



UNACCOMPANIED YOUNG MIGRANTS

IDENTITY, CARE AND JUSTICE

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A relational approach to unaccompanied minor migration, detention and legal protection in Mexico and the US

Mario Bruzzone and Luis Enrique González-Araiza

Introduction

This chapter considers the state systems of protection for unaccompanied migrant minors in Mexico and the US. The transits and arrivals of Central American minors – from El Salvador, Guatemala, and Honduras – offer important opportunities for scholars to consider the sociolegal practices of migrant care, especially how legally-accepted but institutionally-unfulfilled claims might signify something more than system failures. Instead this chapter takes the law and state institutions as sites for power relations to play out, rather than as outcomes of legislative power struggles or as resources for mutual claims by states and individuals (Martin, 2011). Our objective is to analyse the distinctive – and perhaps constitutive – tensions that govern state systems of protection for unaccompanied minors, looking to both legal texts and the empirical realities of state activities in Mexico and the US.

US and Mexican legal systems systematically limit migrant minors' rights and agency, in large part through determinations that children are not full legal subjects. Although migrant minors often make considered decisions as individuals and as parts of a family unit, they are generally not granted legal rights to make decisions regarding their best interests. Writing in the US context, Lauren Heidbrink emphasises a paradox of child agency:

Without a legally recognized caregiver, the law views unaccompanied children as existing alone, though paradoxically still dependent. Without a recognizable

parent, the child cannot meaningfully access the state to petition for legal relief ... Yet as social actors, migrant children challenge conceptualizations of child dependence and passivity, explicitly through their unauthorized and independent presence in the United States, and implicitly in the ways they move through multiple geographic and institutional sites in search of care, education, or employment. (2013: 138–9)

We follow Heidbrink in emphasising the problem of unaccompanied minor migrants' agency for systems that attempt to erase it in legal discourse and minimise it in everyday practices. Our analyses highlight the important work that 'childhood' does as a category and as a legal resource. Yet we also recognise that the contradiction that Heidbrink examines also constrains the state, because one cannot rid minors of agency by judicial or institutional fiat (Martin, 2011: 478).

Through this method, we seek to make several contributions. First, in dialogue with work on humanitarian borderwork (Williams, 2011, 2015; Vaughan-Williams, 2015; Pallister-Wilkins, 2017) and the 'politics of life' – in Didier Fassin's words, 'the evaluation of human beings and the meaning of their existence' (2007: 500–501) – we demonstrate how state systems of unaccompanied migrant minor protection reveal tensions between care for children and policing for undocumented migrants (Heidbrink, 2013), something that is highlighted in other chapters in this book (most notably Chapters One, Two and Ten). Through carework and policing practices, the exclusionary use of borders ('borderwork') can be reinforced, as national organisations carry out their responsibilities in relation to unaccompanied minor migrants as well as by non-state actors challenging the supposed fixity of state-centred boundaries. We emphasise how affirmations of social value may support exclusionary projects, even while the state is disunified and polyvocal. The disunified state's contradictory practices serve as both field of struggle and engine of differentiation in which unaccompanied migrant minors are figured as the most dependent and vulnerable figures in the system, as well as the figures that the system most disprivileges and disadvantages.

Second, and inscribed within our approach, we make a descriptive-interpretive account of the Mexican everyday institutions that serve unaccompanied migrant minors, and their legal bases, accessible to Anglophone readers. At one level, we respond to changes in Mexican law since 2011 that have been inadequately described in English. At

a different level, our collaboration works to sketch Mexican legal contradictions and frameworks for scholars less familiar with the complex social practices and understandings associated with Mexican law and political institutions. As scholars have long observed, the law relies on external categories to prescribe and proscribe behaviours, and it further relies on a strategic indeterminacy to invest law-enforcement agents and agencies with a practical power to coerce behaviour (Harcourt, 2005; van Wichelen, 2015; Woodward and Bruzzone, 2015; Gorman, 2017). We put pressure on both the US and Mexican systems' irregularities, where the law fails to recognise adequately the social fields that it attempts to organise as well as where everyday practices subvert the law.

Third, we recognise that unaccompanied minors make decisions in a system that is configured in part by a bi-national effort to restrain Central American migration (Villafuerte Solís and García Aguilar, 2015; Seelke and Finklea, 2017; Vogt, 2017). We argue that migrant protection in North America should be seen as a 'geolegal' space (Brickell and Cuomo, Forthcoming) provisionally unified by minor migrants' mobilities, rather than segmented by national territories. The broader system of US–Mexico state protection of unaccompanied minor children acts to stabilise the potentially chaotic consequences of minor migration and yet is checked and delimited by its own internal tensions. This proposal extends recent works that highlight how migrant minors exhibit agency throughout their journeys (Heidbrink, 2013; Aitken et al, 2014; Thompson et al, 2017; Swanson and Torres, 2016; see also Puga 2016). Few unaccompanied Central American minors enter Mexico with the intent to stay. Rather, through a focus on migrants' access to social services and forms of protection, minor migrants' strategies en route can reveal the series of reciprocities between subnational institutions that take place across borders.

The Mexican system for protecting minor migrants

The Mexican legal framework for protecting unaccompanied migrant minors is broadly oriented to favour migrants' rights, and especially those of unaccompanied minor migrants. However, this pro-claimant orientation in legal texts belies the legal and institutional realities. We offer the story of 'Milton' as a vehicle to explore the severe difficulties for minor migrants to access their rights to remain in Mexico. Finally, we offer a critical analysis of the enforcement of migrants' rights in Mexico by taking departures from statute not as exceptions to the law, but as the law's normal operation.

