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ISSUE BRIEF

INDIGENOUS CHILD MIGRATION: RESEARCH, LAW, AND POLICY FOR CONSIDERATION IN IMMIGRATION PROCEEDINGS

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INDIGENOUS CHILD MIGRATION: RESEARCH, LAW, AND POLICY FOR CONSIDERATION IN IMMIGRATION PROCEEDINGS

INTRODUCTION

Indigenous Peoples are subject to a wide range of harms, and Indigenous children and youth are additionally subjected to unique age-specific harms. When Indigenous children and youth navigate the U.S. immigration system, their experiences are complicated by the distinct political, economic, linguistic and social dimensions of their identity as both Indigenous and as a child.

There are more than 5,000 distinct groups of Indigenous Peoples around the globe comprising over 500 million people; as such, a discussion of the specific conditions for Indigenous children and youth is beyond the scope of this brief. Instead, this brief examines how some child- and youth-serving legal systems in the United States have adapted to recognize the unique characteristics and needs of Indigenous children to ensure that laws and processes safeguard their rights and well-being. Arguably the most significant instance of this formal recognition in the U.S. is the Indian Child Welfare Act (ICWA). This brief does not call for the strict application of or compliance with ICWA in the immigration setting.[1] Instead, it identifies the concepts and practices enshrined in ICWA as having the potential to inform and even transform immigration proceedings involving Indigenous children and youth.

This brief is intended to assist adjudicators as they consider decisions impacting Indigenous children and youth, to enlist best practices in accommodating Indigenous children and youth in the immigration context, and to reduce the unintended harm to Indigenous young people as they navigate U.S. immigration systems. The brief is comprised of three sections: 1) the interdisciplinary research on Indigenous child migration with a specific focus on Mexico and Central America; 2) a primer on the Indian Child Welfare Act, which provides guidance on how child- and youth-serving legal systems adapt to Indigenous culture and identity; and 3) critical implications for immigration law and practice, which includes practices for effectively working with Indigenous children and youth.

THE ISSUE DEFINED

Researchers have documented how Indigenous children often do not have adequate access to protection in countries of origin, zones of transit, and countries of arrival and settlement.[2] UNICEF suggests that Indigenous migrant and refugee children are also at greater risk for trafficking.[3] In the context of U.S. immigration law, Indigenous identity is often conflated with ethnicity or race. Racialized as Latinx and homogenized by U.S. policymakers, the Indigenous identity of Latin Americans remains largely obscured in discussions of migration yet is central to understanding the underlying reasons spurring Indigenous children and youth to migrate transnationally.

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[1] Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963.
[2] *See* UNICEF, UPROOTED: THE GROWING CRISIS FOR REFUGEE AND MIGRANT CHILDREN (2016).
[3] *Id.*

As new arrivals engaged in US immigration systems, children additionally confront well-documented obstacles in expressing their well-founded fear of persecution[4] and in meeting evidentiary and credibility standards regarding their experiences of past persecution and/or their fear of future persecution.[5] For those children without legal representation, these obstacles are heightened. With only one narrow exception—Special Immigrant Juvenile status for children who have been abused, abandoned, or neglected—immigration law does not consider a child's best interests, leaving undeliberated questions of the child's safety and well-being.

Taken together, Indigenous children and youth often confront a series of challenges that result in them not being fully recognized by the U.S. immigration system in terms of their identity, unique linguistic needs, and the types of legal claims they may make.

A Note on Terminology

Language is dynamic and, as a result, a variety of identifiers are utilized in legal settings and by Indigenous individuals themselves. At a general level, these may include Indigenous, First Nations, Sovereign Nations, Original Communities, and Aboriginal, among others. Specific Indigenous Peoples also enlist other, highly contextualized terms that reflect diverse histories, politics, and culture. For example, in Latin America, Indigenous generally refers to the first inhabitants who have occupied land since time immemorial and tends to be an inclusive term for pre-Columbian people of the Americas and their descendants. In contrast, "*indio*" (Spanish for "Indian") in Latin America often is understood as a derogatory term originating from Spanish colonial forces and utilized as a racial slur in contemporary life.[6]

Notably, these terms may or may not align with language used across countries, courts and statutes. For instance, while "Indian" and "tribe" are common legal categories and familiar terms of art across Indian law practice and scholarship in present-day U.S., they are also contested classifications with profound political, biological, and social implications.[7] For instance, both of these terms are implicated in the Indian Child Welfare Act, which specifically identifies an "Indian child" as "any unmarried person

Terms to Know:

- **"Indigenous"** refers to the first inhabitants who have occupied land since time immemorial. In Latin America, Indigenous generally is an inclusive term for pre-Columbian people of the Americas and their descendants.
- **"Indian Child"** under Federal Indian Law "any unmarried person who is under age eighteen and is either (1) a member of an Indian tribe or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." Tribes must be recognized by the federal government.
- **"Tribe"** is invoked to define rights as well as intergovernmental relationships and responsibilities. Elsewhere across the Americas, "Nation" or "Peoples" are prioritized over "Tribe" to underscore sovereignty and independence.

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[4] *See* 8 U.S.C. § 1101(a)(42).
[5] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).
[6] G. Myers, *Urbanism and Indigenous Identity in Latin America*, 26 PROGRESS IN HUMAN GEOGRAPHY 311, 313 (2002).
[7] DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 4-6 (Univ. of Okla. Press 2001).

who is under age eighteen and is either (1) a member of an Indian tribe or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[8] All Tribes have the right to determine who is a citizen or member, and different Tribes have different requirements for eligibility. Thus, in this context "tribe" is invoked to define rights as well as intergovernmental relationships and responsibilities.[9] Elsewhere across the Americas, "Nation" or "Peoples" are prioritized over "Tribe" to underscore sovereignty and independence.

