

## DOING BETTER FOR CHILD MIGRANTS

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Professor Ann Laquer Estin's *Child Migrants and Child Welfare: Toward a Best Interests Approach*<sup>1</sup> makes several important contributions to our understanding of the complicated legal questions posed by a timely and too often tragic phenomenon: large numbers of unaccompanied child migrants, including many coming into the United States. Estin helpfully disentangles and explores the welter of possibly applicable laws, from U.S. constitutional provisions to international human rights laws, federal immigration laws, and state family laws.<sup>2</sup> Her careful analysis also exposes significant gaps, pointing out how some issues fall between relevant bodies of law.<sup>3</sup>

Although each of the sources of law canvassed in the article is animated by its own set of values and assumptions, Estin's bottom line is that "we can and should do better"<sup>4</sup> for the children in question. As an American family law expert, Estin identifies her principal area of concern as "assur[ing] that the federal agencies who take custody of unaccompanied minors are adequately addressing children's needs for care and protection as the process unfolds, including their need for legal representation"—responsibilities assigned to the Office of Refugee Resettlement (ORR) in Department of Health and Human Services.<sup>5</sup> Given her expertise and her central concern, Estin recommends infusing all the different areas of law pertinent to child migrants with due regard for family law's ubiquitous "best interests principle."<sup>6</sup>

For those of us who lament how harm to children has become acceptable collateral damage in the pursuit of stricter immigration laws and enforcement practices, Estin's call to focus on children and to do

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1 Ann Laquer Estin, *Child Migrants and Child Welfare: Toward a Best Interests Approach*, 17 WASH. U. GLOBAL STUD. L. REV. 589 (2018).

2 *See id.*

3 *See id.* at 590.

4 *Id.*

5 *Id.*

6 *See id.* at 591. *See* JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 4 (1979) (explaining the importance of both physical and psychological wellbeing in serving the child's best interests). This book, authored by a law professor, a psychoanalyst, and a pediatric psychiatrist, stands out as one of the classic authorities on how the legal system should treat children, even if some of its recommendations engendered controversy. *See, e.g.*, Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 L. & CONTEMP. PROBS. 195, 202 n.80 (2014) (noting controversy over their recommendation for one custodial parent who would control access by other parent).

better for them comes none too soon. This response examines whether the best interests principle is up to the job, in light of lessons learned from child custody disputes and controversies about child migrants, past and present.

### I. THE PROMISE AND PERILS OF THE BEST INTERESTS PRINCIPLE

To the extent that the best interests principle asks legal decisionmakers to stand in the child's shoes, taking the child's point of view<sup>7</sup> and prioritizing the child's need for a strong and continuous relationship with a parent (or one performing the role of parent),<sup>8</sup> it has much to offer to the confused and confusing treatment of child migrants. For example, as Estin points out, using the best interests principle should, in theory, prevent the routine separation of U.S.-citizen children from their non-citizen parents<sup>9</sup> and should help ensure legal representation for unaccompanied children.<sup>10</sup> Such changes would represent significant improvements in the status quo, which now includes a "zero tolerance" policy imposing on adults who illegally enter the United States imprisonment and separation from their children.<sup>11</sup> Another advantage of the best interests principle is that, as applied, it purports to require an individualized examination of a particular child and his or her situation, rejecting broad generalizations<sup>12</sup> and in turn promising needed flexibility and nuance for crafting appropriate responses tailored to the specific plight of each child migrant.

Yet, the best interests principle has difficulties of its own. The very terminology overpromises, suggesting that children in in difficult situations, for example, a contest between divorcing parents or a case of maltreatment (or a migration crisis), can have their *best* interests actualized, when a more realistic approach would seek to achieve "the least detrimental alternative" under challenging circumstances.<sup>13</sup> Most

<sup>7</sup> See, e.g., GOLDSTEIN ET AL., at 40 (emphasizing how placement decisions should reflect the child's sense of time).

<sup>8</sup> See, e.g., *id.* at 31 (emphasizing the importance of safeguarding the child's need for continuity of relationships).

<sup>9</sup> Estin, *supra* note 1, at 594.

<sup>10</sup> *Id.* at 597.

<sup>11</sup> See Miriam Jordan & Ron Nixon, *Trump Administration Threatens Jail and Separating Children From Parents for Those Who Illegally Cross Southwest Border*, N.Y. Times (May 8, 2018), <https://www.nytimes.com/2018/05/07/us/politics/homeland-security-prosecute-undocumented-immigrants.html>.

