

From Apology to Action: A Comment on Transitional Justice in the United States and Canada

Victoria Roman

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/mjil>



Part of the [Immigration Law Commons](#)

Recommended Citation

Victoria Roman, *From Apology to Action: A Comment on Transitional Justice in the United States and Canada*, 37 Md. J. Int'l L. 122 (2022).

Available at: <https://digitalcommons.law.umaryland.edu/mjil/vol37/iss1/9>

This Notes & Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

From Apology to Action: A Comment on Transitional Justice in the United States and Canada

VICTORIA ROMAN[†]

I. INTRODUCTION

On September 30, 2021, National Day of Remembrance for Native Americans,¹ Senator Elizabeth Warren (D-Mass) and the Co-Chairs of the Congressional Native American Caucus reintroduced The Truth and Healing Commission on Indian Boarding School Policies in the United States.² U.S. Secretary of the Interior Deb Haaland (Laguna Pueblo) first introduced the bill in September 2020,

© 2022 Victoria Roman

[†] J.D. Candidate (2023), University of Maryland Francis King Carey School of Law. The author is Indigenous Guarani and wants to recognize the powerful Indigenous voices and knowledge that contributed to this paper. The author would like to thank Professor Matiangai Sirleaf for her mentorship, helpful commentary, and direction as well as the Staff Editors at the *Maryland Journal of International Law*. Special thanks to her husband Graham, two-year-old daughter Ellie, and one-month-old son August for their support and love.

1. Canada's Constitution calls its First Nations people "Aboriginal, First Nations, Métis, and Inuit." Alfred and Corntassel describes the word Aboriginal as a "state construction that is instrumental to the state's attempt to gradually subsume Indigenous existences into its own constitutional system and body politic since Canadian independence from Great Britain." Taiiaki Alfred & Jeff Corntassel, *Being Indigenous: Resurgences against Contemporary Colonialism*, 40 GOV'T & OPPOSITION, 597, 598 (2005). Contrarily, Indigenous is a term that speaks to identity trapped within colonialism. The term Indigenous asserts an "oppositional, place-based existence [...] that fundamentally distinguishes Indigenous peoples from other peoples of the world." *Id.* at 597. There is some drawback to using the term Indigenous because it reflects a homogeneity for different peoples throughout the world. The author uses Indigenous with a capital "I" to reflect the formalism of a specific people. The term Indigenous is used to reflect the unique oppositional geography inherent in being a person dispossessed through colonization. Throughout the paper, the author uses First Nations for Indigenous peoples in Canada and Aboriginal and Indian when referring to specific terms cited in statutes and government records. Whenever possible, the author tries to name the tribe and the land as intended. People is used in the plural to show that people have a multitude of identities and to respect the different ways Indigenous peoples straddle political, cultural, and personal identities no matter how he, she, or they classify themselves.

2. Truth and Healing Commission on Indian Boarding School Policies Act, S.2907, 117th Cong. (2021–2022).

but the bill never made it past the U.S. House of Representatives. The current bill would establish a Truth Commission to investigate and acknowledge injustices resulting from Indian boarding schools as well as support healing for tribal communities.³ Prompted by the discovery of the 215 unmarked graves at the Kamloops Indian Residential School, Secretary Haaland, through the Department of the Interior (the Department), launched the Indian Boarding School Initiative.⁴ Secretary Haaland is the first Native American cabinet member in United States history.⁵ She leads the Department of the Interior, which was largely responsible for the maintenance of the residential boarding schools and currently investigates and documents “the loss of human life and the lasting consequences of residential Indian boarding schools.”⁶ Secretary Haaland has a personal connection and responsibility to the Department’s investigation, as her own great-grandfather was taken to the Carlisle Indian School in Pennsylvania.⁷

H.R. 8420 proposes transitional justice mechanisms in the United States,⁸ an established democratic state that stands in stark contrast with more traditional states that undergo transitional justice processes.⁹ Transitional justice refers to the processes and mechanisms used “to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve

3. Warren, *Davids, Cole Reintroduce Bipartisan Bill to Seek Healing for Stolen Native Children and Their Communities*, ELIZABETH WARREN (Sept. 30, 2021), <https://www.warren.senate.gov/newsroom/press-releases/warren-davids-cole-reintroduce-bipartisan-bill-to-seek-healing-for-stolen-native-children-and-their-communities>.