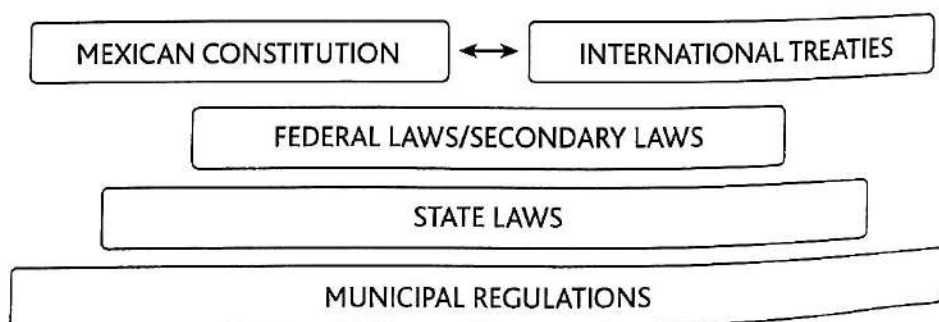
Legal framework

In June 2011, a Mexican legal reform dramatically reformed the legal framework for the protection of migrant children. The reform's foundation begins in Constitutional Article 1:

- a) All persons present in Mexican territory will enjoy the human rights recognised in this Constitution, as well as all international human-rights treaties to which Mexico is signatory (Article 1, Paragraph I)
- b) All related human-rights standards [*normas*] must be interpreted to favour the greatest degree of protection for the individual (Article 1, Paragraph II)
- c) The Mexican government as a whole is obliged to “promote, respect, protect and guarantee” the human rights of people in Mexico, in accordance with the principles of universality, interdependence, indivisibility and progressivity (Article 1, Paragraph III)¹

The reform amended many more of the Constitution's 136 articles, including Articles 3, 11, 15, 18, 29, 89, 97, 102 B and 105. Across these amendments, the reform re-codified the legal recognition of migrants' rights and provided some legal tools for rights enforcement and legal remedies. The Constitutional reform was, however, only the first step. Following the organisation of Mexican law, while each Constitutional Article recognises a specific right, those rights must be specified in application and in their mechanisms through statutory or ‘secondary’ federal laws (see Figure 6).

Figure 6: Hierarchy of Mexican law



A further reform in October 2011 incorporated 'the best interest of the child' (*interés superior de la niñez*) into the Mexican Constitution:

In all decisions and actions of the State, the principle of the best interest of the child will be observed and complied with, fully guaranteeing children's rights. Children have the right to satisfy their needs of food, health, education and healthy recreation for their comprehensive development. This principle should guide the design, execution, monitoring and evaluation of public policy aimed at children. (Article 4, Paragraph IX)

As a legal concept, the 'best interest of the child' guarantees children the affective and material conditions for a 'dignified life' (*vida digna*), as well as the material goods and services necessary to their present wellbeing and future growth. Although space precludes a significant treatment of the legal conception of 'dignified life' in Latin American jurisprudence and legal thinking (see Pasqualucci, 2008), it is foundational to understanding the Mexican uptake of the 'best interest of the child'. For our purposes, 'dignified life' implicates a set of affirmative duties or positive obligations that states have to provide for citizens, as well as the converse, that neglect or the failure to provide constitutes a violation of the child's individual rights.

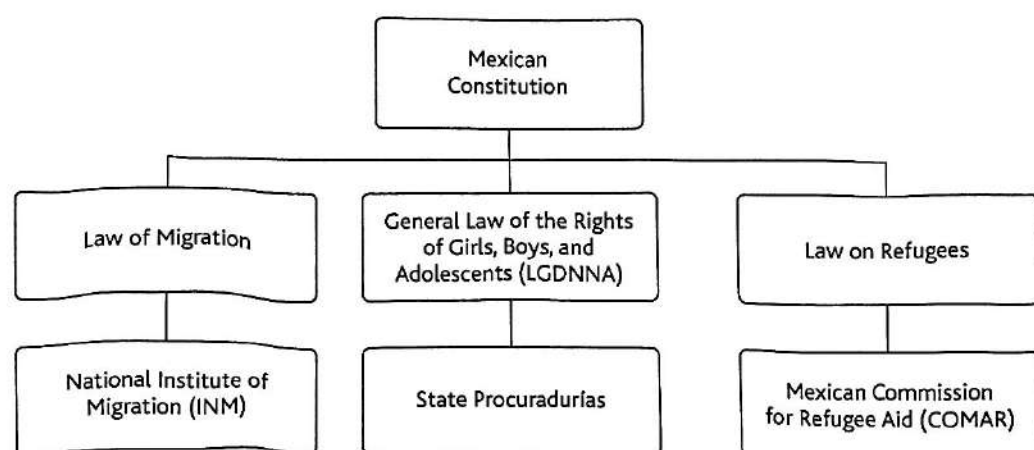
The Constitutional reforms led to three distinct 'secondary' laws relating to the rights of refugees and migrants: 2011's Law of Migration (*Ley de Migración*), 2011's the Law on Refugees, Complementary Protection and Political Asylum (*Ley sobre Refugiados, Protección Complementaria, y Asilo Político*; 'Law on Refugees'), as well as 2014's General Law of the Rights of Girls, Boys, and Adolescents (*Ley General de los Derechos de Niñas, Niños y Adolescentes*; LGDNNA). The Law of Migration and Law on Refugees followed from Article 11, establishing that 'every person has the right to seek and receive asylum' in Mexico (Article 11, Paragraph II). The Law of Migration enables minor migrants to regularise their status for 'humanitarian reasons' (*razones humanitarias*) and further, if unaccompanied and detained, transfers responsibility for housing and protection to Mexico's national child-welfare agency (*Sistema Nacional Para el Desarrollo Integral de la Familia*, DIF) and out of detention centres (Article 74, Law of Migration). The Law of Migration and the Law on Refugees direct the Mexican Commission for Refugee Aid (COMAR; *Comisión Mexicana de Ayuda a Refugiados*) and the migration-enforcement agency INM (National Institute of Migration; *Instituto Nacional de Migración*) to guarantee

the 'best interest of the child' for all minors, including non-citizens (Articles 9 and 20, Law on Refugees; Articles 11 and 120, Law of Migration).