<sup>12</sup> "In a custody or adoption proceeding, we are not concerned with the best interest of children generally; we are concerned, rather, with the best interest of THE child." In re Petition of R.M.G., 454 A.2d 776, 795 (D.D.C. 1982) (Mack, J., concurring) (emphasis in original). See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 227, 247 (Summer 1975).

<sup>13</sup> GOLDSTEIN, et al., *supra* note 6, at 53.

prominently, the principle provides a notoriously indeterminate standard, as scholars and law reformers have long pointed out in examining the principle's use to resolve child custody disputes.<sup>14</sup> In the context of custody disputes, the principle's indeterminacy creates obstacles to settlement<sup>15</sup> and often appears to send destructive messages about the relative value of the competing parents.<sup>16</sup> In part for such reasons, contemporary custody law has come to rely less on best interests and, instead, increasingly on joint custody arrangements<sup>17</sup> and private ordering.<sup>18</sup> Extending the best interests principle to child migrants and their legal problems would not, in most cases, trigger these particular disadvantages specific to custody disputes.

I have far less confidence, however, that the indeterminacy of the best interests principle in the context of child migration would avoid an additional difficulty for which it has been called out in custody cases: the invitation for decisionmakers to impose their own intuitions, assumptions, and value judgments.<sup>19</sup> Family law is replete with custody cases in which trial judges have used the best interests principle to disapprove of mothers pursuing higher education or careers,<sup>20</sup> penalize women's sexual choices,<sup>21</sup> and favor conventional religions,<sup>22</sup> to name just a few examples. In response, some state legislatures have sought to tame the best interests principle in the custody context with statutory "dos" and "don'ts"—factors that courts must consider and factors that they must not.<sup>23</sup> No such statutory guardrails presently exist in the context of child migrants.

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14 See Mnookin, *supra* note 12, at 255-61. See also Robert H. Mnookin, *Child Custody Revisited*, 77 L. & CONTEMP. PROB. 249, 250-53 (2014) (maintaining that indeterminacy claims made in 1975 remain largely true years later).

15 See Mnookin, *supra* note 12, at 262.

16 See *id.* at 290 (hypothesizing how deciding custody by "coin flip" would avoid this problem).

17 See, e.g., CAL. FAM. CODE § 3080 (West, Westlaw through 2018 Legis. Sess.) ("There is a presumption, affecting the burden of proof, that joint custody is in the best interest of a minor child. . .").

18 See, e.g., MO. ANN. STAT. § 452.310.8 (West, Westlaw through 2017 Legis. Sess.) (requiring divorcing parents to file proposed parenting plan, informing the court how they would divide residential time, decisionmaking authority, and child support).

19 See, e.g., David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481 (1984) ("Many people criticize judges who decide custody cases for giving inappropriate expression to personal or sexist biases.")

20 See, e.g., Ireland v. Smith, 542 N.W.2d 344 (Mich. Ct. App. 1995); Rowe v. Franklin, 663 N.E.2d 955 (Ohio Ct. App. 1995).

21 See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984) (interracial relationship); *Fulk v. Fulk*, 827 So.2d 736 (Miss. Ct. App. 2002) (same-sex relationship).

22 See, e.g., *In re Marriage of Atchley* 334 S.W.3d 709, 715-16 (Mo. Ct. App. 2011).

23 See, e.g., MO. ANN. STAT. § 452.375.2 (West, Westlaw through 2017 Legis. Sess.) (listing factors that court must consider), § 452.375.8 (disallowing preference based on parent's age, sex, or financial status or child's age or sex).

Further, another important limit on the best interests principle, the constitutional right of fit parents to decide how to rear their children,<sup>24</sup> would not typically apply to *unaccompanied* child migrants, leaving wide room for government officials, including judges, to invoke “best interests” to advance agendas disconnected from the minor in question.

## II. CAUTIONARY TALES FROM THE PAST

Migrant children played starring roles in two highly publicized cases from the not too distant past. In one, decisionmakers at various stages used the best interests principle’s indeterminacy to give weight (perhaps decisive weight) to the perceived superiority of this country’s political regime, overcoming ordinary deference to the authority of parents choosing to live under communism. Although appellate courts eventually required a course correction, the proceedings took time—too much to remedy the earlier errors. The second case, with strikingly similar facts, demonstrates a more circumscribed approach, in which the decisionmakers resisted the temptation to allow the prospects of a child’s return to a communist-totalitarian state to justify a departure from the usual rule of parental autonomy. Together, these contrasting cases demonstrate the need to take care that political considerations do not infect well settled policies and practices governing child welfare.

