Voice, Agency and Vulnerability: the Immigration of Children through Systems of Protection and Enforcement

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INTRODUCTION

As the organizer of a 2009 summer workshop held at the Radcliffe Institute for Advanced Study at Harvard University on unaccompanied, undocumented children in the United States, I am delighted to introduce the first in a series of publications that will contribute to a growing nationwide debate on the challenges facing this vulnerable population. First, a word of explanation about the workshop participants before describing matters of substance. I designed the workshop to bring together academics and practitioners who speak different professional languages, use different methodologies in their research and practice, disseminate their findings in different venues, and rarely have the opportunity, or perhaps even the inclination, to sit down together to share knowledge, to ask unexpected questions, and to debate the consequences of public policy decisions. The participants included three immigration attorneys, two law professors, two immigration judges, a specialist on child refugees within the Lutheran Immigrant and Refugee Service, a child psychiatrist, a developmental economist, a sociologist, and five anthropologists. In addition to their expertise in children, migration, and the law, participants were chosen for the ways their experience or training blurs the divide of the academic and practitioner and spans the private and public sectors. For example, some participants are employed by NGOs under contract to the government while others moved from government work to private research positions or currently combine teaching with legal practice. In this group, practitioners regularly publish and academics often consult. Five of the sixteen migrated to the United States, four speak English as a second language, fourteen have extensive international experience, and all have professional expertise in the legal and social issues raised by the migration of people across borders. Participants included Jacqueline Bhabha, Susan Coutin, Michael Creppy, Daniel Dowell, Olivia Faries, Elzbieta Gozdziak, Barbara Hines, Elizabeth Krause, Stuart Lustig, Cecilia Menjivar,
In this first set of articles, we consider an overarching workshop theme, namely child agency versus adult power. In the workshop, we examined the role children play in migratory decisions and the extent to which these decisions can be seen as acts of independent choice or agency. Our discussion centred on the different meanings of agency and voice across cultures, generations, time periods, and bodies of law. We considered the different domains in which children display agency, as well as the structures and ideologies that enhance or limit their ability to act on their own apart from adults. We asked to what extent Western ideologies of childhood as an innocent and protected life stage condition the views and practices of adult advocates and decision makers. How do children’s views of themselves as mature and responsible contrast with the dominant understanding of them as immature and dependent within The Division of Unaccompanied Children Services of the Office of Refugee Resettlement? Is the idea of children’s rights as human rights compatible with the basic framework of American immigration law? What does it say about children’s rights when US immigration law treats “accompanied” children primarily as dependents of adults rather than autonomous actors but obligates “unaccompanied” minors to meet the substantive rules and evidentiary requirements of adult refugees without legal safeguards for their developmental immaturity, limited experience, and special vulnerability as children alone?

What follows is a short article by attorney Aryah Somers at The Door, a legal service provider in New York, who discusses the legal challenges posed for undocumented minors who encounter overlapping systems of protection and enforcement when they are identified by state and federal authorities. The three case studies presented in this article highlight the increasing tension between humanitarianism and protection, on the one hand, and security and law enforcement, on the other. In response to the legal issues and ethical dilemmas examined by Somers, we have included four commentaries intended to broaden the discussion by including therapeutic and social scientific perspectives from Olivia Faries, Director of Children’s Services at Lutheran Immigration and Refugee Service where she oversees a national network of services for refugee minors, child victims of human trafficking, and unaccompanied children in federal custody; Stuart Lustig, a child psychiatrist and trauma expert at the University of California in San Francisco; Cecilia Menjivar, a sociologist at Arizona State University at Tempe and expert on family migration and immigrant networks in Central America and the United States; and Elizabeth Krause, an anthropologist at the University of Massachusetts at Amherst and expert on population shifts, social memory, and cultural representations of family and youth. This first article, and the four commentaries that follow it, centre on children’s ability to speak and act for themselves during and after migration to the United States. In her commentary Elizabeth Krause poses the critical questions: what does giving a voice to “voiceless” subjects mean? How can undocumented minors make
themselves heard amid the cacophony of competing authorities who speak for and about them? How can their visibility as victims be reconciled with their visibility as threats?

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Aryah Somers

INTRODUCTION

Children are being migrated through multiple systems of protection and enforcement in the United States: child welfare, immigration and juvenile justice. While children employ agency as they migrate for purposes of seeking safety and improvement of life conditions both within and outside the United States, when children enter these systems, they express disempowerment, fear and frustration. Humberto, a fifteen-year-old boy from Central America, says, “I just feel very alone. Every time I go to a new place, I tell them what happened to me. No one seems to do anything and I do not know what to do”.

Humberto describes himself as having always been mischievous to the point that his grandmother used to tie him to the bedpost. He spent his early childhood with his grandmother and several cousins who had also been left in his grandmother’s care. When he was about eight years old, he went to live with his mother in the capital city of his country. He had difficulties adjusting to life with his mother and he endured physical and emotional abuse. His mother would tell him that she had wanted to abort him. He felt unwanted and unloved. He never knew his father and different men came in and out of his life as a result of his mother’s relationships. The most recent boyfriend was physically abusive towards Humberto. When he was about fourteen years old, he decided to come to the United States to flee this situation. He had saved some money after years of working in construction and other odd jobs. He navigated and negotiated his way on trains, buses and across borders through several countries before arriving to the northern border with Mexico. He paid a coyote about US$ 500 to help him across the desert. As he was crossing the border, he was detained by US Customs and Border Control (CBP), interviewed alone in a
border patrol detention centre by Immigration and Customs Enforcement (ICE), and then transferred to the custody of the Office of Refugee Resettlement (ORR) of the US Department of Health and Human Services (HHS). This was only the beginning of a long journey for Humberto through various systems ostensibly designed to ensure care, protection and rehabilitation of children in the United States.