The third law, the LGDNNA, is the main legal instrument for enforcing children's rights in Mexico. Beyond the 'needs' specified in Article 4 (above), the 'best interest of the child' standard has obliged the Mexican Congress to harmonise programmes and obligations for children's wellbeing across federal, state and municipal levels of government. We list the rights recognised in the LGDNNA in full, as part of this chapter's objective to outline the Mexican legal framework for Anglophone social science researchers:

1. Rights to life, survival and development;
 2. Right of priority [in relation to others' rights-claims];
 3. Right to identity;
 4. Right to live as a family;
 5. Right to substantive equality;
 6. Right not to be discriminated against;
 7. Right to live in conditions of well-being and healthy development;
 8. Right to personal physical integrity and a life free from violence;
 9. Right to health and health-care;
 10. Right of inclusion for children and adolescents with disabilities;
 11. Right to education;
 12. Right to rest and recreation;
 13. Rights to freedom of ethical convictions, thought, conscience, religion and culture;
 14. Rights to freedom of expression and access to information;
 15. Right to participate;
 16. Rights of association and assembly;
 17. Right to privacy;
 18. Rights to legal security and due process;
 19. Rights for migrant children and adolescents; and
 20. Right of access to information and communication technologies.
- (Article 13, LGDNNA)

In addition, the LGDNNA includes a special section with 12 articles (Articles 89–101) that grant protections to migrant children and adolescents. The LGDNNA, the Law of Migration, and the Law on Refugees act complementarily, and have come to define and even expand the Constitutional protections for unaccompanied minor migrants (see Figure 7).

Figure 7: Laws governing Mexican institutions involved in migrant protection

Mexican migrant protection in practice: the story of Milton

This description of minor migrants' legal rights appears to illustrate an orientation that prioritises care of minors over migration enforcement. In practice, however, unaccompanied minor migrants have little practical access to state protection. Here we follow the story of 'Milton' (a pseudonym), to elucidate how the Mexican system for migrant-minor protection militates towards a disinterest in the wellbeing of its charges. Heidbrink's paradox of migrant-minor agency arises as Mexican state institutions treat migrant minors as if they lack functional agency and produce them as legal subjects without rights to make decisions, and yet state protections are unavailable unless minor migrants make use of the very agency they are purported not to have. Further, as this section will detail, minor migrants' access to Mexican state protection is extremely difficult without outside social and legal support.

Milton arrived at the FM4 Paso Libre² Shelter in Guadalajara in February 2017 as a 17-year-old travelling alone from Honduras. Similar to many Mexican migrant shelters, FM4 has a formal intake procedure for new arrivals, involving an interview as one step.

In his interview, Milton mentioned two contributing causes for his departure. First, the economic conditions in his community of origin were precarious. Second, the Mara 18 gang had begun forcible recruitment of young men from his neighbourhood into its ranks. Milton had not (yet) been targeted individually; instead he left because the gang "was just about to come for me at my house to take me away". Because he was an unaccompanied minor, FM4 offered to assist him in regularising his migration status in Mexico, cautioning that the process could take months. Both the economic factors –

which negatively impact his right to development in the context of the LGDNNA – and gang-related insecurity offered ‘humanitarian reasons’ (Law of Migration, Article 52, Section V; and Article 74) for regularisation in Mexico. Milton accepted.

FM4 personnel contacted the Jalisco State Agency for the Protection of Children and Adolescents (‘the Procuraduría’; *Procuraduría³ de Protección de Niños, Niñas y Adolescentes del Estado de Jalisco*) by telephone. The Procuraduría is the legal representative for all unaccompanied minor migrants (LGDNNA, Article 136) and is charged with determining, enacting, and evaluating ‘special protection measures’ for children under its supervision. Procuraduría employees, however, did not come for Milton. When FM4 personnel contacted the Procuraduría a second time, they were told that the agency “did not have the operational capacity to make it happen” – and directed FM4 employees to deliver Milton to their office themselves. This request to FM4 – which was also a denial of services to Milton – put shelter workers under legal risk. Because the Procuraduría was not yet legal custodian, Milton’s legal guardian was not consenting to the transportation, and Milton was legally disqualified from consenting, transport in any private vehicle met the Mexican legal definition for trafficking minors (Mexican Federal Criminal Code, Article 366). Instead, and with Milton’s participation, FM4 personnel formulated and presented a legal petition for state protection through the Procuraduría as well as the first steps towards a humanitarian visa.

