indeed, the relationship between the federal government, states, and localities are now perhaps worse than ever. Much of this fight is over “sanctuary policies,” which festered for years behind the scenes during the Bush and Obama administrations. As the federal government became more reliant on state and local assistance in immigration enforcement, states and localities began demanding more say over when, and in what circumstances, that assistance will be offered.

²² See Molly Hennessy-Fiske, *U.S. is Separating Immigrant Parents and Children to Discourage Others, Activists Say*, L.A. TIMES (Feb. 20, 2018), <http://www.latimes.com/nation/la-na-immigrant-family-separations-2018-story.html>; Dora Galacatos, et.al, Opinion, *Child Snatchers at the Border*, N.Y. TIMES, Mar. 1, 2018, at A23. Despite these reports, the Trump administration has not acknowledged this as an official policy. Nevertheless, there were earlier reports that separating families was a policy that it was serious considering. See Caitlin Dickerson & Ron Nixon, *Trump Administration Weighs Separating Families to Deter Illegal Immigration*, N.Y. TIMES, Dec. 21, 2017, at A15.

²³ See Estin, *supra* note 4, at 598.

²⁴ See generally Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001).

While previous administrations worked to find common ground, those negotiations largely broke down with the election of Donald Trump. He has repeatedly attacked sanctuary jurisdictions that refuse to fully cooperate with the federal government, including repeated threats to deny them federal funding.²⁵ In turn, these attacks have only strengthened the resolve of many states and localities, with some going even further to withhold their cooperation.²⁶

Family court judges know that when parents fight, it is often the children who suffer most. Sadly, this might also be the case for the immigrant children caught in the middle of this political battle. As the Trump administration carries out its plans to expand interior enforcement operations, especially the use of unannounced raids, there will likely be more need for advanced coordination with local child welfare and social service officials to ensure appropriate care is available for the children left behind. But fears that such coordination will allow local officials to tip off the public about an impending operation, as the Mayor of Oakland recently did, will likely lead federal officials to refrain even more than they already do.²⁷ At the same time, as the number of immigrant children released to family members and sponsors grow, the federal government can certainly use the help of state and local child welfare agencies to monitor their well-being. Even if asked, however, these agencies may nevertheless refuse out of fear that their work might eventually help the federal government in the deportation of that child, or raise immigration consequences for other individuals in the household.²⁸

I also fear that the current fight over sanctuary and enforcement will have long term implications for federal-state cooperation on child welfare in the future. Presidents do not serve forever. Policies do change. But given the degree to which institutional trust has eroded, it may be a while before the conditions are ready for meaningful partnerships on anything related to immigration. There is, of course, a certain irony to all of this: the reason why the federal government is battling so many states and localities

²⁵ See Priscilla Alvarez, *Trump Cracks Down on Sanctuary Cities*, ATLANTIC (Jan. 25, 2017), <https://www.theatlantic.com/politics/archive/2017/01/trump-crack-down-sanctuary-city/514427/>.

²⁶ See, e.g., Liz Robbins, *'Sanctuary City' Angry Mayors Vow to Defy Trump Immigration Order*, N.Y. TIMES, Jan. 26, 2017, at A17.

²⁷ See Meagan Flynn, *Oakland Mayor Who Tipped off Immigrants to ICE Raid Draws Justice Department Scrutiny*, WASH. POST (Mar. 2, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/03/02/justice-department-reviewing-actions-of-oakland-mayor-who-tipped-off-immigrants-of-ice-raid-white-house-says/?hpid=hp_hp-top-table-main-immigration-arrests%3Ahomepage%2Fstory&hpid=hp_hp-top-table-main-immigration-arrests%3Ahomepage%2Fstory&utm_term=.75c8009453ed.

²⁸ Such a fear may not be unfounded. There have been reports that the Trump administration is considering random spot checks of homes in which children are placed, "which would most likely result in even more immigration arrests, as those homes often contain other undocumented immigrants." See Dickerson & Nixon, *supra* note 22.

is because it wants them to offer their assistance and cooperation in enforcing federal immigration laws. Yet the manner in which they have pursued this “cooperation,” and why it has broken down, is because the federal government is so accustomed to its plenary power over immigration and do not believe that input from states or localities are worth considering. But this is no way to build a partnership. And how this has played out in the context of immigration enforcement offers some important lessons for how cooperative arrangements might be formed with respect to child welfare.