### A. *Walter Polovchak*

In Walter Polovchak’s case, which began in July, 1980, his parents lost custody of their twelve-year-old son in the United States when he resisted their plan for the family to return to its original home in the Ukrainian Soviet Socialist Republic.<sup>25</sup> The Chicago police, the United States Department of State, the United States Immigration and Naturalization Service, and the local juvenile court all believed that Walter’s preference for living in a free society should trump his parents’ authority. As the Illinois court of appeals observed in reversing the juvenile court’s order that made Walter a ward of the court<sup>26</sup> and displaced his parents’ ability to decide where Walter should live: “We have serious doubt as to whether

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24 *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion) (citing “presumption that fit parents act in the best interests of their children”). See also JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979) (urging narrow grounds for state intervention in the parent-child relationship because intervention always harms the child).

25 *In re Polovchak*, 454 N.E.2d 258, 259 (Ill. 1983).

26 The juvenile court declared Walter a ward of the court on the grounds that he was a minor beyond the control of his parents and that “and that it was in the best interests of the minor and the public that Walter be adjudged a ward of the court.” *Id.* at 260.

the State would have intervened in this realm of family life and privacy had the parents' decision to relocate involved a move to another city or state. The fact that the parents had decided to move to a country which is ruled under principles of government which are alien to those of the United States of America should not compel a different result."<sup>27</sup>

While the juvenile court order remained on appeal, the parents returned to the Ukraine without Walter.<sup>28</sup> The Supreme Court of Illinois affirmed the court of appeals, holding that the evidence did not support the juvenile court's order and its interference with parental custody. The United States Supreme Court denied certiorari.<sup>29</sup> Walter's parents also prevailed in federal litigation, in which they successfully claimed that the federal government had violated their due process rights by granting Walter asylum and issuing a "departure order control" barring him from leaving the United States—all without notice or an opportunity for a hearing for the parents.<sup>30</sup>

Yet, by the time the United States Court of Appeals ruled in the parents' favor in 1985,<sup>31</sup> their victory had become a hollow one. Walter would turn eighteen in just days. (In fact, the court did not publish the opinion until after his birthday.) Walter's own rights and interests had grown more compelling with age,<sup>32</sup> and—the court explained—"it is surely relevant that Walter has decided that he does not want to be a communist or an atheist and that his parents have only the few remaining days of his minority to try to change his mind."<sup>33</sup> Walter remained in the United States and became a citizen in 1985.<sup>34</sup>

### *B. Elian Gonzales*

Five-year-old Elian Gonzalez used an inner tube to survive a hazardous boat trip from Cuba to Florida in 1999, although his mother perished in the same attempt to come to the United States. Following his rescue, Elian was placed temporarily in the custody of his great-uncle, Lazaro Gonzalez,

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27 *In re Polovchak*, 432 N.E.2d 873, 879 (Ill. App. Ct. 1981).

28 *See Polovchak*, 454 N.E.2d at 264.

29 465 U.S. 1065 (1984).

30 *Polovchak v. Meese*, 774 F.2d 731, 733 (7th Cir. 1985).

31 *Id.* at 731.

32 *Id.* at 737.

33 *Id.*

34 *See* WALTER POLOVCHAK WITH KEVIN KLOSE, FREEDOM'S CHILD: A COURAGEOUS TEENAGER'S STORY OF FLEEING HIS PARENTS—AND THE SOVIET UNION—TO LIVE IN AMERICA (1988); Cynthia Dizikes, *1980s Newsmakers: Where Are They Now?*, CHICAGO TRIB. (Nov. 23, 2011), [http://articles.chicagotribune.com/2011-11-23/news/ct-met-newsmakers-1980s-20111123\\_1\\_littlest-defector-ukrainian-boy-walter-polovchak](http://articles.chicagotribune.com/2011-11-23/news/ct-met-newsmakers-1980s-20111123_1_littlest-defector-ukrainian-boy-walter-polovchak).

and his family in Miami. Elian's father, who had separated from his mother but had maintained an ongoing relationship with the boy, asked the Miami relatives to return him to Cuba, where Elian would live with his father, the father's wife, and their child. The Miami relatives declined and filed a petition for asylum on behalf of Elian.<sup>35</sup>