Ultimately, we encourage adjudicators to be mindful of this multiplicity of terms and interpretations—any of which may be legal, regional, and deeply personal. To the extent the setting permits, individual parties should be asked what identification they utilize and prefer.

INTERDISCIPLINARY RESEARCH ON INDIGENOUS CHILD MIGRATION

Although children have migrated for centuries, the past decade has brought an increasing visibility of migrant and refugee children in the media and among policymakers. There is a robust and growing body of scholarship on unaccompanied children particularly in the United States and Europe.[10] In contrast, there is limited scholarship on Indigenous child migration from the Americas.

INDIGENOUS CHILD MIGRATION FROM LATIN AMERICA

Discrimination toward Indigenous Peoples in Latin America dates to the colonial era during which colonial forces framed Indigenous Peoples as "the Indian problem" in which their "savagery" was framed as an impediment to progress and modern nationhood.[11] This longstanding discrimination continues to be espoused by many Latin American governments in the present day in an effort to effectively eradicate Indigenous Peoples.[12] Beliefs that Indigenous Peoples are less than human and thus less deserving of rights and protections, physically predisposed to hard labor, 'backwards,' 'savages,' and 'witches' pervade many governments' policies and practices across the region.[13] Discrimination against Indigenous Peoples is expressed within government institutions, the private sector, and/or within everyday interactions. Although discriminatory, this harm is not always seen as a transgression of the law.

Scholars have long traced the multiple displacements and compelled migrations that Indigenous communities have confronted and continue to confront, owing to state violence, foreign intervention, extractive development, and the vagaries of climate change. So too, researchers have traced the diverse forms of mobility that young people enlist to navigate violence and poverty,

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[8] 25 U.S.C. § 1903(4).
[9] Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
[10] JACQUELINE BHABHA, CHILD MIGRATION AND HUMAN RIGHTS IN A GLOBAL AGE 102-03 (Princeton Univ. Press 2014).
[11] Giovanni Batz, *The Ixil University and the Decolonization of Knowledge*, *in* INDIGENOUS AND DECOLONIZING STUDIES IN EDUCATION: MAPPING THE LONG VIEW (Linda Tuhiwai Smith, Eve Tuck & K. Wayne Yang eds., Routledge 2018).
[12] STATE VIOLENCE AND GENOCIDE IN LATIN AMERICA: THE COLD WAR YEARS (Marcia Esparza et al., eds., Routledge 2009).
[13] LAUREN HEIDBRINK, MIGRANTHOOD: YOUTH IN A NEW ERA OF DEPORTATION (Stanford Univ. Press 2020).

including seasonal migrations for wage labor[14], rural to urban migration (e.g., street labor or domestic labor)[15], and increasingly migration within the Global South.[16] As seasonal, regional, and transnational migrants, young people use migration as a collective and historically rooted survival strategy that responds to their past experiences of violence and marginalization and to their present and future needs.

Given growing awareness of young people migrating to the United States, much of the scholarly and applied research has focused on Central American children. While the countries of El Salvador, Guatemala, and Honduras are often homogenized geopolitically as "the Northern Triangle", the levels of migration and deportation of children are not experienced uniformly across the region nor within individual countries. Take, for example, Guatemala: Guatemalans are consistently the largest group of young people entering Mexico and the United States; they are also disproportionately deported in comparison to their Honduran and Salvadoran counterparts.[17] Over the last decade, the number of Guatemalan children deported from the United States and Mexico has increased ninefold.[18] So too, Indigenous Peoples from the Mexican departments of Chiapas and Oaxaca are overrepresented in the numbers of people migrating to the U.S., due in large part to displacement due to discrimination, marginalization, and state-sponsored violence.[19]

Emergent research on child migration from Venezuela, Brazil, and Ecuador to the United States has documented the ways that Indigenous Peoples have been adversely impacted by far-right political regimes, resource extraction and toxic development (e.g., mining, hydroelectric dams, African Palm production, etc.), and the consequences of climate change that displace Indigenous Peoples with long-held, locally situated ecological practices and knowledge.[20]