4. Memorandum from Secretary of the Interior Deb Haaland on Federal Indian Boarding School Initiative to Assistant Secretaries, Principal Deputy Assistant Secretaries, and Heads of Bureaus and Offices (Jun. 22, 2021) (on file with the U.S. Department of the Interior).

5. Nathan Rott, *Deb Haaland Confirmed as 1st Native American Interior Secretary*, NPR (Mar. 15, 2021, 6:21 PM), <https://www.npr.org/2021/03/15/977558590/deb-haaland-confirmed-as-first-native-american-interior-secretary>.

6. *Secretary Haaland Announces Federal Indian Boarding School Initiative*, U.S. DEP’T OF THE INTERIOR (June 22, 2021), <https://www.doi.gov/pressreleases/secretary-haaland-announces-federal-indian-boarding-school-initiative>.

7. Deb Haaland, *My grandparents were stolen from their families as children. We must learn about this history*, WASH. POST (June 11, 2021), <https://www.washingtonpost.com/opinions/2021/06/11/deb-haaland-indigenous-boarding-schools/>.

8. Truth and Healing Commission on Indian Boarding School Policy Act, H.R. 8420, 116th Cong. (2020); S. 4752, 116th Cong. (2020).

9. Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1181, 1197–98 (2021).

reconciliation.”¹⁰ Through efforts such as truth commissions, reparations, and prosecutions, the hope is to create a more just and secure political order.¹¹ While the United States has supported transitional justice efforts in other countries,¹² it has never sponsored a truth commission. Prior to H.R. 8420, all U.S.-based truth commissions had carried on through local, grassroots efforts and strategic coalition building.¹³

For this first attempt at government-sponsored transitional justice initiatives, the United States draws inspiration from its North American neighbor. Canada’s Truth and Reconciliation Commission (TRC) attempted to document and redress the harms caused by residential schools from 1883 to 1988.¹⁴ In 2015, the Commission released its findings and “94 Calls to Action.”¹⁵ Yet, at the time of this paper, only thirteen projects have been completed.¹⁶ Perhaps the greatest obstacles to fulfilling the Canadian 94 Calls to Action have been structural barriers and competing public interests.¹⁷ The United

10. U.N. Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, ¶ 8, UN Doc. S/2004/616 (Aug. 23, 2004).

11. Jeremy Webber, *TRANSITIONAL JUSTICE* 98, 104–05 (Melissa S. Williams et al. eds., 2012).

12. *Transitional Justice Overview*, U.S. DEP’T OF ST. (May 16, 2016), <https://2009-2017.state.gov/documents/organization/257771.pdf>.

13. A Truth Commission in Greensboro, North Carolina, formed to address the Greensboro Massacre. On November 3, 1979, a group of peaceful protestors calling for racial and economic justice were fired upon and murdered by Klansmen and Nazis. GREENSBORO TRUTH & RECONCILIATION COMM’N, <https://greensborotrc.org/> (last visited Nov. 22, 2021); see also Nichole Christian, *Truth and Reconciliation Comes to Detroit*, THE TAKEAWAY WNYC (Nov. 21, 2011), <https://www.wnyc.org/story/171612-truth-and-reconciliation-comes-detroit/> (establishing a truth commission in Detroit to “shine a spotlight on the legacy of race-based housing policies”); see also MD LYNCHING MEM’L PROJECT, <https://www.mdlynchingmemorial.org/> (last visited Nov. 22, 2021) (establishing Maryland as the first state to enact a state-wide truth commission to investigate the forty Black Americans lynched in Maryland).

14. TRUTH & RECONCILIATION COMM’N OF CAN., *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015).

15. *Truth and Reconciliation Commission of Canada: Calls to Action*, TRUTH & RECONCILIATION COMM’N OF CAN. (2015), https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf.

16. Five of the six proposals related to children are incomplete. *Beyond 94: Truth and Reconciliation in Canada*, CBC NEWS (Mar. 19, 2019), <https://newsinteractives.cbc.ca/longform-single/beyond-94?&cta=1>.

17. Eva Jewell and Ian Mosby, *Calls to Action Accountability: A Status Update on Reconciliation*, YELLOWHEAD INST. (Dec. 17, 2019),

States can fall into similar traps if its TRC is rooted in a settler–colonial relationship. In order for the United States to avoid similar mistakes and have more far-reaching impacts, the United States’ TRC should incorporate local practices and address structural harms.