Both the Immigration and Naturalization Service (INS) and the federal courts rejected the asylum petition. The INS reasoned that young children lack the capacity to apply for asylum and that, absent special circumstances, the child's parent is the proper adult to represent the child in asylum proceedings and that the father's residence in Cuba did not constitute a special circumstance.<sup>36</sup> The United States Court of Appeals centered its analysis on the usual authority of parents to decide where their children will live. In telling language, however, the court conceded that it had reasons to worry even though it deemed the INS policy to be reasonable:

According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance, sufficient in and of itself, to justify the consideration of a six-year-old child's asylum claim (presented by a relative in this country) against the wishes of the non-resident parent. We acknowledge, as a widely-accepted truth, that Cuba does violate human rights and fundamental freedoms and does not guarantee the rule of law to people living in Cuba. Persons living in such a totalitarian state may be unable to assert freely their own legal rights, much less the legal rights of others. Moreover, some reasonable people might say that a child in the United States inherently has a substantial conflict of interest with a parent residing in a totalitarian state when that parent—even when he is not coerced—demands that the child leave this country to return to a country with little respect for human rights and basic freedoms.<sup>37</sup>

Given these concerns, the court might well have come out the other way had it relied on a generalized best interests approach. Instead, the court set aside its obvious political and ideological preferences to follow the teachings of Goldstein, Freud, and Solnit, who counseled that deference to the autonomy of fit parents must come *before* any government intervention claiming to rest on best interests.<sup>38</sup>

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35 For these facts, see *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

36 *Id.* at 1349.

37 *Id.* at 1353 (citation & footnote omitted).

38 GOLDSTEIN et al., *supra* note 24.

### III. CURRENT CONTESTS

Both Walter Polovchak's case and that of Elian Gonzalez pit general considerations of best interests based on public policies about disfavored political regimes, on the one hand, against the liberty of fit parents to make relocation decisions for their children, on the other. These cases provide illuminating background for controversies that have surfaced today. Today's cases differ in important ways that might make them even more difficult than the earlier precedents, however. First, the contemporary controversies concern unaccompanied minors, that is, children who lack fit parents—so the foundational rule of parental autonomy cannot resolve the conflict. Second, the discord centers not on comparisons between the United States system of government versus a foreign system, but rather on political and cultural divides sparked purely by matters of domestic law, specifically abortion access and LGBT parenting. Yet, in my view, these cases expose the minefields that unchallenged use of the best interests principle can produce for child migrants.

#### A. *Abortion*

Currently, a class action is pending challenging the anti-abortion policies of ORR, an arm of the Department of Health and Human Services, which manages the care and placement of ““alien children who are in Federal custody by reason of their immigration status.””<sup>39</sup>

This litigation arose after Scott Lloyd, Director of ORR, imposed obstacles to abortion access on minors within ORR's authority.<sup>40</sup> For example, in one case, J.D., age 17, entered the United States as an unaccompanied minor, was apprehended at the U.S. border, and was remanded to ORR's custody at a shelter in Texas, where a medical examination determined she was pregnant.<sup>41</sup> Deciding she wanted an abortion, she followed Texas law applicable to minors seeking abortion without parental involvement by initiating a “judicial bypass” in a court that found her sufficiently mature to make her own abortion decision.<sup>42</sup> While not contesting her constitutional right to obtain an abortion so long

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39 *Garza v. Hargan*, 2018 WL 1567600, at \*1 (D.D.C. 2018) (quoting 6 U.S.C. § 279(b)(1)(A)).

40 See Jeremy W. Peters, *Under Trump, an Office Meant to Help Refugees Enters the Abortion Wars*, N.Y. TIMES, (Apr. 5, 2018), <https://www.nytimes.com/2018/04/05/us/politics/refugee-office-abortion-trump.html>.

41 *Garza*, 2018 WL 1567600, at \*2.