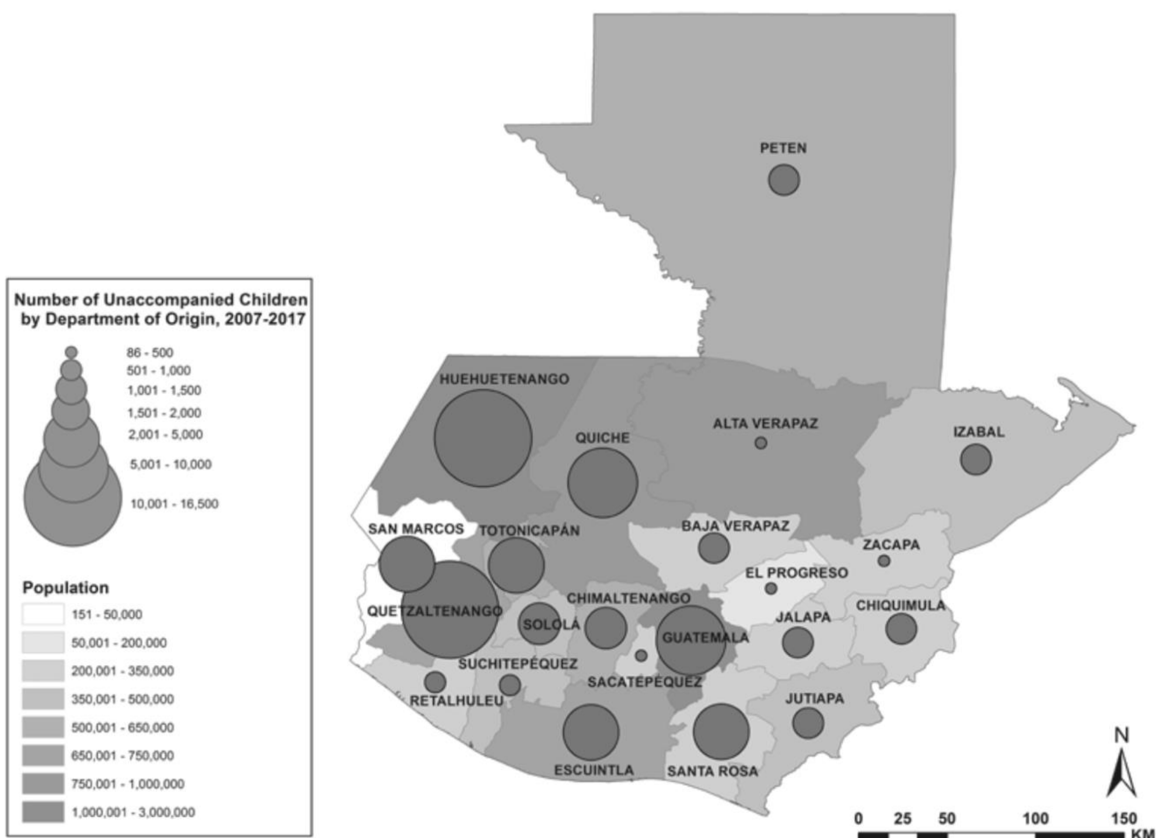
A SPOTLIGHT ON GUATEMALA

In Guatemala, there are twenty-four Indigenous groups: twenty-two Maya Nations, the Xinca, and Garifuna. Each community has their own respective histories, languages, cultures, and customs. According to the most recent Guatemalan national census, approximately 44 percent of the population is Indigenous; however, according to the Council of Maya People, 75 to 80 percent of

[14] JESSICA K. TAFT, THE KIDS ARE IN CHARGE: ACTIVISM AND POWER IN PERU'S MOVEMENT OF WORKING CHILDREN (NYU Press 2019).
[15] KATE SWANSON, BEGGING AS A PATH TO PROGRESS: INDIGENOUS WOMEN AND CHILDREN AND THE STRUGGLE FOR ECUADOR'S URBAN SPACES (Vol. 2) (Univ. of Ga. Press 2010).
[16] Jonathan Crush & Abel Chikanda, *South–South Migration and Diasporas*, *in* ROUTLEDGE HANDBOOK OF SOUTH-SOUTH RELATIONS 380 (Elena Fiddian-Qasmiyeh & Patricia Daley eds., Routledge 2018).
[17] U.S. Customs & Border Protection, *Southwest Land Border Encounters (By Component)*, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters-by-component (Aug. 28, 2024).
[18] HEIDBRINK, *supra* note 13.
[19] Asad L. Asad. & Jackelyn Hwang, *Migration to the United States from Indigenous Communities in Mexico*, 684 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 120 (2019). *See also,* Laura Velasco Ortiz & Dolores París Pombo, *Indigenous Migration in Mexico and Central America: Interethnic Relations and Identity Transformations*, 41 LATIN AM. PERSP. 5 (2014).
[20] Danilo Urzedo & Pratichi Chatterjee, *The Colonial Reproduction of Deforestation in the Brazilian Amazon: Violence Against Indigenous Peoples for Land Development*, 22 J. OF GENOCIDE RSCH. 302 (2021).

the population is Indigenous.[21] The discrepancy in the approximate figures and claims of undercounting of Indigenous Peoples has been attributed to a variety of reasons that are related to discrimination, racism, and structural inequalities. The undercounting of Maya Peoples in Guatemala can be considered a form of "statistical genocide", or the elimination of oppressed and minority groups from official state data.

The scale of child migration from Central America is difficult to assess, even more so of Indigenous children. Since the U.S. government began to centralize data on the numbers of unaccompanied children and children in families apprehended in the United States each year, Guatemalans have consistently been the largest nationality. Only in 2008 did Guatemalan authorities begin to record statistics on child migration. The absence of statistics across the region is emblematic of the ways children have been overlooked historically in migration studies and public policy—either considered as miniature adults, folded into family migration statistics, or not counted at all.



Guatemala's Secretariat of Social Welfare (SBS, *Secretaría de Bienestar Social*) estimates that 70 to 95 percent of minors returned to Guatemala (including from Mexico and the United States) are Indigenous—primarily Mam and K'iche' children from rural communities in the western

[21] PRENSA LIBRE, *Tres argumentos del Consejo del Pueblo Maya para rechazar los resultados del Censo* (Sept. 24, 2019, 22:23), https://www.prensalibre.com/ciudades/quetzaltenango/tres-argumentos-del-consejo-del-pueblo-maya-para-rechazar-los-resultados-del-censo/.

highlands of the country.[22] A Freedom of Information Act request to U.S. Customs and Border Protection (CBP) regarding the communities of origin of unaccompanied children over the decade 2007 to 2017 revealed that Guatemalan migrant minors originate from primarily Indigenous communities in the highlands and along the Mexican-Guatemalan borderlands, where historically there have been shared Indigenous identities with the Maya in Southern Mexico. Increasingly, youth coming to the United States represent a diversity of Guatemala's twenty-two distinct Maya communities, including K'ekchi', K'anjobal, and Akateko, among others.[23]

In Guatemala today, Maya Peoples experience individualized and structural forms of racism and greater inequality than their non-Indigenous (known as *ladino*) counterparts. This is borne out in statistics across all indicators—educational outcomes, health disparities, violence, access to justice, among others.[24] For example, as education researchers document, discrimination against Indigenous children in Guatemala's public education system manifests in the Ministry of Education's well-documented discriminatory curriculum in public schools[25], refusal to hire qualified Indigenous teachers, unwillingness to discipline racist behaviors of teachers and schools administrators, and a failure to comply with the Peace Accords which explicitly promote Maya-, Garifuna-, and Xinca-language education.[26] When disaggregated by geographic area (rural versus urban) and Indigenous versus non-Indigenous identity, there are significant disparities in investments and therefore in educational outcomes. As a result, Indigenous children suffer graver outcomes compared to their *ladino* counterparts. In the case of Guatemala, this disinvestment is not a matter of a lack of resources or a lack of qualified teachers or health care providers within the country. Rather, listening to government speeches, reviewing transcripts of parliamentary debates, interviewing state bureaucrats, observing in courtrooms, and scrutinizing state child welfare institutions makes clear that this disinvestment is a deliberate state strategy designed to harm, persecute, and ultimately to eradicate Indigenous Peoples from Guatemala.[27]