Transitional justice as a field can lean towards state-centric, Western concepts of conflict resolution, which reinforce the settler–colonial relationship, rather than emancipate. Justice within nontraditional contexts needs to be decolonized and address structural injustice. Against this background, this paper investigates the effectiveness of transitional justice in nontraditional transitional frameworks and posits that traditional transitional justice frameworks are inadequate when addressing human rights violations of Indigenous peoples because of competing claims for sovereignty.

Section II outlines the legal background of genocide and the historical background of residential schools that occurred in the United States and Canada.¹⁸ Section III compares the truth and reconciliation processes in the United States and Canada.¹⁹ Finally, this paper concludes by offering suggestions for emancipatory TRC in nontraditional contexts.²⁰

II. CULTURAL GENOCIDE IN THE UNITED STATES AND CANADA: FACTUAL AND LEGAL BACKGROUND

A. Legal Background of Cultural Genocide

This section applies international law mechanisms to understand the United States’ and Canada’s liability for the residential boarding schools and child welfare actions. The following section will (1) discuss the historical origins of “cultural genocide” and its position in international law through relevant treaties and resolutions, (2) analyze the United States’ and Canada’s responsibility under international customary law, and (3) explore the right to redress as an element of transitional justice.

<https://yellowheadinstitute.org/2019/12/17/calls-to-action-accountability-a-status-update-on-reconciliation/>.

18. *See infra* Section II.

19. *See infra* Section III.

20. *See infra* Section V.

i. Lemkin and the Drafting of the Genocide Convention

Facing a new world in the aftermath of World War II, Allied powers sought to ensure that genocide would never happen again.²¹ As Winston Churchill stated, "there is no doubt that this is [...] the greatest and most horrible single crime ever committed in the whole history of the world."²² To put a name to the atrocities committed, Polish–Jewish jurist Raphael Lemkin coined the term genocide from the Greek prefix *genos*, meaning race or tribe, and the Latin suffix *cide*, meaning killing.²³ Lemkin was appalled that there was no legal definition beyond mass murder to describe the Armenian genocide and was determined to find a legal avenue to hold Nazis responsible during the Nuremberg trials.²⁴ Lemkin’s original conception of genocide included destruction of cultural identities through systemic violence.²⁵ Lemkin’s novel approach was two-fold. First, the negative process included the “destruction of the national pattern of the oppressed group.”²⁶ Second, the positive aspect contained “the imposition of the national pattern of the oppressor.”²⁷ The initial act was negative because it was destructive, while the second act was positive because it imposed the adoption of a majoritarian culture upon the minority group.²⁸ For Lemkin, destroying an entire set of people was intrinsically linked to the destruction of cultural identity.²⁹ Genocide was cultural.

21. *Legal Framework: The Genocide Convention*, U.N. OFF. ON GENOCIDE PREVENTION & THE RESP. TO PROTECT, <https://www.un.org/en/genocideprevention/genocide-convention.shtml> (last visited Apr. 10, 2022).

22. MARTIN GILBERT, *AUSCHWITZ AND THE ALLIES* 341 (1981).

23. *Definitions*, U.N. OFF. ON GENOCIDE PREVENTION & THE RESP. TO PROTECT, <https://www.un.org/en/genocideprevention/genocide.shtml> (last visited Oct. 19, 2021).

24. Raphael Lemkin, *Genocide*, 15 AM. SCHOLAR 227, 227 (1946). “Would mass murder be an adequate name for such a phenomenon? We think not, since it does not connote the motivation of the crime, especially when the motivation is based upon racial, national or religious considerations.”

25. U.N. Secretary General, *Draft Convention on the Crime of Genocide*, 17, UN Doc E/447 (June 26, 1947). The *Draft Convention* included three types of genocide: physical, biological, and cultural.

26. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (1944).

27. *Id.* at 80.

28. Leora Bilsky & Rachel Klagsbrun, *The Return of Cultural Genocide?*, 29.2 EUR. J. INT’L L. 373, 378 (2018) (quoting Lemkin, *supra* note 26, at 79).