FM4’s senior staff travelled with Milton to present the petition in person. Upon delivery, the Procuraduría chose to leave Milton with FM4, and to leave his guardianship in a state of legal limbo while it decided on Milton’s case, continuing the legal risks for the shelter and its employees. A full month passed before the Procuraduría gave its response. The response offered two fundamental decisions: first, it granted Milton ‘urgent protection measures’, consisting of the safekeeping and legal custody by FM4; and second, it affirmed that legal representation and immigration procedures were the Procuraduría’s sole remit, and that FM4 was barred from assisting Milton’s regularisation. The Procuraduría did not communicate with Milton nor FM4 to follow up on the case for the next two months.

After those two months, FM4 filed a legal-neglect complaint on Milton’s behalf with the Jalisco State Human Rights Commission, responsible for investigating legal violations committed, commissioned or enabled by public servants. Following the letter of the LGDNNA, the complaint listed the Procuraduría’s titular heads: the governor of Jalisco and mayor of Guadalajara. Within three weeks, the Procuraduría

sent a response for Milton to have interviews with its psychologist, social worker and lawyer in short order. Again, none of these workers showed up for Milton. FM4 staff accompanied Milton back to the Procuraduría offices to force the issue. After the interviews, however, Procuraduría officials demanded a photo identification from the Honduras Ministry of Foreign Affairs. Milton lacked this document, but Procuraduría officials said that they could take the necessary steps to get one on Milton's behalf.

Another month passed without contact from the Procuraduría. The nearest Honduran consular authority to Guadalajara lies in San Luis Potosí, two states and 330 km distance away. FM4 had assumed that the Procuraduría had regular contact with the Consulate and familiarity with its procedures, but after the month, FM4 staff contacted the Consulate directly. The Consulate was willing to speak with FM4 as Milton's legal custodian in Mexico, and staff said that they had no record of contact from the Procuraduría of Jalisco – indeed, they had no knowledge of Milton's case until FM4's communication. The Consulate processed Milton's request and delivered the ID directly to the FM4 shelter.

FM4 and Milton made a strategic decision to bypass the Procuraduría and submit the application for legal status directly to the INM. FM4 recontacted the office of the State Human Rights Commission, to note the Procuraduría's failure to contact Milton's consulate and to charge that this neglect violated Milton's rights under the Vienna Convention on Consular Relations (Article 5, paragraphs e, g, h) as well as a violation of his rights under the LGDNNA. One week later, the Procuraduría summoned Milton and, with staff of both the Human Rights Commission and the INM, finalised his regularisation in Mexico. Milton's 'humanitarian' regularisation had taken just under 11 months. He received his official documentation nine days prior to his 18th birthday.

Understanding minor migrants' claims to protection in Mexico

We find Milton's experience both unjust and infuriating. We hasten to add that Jalisco is widely considered a Mexican state 'friendly' to migrants, both in bureaucracy as well as in cultural discourses and prevailing attitudes. Yet while the impediments were both numerous and drawn out, they were not, and are not, atypical.

Before progressing to discuss the US system of migrant minor protection, we want to draw out three points. Our first point concerns rights. Neither the Procuraduría nor the INM contested Milton's legal claim to a humanitarian visa, as formulated in his initial petition. An

account based in liberal political theory might highlight problems of determining and guaranteeing justice for migrants and others outside the state polity (see, for example, Carens, 2015). But we might instead read for the social tensions that exist between the law and its exterior. One law, the LGDNNA, has both mandated the institutions that are to care for unaccompanied minor migrants, including the Procuraduría, and left those institutions unaccountable, or barely accountable, for failing to do so. The toleration of rights violations is indicative of both an economy of rights – differential allocation based in social practices, which manifest in law and institutions – as well as an intimate economy of migration (Hiemstra and Conlon, 2016) to control and distribute who should pay for the social reproduction of some children and all migrants. We should be hesitant to assume that all the individuals carry equal standing, which is a crucial point of departure for liberal political theory. Instead, the organised neglect of Milton enacts a social process that decides whether paperwork is worth filing, a legal status is worth adjudicating, rights are worth protecting, and a life is worth legitimising. Milton's experience describes an agency that shunts off the responsibility for keeping him alive to an NGO, and continually reinforces Milton's lesser status as a certain type of political subject, one who is constructed as – but, we caution, not automatically *lived* as – less 'grievable' (Butler, 2015) and 'less-than-fully-human' (Philo, 2017).

Our second point concerns knowledge. Claiming rights within this system, even rights that all participating agencies agree are due, requires a profound knowledge of both legality and procedure. To receive his legal protections, Milton had to know: (a) Mexican law regarding unaccompanied migrant minors; (b) whether his case qualified under Mexican law; (c) the agency (the Procuraduría) charged with his legal protection; (d) how to write a legal petition; (e) how to petition that agency in particular; (f) how to petition for legal status to a second agency, the INM; (g) how to file a complaint with a third agency, the Human Rights Commission, including who to charge with neglect when the first agency did not fulfil its legal obligations; (h) where to get a Honduran photo ID while in Mexico; (i) how to get a Honduran photo ID while hundreds of kilometres from the nearest consulate; (j) how to fill out the various necessary forms for the application process; (k) how to work around the Procuraduría in order to solicit legal status from the INM, using Human Rights Commission workers for assistance; and (l) how to support himself, without legal authorisation to work, during a process lasting close to a year. Recently both media and UN officials have implied that growing numbers of successful asylum claims in Mexico indicated better state protections

for migrants in general and particularly for unaccompanied minor migrants. As the sheer difficulty of managing this system should attest, no valid inferences can be drawn about asylum trends in Mexico if they ignore or elide the actions of the non-governmental organisations that make asylum possible.