LEGAL SYSTEMS ADAPTATION TO INTERDISCIPLINARY RESEARCH

While there is limited research on the Indigenous identities of migrant children, there is robust scholarship on how legal and custodial systems in the United States can best care for Indigenous

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[22] HEIDBRINK, *supra* note 13.
[23] TRAC IMMIGRATION, 40 LANGUAGES SPOKEN AMONG ASYLUM SEEKERS WITH PENDING MPP CASES (April 26, 2021) https://trac.syr.edu/immigration/reports/644.
[24] LAUREN HEIDBRINK et al., CONDITIONS OF CHILDREN AND YOUTH IN GUATEMALA (Columbia University's Center for Mexico and Central America, 2022) https://drive.google.com/file/d/12dyjJyo3s1b3kuptfp4a3PAEUmnGnTbq/view. *See also*, Mneesha Gellman & Michelle Bellino, *Fighting invisibility: Indigenous citizens and history education in El Salvador and Guatemala*, 14 LATIN AM. AND CARIBBEAN ETHNIC STUD. 1 (2019). *See also*, Arachu Castro et al., *Assessing equitable care for Indigenous and Afrodescendant women in Latin America*, 38 REV. PANAM. DE SALUD PÚBLICA 96 (2015). *See also*, Giovanna Gatica-Domínguez et al., *Ethnic inequalities and trends in stunting prevalence among Guatemalan children: an analysis using national health surveys 1995–2014*, 18 INT'L J. FOR EQUITY IN HEALTH 1 (2019).
[25] Alexandra Allweiss, *"Too Dangerous to Help": White Supremacy, Coloniality, and Maya Youth*, 65 COMP. EDUC. REV. 207 (2021).
[26] Antonia María Sánchez Lázaro & René Humberto López Cotí, *Racism and education. A discussion pending task. The case of the original people of Guatemala*, 237 PROCEDIA SOC. & BEHAV. SCI. 823 (2017).
[27] Michelle J. Bellino, *So That We Do Not Fall Again: History Education and Citizenship in "Postwar" Guatemala*, 60 COMP. EDUC. REV. 58 (2016).

children and their families and communities. This section discusses interdisciplinary research on Indigenous children and families and how domestic systems have adapted to such research. It focuses, specifically, on the research-informed Indian Child Welfare Act, which is held as the gold standard for child welfare in the U.S.

THE INDIAN CHILD WELFARE ACT (ICWA) IS THE GOLD STANDARD FOR THE TREATMENT OF INDIGENOUS CHILDREN

ICWA is a federal law that applies in child dependency proceedings and adoptions. Before the U.S. Congress passed ICWA in 1978, state child welfare authorities and private adoption agencies separated roughly 35% of Indigenous children from their families and intentionally placed nearly 85% of these children in non-Native foster and adoptive homes.[28] Congress attributed these alarming numbers to anti-Indigenous discrimination institutionalized in programs like the Indian Adoption Project (1958-1967), which promoted the adoption of Native children by white adoptive families. Following sustained pressure from diverse Sovereign Nations, Congress eventually recognized that it is in the best interest of the child to maintain connections to their kin and communities and that children are vital to the continued existence of Native Nations.[29]

Designed "to protect the best interests of Indian children and to promote the stability and security of Indian Tribes and families,"[30] ICWA provides specific protections to parents and families while also enshrining Tribal government rights to intervention, jurisdiction, and participation in cases involving their families. In this way, ICWA balances the rights of parents with the interests of the state and Tribal governments in the best interests of Indigenous children.[31] Notably, ICWA also recognizes a Tribal interest in Indigenous children that is equal to, but separate from, that of parental interest. For example, the Tribe(s) in which the child is or may be enrolled must be notified if the child is taken into foster care or changes placement.[32] In the case where an Indigenous child is removed from their home to a placement off the reservation, their Tribe has the right to intervene and request the transfer of the case to Tribal court.[33] These jurisdictional provisions, which the Supreme Court has called the "heart of the ICWA," attempt to ensure that the Tribe itself either gets to adjudicate the child protection case or be a party to the case in state court.[34]

In other words, while both ICWA and most state statutes make the best interests of the child a priority, under ICWA a Sovereign Nation's interest in its continued existence is of equal, if not paramount, importance.[35] Critically, however, this is more than a jurisdictional provision. The

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[28] M. Brinton Lykes et al., *Participatory and Action Research Within and Beyond the Academy: Contesting Racism through Decolonial Praxis and Teaching "Against the Grain,"* 62 AM. J. CMTY. PSYCH. 406 (2018).
[29] Rolando Hernandez, *U.S. Supreme Court Upholds Indian Child Welfare Act*, OREGON PUBLIC BROADCASTING (June 16, 2023, 1:13pm) https://www.opb.org/article/2023/06/16/supreme-court-indian-child-welfare-act-discussion/#:~:text=In%20a%207%2D2%20decision,adopted%20outside%20of%20their%20tribes.
[30] 25 U.S.C. § 1902.
[31] Kathryn Fort, *The Road to Brackeen: Defending ICWA 2013-2023*, 72 Am. U. L. Rev. 1673, 1678-79 (2023).
[32] 25 U.S.C. § 1912(a).
[33] Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 52 (1989).
[34] Holyfield, 490 U.S. at 36. *See also* Christine M. Metteer, *A Law Unto Itself: The Indian Child Welfare Act as Inapplicable and Inappropriate to the Transracial/Race-Matching Adoption Controversy*, 38 BRANDEIS L.J. 47 (2000).
[35] Kacy Wothe, *The Ambiguity of Culture as a Best Interests Factor: Finding Guidance in the Indian Child Welfare Act's Qualified Expert Witness*, 35 HAMLINE L. REV. 729 (2012).