THE SHIFT FROM DHS (DEPARTMENT OF HOMELAND SECURITY) TO ORR AND THE BALANCE BETWEEN ENFORCEMENT AND PROTECTION

Over the last decade, there have been significant changes to the structure and system of enforcement and protection of unaccompanied children in the immigration system. Prior to the Homeland Security Act of 2002, the Immigration and Naturalization Service (INS) was responsible for the custody of undocumented, unaccompanied and separated children in the United States who were placed in removal proceedings (Amnesty International, 2003). INS policies reflected a social control and enforcement orientation towards unaccompanied and separated children. Human rights activists pointed to the fundamental conflict that existed within the INS as an agency responsible for immigration enforcement, yet also responsible for the care and protection of these children (Amnesty International, 2003; Human Rights Watch, 2000). This conflict led to the deprivation of basic human rights of children, refoulement, and the use of secure detention centres that have been similarly criticized in Spain and Greece (Amnesty International, 2003:1, footnote 4; Human Rights Watch, 2008a; Human Rights Watch, 2008b; Human Rights Watch, 2009).

After years of litigation against the INS, the Stipulated Flores Settlement Agreement resulted in a shift towards a child welfare framework for the treatment of children in INS custody by requiring separate licensed facilities for children that comply with state child welfare laws, introducing a general policy favoring release of children to family members or community entities, and providing for specific rights to education, health care, and psychological support while in custody (Stipulated Settlement Agreement, Flores v. Reno, 1996; Women’s Commission, 2007). The passage of the Homeland Security Act of 2002 furthered this shift to the child welfare orientation by taking away the care and placement of “unaccompanied alien children” from DHS and giving this power to ORR (US Department of Health and Human Services, 2010). The term “unaccompanied alien children” was also created in this legislation (Homeland Security, 2002). It is a constructed legal concept that has created significant policy and practical problems because of conflicting interpretations of the term by different agencies depending on the timing and the context in which a child comes into contact with a federal agency. As a result of narrow interpretations of this term, some children are placed in DHS subcontracted facilities or are deemed to be accompanied and are placed in family detention centres or
face removal from the United States (Women’s Commission, 2007). It is critical that the interpretation of this term not be used as a vehicle to limit children’s access to any of the child protection features that have been put into place by Congress for the protection of children.

Based upon this new congressional mandate, ORR provides care and placement to nearly 8,000 unaccompanied children per year. As noted, there are many thousands of children who do not get transferred to ORR care and protection and remain in the enforcement realm of the immigration system (Women’s Commission, 2007). Children who do enter the ORR system are placed in subcontracted juvenile justice or institutional facilities, or foster care. The shift in orientation can be seen in the reduction of ORR’s use of subcontracted juvenile justice facilities from 30 per cent under INS to approximately 10 per cent now. Yet, there is still concern among advocates that certain DHS enforcement policies are influencing an increased use of juvenile justice facilities that could climb back to INS levels. These enforcement policies seem to originate from the Office of the Principal Legal Advisor and flow through the Department of Homeland Security’s Juvenile and Family Residential Management Unit and other offices of Immigration and Customs Enforcement. This concern is heightened because of the power imbalance between DHS and ORR. The result has been enforcement policies that overpower the child protection policies and create uneven and inadequate implementation of the congressional mandate for the care and protection of unaccompanied children.

THE IMPLICATIONS OF THE POWER IMBALANCE FOR CHILDREN: CONFIDENTIALITY, LEGAL INTEREST AND BEST INTEREST

Humberto experienced the reality of this power imbalance despite the congressional mandate for his protection. While he was detained, he felt able to disclose to his caseworker at the ORR subcontracted shelter that he had an abusive life with his mother and he did not want to be returned to his country of origin. Yet, Humberto did not know that information given at the ORR shelter could be shared with DHS, the immigration enforcement agency. Attorneys came to the shelter facility where he was detained and while they were able to screen him for potential relief from removal, Humberto appeared before the immigration judge alone. There was no guardian ad litem or court-appointed special advocate to ensure articulation of his best interests and his voice was largely eviscerated despite the many actors in the process. Humberto says, “I felt safe but desperate. I just did not want to lose my case and be deported”.

Recognition of the need for the representation of unaccompanied children is included in the Homeland Security Act of 2002 and reflects key lessons learned from the child welfare system. In the 1960s, juvenile courts recognized that they were struggling with determinations of a child’s best interest (Stein, 2006: 78 and Chapter 2). In 1962, the New York State legislature was the first in the country to authorize the New York Family Court to appoint attorneys to
represent children in child protective proceedings and delinquency (Sobie, 2006: 10). In 1974, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA) that provides for the appointment of a guardian ad litem to represent the child’s interests in all judicial proceedings (Child Abuse Prevention and Treatment Act, 1974). Based upon these lessons learned, in the Homeland Security Act of 2002, the Director of ORR is required to develop a plan for the timely appointment of qualified and independent legal counsel to represent the interests of each child (Homeland Security, 2002). The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA of 2008) goes even farther by requiring that ORR ensure that unaccompanied children have legal counsel in court and to protect them from mistreatment, exploitation, and trafficking. Even more critical, the child advocate program that has been piloted by The Immigrant Child Advocacy Project at the University of Chicago has been authorized for further expansion (Immigrant Child Advocacy Project, 2010). The TVPRA of 2008 calls upon the Secretary of Health and Human Services to appoint independent child advocates for child trafficking victims and other unaccompanied children to advocate for their best interest.