42 *Garza v. Hargan*, 874 F.3d 735, 736-37 (D.C. Cir. 2017) (Millett, J., concurring).

as she complied with the requirements of state law,<sup>43</sup> ORR would not let J.D. proceed until she first “extract[ed] herself from custody.”<sup>44</sup> Doing so, however, would require either returning to the country from which she had traveled to flee abuse or finding a sponsor, that is, a foster parent, willing to take custody.<sup>45</sup>

ORR sought to justify these requirements on two grounds. First, government should play no role in “facilitating” J.D.’s abortion, given that the Constitution does not require government assistance for those seeking to exercise their reproductive rights.<sup>46</sup> Yet, as Judge Millett’s opinion points out, J.D. was not seeking facilitation in the form of payment, transportation assistance, or paperwork, not to mention the fact that sponsorship would require considerable government involvement.<sup>47</sup> Second, ORR strongly opposes abortion and contends that terminating her pregnancy would not serve J.D.’s best interests. Again, as Judge Millett observes, however, once the state bypass judge determined that J.D. had sufficient maturity to make her own decision, it foreclosed reliance on best interests.<sup>48</sup> Indeed, as Judge Millett explains, “the government does not even claim that it is making an individualized ‘best interests’ judgment in forbidding J.D.’s abortion. It is simply supplanting her legally authorized best interests judgment with its own categorical position against abortion—which is something not even a parent or spouse or State could do. Only the big federal government gets this veto, we are told.”<sup>49</sup>

Such (mis)use of the best interests principle in an effort to thwart abortions by unaccompanied minor migrants comes into focus even more clearly in an opinion granting class certification and a preliminary injunction in a challenge to such official policies.<sup>50</sup> The district court’s opinion quotes Director Lloyd’s reaction to the plight of one unaccompanied minor migrant who had become pregnant as the result of a sexual assault: He believes that abortion is “‘violence that has the ultimate destruction of another human being as its goal,’ that ‘abortion does not here cure the reality that she is the victim of an assault,’ [and] that ‘[t]o decline to assist in an abortion here is to decline to participate in violence against an innocent life.’”<sup>51</sup> Lloyd elaborated on his best interests rationale:

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43 *Id.* at 737.

44 *Id.* (emphasis omitted).

45 *Id.*

46 *See id.* at 740; *see generally, e.g., Harris v. McRae*, 448 U.S. 297 (1980).

47 *Garza*, 874 F.3d at 740-41 (Millett, J., concurring).

48 *Id.* at 741.

49 *Id.*

50 *See Garza*, 2018 WL 1567600.

51 *Id.* at \*2.



At bottom, this is a question of what is in the interest of the young woman and her child. How could abortion be in their best interest where other options are available, and where the child might even survive outside the womb at this stage of the pregnancy? Here there is no medical reason for abortion, it will not undo or erase the memory of the violence committed against her, and it may further traumatize her. I conclude that it is not in her interest.<sup>52</sup>

J.D. ultimately obtained an abortion, with the assistance of an attorney who took the case to the U.S. Court of Appeals twice, first for an unsuccessful resolution by a three-judge panel and then for a favorable outcome upon rehearing en banc.<sup>53</sup> The district court later certified a class action and—consistent with Supreme Court doctrine—issued a preliminary injunction against ORR policies and practices that unduly burden unaccompanied minors’ efforts to obtain abortions, including ORR’s effective exercise of a veto over such abortions.<sup>54</sup>

Whatever the final outcome of the larger controversy, which continues with the government’s appeals,<sup>55</sup> we can hear echoes of the classic problems that the best interests principle has engendered in the more routine custody context. Indeterminacy invites official value judgments that often have nothing to do with the particular child in question and her individual situation.

### B. *LGBT Family Placement*

While the migration of unaccompanied children has produced a full-blown “culture-war”<sup>56</sup> battle centered on the reproductive rights, it has also begun to open up a new front over LGBT parenting. Lamda Legal has filed suit against the Department of Health and Human Services, as well as the United States Conference of Catholic Bishops (which receives

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<sup>52</sup> *Id.* at \*3. He continued:

Refuge is the basis of our name and is at the core of what we provide, and we provide this to all the minors in our care, including their unborn children, every day. In this request, we are being asked to participate in killing a human being in our care. I cannot direct the program to proceed in this manner. We cannot be a place of refuge while we are at the same time a place of violence. We have to choose, and we ought to choose to protect life rather than to destroy it.

*Id.*

<sup>53</sup> *Garza*, 874 F.3d at 735.

<sup>54</sup> *Garza*, 2018 WL 1567600, at \*10-\*11. For related litigation, see *Doe v. Office of Refugee Resettlement*, 884 F.3d 269 (5th Cir. 2018).

<sup>55</sup> See Notice of Appeal, *Garza v. Azar*, No. 18-5093 (D. C. Cir. Apr. 9, 2018); *In re Alex Azar*, No. 18-8003 (D.C. Cir. Apr. 12, 2018).