intentional placement of Indigenous children with family members or with other members of their Native Nations at once "protect[s] the best interests of Indian children *and* promote[s] the stability and security of Indian tribes and families."[36] Thus, ICWA identifies familial, political, and cultural ties as intrinsic to children's health and welfare and likewise recognizes that children's well-being is fundamental to the health of a community. In this way, ICWA honors and formally recognizes the community as responsible for the care, education, learning, and health of an Indigenous child, and for protecting and promoting a child's identity, sense of belonging, self-worth, and community resilience.[37]

Owing to this necessarily multifaceted understanding of best interests, ICWA is commonly regarded as "the gold standard" for child welfare more broadly. While ICWA as a remedy cannot be analogously applied to the immigration context, its attention to the interrelated interests of children and their broader communities underscores the critical role of relationality, in addition to formal legal status, in defining rights, responsibilities, and best interests.

There is a robust body of scholarship that evidences how Indigenous children placed in non-Indigenous environments are more likely to struggle with self-harm, suicide ideation, and mental illness[38] than similarly-situated Indigenous children placed in environments that follow their traditions and culture and speak their native language.[39] States across the political spectrum have taken considerable steps to implement ICWA, including: appointment of ICWA case workers; inclusion of ICWA and tribal information in court case management systems; judges regarding Tribal representatives as legal authorities; the timely provision of court documents to Tribal authorities; funding for qualified expert witnesses; physical reorganization of courtrooms to remove the dais and ensure deliberations where all parties, including adjudicators, are on the same level; co-locating family court judges on Tribal lands to remove barriers to full participation; and the development of joint jurisdiction courts. These initiatives to adopt ICWA recognize the broadly accepted strong deference accorded to ICWA in the protection of Indigenous children.[40]

COLLABORTIVE AND EXTENSIVE APPLICATION OF ICWA

One of the most significant features of ICWA is the extent to which Indigenous and non-Tribal entities have collaborated on, implemented, and applied the principles of the Act. In 2003, the National Council of Juvenile and Family Court Judges (NCJFCJ), which represents the oldest judicial membership organization in the U.S., published a checklist to guide judges and judicial

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[36] National Indian Law Library, *Topic 4: Notice*, https://narf.org/nill/documents/icwa/faq/notice.html (last visited Aug. 15, 2024).
[37] Camilla Londschouw, *A Victory for Native Children and Their Families: U.S. Supreme Court Preserves ICWA*, CULTURAL SURVIVAL (June 28, 2023), https://www.culturalsurvival.org/news/victory-native-children-and-their-families-us-supreme-court-preserves-icwa.
[38] Robyn J. McQuaid et al., *Parent-Child Separations and Mental Health among First Nations and Métis Peoples in Canada: Links to Intergenerational Residential School Attendance*, 19 INT'L J. ENV'T RSCH. PUB. HEALTH 1, 4 (2022).
[39] M.E. Pearce et al., *The Cedar Project: Resilience in the Face of HIV Vulnerability within a Cohort Study Involving Young Indigenous People Who Use Drugs in Three Canadian Cities*, 15 BMC PUB. HEALTH 1095 (2015).
[40] California Ass'n of Collaborative Courts, *Justice Reimagined—Joint Jurisdictional Approach* (2022) https://wearecacc.org/wp-content/uploads/2022/10/Session-43.-Joint-Jurisdiction-Tribal.State_.pdf.

officers in implementing ICWA. NCJFCJ later passed a resolution in support of the full implementation of ICWA in 2013. Building on the original checklist, in 2017 NCJFCJ published the *ICWA Judicial Benchbook*[41] for state court judges, which covers all stages of the court process from the preliminary protective hearing until juvenile and family court involvement has ended and the child has safely been returned home or placed in a new, secure and legally permanent home.[42] In other words, ICWA has the full support of the bench in its implementation from start to finish.

NCJFCJ's work in other decision-making contexts, for instance their guidance on preliminary protective hearings and court practices in child abuse and neglect cases, has in turn informed the ongoing development of ICWA resources and training. While modified somewhat for ICWA cases, NCJFCJ's self-reflective practices are arguably relevant to any adjudicator who works with Indigenous youth.

Questions include:

- What assumptions have I made about the cultural identity, genders and background of this family? What is my understanding of this family's unique culture and circumstances? How is my decision specific to this child and this family?[43]

In yet other legal spaces, ICWA is recognized for the extent to which efforts must be made to ensure cultural competency in decision-making. For example, ICWA regulations require jurisdictions to conduct child custody proceedings in a way that reflects the cultural and social standards prevailing in the child's tribal community and family.[44] One illustration of this is requiring a qualified expert witness (QEW) to testify from a social and cultural perspective as to whether children are at risk of serious emotional or physical harm, prior to removal. As applied in Minnesota, for example, a QEW is someone designated by the Indigenous child's Tribe as being qualified to testify as to prevailing social and cultural standards of that tribe. By drawing on the QEW's expertise, decision-makers can better understand the child's tribal culture and customs as well as prevailing social and cultural standards and contemporary and traditional practices of the Tribe[45] Calling upon experts mitigates the gap between Western concepts, general understandings, and world views that cannot be properly applied to Indigenous children's cases.

[41] CASEY FAMILY PROGRAMS, *How Can Child Welfare Systems Apply the Principles of the Indian Child Welfare Act as the 'Gold Standard' for All Children?* (April 1, 2022) https://www.casey.org/icwa-gold-standard/.