29. Dirk Moses, *Lemkin, Culture, and the Concept of Genocide*, in *THE OXFORD HANDBOOK OF GENOCIDE STUDIES* 34 (Donald Bloxham, A. Dirk Moses eds., 2010); *see also*

The International Military Tribunal at Nuremberg (IMT) mentioned the word “genocide” only once while conducting Nazi criminal trials and only in passing as “the prime illustration of a crime against humanity.”³⁰ Perhaps due to the prosecutorial nature of the Nuremberg trials, the IMT was confined to international criminal law. Acts of aggression and crimes against humanity took center stage, leaving behind claims for cultural destruction and relying heavily on the rules of trial, legal precedence, and dismissal of any retroactive claims.³¹

The United Nations General Assembly first adopted Lemkin’s more encompassing definition of cultural genocide in its draft resolution.³² Later, both the Secretariat and Ad Hoc Committee reports included cultural genocide provisions.³³ The Secretariat’s Draft included three distinct categories of genocide: physical, biological, and cultural.³⁴ Yet, the ill-fated cultural genocide provisions did not survive the final draft of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), and only echoes of protecting cultural property and heritage through

Id. at 37 quoting *Memorandum from Raphael Lemkin to R. Kempner*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, R. KEMPNER PAPERS (RS 71.001) (June 5, 1946). “Cultural Genocide is the most important part of the [Genocide] Convention.”

30. Payam Akhavan, *Crimes of Omission: Why a UN Treaty on Genocide but Not on Crimes Against Humanity?*, JUST SECURITY (Sep. 21, 2021), <https://www.justsecurity.org/78286/crimes-of-omission-why-a-un-treaty-on-genocide-but-not-on-crimes-against-humanity/>.

31. For a closer look into the motivations behind the IMT, see L. DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* 89–90 (2001).

32. “Genocide is the denial of the right of existence of entire human groups [...]. Such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity *in the form of cultural* and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations [...]. The general assembly, therefore, affirms that genocide is a crime under international law [...] for the commission of which principals and accomplices [...] whether the crime is committed *on religious, racial, political or any other grounds*—are punishable.” G.A. Res. 96(I), at 188–89 (Dec. 11, 1946). The General Assembly later reaffirmed that genocide was an international crime in G.A. Res. 180(11), at 129–30, (Nov. 21, 1947) (emphasis added).

33. Draft Convention on The Crime of Genocide, Communications Received By the Secretary-General, U.N. Doc. A/401 art.I(II)(3)(d)(e), at 6–7 (1947) [Draft Convention]; Rep. of the Ad Hoc Comm. on Genocide, at 55, U.N. Doc. E/794, (May 24, 1948).

34. *Supra* note 33 [Draft Convention] at 25–26. Physical genocide is the killing of a group, biological genocide focuses on sterilization and reproductive measures that prevent births within a particular group, and cultural genocide generally focuses on the destruction of language, religion, and places of worship.

international human rights treaties³⁵ and treaties that protect certain minoritized groups remained.³⁶ Geopolitical interests elbowed their way into protecting colonial countries' own behavior, which routinely violated minority rights, particularly those of Indigenous peoples.³⁷ It was decided that the issue of "cultural genocide" was better dealt with under the United Nations Declaration for Human Rights, which was also being debated at the time.³⁸

Remnants of the 1947 draft treaty included cultural genocide in Article 2 of the final draft which prohibits acts committed with "intent to destroy, in whole or part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) [and] forcibly transferring children of the group to another group."³⁹

This was a watered-down version of the original draft, but the Genocide Convention did include the forcible transfer of children.⁴⁰ Although Rafael Lemkin's definition of genocide and the original draft

35. Protocol II to the Convention on the Protection of Cultural Property in Times of Armed Conflict, May 14, 1954, 249 UNTS 240; Rome Statute of the ICC, arts. 8(2)(b)(ix) & 8(2)(e)(iv), 21 UNTS 90, 17 July 1998, entered into force 1 July 2002.

36. The United Nations Declaration on the Rights of Indigenous Peoples 2007, UN Doc. A/61/L.67/ Annex (2007); Convention for the Safeguarding of Intangible Cultural Heritage 2003, 2368 UNTS 3.

37. LEO KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* 30–31 (1983).

38. Johannes Morsink, *Cultural Genocide, the Universal Declaration, and Minority Rights*, HUMAN R. Q. 1030 (Nov. 1999) (citing *Summary Record of Meetings*, U.N. GAOR 6th Comm., 3d Sess., at 206, U.N. Doc. A/C.6/SR (1948)).

39. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

40. William A. Schabas, *Convention on the Prevention and Punishment of the Crime of Genocide*, U.N. AUDIOVISUAL LIBR. OF INT'L L. at 2 (2008), https://legal.un.org/avl/pdf/ha/cppcg/cppcg_e.pdf.

treaty of the Genocide Convention clearly shows a connection between cultural destruction, forced assimilation, and the crime of genocide, forcibly removing children through the residential school systems in both Canada and the United States directly echoes the language in Art. II(e) of the adopted Genocide Convention.⁴¹

The United States did not ratify the Genocide Convention until forty years later due to a fear of facing prosecution for its treatment of African American and Native American citizens.⁴² The United States ratified the Genocide Convention in 1988 only with reservations that granted immunity from prosecution.⁴³

ii. *Enforcement Under International Law*

The Rome Statute of the International Criminal Court (Rome Statute) adopted the Genocide Convention's definition and provided an avenue to prosecute perpetrators of genocide and crimes against humanity.⁴⁴ While the United States originally signed the Rome Statute in 2000, the United States did not ratify the treaty and in 2002, withdrew any obligation under the Rome Statute.⁴⁵ The United States is notably not a party to the ICC, citing opposition to universal jurisdiction.⁴⁶ However, genocide could be enforced under *jus cogens*, norms accepted and recognized by the international community to amount to customary law.⁴⁷ Furthermore, Article 1 of the Genocide Convention contains a provision in which states have a legal obligation to "prevent" genocide, and the Universal Declaration of Human Rights

41. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

42. Lindsay Glauner, *The Need for Accountability and Reparations: 1830-1976 the United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide against Native Americans*, 51 DEPAUL L. REV. 911, 925 (2002).

43. Christopher C. Joyner, *United States: Genocide Convention Implementation Act of 1987*, 28 I.L.M. 754, 755 (May 1989).

44. Rome Statute of the International Criminal Court art. 1, 5, July 17, 1998, 2187 U.N.T.S. 38544.

45. Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, AM. SOC'Y OF INT'L LAW (May 11, 2002), <https://www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty>.

46. Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 251 (2001).

47. U.N. OFF. OF LEGAL AFF., *Chapter V: Peremptory norms of general international law (jus cogens)*, at 141, <https://legal.un.org/ilc/reports/2019/english/chp5.pdf>.

(UDHR) holds states accountable for the treatment of their own populations.⁴⁸

While treaty law is only enforceable to states which are parties to the treaty, customary international law (CIL) is binding on all states.⁴⁹ CIL is a binding requirement derived from consistent state practices that establish international norms.⁵⁰ Traditionally, there was a four-part test to determine if a norm has become part of international custom.⁵¹ However, after *Nicaragua v. U.S.*,⁵² the International Court of Justice (ICJ) adopted a two-part test, which focused primarily on (1) state practice and (2) *opinio juris*.⁵³ In the Asylum Case, the ICJ made clear that state practice requires “a constant and uniform usage practiced by the States in question [resulting in] a duty incumbent on the territorial state.”⁵⁴ The state practice does not need to be adopted universally but should show wide acceptance.⁵⁵ As per the second prong, *opinio juris* is “a belief that [a] practice is rendered obligatory by the existence of a rule of law requiring it.”⁵⁶ A practice does not amount to *opinio juris* merely if states are widely adopting a habit of

48. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

49. An exception to this is if a state is a “persistent objector.” According to the persistent objector doctrine, states can escape a customary law obligation if they have consistently objected to the custom since before the custom’s formation. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L. J. 202, 233–34 (2010).

50. Once States have consented to a customary international law rule, they cannot withdraw its consent. Kathleen Barrett, *Customary International Law*, OXFORD RES. ENCYCLOPEDIA OF INT’L STUD., 17. Oxford University Press.

51. Previously, the ICJ relied on elements of duration, uniformity, generality of practice, and *opinio juris* to determine if something qualified as binding under customary international law. Meg Good, *Implementing the Human Right to Water in Australia*, U. OF TASMANIA L. REV., 107 (2011); see also Statute of the International Court of Justice (1945) Act 1945/32 I.; BROWNIE, PRINCIPLES OF INT’L L., 3 (Oxford University Press, 5th ed 1998); Asylum Judgment (Colombia v. Peru), 1950 I.C.J. 266, 276–77 (November 20); Fisheries Jurisdiction (United Kingdom v. Iceland), Merits Judgement, 1974 I.C.J. 175 (July 25).

52. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 190 (June 27).

53. *Id.*

54. Asylum Judgment (Colombia v. Peru), 1950 I.C.J. 266, 276–77 (November 20).

55. Restatement (Third) of the Foreign Relations Law of the United States § 102, Reporters’ Note b, (1987).

56. *Id.*

practice; states must follow the practice out of a sense of legal obligation.⁵⁷

As discussed in Section III, *infra*, the United States and Canada engaged in genocide to bring about the destruction of a group “in whole or in part”⁵⁸ by causing psychological and physical harm to residential children,⁵⁹ forcing sterilization of Indigenous women,⁶⁰ and “forcibly transferring children of the group to another group.”⁶¹

Under Article 8 of the UDHR, “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”⁶² Because of human rights violations, such as the forcible removal of children, Indigenous peoples have the right to redress the harms caused to them. The International Covenant on Civil and Political Rights (ICCPR)⁶³ and the Optional Protocol to the International Convention on Economic and Social Rights (OP-ICESCR)⁶⁴ provide a right to redress. Beyond the Covenants and the UDHR, the International Convention on the Elimination of All Forms of Racial Discrimination

57. *North Sea Continental Shelf* (Fed. Repub. Ger. v. Den. & Neth.), 1969 I.C.J. 3, 45 (Feb. 20).

58. *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, art. II.

59. Antonio Buti, *Canadian Residential Schools - The Demands for Reparations*, 5 FLINDERS J. L. REFORM 225, 233 (2001).

60. KAREN STOTE, *BIRTHRIGHT DENIED, THE STERILIZATION OF INDIGENOUS WOMEN*, HERIZONS, 16 (2017) (noting that in a six-year period in the 1970s, doctors in Canada and the United States sterilized about twenty five percent of Indigenous women); *see also* Fakiha Baig, *Indigenous women still forced, coerced into sterilization: Senate report*, THE CANADIAN PRESS (June 3, 2021, 8:26 PM), <https://globalnews.ca/news/7920118/indigenous-women-sterilization-senate-report/> (detailing a Canadian senate report where Indigenous women were coercively sterilized as recently as 2019).

61. *Supra* note 39.

62. According to the UDHR, “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law.” *Universal Declaration of Human Rights*, G.A. Res. 217 A, U.N. GAOR, 3d Sess., 1st Plen. Mtg., U.N. Doc A/810 at 71 (Dec. 2, 1948). [Rule 21.7.1]

63. Article 2(3)(a): “Each State Party [. . .] undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy” which entered into force the 23rd of March 1976. G.A. Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) 52, UN Doc A/6316 (1966) UNTS 171.

64. *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, G.A. Res 63/117, U.N. GAOR, 63d Sess. Supp No 49, UN Doc A/RES/63/117, (2008) (Optional Protocol).

(ICERD),⁶⁵ the Convention on the Rights of the Child (CRC),⁶⁶ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁶⁷ address the right to redress for minority groups whose human rights have been violated.

While the United States and Canada have not ratified all these treaties,⁶⁸ both governments are currently engaging in redress efforts through their Truth and Reconciliation Commissions.⁶⁹ It is vital that the correct measures are used to correct harms.

B. *Factual Background*

Cultural genocide in the United States and Canada manifested through forced assimilation and child welfare policies. This section analyzes the (1) historical and legal background of residential boarding schools in the United States and Canada,⁷⁰ (2) modern child welfare policies in the United States and Canada,⁷¹ and (3) potential disruption of tribal sovereignty due to *Brackeen v. Haaland*, a recent challenge to Native child welfare laws.⁷² This section will lay the groundwork to

65. Article 6: “States Parties shall assure to everyone within their jurisdiction effective protection and remedies [. . .] as well as the right to seek just and adequate reparation or satisfaction.” G.A. Res. 2106 (XX), art. 6 (Dec. 21, 1965).

66. Article 39: “States Parties shall take all appropriate measures to promote physical and physiological recovery and social integration of a child victim of [any form of] cruel, inhuman or degrading treatment or punishment.” G.A. Res 44/25, Annex 44 UN GAOR Supp. (No. 49) 167, UN Doc A/44/49 (1989).

67. Article 14(1): “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” G.A. Res. 39/46, Annex 39 U.N. GAOR Supp. (No. 51) 197, UN Doc A/39/15 (1984).