<sup>56</sup> See *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

taxpayer funding for its placement services), for disqualifying a married lesbian couple in Texas from serving as foster parents for unaccompanied child migrants “because their family structure doesn’t ‘mirror the holy family.’”<sup>57</sup>

Although the lawsuit, still in its early stages at the time of this writing, does yet not offer a fully developed picture of the role played by the best interests principle, one can easily imagine the likely possibilities based on earlier cases outside the migration setting. For example, in an unsuccessful challenge to a one-time Florida law banning adoptions by same-sex couples, the state defended the ban on the basis of the best interests principle, citing the importance of “dual-gender parenting . . . in shaping sexual and gender identity and in providing heterosexual role modeling.”<sup>58</sup> Such arguments not only rest on an explicit premise that heterosexual parents are better than LGBT parents, but also on an implicit premise that the best interests principle assumes a “fear of the queer child.”<sup>59</sup> Such unsupported and generalized value judgments exemplify the perils of the best interests principle’s indeterminacy.

#### IV. CONCLUSION

Of course, this country and its legal actors can and should do far better for unaccompanied migrant children than we are doing now, as Professor Estin compellingly demonstrates. Putting children (that is, each child) at the center of the analysis stands out as a worthy goal that would mark significant improvements over current American policies. Is the best interests principle the most effective way to achieve this goal? Perhaps. Certainly, the principle is familiar, both from its long history in American

<sup>57</sup> See *Family Equality Council Applauds Lawsuit Calling Out HHS Discrimination Against Lesbian Couple*, FAMILY EQUALITY COUNCIL (Feb. 20, 2018), [https://www.familyequality.org/news\\_\\_media/2018/02/20/2345/family\\_equality\\_council\\_applauds\\_lawsuit\\_calling\\_out\\_hhs\\_discrimination\\_against\\_lesbian\\_couple](https://www.familyequality.org/news__media/2018/02/20/2345/family_equality_council_applauds_lawsuit_calling_out_hhs_discrimination_against_lesbian_couple) (describing *Marouf v. Azar*); Angela Morris, *Lesbian Law Prof Sues Over Rejection as Foster Parent*, TEX. LAW. (Feb. 21, 2018), <https://www.law.com/texaslawyer/2018/02/21/lesbian-law-prof-sues-over-rejection-as-foster-parent/> (same).

<sup>58</sup> See *Lofton v. Secretary of Dept. of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2005). Later, a state court struck down the ban court as irrational and in violation of equal protection because of, *inter alia*, the absence of empirical evidence that parental sexual orientation affects child wellbeing. *Florida Department of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79 (Fla. Dist. Ct. App. 2010). *But cf.* Associated Press, *Oklahoma Governor Signs Adoption Law Opposed by LGBT Groups*, N.Y. TIMES (May 11, 2018), <https://www.nytimes.com/aponline/2018/05/11/us/ap-us-xgr-gray-adoption-oklahoma.html> (reporting law that allows adoption agencies to refuse to place children with LGBT parents, based on religious or moral objections).

<sup>59</sup> For persuasive challenge to this assumption, see Clifford Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 685 (2013) (contending that “queerness is neither morally nor legally relevant to children’s best interests”).

custody law<sup>60</sup> and its appearance in several international instruments.<sup>61</sup> Yet, it comes with baggage and poses risks, as past and present controversies illustrate.

Perhaps, however, we might consider Professor Estin's article as part of a series of broader efforts to clarify<sup>62</sup> or even reconceptualize<sup>63</sup> the legal understanding of childhood and the legal treatment of children, in the hope of doing better. Read through this lens, Professor Estin's article insists that we must include in these emerging conversations an often forgotten and especially vulnerable group of children<sup>64</sup> whose current wellbeing and future lives, even more than others', depend directly on law.

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60 See MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: A HISTORY OF CHILD CUSTODY IN AMERICA 121-60 (1994).

61 See Estin, *supra* note 1, at 593.

62 The American Law Institute has undertaken a project that aims to "restate" the law relevant to children. See RESTATEMENT OF THE LAW, CHILDREN AND LAW (AM. LAW INST., Tentative Draft No. 1 2018).

63 See Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448 (2018).

64 Indeed, the Department of Health and Human Services recently disclosed that it has lost track of nearly 1,500 migrant children. See Ron Nixon, *Federal Agencies Lost Track of Nearly 1,500 Migrant Children Placed with Sponsors*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/26/us/politics/migrant-children-missing.html>.