[42] NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *Indian Child Welfare Act Judicial Benchbook* (Nov. 1, 2017), https://www.ncjfcj.org/publications/indian-child-welfare-act-judicial-benchbook/ (endorsed by the Nat'l Am. Indian Court Judges Ass'n, Nat'l Indian Child Welfare Ass'n, Tribal Law & Policy Inst., & Indian Child Welfare Act Appellate Project at Mich. State Univ.).

[43] CAPACITY BUILDING CENTER FOR COURTS, *Model ICWA Judicial Curriculum: Faculty Guide and Curriculum Materials*, IV-7 (2014), https://cip.colorado.gov/sites/cip/files/documents/CBCC%20Model%20ICWA%20Judicial%20Curriculum%20Faculty%20Guide.pdf.

[44] CASEY FAMILY PROGRAMS, *supra* note 41.

[45] MINN. DEP'T OF HUMAN SERV., *Indian Child Welfare Act/Minnesota Indian Family Preservation Act Manual* 12 (Aug. 2022), https://www.dhs.state.mn.us/main/groups/county_access/documents/pub/dhs16_157701.pdf.

CRITICAL IMPLICATIONS FOR IMMIGRATION PRACTICE

There are several ways that a young person's Indigenous identity may impact the immigration process, ranging from the limited availability of documentation, fear of law enforcement, limited access to interpreters, distrust of government authorities, and intergenerational trauma, among others.

HOW INDIGENEITY IMPACTS THE IMMIGRATION PROCESS

***Limited availability of the types of documentation that asylum seekers are required to present*:** Because many Indigenous victims may not report crimes to government or communal authorities in countries of origin and, for those who try, police often turn them away or do not implement laws meant to protect victims, there is often limited to no documentation of crimes perpetrated against Indigenous Peoples. For those who are able to secure a copy of a police report or an order of protection, for example, it is important to note that these orders may not be enforced due to institutionalized discrimination against Indigenous Peoples and the intentional scarcity of governmental resources made available/accessible to Indigenous communities in countries like Guatemala and others.[46]

Considerable distrust of law enforcement and access to justice: Based upon generations of violence and discrimination, Indigenous Peoples have a well-warranted and deeply rooted distrust of law enforcement and governmental authority figures, including judges, more generally. This may manifest in credible/reasonable fear and asylum interviews, and in different contexts throughout immigration or federal custodial processes. Given that many asylum seekers have experienced multiple traumas (at times, very recently); may be fearful of uniformed Customs and Border Protection (CBP) officers and others conducting interviews that might be used against them in immigration proceedings; and require but may not receive appropriate interpretation services, Indigenous asylum seekers are unlikely to disclose some, or all, of the most traumatic or intimate harms they've suffered. As a result, they may be deported or deemed not to be credible if they disclose past traumas or abuse later in the process. Thus, the inability to disclose past or fear of future persecution does not necessarily signify that they have not suffered violence or persecution.

[46] *See* Perez v. Garland, 83 F.4th 630, 633-34 (7th Cir. 2023) ("Nerio [a Mayan woman from Guatemala who was persecuted on the basis of her Indigenous identity] did not initially report Walter's misconduct to law enforcement, and we have found it 'reasonable—even in cases of extreme violence—to expect asylum seekers to have sought help from the authorities.' And when Nerio eventually did report Walter, the government issued a protective order. Indeed, the IJ regarded the protective order as a significant legal penalty, given Walter's reportedly angry response to it. Additionally, the IJ reasonably weighed the generalized country-condition evidence against Nerio's more particularized testimony, which reflects that the government responded to her entreaties for help by taking steps to protect her." (internal citations omitted)). *Compare, Matter of C-G-T-*, 28 I&N Dec. 740, 743-44 (BIA 2023) ("In *Matter of S-A-*, the Board recognized that it may be futile or dangerous for an abused child to seek protection from the authorities. Multiple circuit courts have recognized that due to their young age, children may not be able to articulate their fear, or approach law enforcement officials, in the same way as an adult. When a child is being abused by a parent or relative, the child may be prevented by their abuser from contacting the authorities, or any attempt to report the harm might worsen the child's circumstances. These are fact-specific inquiries, and we recognize that there may be a substantial difference in the ability of a young child to report abuse or recognize mistreatment as abuse, as compared to an older child." (internal citations omitted)).

***Interpretation*:** Access to effective interpretation is consistently an area of concern for Indigenous Peoples in the U.S. immigration system. Many governments fail to provide interpretation for Indigenous Peoples in administrative or judicial proceedings in their countries of origin; thus, asylum seekers may not expect U.S. authorities to provide effective interpretation within immigration detention or proceedings, even when they do not speak Spanish or English. Still others may not be provided interpreters by CBP and other immigration agencies and service providers, even when explicitly requested or when there is an obvious need. Because Indigenous communities in their home country may be discouraged and discriminated against if they speak their native language, many Indigenous children and youth will prefer to proceed in Spanish, even when it is clear that a native-language interpreter is best suited for interpretation. As a result, understanding a child or youth's capacity for Spanish or English is critical.

***Cumulative and ongoing harms of intergenerational trauma*:** It is important to note that historical traumatic events are not only in the past but also *ongoing* as Indigenous Peoples continue to experience the force of settler colonialism in their everyday lives. Scholar Brave Heart (Lakota Nation) describes historical trauma as a "cumulative emotional and psychological wounding, over the lifespan and across generations emanating from massive group trauma experiences."[47] Thus, present-day displacement, detention and family separation are often experienced as a continuation of historical traumas in the present-day. Further, Indigenous asylum seekers frequently experience multiple traumas before, during, and after migration to the U.S., including in their home country, in transit through Mexico and other countries, at the U.S.-Mexico border, and in U.S. custody. As psychologists and scientific researchers have extensively documented, multiple traumas impact memory processing; cause significant changes in affect and mood, including debilitating depression and anxiety; induce feelings of guilt, shame, fear, and paranoia; and produce disrupted sleep and corresponding deficits in cognitive functioning, among other symptoms.[48] These symptoms may be further triggered or exacerbated when testifying via video or phone from the confines of detention. These symptoms shape reliability and specificity of testimony, an individual's general functioning, and their access to information about U.S. immigration law needed to properly apply for and present claims to relief from deportation (e.g., compliance with the 1-year deadline for filing an asylum application).