III.

The issue of child welfare also raises questions about Congress’ long practice of using the agency structure to balance competing interests in our immigration system. As Professor Estin notes, Congress not only imposed substantive requirements with respect to how unaccompanied immigrant children and their claims are to be handled.²⁹ They also transferred primary responsibility for their care to ORR and HHS.³⁰ Congress no doubt believed that ORR and HHS would be better positioned to ensure the best interest of the children, especially compared to officials in DHS. More than any other federal department, HHS had the most institutional experience in dealing with issues affecting children. ORR’s traditional role resettling refugee families also seems relevant to the task of vetting the sponsors to which unaccompanied children are released and minor their welfare after such placement.

But as Professor Estin astutely notes, experience dealing with families and children does not necessarily translate into expertise in child welfare or services. And even when it comes to their experience with refugee children, it is not clear how much ORR’s experience translates. First, ORR has historically provided support to refugees through an established network of state and local resettlement agencies.³¹ Such a network did not exist with respect to the placement or custody of child migrants, or the complex task of shepherding them through the immigration process. Second, in dealing with refugees, ORR experience is in handling immigrants whose legal status has already been approved, not those who are petitioning for legal status in removal proceedings. Third, ORR’s

²⁹ See Estin, *supra* note 4, at 599.

³⁰ See *supra* note 16.

³¹ See ANDORRA BRUNO, CONG. RESEARCH SERV., R41570, U.S. REFUGEE RESETTLEMENT ASSISTANCE, at 12-17 (2011).

experience with children is largely in the context of resettling families where children are accompanied by one or more parents. But ORR's jurisdiction extends only to unaccompanied immigrant children; DHS retains custody of children apprehended with their parents.

Institutionally, what this means is that in the immigration system, the care of children is assigned to different agencies, neither of which have the full range of expertise to deal with the issues that children face. Children who are apprehended with their parents, and thus not "unaccompanied," remain under the jurisdiction of DHS. DHS officials are familiar with detention, custody, and immigration proceedings, but not a whole lot about child services or care. Thus, when the need for large-scale family detention facilities arose, DHS relied on what it knew best and turned to partners they were most familiar with. Thus, two of the earliest and most controversial facilities to house families—the South Texas Family Residential Center in Dilley and the Karnes County Residential Center—were built and managed by two of the largest private prison companies in the country.³² After allegations that mothers and children were held in prison-like conditions, both facilities were sued for violating a settlement agreement that required immigrant children to be housed in licensed child-care facilities.³³

The unaccompanied children who are assigned to ORR have fared better. But gaps in ORR's institutional expertise also shows. Because there were no existing network for the care, processing, and monitoring of immigrant children, ORR has had to build up that network of providers largely from scratch. A substantial set of tasks are also delegated to these network partners, including the screening of family members or sponsors to whom the majority of these children are released.³⁴ For years, ORR struggled to establish procedures to adequately monitor the care that network providers give, and the manner in which family members and sponsors are screened.³⁵ There has also been complaints that ORR does not do enough to check on the welfare of the children once they are

³² See Karen Musalo & Eunice Lee, *Seeking a Rational Approach to a Regional Refugee Crisis: Lessons from the Summer 2014 "Surge" of Central American Women and Children at the US-Mexico Border*, 5 J. ON MIGRATION & HUMAN SECURITY 137, 141-142 (2017); Lisa Olsen, *Private Prisons Boom in Texas and Across America Under Trump's Immigration Crackdown*, HOUS. CHRON. (Aug. 19, 2017), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Private-prisons-boom-in-Texas-and-across-America-11944652.php>.

³³ See Musalo, *supra* note 32, at 142-143.

³⁴ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-16-180, UNACCOMPANIED CHILDREN: HHS CAN TAKE FURTHER ACTIONS TO MONITOR THEIR CARE 28 (2016), <https://www.gao.gov/assets/680/675001.pdf>.

³⁵ See *id.* at 33-35.

released,³⁶ or adequately instruct sponsors to ensure that children appear at their immigration hearings.³⁷ In many ways, what ORR has developed is a system that mirrors how it manages refugee resettlement. But here, it is not clear that such a system works all that well with respect to the unique and competing demands of immigrant children facing deportation.