Our third point concerns the power relations between and within institutions. Milton barely interacted with any worker or individual in any of the agencies involved as a person. The social norms around reciprocity and respect that 'personhood' typically implies were absent. Rather, Milton was an obligation, a chore, a name on a form, and finally a cause for a lawsuit. Simultaneously the agencies involved all evinced competing, even surprising priorities. The Procuraduría did not help the figure who its entire existence is based around. The INM did not attempt to deport the migrant, contrary to much of its institutional, cultural and funding priorities. The Jalisco State Human Rights Commission assisted with a case only marginally within its legal purview, possibly because of the governor's or mayor's fears of bad publicity. The temporary alliances in Milton's experience are less mission- or morally-driven than related to struggles between and within agencies. Those struggles play out in part across a binary of migrant care and migration enforcement. The claim to the Human Rights Commission against the Procuraduría was that a failure of care was also a *de facto* form of punishing Milton (Doering-White, 2018): legally Milton was to do nothing but wait. The capacity to use the Human Rights Commission to enforce rights is limited as a tactic; it is less a permanent safeguard than an indicator of a broader power configuration in the moment when Milton attempted to claim his legal rights.

The US system for minor migrants

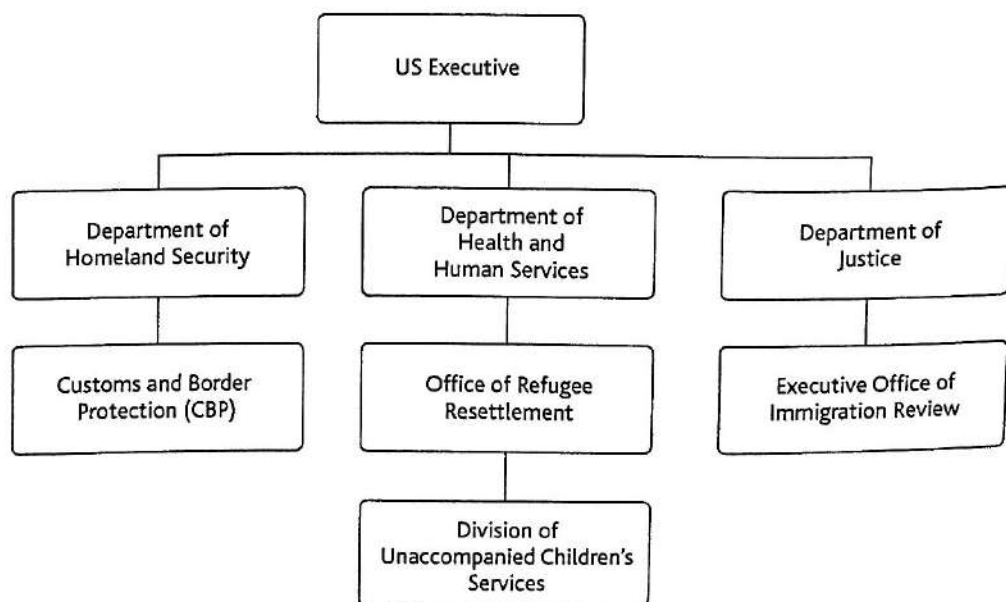
The chapter now moves to an examination of the US system for minor-migrant protection as well as for the arbitration of unaccompanied migrant minors' claims to state protection. We summarise the relevant legal procedure and agencies briefly, in deference to the many strong accounts elsewhere. Our focus lies in a pair of contradictory state imperatives that inform our account of Mexican state protections. First, US agencies are caught between political directives to punish unaccompanied minors as undesired immigrants and alternatively to protect them as endangered children. Second, US agencies contradictorily treat unaccompanied minors as both 'adults in miniature' and as dependants incapable of agency (Aitken et al, 2014).

As we show, the overlap of these imperatives is an important point of contact between humanitarian borderwork and children's geographies, both within the social work system and within the legal system.

US legislative framework for unaccompanied minor migrant protection

Two major pieces of US legislation have configured the legal framework of unaccompanied minor migrant⁴ protection. The first is the 2002 Homeland Security Act. The Act transferred the care for unaccompanied minor migrants out of the hands of the US immigration-enforcement bureaucracy and into the auspices of the federal Department of Health and Human Services (see Figure 8). However, the 'best interest of the child'⁵ standard was never formally extended to children in immigration detention, although it is both a mandated 'consideration' and a key principle of the domestic child welfare system. The second piece of legislation is the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPPRA), directed specifically at unaccompanied migrant minors. TVPPRA both clarified and expanded the set of protections for migrant children in the US from non-contiguous countries. Section 1232(a)(3) mandates that personnel of US Customs and Border Protection (CBP), which operates migration controls at US territorial borders, determine four items when detaining an irregular migrant minor for possible

Figure 8: US migration enforcement and unaccompanied minor migrant protection agencies



repatriation. The CBP can immediately repatriate only minors who (a) can and do accept voluntary return, (b) have no possible claims of asylum, (c) have not been potential victims of trafficking, and (d) are Canadian or Mexican nationals. All others are to be transferred to the Office of Refugee Resettlement (ORR), outside the Department of Homeland Security (DHS).

The CBP must decide all four of the above items within the first 48 hours, as a consequence of legal settlement in the case of *Flores vs. Reno* (1996). As a safeguard, even minors for whom the CBP has not decided within the deadline are transferred to ORR custody, specifically the Division of Unaccompanied Children's Services, although the CBP might make an alternative determination after 48 hours has elapsed. A separate bureaucracy, the Department of Justice's Executive Office of Immigration Review, conducts hearings to adjudicate the rights of unaccompanied minor migrants' cases. The ORR often releases unaccompanied minor migrants to 'sponsors', who assume legal guardianship of the minor and who may not have regular migration status. Thus, when unaccompanied migrant minors encounter a CBP agent, whether at a port of entry or between ports of entry, they move across migration-enforcement and social-services bureaucracies, sometimes several times (Byrne and Miller, 2012: 7). Without detailing the multiple legal avenues that migrants have for establishing their continued or permanent residence in the US, it suffices to note that minor migrants' cases can take substantial amounts of time, and that permanent detention is often not practicable for the US government.