***Understanding of time and chronology*:** In addition to the ways trauma may impact memory and narratives, Indigenous understandings of time and chronology differ from the way the U.S. immigration system is designed to process information and events, and from western conceptions of time more broadly. Generally speaking, the U.S. immigration system views time as a linear chronology of events against which all events can be measured. That is, the concept of time is presumed to be inherently universal, shared, fixed, and linear, from past to present to future. This understanding of time does not correspond with the ways Indigenous Peoples commonly experience the world. For example, in Maya cosmovision, time is cyclical—the present is intimately linked to the past and the future, and experiences may be situated within multiple frames of reference. Time for Maya Peoples is social and relational; there is not an absolute time. This understanding of time may shape testimony and recounting of the chronology of events in an

[47] Maria Yellow Horse Brave Heart, *The Historical Trauma Response Among Natives and Its Relationship to Substance Abuse: A Lakota Illustration*, 35 J. PSYCHOACTIVE DRUGS 7 (2003).
[48] Luis Ayerbe et al., *Psychosis in Children of Separated Parents: A Systematic Review and Meta-Analysis*, 63 EUR. PSYCHIATRY 1 (2020).

Indigenous person's life. If this context is not considered or understood by U.S. authorities working to process and adjudicate immigrants' legal claims, the ways that Indigenous Peoples narrate their experiences can lead adjudicators to presume an applicant lacks credibility, when the actual issue at play is a fundamental difference in understandings and experiences of time.[49]

A FRAMEWORK FOR WORKING WITH INDIGENOUS CHILDREN AND YOUTH IN IMMIGRATION PROCEEDINGS

Indigenous children and youth benefit from accommodations for children and youth generally, such as removing of the robe, making modifications to the courtroom (e.g., stepping down from the dais, placing furniture in a circle, etc.), utilizing plain and respectful language, and taking longer breaks.[50] In addition, the following practice tips may be useful to help immigration judges and other adjudicators (e.g., asylum officers) with their consideration of applications for immigration status and humanitarian protection, to ensure Indigenous children and youth are comfortable, and to facilitate their testimony:

Tips for working with Indigenous children and adolescents:
▪ *Limit the number of people in the courtroom:* As a general practice, it is best to have as few people as possible in the courtroom, asylum office, or any other space used to interview children or elicit their testimony. Applicants may be reluctant to testify about painful incidents, may be intimidated, and may be fearful that what they disclose during testimony may be shared with others— they can even be fearful that interpreters may disclose information to their communities here in the U.S. or in their countries of origin. This is especially true for Indigenous children, whose communities in the U.S. and abroad are often quite distinctive and interconnected. The same may be true for family, such as siblings, or community members in attendance with the child or youth. It may also be appropriate to simply close proceedings.
▪ *Recognize varied behavioral/societal norms.* There is considerable variation in behavioral and social norms across cultures. For example, in some Indigenous communities, it is a sign of disrespect to make or hold eye contact or to shake hands firmly. Children and adults alike may keep their heads down in deference to authorities. Children may also speak quietly, or they may have trouble speaking negatively about their elders or other community and family members, even if such persons have inflicted severe harm. These are differences in cultural behaviors and not indications of veracity or credibility.

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[49] Kathryn Hampton et al., *The Psychological Effects of Forced Family Separation on Asylum-Seeking Children and Parents at the US-Mexico Border: A Qualitative Analysis of Medico-Legal Documents*, 16 PLOS ONE 11 (2021).
[50] Ernesto. Castañeda et al., *Symptoms of PTSD and Depression Among Central American Immigrant Youth*, 1 TRAUMA CARE 99 (2021).

- *Recognize varied presentations of trauma.* Psychologists document that there is no one, uniform way to express trauma. Some people may have very limited affect or be very stoic in recounting harms they suffered; others may have difficulty maintaining composure to testify. Affect—the emotion or feeling displayed through facial expressions, hand gestures, posture, voice characteristics, and other physical manifestations— is not an indicator of veracity or credibility, especially as related to children from other cultures and narration of traumatic experiences.

- *Where possible, limit the child's oral testimony—resting mostly on the child's sworn, written affidavit, if one is submitted.* Per regulation[51], immigration judges can call upon parties to narrow the issues to be adjudicated in a hearing involving a child or adolescent. This will limit the scope of testimony for young people and minimize the amount of time they are exposed to harmful or retraumatizing circumstances.

- *Engage expert witnesses*: Consulting experts, whether they be country conditions experts, child psychologists/psychiatrists who work with Indigenous and other immigrant populations, or other types of specialists with research-informed experience, can often provide adjudicators with insights that Indigenous children may be unable to fully articulate given their youth, variations in language, and the societal and cultural norms in which they are steeped. Adjudicators should also consider historical context and country conditions evidence even when Indigenous applicants do not address such concepts during testimony. Adjudicators should not rely solely on certified interpreters for gaining the necessary understanding of a child's story and legal claim, as such interpreters are trained to translate words alone and are not permitted to provide any additional information or context. In addition, Indigenous families may choose not to share their past experiences of torture, massacres, or state violence with their children, so applicants (especially children) may not know the full historical and political contexts in which their claims are embedded.

- *Appropriately consider and weigh the expertise and collaborative value of youths' kin and community.* Given technological advancements, it is now frequently possible to involve applicants' family and community members in their immigration proceedings. Such involvement can take many forms: affidavits that corroborate or explain events and context; witness testimony; letters of support; or even virtual or in-person accompaniment at hearings and interviews. Involving other Indigenous people from the child's family or community may meaningfully enhance the safety and legitimacy of immigration hearings and interviews for Indigenous children. As in other legal contexts, recognizing the value of children's contributions alongside those of their family and community members powerfully affords children "the dignity of participation."[52]

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[51] 8 C.F.R. § 1003.21 (2022).