Despite the fact that these roles were created to ensure that the child’s legal interest and best interest are separately and wholly represented, in implementation, these roles have been restricted. The attorneys who are funded under the ORR appointment provision cannot directly represent the children in court, despite the fact that there appear to be no legal restrictions on voluntary federal government funding of direct representation for unaccompanied children. These attorneys struggle to pursue all forms of relief from removal and to ensure that DHS has complied with all due process rights of children. This restrictive interpretation of representation creates a power imbalance in immigration courtrooms where DHS has a constant presence and the children’s pro bono attorneys are marginalized. It is critical to note that the Executive Office of Immigration Review has taken specific and noteworthy steps to recognize the special responsibilities to accompanied and unaccompanied children (US Department of Justice, 2007). Despite this effort the continued restriction on representation means that this imbalance will continue. There is also no current structure in place to recognize the child advocate’s place before the immigration court, DHS and ORR to present the child’s best interest. Although this program is still under development, Humberto’s experience and that of the thousands of children who enter the immigration system can all attest to this confusing reality.

THE IMPORTANCE OF EXTENDING THE CHILD WELFARE FRAMEWORK

Humberto was treated in accordance with the basic child welfare standards of the immigration system that Congress has mandated, including the least restrictive setting and family reunification. The TVPRA of 2008 requires that an unaccompanied child in the custody of the Secretary of Health and Human Services...
Services be promptly placed in the least restrictive setting that is in the best interest of the child. The TVPRA of 2008 also sets forth a system of family reunification and follow-up services that are coordinated by ORR through subcontracts, with NGOs such as the Lutheran Immigration and Refugee Services and the United States Conference of Catholic Bishops. However, there are due process concerns around the family reunification process and obstacles for children in juvenile justice facilities. Because Humberto was in a shelter facility rather than in a juvenile justice facility, he was able to reunify with a family member after about three months. He says, “I made friends when I was there at the shelter. I think about them a lot, especially my friend Rodrigo who got deported. I got to leave the shelter, but he got deported”.

Once released, Humberto found himself in an exciting yet overwhelming new world. He learned how to take the subway, attended a youth agency for English language courses, and shared his skills in construction with other young people. But after six months of living with his family member, he felt enormous pressure to work and his family member insisted he stop going to school and work or leave the house because he could not afford to keep taking care of him. Humberto turned to sleeping on the streets and came to the attention of child protective services. An investigation was conducted and Humberto ended up living in a group home for a short period of time. Humberto was confused about why this group home was so different from where he was first detained. Humberto said,

I thought I was detained again. I kept asking about my immigration court. My caseworker told me that my case plan was return to my country. I did not understand who the attorney was that was going to help me. I did not want to go back to my country.

Then, Humberto was arrested for shoplifting and he was sent into the juvenile justice system. The juvenile judge directed that he be placed in a diversion program and returned to the group home. However, probation officers in the juvenile justice system notified ICE about Humberto’s immigration status and he was picked up and placed in federal immigration custody. ICE transferred him to ORR and Humberto was placed in an ORR facility, but this time in a more restrictive juvenile justice facility. Humberto says, “I just feel like giving up”.

The use of juvenile justice facilities for placement of unaccompanied children began with the INS. Children’s rights activists heavily criticize the use of these facilities for placement of unaccompanied children. In the juvenile justice system, these facilities are used for detention prior to adjudication for delinquency, commitment by a juvenile court to secure placement, or placement in a secure facility by another juvenile justice administrative body (Taylor, Fritsch, Caeti, 2007). Since the 1960s, states have de-emphasized rehabilitation and best interests determination as the goals of the juvenile justice system, and have focused on public safety, punishment and accountability that have lead to the creation of a punitive system of social control (Feld, 1998: 251). In the immigration system, the use of secure facilities has been based upon a balancing of criteria including protecting children from those who may harm them, danger to self and others, risk of flight,
and best interest of the child.\textsuperscript{9} (Homeland Security, 2002; Stipulated Settlement Agreement, Flores vs. Reno, 1996; TVPRA, 2008). The TVPRA of 2008 requires that the Secretary of Health and Human Services make a determination for secure placement only after analysing whether the child poses a danger to self or others or has been charged with a criminal offense, subject to a monthly review. The “criminal offense” language significantly narrows the category of unaccompanied children who can be placed in secure detention since juvenile delinquencies are not crimes in the immigration system.\textsuperscript{10}

Children’s advocates are very concerned about the placement of unaccompanied children in juvenile justice facilities because they do not meet the least restrictive standards of the Flores Settlement Agreement. With the continued use of subcontracted juvenile justice facilities where minors are shackled for court appearances, a discriminatory stigma attaches to the “secure placement” child in a way that adversely impacts the family reunification process and removal proceedings. All of this is particularly important because the juvenile justice system itself is criticized for its stigmatization of racial minorities and poor children. The stigma is heightened for the “secure placement” children in federal custody (Feld, 1998).\textsuperscript{11} ORR should reduce the use of juvenile justice facilities for unaccompanied children. This would better reflect the TVPRA of 2008 and ensure that the secure placement system is not used as a default system simply because more beds have been subcontracted. Additionally, there should be independent review of placement decisions that reflects the child welfare protection mandate of ORR.