Internal tensions in US protection of migrant minors

Unaccompanied minor migrants' initial contact with state agents occurs with the CBP, which is both metaphorically fitting and indicative of a broad state orientation. A deep distrust of migrants pervades the system. CBP agents do not evaluate minor migrants' 'best interests' or protection needs, nor elicit testimony that might be favourable to them as rights claimants. Rather, CBP agents evaluate unaccompanied minor migrants' stories for their perceived truthfulness and their adherence to definitional standards of asylum (Mountz, 2010; Fassin and Kobelinsky, 2012). Yet this sceptical consistency belies an inconsistency: CBP agents are widely regarded as poorly trained in asylum procedures, much less for work with children, which entails inconsistent application of rules for protection (UNHCR, 2014). Indeed, a major complaint of CBP agents' union has been that

agents must care for minor migrants without really knowing how (National Border Patrol Council, 2014). Conversely, ORR provides unaccompanied minor migrants with access to education, housing, health care, mental health services and legal assistance services. These social welfare imperatives exist alongside discretionary powers, for example to determine minors' housing placements on a continuum from sponsored release to 'staff-secure' facilities with severely restrained mobility (Terrio, 2015). In practice, ORR and DHS decide individual minors' confinement through both mission and cost, especially social-reproductive costs (Terrio, 2015; see also Williams and Massaro, 2016).

Judicial oversight is characterised by a second set of tensions. On the one hand, CBP and ORR have an affirmative duty of protection after apprehending unaccompanied minor migrants, and – apart from deportation – may only discharge that duty by placing minor migrants with 'sponsor' caregivers, because minors cannot be legal agents. The legal scholar Sarah Rogerson writes that 'rather than existing as persons with individual substantive and procedural rights, children are subjected to the presumption that they lack self-sufficiency and are therefore innately dependent' (2017: 846). On the other hand, in court minor migrants are treated as 'adults in miniature' – subject to identical evidentiary and burden-of-proof criteria, responsible for finding legal counsel, and without age-specific protections from expulsion when contrary to their best interests (Heidbrink, 2013; Terrio, 2015; Rogerson, 2017). Mexican minors are likewise capable of consenting to their removal, as above. Such a system leads to the absurd spectacle of three- and four-year-olds 'representing themselves' in immigration court (Coxon-Smith, 2017).

The Federal Appellate case *Flores v. Sessions* (2017) provides a concrete example of both sets of legal tensions. *Flores v. Sessions* considered and then affirmed minor migrants' right to a bond hearing while under ORR custody – that is, a hearing to determine if they may be granted release on bond⁶ in certain circumstances. At first glance a minor procedural issue, the right to a bond hearing also establishes other rights for minor migrant detainees, including rights to be represented by legal counsel, to an assessment of detention by an immigration judge outside the ORR, to present evidence and respond to government evidence, and to build a public record of custody (Prandini and Kamhi, 2017). The exercise of any of these rights, however, comes within an ORR context in which minors have few rights to exercise on their own behalf – because they are not legally competent to exercise rights, nor carry responsibility for potential immigration offences (Martin, 2011; Bosniak, 2013; Heidbrink, 2013;

Rogerson, 2017). The form of legal challenge used, the class action, parallels these tensions. A class action posits that some group has rights but is unable to exercise those rights in a practical way. Thus in the first instance, the court adjudicates that rights exist and are denied – that, for instance, unaccompanied minor migrants have rights to bond hearings. But in the second instance, the legal system removes the negotiations over the specific content of those rights to a level where class members are not present – such as legal proceedings in which minor migrants are not competent to practise and require others in order to have rights.

These bureaucratic tensions offer two points of contact across scholarship on humanitarian borderwork and children's geographies. First, the titular 'Flores' of the above legal cases is a single person: Jenny Lisette Flores, a detained migrant who was a minor in the 1980s. *Flores* lawsuits concern the dual use of confinement for both policing and protecting unaccompanied minor migrants. In the 30-year history of *Flores* lawsuits, the Department for Homeland Security (prior to 2003 the Immigration and Naturalization Service, INS), have continued to defend confinement as the single, combined, appropriate response to both enforcement needs and humanitarian emergencies (Terrio, 2015; in other contexts, see Williams, 2011; Vaughan-Williams, 2015). Detaining children both protects them 'from threats by smugglers, traffickers, and gangs' (DHHS, section 6.2.2) and protects a social body outside of detention from a minor migrant who 'poses a danger to himself or others, or ... presents an escape risk' (DHHS, section 1.4.2). 'Protecting' unaccompanied minor migrants does bordering work without a necessary recourse to expulsion or deportation, in part but not exclusively by spatial segregation (Coutin, 2010). The discursive conflation of policing and punishment is a productive instance of confinement practice, even as representation organises practices and procedures of who to confine, where, in what forms of facilities, and to what ends.