[52] Ann M. Haralambie, *Recognizing the Expertise of Children and Families*, 6 Nev. L.J. 1277, 1280 (2006). *See also*, Lenni B. Benson & Claire R. Thomas, *Asylum-Seeking Children and the Australian Protection Visa Process*, *in* PROTECTING MIGRANT CHILDREN: IN SEARCH OF BEST PRACTICE (Mary Crock & Lenni Benson eds., Elgar Publishing 2018).

Most importantly, adjudicators should pay close attention to the language needs of Indigenous children to ensure there is proper interpretation, a fundamental element to a fair hearing.

***Tips to identify and continuously evaluate interpretation needs of Indigenous children**:*
▪ *Explore language needs early and often in proceedings.* Legal counsel for Indigenous children should be able to inform adjudicators regarding the language needs of their clients; however, many, if not most, Indigenous children are unrepresented. Regardless, judges should always ask questions like: Do you speak any other languages? Do your parents or family members speak any languages other than Spanish? It is important to note that typically Indigenous languages are not dialects but rather distinct languages with their own grammar, vocabulary, and at times, letters. To say someone speaks a "dialect" is often used to disparage the sophisticated knowledge systems of Indigenous Peoples.
▪ *Confirm Spanish abilities before proceeding in Spanish, even if requested by the child.* Because Indigenous Peoples in their home country often are discouraged and discriminated against if they speak their native language, many Indigenous children and youth will opt to proceed in Spanish. Thus, allowing Spanish interpreters to assess thoroughly Spanish language ability before proceeding in Spanish is imperative.
▪ *Confirm suitability of interpreters for sensitive testimony*. It may also be necessary to obtain interpreters who conform to the wishes of the child if the child is required to provide sensitive or traumatic testimony. For example, in addition to ensuring the interpreter is not from the child's home community, the adjudicator should ensure that the interpreter conforms to the child's preferred gender before proceeding with testimony.
▪ *Avoid continuances for children who prefer native-language interpretation*. Continuances can add stress to the immigration court process, and children often fear undue delays. As a result, many children will prefer to move forward in Spanish out of concern for unnecessary delays, the Court should have Indigenous interpreters available to the greatest extent possible to avoid continuances.
▪ *Allow the applicant and interpreter to establish a rapport* by talking about matters unrelated to the proceeding at the outset. This also allows for adjudicators to observe the fluidity (or lack thereof) of their communication and understanding.
▪ *Verify and monitor accuracy of relay interpretation.* There are considerable regional differences even when Indigenous people speak the same language–some communities are more remote and develop variations of the same language that are indecipherable to one another. The adjudicator (both before and during testimony) should watch for any indication that the child and interpreter are having trouble communicating, as this could be a sign that they do not speak the same variation of a particular Indigenous language.

Immigration Judges should consider incorporating other relevant elements from ICWA in the context of immigration adjudications.

Considerations for incorporating ICWA principles in children's immigration adjudications:
▪ *Valuing inclusive and diverse cultural practices.* Consider asking the following questions in each Indigenous child's case: In what ways do dominant cultural assumptions influence case decisions about the rights of Indigenous children? Is it possible that more children could remain safely in the U.S. if these assumptions were identified and considered thoroughly? What cultures are present among the children and families that interact with EOIR? What traditions and values are important to these children and families? What can I do, as an adjudicator, to better understand these traditions and values?
▪ *Authentic engagement with Tribes/Indigenous communities.* How could community leaders and representatives have a greater voice an Indigenous child's case? If this is not possible, can the Court request cultural experts to bring their expertise to bear on decision-making?
▪ *Indigenous children's critical connection to family, community, and Indigenous identity.* While the Office of Refugee Resettlement is the agency predominantly tasked with family reunification, Immigration Judges do occasionally play a role in reunification whether by bond determination related to children (whether family or a Flores bond) and by decisions related to the safe repatriation of the child such that immigration judges should consider family unity. Does the family reunification decision (either by bond, relief, or repatriation) protect an Indigenous child's right to family, community, and culture?
▪ *Don't assume. Ask for clarification.* When Indigenous children testify about cultural practices or use terminology unfamiliar to adjudicators, it is crucial to ask more questions about cultural or communal meaning. Depending on the language, there are variations in how interpreters may translate gender terminology, verb tenses, or specific phrases and words. Moreover, interpreters are trained to translate words but not necessarily context; hence the importance of asking clarifying questions.

CONCLUSION

The aim of this brief is to reduce unintended harm to Indigenous children and youth as they navigate the U.S. immigration system. As detailed here, many of these young people have *already* experienced disproportionate harms, whether from forced governmental or climate-related displacement; discrimination and state violence; socioeconomic precarity; and/or intergenerational and historical trauma, among others. In the immigration system, these harms are often quickly compounded owing to improper or insufficient documentation of victimization, inadequate access to appropriate interpretation services, and a prevailing tendency to trivialize Indigeneity or conflate it with race or ethnicity.

In response, this brief suggests a more contextualized, robust, and sensitive approach to immigration proceedings involving Indigenous children and youth. To do so, it foregrounds concepts and practices enshrined in the Indian Child Welfare Act, which uniquely and necessarily recognizes that psychological belonging; ongoing connection to family and community, language, and culture; and physical security can mitigate the impact of many of the harms Indigenous children might experience. Commonly regarded as "the gold standard" for child welfare, we believe the best practices outlined in ICWA are salient to the immigration context and, just as important, can be integrated into court practices and procedures, as well as into less formal interactions between court actors and Indigenous children, in a straightforward and sustainable way.

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