THE POLICY CHALLENGES PRESENTED BY CHILDREN MIGRATING THROUGH INTERSECTING SYSTEMS OF PROTECTION AND ENFORCEMENT

Humberto’s experiences in these three systems demonstrate significant policy dilemmas. Humberto is not alone in his migration through these systems. Raquel was brought into the United States as an infant and does not know the precise circumstances of her entry into the country. Her mother began using drugs when Raquel was around four years old and she abandoned her when she was six years old. Child protective services stepped in and Raquel was placed in foster care. Raquel had a positive experience and was placed with a family who was supportive and strong. However, Raquel fell into the wrong crowd in tenth grade and was arrested as a passenger in a stolen vehicle. She was sent into the juvenile justice system where the judge placed her in a diversion program and ruled that she be returned to her family. Yet, probation officers called ICE to inform them that a suspected undocumented child was at their facility and to inquire if ICE wanted to detain and prosecute her. Once her caseworker learned about the contact with ICE, she worked with her agency to intervene and stop her detention because she was in the care and custody of the state. Raquel returned to her foster family and eventually obtained her lawful permanent
residence. She is planning to go to college next year. In reflecting on her experience Raquel says, “I was very scared when my caseworker told me that immigration was coming to get me. I did not understand. As far back as I can remember, I was here and this is my home with the only family I have ever known”. Raquel and Humberto faced the intersection between juvenile justice and child welfare and ended up in very different situations. One critical issue that arose for Raquel was that since she entered the child welfare system at the age of six, she did not obtain access to counsel on immigration matters until she was on the brink of being deported at the age of 16.

Jermaine’s story reveals a different outcome. Jermaine came into the state child welfare system when he was about eleven years old after his mother passed away. Jermaine’s mother had brought him into the United States on a visitor visa when he was about three years old. The state child welfare system’s case plan was for reunification with his father in Jamaica and he was returned there. However, child welfare authorities were unable to conduct a suitability assessment of the home environment and did not know that his father was abusive towards his second wife and two young children. When he arrived at around the age of 12, he was treated very violently by his father when he identified himself as being gay. In order to escape his violent home, Jermaine returned to the United States on a fraudulent visa when he was fifteen. He is now 16 years old and living on the streets. He is worried about going into child protective services because they could send him back to Jamaica. Jermaine, similar to Raquel, was eligible for immigration relief so that he should not have been removed to Jamaica. Yet, he did not gain access to counsel until he was homeless and identified as needing immigration services by the shelter referral system.

The differences between Humberto, Raquel and Jermaine’s cases demonstrate how these intersecting and overlapping systems are struggling to respond to the protection needs and rights of refugee and stateless children (Platt, 2009; Scott and Steinberg, 2008; Walker, Brooks, Wrightsman, 1998). The power struggle between enforcement and protection of unaccompanied children in the immigration system is also evident in the child welfare and juvenile justice systems. In the cases of both Humberto and Raquel, decision-makers in the child welfare or juvenile justice systems reflected immigration enforcement policies.
rather than investigating the legal interests of the children or analysing the best interest of the child. In Jermaine’s case, his immigration status drove decision-makers to return him to his country of origin without conducting a home suitability assessment or pursuing claims for asylum or special immigrant juvenile status. Policymakers must protect the integrity of our juvenile justice and child welfare systems by ensuring that neither enforcement policies nor immigration status drive decision-making on children within those systems. Children should not be moved into the immigration system as a system of last resort or be removed from the United States without adequate protections in place. In all of these individual cases, and in the systems themselves, the focus should be on protection, not enforcement.

Globally, best practices point to developing child protection systems that take into account principles of non-discrimination and the right of the child to meaningfully participate in decision-making processes (UNHCR, 2008:17). Yet, children are facing very complex systems. In the United States, experts studying the child-saving movement that led to the creation of the juvenile court point to ambivalence on the rights of children and the interplay of race, class, ethnicity and nationality on the development of the structure and policies within the juvenile court system (Feld, 1998; Platt, 2009). When immigration enforcement moves into these systems, there are significant concerns regarding the rise of discriminatory practices and marginalization. It is unsurprising then that children lose agency and voice, and are highly vulnerable to outcomes contrary to their best interest.

At the same time as taking steps to ensure the integrity of our existing child welfare and juvenile justice systems, the new congressional mandate expressed in the TVPRA of 2008 will further enhance the protection orientation of the immigration system. Section 235 of the TVPRA of 2008 calls for child protection-based measures including the appointment of child advocates, safe repatriation and reintegration, permanent protection for certain at-risk children, non-adversarial asylum interviews, and other procedural and substantive considerations of the special needs of children. The Department of Health and Human Services should have the power and resources to fully implement this mandate. Additionally, other federal government agencies should strive to prioritize the clear child welfare-oriented mandate in their interpretation of the TVPRA of 2008. The Convention on the Rights of the Child should be the key normative and legal framework for guiding implementation (United Nations, 1990). There should be collaboration between immigration authorities and experts on child and adolescent development to take into account the capacity, competency and mental health challenges facing children (Scott and Steinberg, 2008). In addition to traditional policymakers, the voices of children and their advocates must also be part of the process (World Vision, 2007). It has been recognized that it is no longer “effective, morally acceptable nor practical to seek solutions to child protection without building on the resiliencies, capacities and contributions of children themselves” (Canadian International Development Agency, 2005).

While we move to incorporate these necessary child welfare-oriented advances, it is also time for immigration authorities to fully implement fundamental
components: a right to effective, direct and competent counsel; safe repatriation and reintegratio standards and procedures; complementary forms of protection for children who cannot be safely repatriated; and incorporation of the best interest of the child as the primary consideration in all policies and procedures.

ACKNOWLEDGEMENTS

The author would like to thank the invaluable comments of Christopher Nugent, Angie Junck and Susan Terrio. This article reflects only the viewpoint of the author and does not reflect the opinions or viewpoints of the organizations with which the author is affiliated or those of the commentators. Any errors or omissions are solely those of the author.