A second point of contact appears within the law, which both distinguishes political rights and differentiates individuals. The US legal system lacks a workable conception of children's agency, instead burdening children with contradictory positions of independence/dependency and responsibility/irresponsibility. If immigration judges in courtrooms are to settle competing interpretations of law, they must also arbitrate what a child is, can do and might be responsible for. A context that is external to the law is necessary for the law to function. Legal contradictions arise when the legal petitioners comprise a set of actors who are not 'full' citizens or fully endowed with legal forms of

liberal subjectivity (Aitken, 2001; Varsanyi, 2008). Yet the terms on which that context is absorbed into the law – judges have a large leeway to declare ‘legal facts’ but cannot enact any reality they choose – reveal a broader set of power relations. When judges adjudicate questions of statutory language, as in *Flores v. Sessions*, they arbitrate how a classificatory status of a generalised human condition – childhood – is recognised against an immigration status. Unaccompanied minor migrants thus have two corresponding figures of contrast, at once adult irregular migrants but also citizen minors invested with legal rights. At the level of borderwork, the critical power relation concerns how (non-)agents’ claims to security and assistance are made to function in a territory that is refusing them residence, perhaps temporarily and perhaps indefinitely (Gorman 2017).

Discussion: towards a relational account of minor migrant protection

This section draws out four points of convergence between the Mexican and US state protection systems to analyse how protection that is granted or withheld in one jurisdiction affects unaccompanied minor migrants’ decisions and experiences in the other. In refusing to stabilise the border as the single site of differentiation between systems, and thereby incorporating longstanding critiques of methodological nationalism (Glick Schiller, 2005), we offer an account of migrant protection as a set of interrelated systems that operate across borders rather than within them. The continuities occur twice over: first, in the meshing of the boundaries of the systems of protection, the ‘geolegal space’ in which agencies rather than nation states provide the relevant boundaries; and in the continuities and linkages that minor migrants as well as state agencies create across space.

To begin, we suggest that ‘best interest of the child’ be understood as an international discourse, notwithstanding national difference in its uptake, that includes institutional conceptions of childhood and child dependence. In facilities and for parent institutions, social service provision is directed at children rather than collaboratively working with minors towards their development. Milton’s case illustrates this nicely, since the FM4 shelter was both the only organisation concerned with Milton’s participation rather than acquiescence but was also forbidden from helping him. Facilities for unaccompanied children in both countries commonly evaluate their success based on services provided rather than outcomes for individuals, especially in terms of psychosocial, educational, or health outcomes. Further,

unaccompanied migrant minor 'protection' takes place in the facilities and general processes that are veiled and largely closed off from exterior scrutiny. Protecting the 'vulnerable' and 'dependent' minors within (Terrio, 2015; Doering-White, 2018) is to be judged only on its alignment to the checklists of proper humanitarian responses for the right sorts of victims (Fassin and Kobelinsky, 2012; Galli, 2018). Yet recurring motifs present children as consumptive burdens, and facilities are put under consistent pressure to cut costs or operate with greater economic efficiency. US facilities in particular are oriented to presume that detained children are inherently potential risks to the public, which means that as a class they are burdens to systems of law and order (Heidbrink, 2013), and that burden must be weighed against their claims to services.

Next, both the Mexican and US systems presume and legally produce 'unaccompanied minors' as non-agential children. On the one hand, the repetitious attempts to call the figure of the dependent child into being presume that the child conforms to the figure necessary for the organisation of institutionalised services (Heidbrink, 2017). As Susan Terrio's work (2015) has shown, minors can be severely sanctioned when they fail to do so. On the other hand, the impossibility of creating a non-agential child in an embodied person makes both the institutions, and the care-enforcement tension that they manifest, vulnerable to unruly behaviours. For facilities and their organising institutions, unauthorised behaviours and departures fail the institutional mandate to confine and control children, the bureaucratic need to compete with other agencies for state resources, and the moral imperative to care. When children do not receive adequate care, they strategise for ways to leave and to find what they need – and they do so without especial regard for borders (see also the discussion of the young people dispersed from the Calais camp in Chapter One, and the young people who leave reception centres in Nordic countries in Chapter Nine).

The messy everyday relationships between care and enforcement should further trouble a state-centric approach that takes state borders as the primary boundary. While we implicitly conceptualised care and enforcement (or policing) as two poles on a single continuum above, the lived experiences of both unaccompanied minor migrants and social workers in actual facilities tend towards oscillations between discrete practices of care and enforcement. We see less broad state prerogatives towards care or enforcement taken up by agencies than instances of care or enforcement responding to immediate institutional needs. For example, Mexican state *procuradurías*, their counterparts in

the federal agency DIF and facilities in the US' ORR system are often poor caretakers. At the same time, what qualifies as legally sufficient care for individuals is often morally insufficient. This situation may appear to place social workers and care workers in an unenviable bind between state power, shifting institutional priorities, and their ethical and occupational obligations to minor migrants (see also Chapters Three, Five, Six and Seven). Yet it also multiplies the sites for resisting a dominant state priority of expulsion within agencies and institutions. As the story of Milton demonstrates, agencies can work to undermine one another's projects, rather than multiplying power by subordinating one agency to another as in the US.