This mismatch is all the more apparent for the small number of unaccompanied children who cannot be released because they are deemed a danger to themselves, charged with a crime, or labeled as a gang member. For these children, ORR has no relevant experience or expertise. As a result, they have relied on existing juvenile detention facilities,³⁸ and have faced their own sets of lawsuits concerning their conditions³⁹ and the standards that are used to determine who goes there.⁴⁰ This will likely become even more of a pressing problem if Trump's efforts to terminate "catch and release" is extended to ORR. To be able to handle the large number of unaccompanied children, and to hold them for the duration of their immigration proceedings, ORR will likely have no choice but to follow DHS's lead, and rely on private prison companies that have the capability of constructing and operating the facilities that would be necessary. The unique institutional perspective that Congress may have intended for HHS and ORR to bring to bear when this happens will likely be even more limited as a result.

Even if HHS and ORR's involvement broadens the considerations that are involved with respect to the treatment of unaccompanied immigrant children, it is not clear that such an expansion necessarily advances either a child's best interest, or that of the nation with respect to immigration. This is especially true when the agency serves as the child's custodian *and* guardian, as is the case with HHS and ORR. Take, for example, the latest controversy involving ORR, which involves neither child placement nor

36 See UNITED STATES SENATE, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, PROTECTING UNACCOMPANIED ALIEN CHILDREN FROM TRAFFICKING AND OTHER ABUSES: THE ROLE OF THE OFFICE OF REFUGEE RESETTLEMENT (2011), <https://www.hsgac.senate.gov/imo/media/doc/Majority%20&%20Minority%20Staff%20Report%20-%20Protecting%20Unaccompanied%20Alien%20Children%20from%20Trafficking%20and%20Other%20Abuses%202016-01-282.pdf>.

37 See *id.* at 47-48.

38 See Elizabeth P. Lincoln, Note, *The Fragile Victory for Unaccompanied Children's Due Process after Flores v. Sessions*, 45 HASTINGS CON. L. Q. 157, 177-78 (2017).

39 See Complaint, *Doe v. Shenandoah Valley Juvenile Center Commission*, No. 5:17-cv-00097 (W.D. Va. 2017).

40 See Order Granting the Motion for Preliminary Injunction, *Saravia v. Sessions*, No. 17-cv-03615-VC (N.D. Ca. 2017).

immigration, but rather abortion.⁴¹ It began when the director of ORR began denying pregnant teens in his custody permission to leave in order to get abortions. The policy itself is connected with a broader policy shift on abortion within HHS under the Trump administration. But these denials were also possible because of the unique role that ORR was given with respect to immigrant children. As their custodian, ORR controls their freedom and actions. But it is as their guardian that ORR claims to be able to decide what is in their “best interest.” A federal judge has issued a temporary order blocking this practice.⁴² Whether it continues remains to be seen. But it is hard to imagine that any other agency would have felt empowered to act on the same grounds that ORR did here.

CONCLUSION

When it comes to immigration these days, it is easy to be a cynic. When the focus is on something as important as child welfare, it is natural to feel discouraged. I whole-heartedly endorse Professor Estin’s prescriptions on how the interest of children might be better assured: existing laws need to be followed, inter-governmental collaboration should be encouraged, and further protections considered.⁴³ Yet given recent developments, I can’t help but feel pessimistic about the prospects of these reforms going forward. After all, children are hardly invisible in today’s immigration debates. Rather the problem appears to be that the debates themselves distort how they are viewed.

It may be then that in order to have an honest conversation about the interest of children then, we need to rethink how we talk about immigration more generally. We should not assume that just because immigration is a federal issue, and child welfare the province of states, that our nation’s interest in immigration should always take precedence. We need to recognize that immigration regulation is a means to an end, rather than an end in itself, and that balancing the competing interests at stake is how good regulations are made. And federal lawmakers and officials should be more willing to consider the input of various stakeholders, including and especially those who are not involved in immigration at the federal level.

To that end, Professor Estin’s lecture is a powerful reminder of our constitutional, legal, and moral obligations to look after the interest of

41 See Jeremy W. Peters, *New Front in Abortion Battle: A Small U.S. Office*, N.Y. TIMES, Apr. 5, 2018, at A1.

42 See *id.*

43 See Estin, *supra* note 4, at 614.

children. It is a detailed account of the many areas where child welfare has already taken hold in immigration law and policy, and the simple steps that might be taken to expand its role. If how we think about immigration is to be expanded beyond the narrow confines of what is considered an immigration interest, this is precisely the kind of perspective that we need.