NOTES

1. The author worked with these children in Arizona and New York. The names of the children referenced in this article have been changed for protection of their identities.
2. The Flores Settlement Agreement now applies to both the Office of Refugee Resettlement for unaccompanied children and the Department of Homeland Security in their contact with all children. While this article is focused on unaccompanied children, there are also significant concerns regarding the treatment of accompanied children by the US Department of Homeland Security.
3. The Office of Refugee Resettlement’s stated mission is to provide people in need with critical resources to assist them in becoming integrated members of American society founded on the belief that newly arriving populations have inherent capabilities when given opportunities.
4. Section 462(g) of Homeland Security Act of 2002 created a new term of unaccompanied alien children that did not previously exist in United States law as a child who (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom: (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.
5. The Women’s Commission report brings to light the issue regarding children who do not make it into ORR custody and remain in the custody of DHS and the relationship with the conflicting interpretation of the term “unaccompanied children”. Additionally, Mexican children apprehended along the border are not generally transferred to ORR custody, until the recent enactment of the Trafficking Victim Protection and Reauthorization Act of 2008.
6. Due process rights for juveniles are based upon the US Supreme Court decision. In re Gault, 387 US 1 (1967). In this landmark decision, the Supreme Court looked to the 14th and 5th amendments to the US Constitution, and required notice of charges, assistance of counsel, opportunity to confront and cross-examine witnesses, and the privilege against self-incrimination for juveniles in the juvenile justice system. In the immigration system, the Flores Settlement Agreement requires that the Immigration and Naturalization Service promptly provide each minor not released with the INS Form I-770, an explanation of the right of judicial review, and the list of free legal
services. The US Code of Federal Regulations recognizes this settlement provision and requires that when a juvenile is apprehended, he or she must be given a Form I-770, Notice of Rights and Disposition, that includes explanation to the child of the right to an attorney, the right to a hearing, and the right to make a telephone call, see 8 C.F.R.§ 236.3(h); 8 C.F.R. § 1236.3(h).

7. The least restrictive setting approach was first articulated in the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"), 42 USC 625, whereby Congress required that a child’s case plan in the state child welfare system take into consideration the least restrictive setting, consistent with the best interest and special needs of the child; See also Stein, 2006:78. Family reunification, a key component of the child welfare system, was articulated in the AACWA through two key goals to (1) prevent the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where desirable and possible, and (2) reunite families through the provision of services.

8. The least restrictive setting was first articulated in the immigration system in the Flores Settlement Agreement which required that the Immigration and Naturalization Service place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs, articulated in the Stipulated Settlement Agreement, Flores v. Reno, Case No. CV85-4544-RJK (C.D. Cal. 1996), Section VII, paragraphs 21-22.

9. The TVPRA of 2008 lays out new criteria for secure placement and builds upon the Flores Settlement Agreement that first articulated the secure placement system by providing that a minor could be held in a juvenile detention facility or secure immigration detention facility based upon a broad list of criteria, Stipulated Settlement Agreement, Flores v. Reno, Case No. CV85-4544-RJK (C.D. Cal. 1996), Section VII, 21-22, and had been supplemented by the Homeland Security Act of 2002 that recognized the option of a detention facility and required a balancing of criteria to make secure placement decisions.

10. See Matter of Devison-Charles, 22 I&N Dec. 1362, 1365-66; BIA, 2000: “[w]e have consistently held... that acts of juvenile delinquency are not crimes”.

11. Feld discusses how the juvenile justice system stigmatizes children, particularly racial minorities and poor children.

12. This Figure demonstrates the overlapping systems with children being migrated into the immigration system with greater frequency as a system of last resort. This is particularly compelling in the case of children who are moved between child welfare and juvenile justice, and eventually into the immigration system.

13. Studies of the development of children’s rights in the United States look to the child-saving movement and the establishment by the Progressives of the first juvenile tribunal in Chicago in 1899. This event is viewed as revolutionizing the treatment of delinquent and neglected children. Our ambivalence on rights covers the spectrum from paternalistic views of children in need of nurturing and protection through to self-determination views of children as fully responsible and accountable.

14. While the United States is a signatory, the United States has not yet ratified the Convention on the Rights of the Child. As a signatory to the Convention on the Rights of the Child ("CRC"), the United States cannot act in a way that defeats the object and purpose of the CRC. The four core principles of the Convention on the Rights of the Child are: right to life, survival and development; right to non-discrimination; the right to participation and the best interest of the child. The CRC was cited in Roper v. Simmons, 543 US 551; 125 S. Ct. 1183; 161 L. Ed. 2d 1, referencing an express prohibition on capital punishment for crimes committed by juveniles under 18.
REFERENCES

Amnesty International

Canadian International Development Agency (CIDA)

Feld, B.

Flores vs. Reno
1996 “Stipulated settlement agreement”, case no. CV85-4544-RJK (C.D. Cal.).

Human Rights Watch
2008a Left To Survive: Systematic Failure to Protect Unaccompanied Migrant Children in Greece, Human Rights Watch, New York.

Hutto Family Detention Center In re
2009 “Settlement agreement”, case no. A-07-CA-164-SS, as modified on August 27.

Immigrant Child Advocacy Project

Platt, A.M.

Roper vs. Simmons
543 US 551; 125 S. Ct. 1183; 161 L. Ed. 2d 1.

Scott, E.S., and L. Steinberg

Sobie, M.

Stein, T.