Finally, shared categories (such as 'unaccompanied minors') and principles (such as 'the best interest of the child') are key sites for a production and regulation of subject positions, as well as a production and regulation of differential mobilities (Mezzadra and Neilson, 2013; Williams and Massaro, 2016). But when political subject positions are shared both across agencies and across national boundaries, new possibilities for alliances emerge. Agencies such as the Procuraduría, INM and the State Human Rights Commission all claim an authority devolved from the Mexican national state even as they may refuse to share in the priorities of other agencies and/or take up priorities opposed to their missions. The Jalisco Procuraduría might, for instance, work with the INM to enable unaccompanied minor migrants to arrive at the US border, transferring the 'burden' to US asylum and border-enforcement officials. The INM and CBP also have an extensive history of collaborations that exceeds the legal mandates and statutory authority of either agency, and more recently have collaborated to subvert Mexico's Law of Migration (Hernández, 2010; Márquez Covarrubias, 2015). More humanely, 'best interest of the child' is an international standard, which at once proposes an effective abnegation of national difference – the standard of 'best' might be fulfilled in either the US or in Mexico for unaccompanied minor migrants – and positions the Mexican and US systems as allied rather than competing. Shared categories and principles comprise one condition of possibility for strategic alliances across agencies, but these alliances are not automatically constrained by state borders.

Let us conclude by returning to the question of minors' agency. Migrants can and do make choices within this system, even though its workings are continually obscured, sometimes by bureaucratic functioning as in Milton's story and sometimes by deliberate acts to undermine migrants' claims to stay (Terrio, 2015). Doering-White (2018) briefly discusses several minors who chose not to undertake

the Mexican asylum process or who abandon it to continue their US-bound journeys. Minor migrants leave the Mexican process not because it is 'bad' for them, but because it takes too long, subjects them to humiliations, and denies them access to everyday and developmental needs. Glibly, we might recognise these non-agential minors as making decisions regarding their 'best interests,' revealing a final interrelation between the Mexican and the US systems of protection: that migrants themselves employ a calculus of their best option. Yet a necessary reciprocity also exists. The reality of minor migrant agency enables a bureaucratic 'game', similar to that between FM4 and the Jalisco Procuraduría, in which the latter gambled that FM4 would assume the costs of Milton's survival. The logic of the 'game' crosses borders, enabled by shared conceptual forms and discourses of protection. Mexican agencies including, but not limited to the state procuradurías, can engage in a certain strategic withholding of services. On the one hand, an absence of provision can mean that other agencies will take up the slack, whether in Mexico or in the US, without denying minors their 'best interest'. On the other hand, agencies in Mexico know they are effectively backstopped by US protections because, for the vast majority of Central American unaccompanied minor migrants, Mexico is not their final, desired or best choice to make a life.

Conclusion

This discussion of the Mexican and US systems of protection recognises that both systems share tensions between care and enforcement, specific orientations to what the 'best interest of the child' means, and in their attempts to declare minor migrants as non-agential children. We suggest that unaccompanied minor migrants' agency and their strategies reveal how the social limits of a common 'humanity' (Butler 2015: 35–44) are continually produced and enacted, that is, the terms on which unaccompanied minor migrants are normatively valued and the outcomes of the social processes of valuation. These valuations are not, however, ever finalised; they are contested both by migrants and through the struggles that bureaucratic institutions' internecine struggles, within states and across borders. Further, both the care-enforcement tension and the problem of child agency are fundamental to the present organisation of systems of minor migrant protection. These problems arise from a political orientation towards migration and asylum, as well as a judicial system that must adjudicate questions outside of its purview in order to adjudicate the problems inside its domain.

The regimes to protect minor migrant children, in both Mexico and the US, establish a subject position of the unaccompanied minor migrant. This subject position gives both a criterion for prescribing individual minor migrants' behaviours and a reference point to establish how far deviations will be tolerated by institutions and their workers. This account tracks closely with recent work in feminist geopolitics to account for how geopolitical initiatives can be lived through individuals' bodies when individuals are made to present as political subjects (Massaro and Williams, 2013; Williams and Massaro, 2016; Brickell and Cuomo, forthcoming). In the law – and the categories and principles that the law codifies – socio-spatial experiences are co-constituted with identities and perhaps with subjectivities. Shared categories and principles become key sites for a production and regulation of subject positions and a production and regulation of material mobilities for the different subjects marked out through these processes.

Epilogue

We complete this chapter in a moment (July 2018) in which the US government has been punitively separating minors from their parents, including for asylum claimants. Framed as 'zero tolerance', it manages to be both extrajudicial punishment and in contradiction to settled understandings of immigration law and *Flores* lawsuits. The US bureaucracy can be observed moving towards migration enforcement and away from migrant care, in part by exploiting children's status as migrants (such as no right to counsel). Future judges may very well decide that the practices are legal – obviating much of this analysis – among a set of much-worse consequences. Yet we caution that such an event would corroborate our orientation here: that the law is a field of struggle. From a sociolegal perspective, we should not assume that the law is inherently stable, but rather that any apparent stillness results from the relations of power that configure it.

Notes

- ¹ At time of writing there is no generally accepted English translation for the current Mexican constitution. Because international legal terminology can be extremely nuanced, this and all subsequent translations should be treated as paraphrases.
- ² For further information about FM4 Paso Libre see www.fm4pasolibre.org/
- ³ *Procuradurías* are government agencies charged with helping individuals access their legal rights. One translation would be 'ombudsman', but for Latin American legal contexts, 'ombudsman' lacks the obligation to help that is crucial to *procuraduría*.

- ⁴ The US legal system uses the term 'unaccompanied alien minors', or UAMs. Our references to unaccompanied minor migrants encompass UAMs when referring to legal contexts.
- ⁵ US legal discourse uses both 'best interest of the child' and 'best interests of the child'. We use the singular 'best interest of the child' to underscore parallels between the Mexican and US conceptions.
- ⁶ The ORR guidance as of February 2018 states that 'Although these hearings are known as 'bond hearings,' ORR does not require payment of any money in the event a court grants bond' (2.9).

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