Taylor, R.W., E.J. Fritsch, and T.J. Caeti

United Nations

United Nations High Commissioner for Refugees

United States Department of Health and Human Services

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Aryah Somers’ article provides an excellent glimpse into the many complexities encountered both by the children winding their way through the systems that attempt to serve them, and by these very same systems themselves. The call for full implementation of important provisions contained in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) points to two of the most important protections that can be made available for children migrating alone: representation by independent counsel and appoint-
ment of an independent child advocate or guardian ad litem. The need for a child to be strongly and aptly represented by an attorney when facing an immigration judge and government appointed counsel is now quite widely recognized, although still inadequately implemented. Perhaps less well established is the equally important need for the child to be followed, throughout the entire journey through the various systems that touch an unaccompanied, undocumented child’s life, by a child welfare advocate that can help to navigate the child’s movement through care and service issues. While the attorney focuses on and represents the child’s legal interests, it is essential that the child advocate have child welfare training and expertise in order to fully address the child’s “capacity, competency and mental health”.

As well described in the article, the system of care for unaccompanied children without legal immigration status is newly developing following the Homeland Security Act of 2002. The TVPRA of 2008 contains important provisions for further improving services to this vulnerable population and a call for the full implementation of this law is timely and necessary. It is just as timely and necessary to implement the law in a manner consistent with recognized best practices in child welfare, and set up a balance of professional services that attend to both the psychosocial and legal vulnerabilities of the child. A balanced approach with social work and legal services can capture the child’s voice and assist the child in navigating the various complex systems to ensure that these systems work to meet the psychosocial needs of the child.

The case examples of Humberto, Raquel, and Jermaine’s journeys through the child welfare, juvenile justice and Office of Refugee Resettlement (ORR) Division of Unaccompanied Children’s Services (DUCS) systems aptly present the need for an independent child advocate to oversee this journey. The unique experience of each of these three children leads to looking at the importance for such an advocate to be trained in assessing the psychosocial situation of a child. Such an assessment involves a thorough review of the child’s history including: developmental history, medical history and status, family history including any available familial support, and current cognitive, emotional and psychological functioning. This assessment then prepares the child welfare advocate to appropriately interact with the systems purportedly serving the child.

Taking one of these cases, Humberto, as an example, and given full implementation of the TVPRA of 2008, we might well have seen a different outcome, or at least an easier path for this young man. If he had been fully legally represented from the time he entered the ORR system by an attorney that pursued any potential for immigration relief, Humberto might never have suffered a subsequent referral to Immigration and Customs Enforcement (ICE) and a second placement with ORR, this time in a locked juvenile justice facility. And, if Humberto had been assigned a child advocate as described above, this child advocate could have evaluated Humberto’s psychosocial status and prepared a report for the court that could have supported the attorney’s efforts. Once Humberto was released to the sponsorship of a family member,
the child welfare function of the advocate would be further carried out by having the advocate regularly check in with Humberto and his sponsor to ensure that Humberto was continually represented by an attorney that could pursue his legal case. Even if the check-ins by the child advocate were unable to circumvent the eventual breakdown in the placement of Humberto with his family member, the child advocate could have informed the local child welfare authority of Humberto's history and vulnerabilities and ensured that Humberto’s desire to continue his education, as well as his legal immigration case, was continued. The child advocate could have continued to work with him and this continuity in care and information may well have prevented Humberto’s reaction to the stress of entering yet another system of care. It is very possible that the further trauma to Humberto from the shoplifting incident, referral to the juvenile justice system, referral to ICE, and placement in a juvenile justice facility by ORR DUCS would have all been avoided.

It is important to note, however, that even the best child welfare services can be rendered ineffective by the very system set up to care for this population of children. A very recent example occurred when an important protective provision of TVPRA that provides for the transfer of minors with approved Special Immigrant Juvenile (SIJ) classification may be moved into Unaccompanied Refugee Minor (URM) programmes was temporarily suspended by ORR as of 1 October 2009. The suspension was apparently ordered due to a concern about funding but profoundly affected minors with approved SIJ applications that turned 18 between 1 October and 21 October 2009. By law and in accordance with most state’s foster care licensing regulations, the URM programmes are only able to accept minors before they reach their 18th birthday. As a result, several minors, some already approved for placement in URM programmes, immediately had the course of their lives altered when this important benefit was pulled back. These young people suddenly no longer had access to funded services with the result that they would be referred to shelters for homeless populations or, even worse, were liable for placement by ICE officials into adult detention settings until their immigration cases are completed. It had already been deemed in the best interest of these unaccompanied minors to receive the continued protection and services offered by the foster care programmes and it had been determined that they were eligible for the first step in receiving immigration relief when this opportunity was then denied. Lutheran Immigration and Refugee Service led other advocates in requesting that ORR reconsider this action. ORR did reinstate the implementation of this TVPRA provision on 21 October 2009 after receiving inquiries about this decision from members of Congress. Sadly, however, this did not occur before several youth permanently lost their access to these important services with the result that they now have to fend for themselves while awaiting their final legal immigration documents and work authorization.
Long-term Family Separations and Unaccompanied Children’s Lives: A Response to Aryah Somers

Cecilia Menjívar

Aryah Somers presents a detailed, in-depth look into the institutional complexities migrant children go through when they migrate alone. Her bridging of the multiple institutional systems that intersect on the lives of these children provides a powerful image of the bureaucratic maze that few of us can imagine. I applaud her focus on the child, which gives us a glimpse into how children see the cumbersome process, their assessments of their lives and decisions, and how they make sense of the overwhelming reality before them when they enter the United States. This focus on the children’s agency and voice is very much welcome.

I would like to open up the lens for a moment, however, and take a broader look at the conditions within which children decide to migrate alone, what motivates them to undertake their journeys, and ultimately, how the broader social webs within which they live influence their views, experiences, and expectations for the future. Therefore, without underestimating the children’s agency and voice, I would like to discuss the broader social context within which they make decisions, act, and dream. I will focus my discussion on the children’s family, both in the countries of origin as well as in the United States, as it is within this immediate social sphere that children decide to migrate and in which children place their hopes for a better future as they see it. I will make a few points based on research among Guatemalan, Honduran, and Salvadoran immigrant families, including my own work, both in the United States and in the countries of origin. Children from these three countries make up the bulk of the unaccompanied migrant children who end up in the bureaucratic labyrinth that Somers so aptly describes, so it might prove helpful to include the view of these children’s families, so as to factor in their experiences (and voices) in discussions about unaccompanied migrant children.

First, I would like to highlight the huge impact that long-term, indefinite family separations have on the families and on the children’s decision to migrate, as well as on what happens to the children during the time they go through the system and beyond. I am not talking about “regular” family separations, which have occurred among most immigrant groups since labour migration has been in place. Here I am talking about long-term, indefinite separations, when the parents (or parent) and the children do not know when or if they will see each other again, such as separations that are linked to the parents’ insecure legal
status in the United States. Salvadoran, Honduran, and Guatemalan immigrants often have temporary legal statuses or are waiting for their applications to the different dispensations (e.g., NACARA, asylum) to be adjudicated. The processing of applications and adjudications usually takes years, if not decades, which translate into lengthy waiting times. These long “in-between” times create enormous anxiety, as each deadline, each temporary permit extension, or submission of a document serves as a reminder of these immigrants’ seeming transitory presence in the United States and temporary absence from their children’s lives back home. At the same time, however, the long waiting periods during which these immigrants hold temporary legal statuses give them the illusion and hope that if they wait a little longer they will become permanent residents and will be able to bring their children to live with them in the United States. This aspect of life among Guatemalans, Salvadorans and Honduran immigrants affects many aspects of their lives, including the immigrants’ ability to travel back home to visit family and see their children regularly as well as other family dynamics; it is pervasive and has been labeled “permanent temporariness” (Baily et al., 2002) or “liminal legality” (Menjivar, 2006). The words of a Guatemalan day labourer interviewed in the San Francisco Bay Area (Worby, 2006) capture the uncertainty of living in this situation: “I told my wife that I would definitely be home by Christmas,” to which his wife responded, “Yes, but which Christmas?”

During this time of separation, the children stay in the care of (usually female) relatives back home, while the parents in the United States work to remit money, and both make efforts to remain connected in different ways. A Guatemalan mother I interviewed in Los Angeles recounted how they would synchronize birthday celebrations so that they would hold a single party across borders in efforts to attenuate the effects of their separation. And while these efforts help the parents and children remain connected and help them to keep a sense of a family, they cannot erase the pain and anxiety that these separations often produce. This is particularly the case when the parents cannot remit enough to cover the children’s expenses (and expectations) or when the caretakers, in spite of receiving remittances, do not fulfil their obligations and the children are neglected. It is in these situations that children feel more intensely the absence of the parents (or parent), particularly when the mother is absent. It is also when they feel the need to migrate on their own to reunite with their parents, regardless of what the journey entails and often ignoring what awaits them upon arrival (and during the journey north). However, the engine behind their decision to migrate and what keeps them going is the idea of being with their loved ones, of living with that parent (or parents) once again, even if when they finally are reunited the family they meet does not resemble the image the children had in their minds. A teenager in El Salvador who had been separated from her mother for years expressed bittersweet views about what the migration of her mother had meant. On the one hand, her material conditions had improved, on the other, she lived “with a hole in my heart because I miss my mother, because nothing can replace a mother” (Menjivar and Abrego, 2009). Thus, gender ideologies shape the experiences of these long-term and often
uncertain separations, but the uncertainty in these separations takes a huge toll on all involved. For the children, it often translates into the decision to undertake an arduous and increasingly more dangerous journey north. Thus, the children’s families and their plans, views, and material situations, including their own chances of regularizing their legal status, are essential to factor in when delineating efforts to aid unaccompanied migrant children.

REFERENCES


Worby, P. 2006 “Phoning home: family separation faced by Mexican and Central American day laborers and strategies to maintain mental well being”, paper presented at the XXVI LASA International, San Juan, Puerto Rico.

The Challenge of Giving Voice

Elizabeth L. Krause

What does giving voice to “voiceless” subjects mean? How can stateless, undocumented children possibly have a voice given the cacophony of competing state bureaucratic voices?

Once detained, youth live a contradiction regarding voice. On the one hand, their voices are some of the most amplified, listened to, tracked, provoked, recorded, and analysed of any subjects. Through various encounters with the workings of the state and its personnel, in private and in public situations, these youth are asked to tell their stories. In addition, non-state workers such as pro bono attorneys and support persons also prompt them to talk.

On the other hand, despite all of this prompting and prodding, listening and evaluating, the youth are characterized as voiceless. How do we sort out this conundrum? What might such sorting expose?
Those intimate with the processing of detainees within and among state institutions use verbs such as “eviscerate” to describe what happens to the voices of undocumented children (Somers, 2010). Eviscerate is what one might imagine raccoons doing to chickens when one of those furry animals breaks into the coop of its feathered friends. The entrails go missing. The scene is terribly bloody. Using the verb in the context of undocumented children becomes a powerful metaphor that draws our attention to a consequence, perhaps unintended: It implies depriving children of vital content. The implication is nothing short of violence.

Legal systems and bureaucracies operate under certain assumptions about truth and voice that need to be challenged particularly in the context of undocumented children.

One of the leading theorists of voice reminds us of the existence of a multiplicity of voices even when commonsense notions might suggest that voice is unitary. Words carry history. The rub is that voices are dialogic. Even within voices, worlds collide. As Mikhail Bakhtin observed in his argument about the character of language, “Each word tastes of the context and contexts in which it has lived its socially charged life; all words and forms are populated by intentions” (Bakhtin, 1980: 293).

The implications run deep: Words retain traces of that long history and those intentions, which may very well be at odds with one another. After all, words are always half somebody else’s. Claiming them as one’s own requires struggle day in and day out. As Bakhtin (1980: 294) famously put it: “Language is not a neutral medium that passes freely and easily into the private property of the speaker’s intentions; it is populated – overpopulated – with the intentions of others. Expropriating it, forcing it to submit to one’s own intentions and accents, is a difficult and complicated process”.

The point to take away is that language is not neutral. The complexities, then, of voice mushroom when one moves from the context of the everyday to the context of detained juveniles. Surely, the difficulty of expropriating the intentions of others increases exponentially in the legal context. Undocumented children are always already responding to a system that has defined them as questionable non-citizens at best and criminal illegal aliens at worse.

Such a perspective may give pause to those who search for authenticity in voice. Matters of cultural and linguistic translation pose only one level of distance from the “authentic”. We might consider three other levels of distance from authenticity.

First, when individuals tell their stories, they perform a version of themselves and their experiences. Undoubtedly, these non-citizen youth are keenly aware of their audiences and the uneven forces at work.

Second, their words are truly overpopulated with the intentions of others – including collisions between the past and the present, between their life on the other side of the border and their life in the United States, between different camps of thought, between different players as they move through the various institutions. Thus, the socially charged life of each word becomes all the more so.
Third, that words are always half somebody else’s surely manifests in tentative, faltering, and uncertain moments as the child struggles to sort out the multiple intentions of words themselves. Youth develop notions of what their audience wants to hear. Thus, their voices carry with them the struggles they are having as persons in limbo.

What might it mean to recognize that there can be no such thing as unmediated truth? What might it mean to think about strategic voices rather than authentic or non-authentic ones?

Despite the undeniably hierarchical power relations that collide when state personnel confront undocumented subjects, power is nevertheless not simply oppressive. Power is also generative. In other words, bureaucrats, social workers, judges and the like enact practices that generate discourses and norms. In turn, these constitute truth.

The custodial system inevitably makes certain categories appear as natural when they are, in fact, not only historical and cultural constructions but also integral to decisions made about youth lacking citizenship privileges. As Somers writes, “With this complex intersection and power of these systems, it is unsurprising that children lose agency and voice as they are migrated through these systems”.

Children’s voices are amplified as they migrate through systems, but those amplifications are distorted due to the eviscerating process itself. In the context of institutions, there is no authentic voice. A search for such an object becomes nothing short of a witch hunt. Certainly, much more sorting could be done as to the conundrum of voice versus voicelessness. Perhaps this reflection begins to expose cultural assumptions about voice and to suggest an alternative and empathetic approach to thinking about the challenges of giving voice to undocumented children.

REFERENCES

Bakhtin, M.
Foucault, M.
Hill, J.
Mental Health Issues Among Detained Youth: A Brief Commentary on Aryah Somers’ Article

Stuart Lustig

The complexity of systems embroiling juveniles in and out of detention raises significant mental health concerns that I, as a child psychiatrist familiar with this population, will briefly address within this short commentary on Aryah Somers informative and poignant article. These issues include the difficulty many traumatized youth face in discussing the events leading up to their detention, and the cumulative impact of detention on their emotional well-being. I will conclude by indicating roles which mental health professionals can play to support youth seeking legal relief from the immigration system, their legal representatives, and their adjudicators.

In some ways, Humberto was fortunate that “he felt able to disclose to his caseworker at the ORR [Office of Refugee Resettlement] subcontracted shelter that he had an abusive life with his mother and he did not want to be returned to his country of origin”. Many undocumented immigrants seeking legal relief have great difficulty listing the traumatic events that have happened to them because of symptoms of post-traumatic stress disorder (PTSD), one of which is actively avoiding any triggers of traumatic memories, such as talking about the traumas. In addition to this avoidance of reminders of trauma, many traumatic experiences may be culturally taboo to discuss, such as rape, homosexuality, or even, for males, admission of abuse by women which may be perceived as an affront to their masculinity. The discussion of taboo traumas can be particularly difficult in front of authority figures such as prison wardens, attorneys, and judges, or with those who are unknown to the victim.

Another mental health concern arises within Humberto’s statement, “I felt safe but desperate. I just did not want to lose my case and be deported”. Indeed, the mental health of asylum seekers is adversely affected by protracted stays in asylum facilities; young people in particular feel punished for crimes they did not commit (other than being in the country illegally) and their emotional state and desperation to leave the detention facility can affect their willingness to consider all legal options (Lauritzen, forthcoming). For adults, a few months in detention can feel quite protracted, but for a young person, those few months can feel like an eternity to be terminated at all costs, even at the cost of effective legal relief that may otherwise be in the not-too-distant future.

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Mental health professionals can help give voice to youths caught among the three systems of protection and enforcement by acknowledging the difficulty of retelling their traumas while offering psychological support to facilitate the emergence of their narratives. Such clinicians can help investigate where a young person’s primary psychological attachments lie, enabling the effective determination of their best interest in placement decisions. Importantly, mental health clinicians can detect and diagnose psychiatric conditions, such as PTSD. Symptoms of PTSD (e.g., poor memory, reluctance to discuss the trauma, emotionally blunt appearance) may, ironically, adversely affect credibility determinations by adjudicators charged with evaluating the likelihood of the very traumas causing these symptoms (Lustig, 2008). Collaboration among medical and legal professionals, although logistically challenging for various reasons, would help protection and enforcement agencies serve and evaluate youths such as Humberto more effectively.

REFERENCES

Lauritzen, C. Forthcoming “Children and families seeking asylum: living conditions and mental health”, *International Migration.*