68. *United Nations Human Rights Treaty Bodies: Treaty Body Database*, OHCHR, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en (accessed June 3, 2022). The United States signed and ratified CAT but is not a party to the CAT Optional Protocol (CAT-OP). The United States signed (Sep. 28, 1966) and ratified (Oct. 21, 1994) CERD. The United States signed (Oct. 5, 1977) CESCPR but did not ratify the treaty. The United States ratified the ICCPR but did so with five reservations. Canada has not signed or ratified the CAT-OP.

The United States is one of three countries to not ratify the CRC. The other non-parties to CRC are Somalia and South Sudan. Karen Attiah, *Why won't the U.S. ratify the U.N.'s child rights treaty?*, THE WASH. POST (Nov. 12, 2014), <https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/>.

70. *Infra* Section II.B.i–ii

71. *Infra* Section II.B.iii

72. *Infra* Section II.B.iv

help demonstrate that the United States and Canadian child welfare policies in the past equate to cultural genocide and that the latest instance in *Brackeen v. Haaland* is a reiteration of previous genocidal policies.⁷³

i. Background of the Residential Boarding Schools

Row after row of small, white headstones greet the visitors to the Carlisle Indian Industrial School. Unlike most of the Indian boarding schools with mass, unmarked graves, these headstones are marked, neatly displaying the tribes and names of the Native children who never came home.⁷⁴ Carlisle, now a military barracks, was the model for a national system of Indian boarding schools designed to systemically destroy Native cultures and communal ties.⁷⁵ The Bureau of Indian Affairs established the first Indian boarding school in 1860 in Yakima, Washington with the goal of assimilating Native children into white, American life.⁷⁶ Believing that the boarding schools were not doing enough to assimilate Native youth, Col. Richard Henry Pratt applied his military background and established the Carlisle Indian School in Carlisle, Pennsylvania.⁷⁷ The goal was to “[k]ill the Indian but save the man.”⁷⁸ Between 1860 and 1978, the Bureau of Indian

73. *Id.*

74. Jeff Gammage, ‘*Those kids never got to go home*,’ THE PHILA. INQUIRER (March 13, 2016), <https://www.inquirer.com/news/inq/those-kids-never-got-go-home-20160319.html>; see also Hilary Beaumont, *Inside the US push to uncover Indigenous boarding school graves*, AL JAZEERA (Dec. 17, 2021), <https://www.aljazeera.com/news/2021/12/17/inside-us-push-to-uncover-indigenous-boarding-school-graves> (“Researchers say unmarked graves likely will be found at majority of boarding schools for Indigenous children across U.S.”).

75. *Carlisle Indian Industrial School*, CUMBERLAND VALLEY VISITORS BUREAU, visitcumberlandvalley.com/listing/Carlisle-indian-industrial-school/1144/ (last visited May 6, 2022) (Note: The official marker in Carlisle calls the genocide of Native culture and community an “acculturation.”)

76. *History and Culture Boarding Schools*, N. PLAINS RESERVATION AID (Oct. 19, 2021), http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_boardingschools.

77. ANTONIA VALDES-DAPENA, *VISUALIZATION A MISSION: ARTIFACTS AND IMAGERY OF THE CARLISLE INDIAN SCHOOL, 1879–1918*, (2004).

78. PHILLIP EARENFIGHT ET AL., *VISUALIZING A MISSION: ARTIFACTS AND IMAGERY OF THE CARLISLE INDIAN SCHOOL, 1879–1918*, (2004).

Affairs opened 357 Indian Boarding Schools.⁷⁹ Churches opened hundreds more.⁸⁰

On recommendation from the Davin Report,⁸¹ the Canadian parliament passed the 1876 Indian Act, which adopted the residential school system that Pratt designed.⁸² The Canadian version of the Indian Residential Schools almost exactly mirrored the United States' paradigm with the exception of explicitly incorporating religion to "Christianize and civilize" Aboriginal peoples.⁸³

The conditions at the boarding schools in both Canada and the United States were horrendous. Behind the school walls were countless incidents of physical and sexual abuse, medical experiments,⁸⁴ and, due to the lack of available sanitation and healthcare, rampant disease at epidemic levels.⁸⁵ Beyond the physical

79. Melissa Mejia, *The U.S. history of Native American Boarding Schools*, THE INDIGENOUS FOUND., <https://www.theindigenousfoundation.org/articles/us-residential-schools> (last visited April 22, 2022); see also *List of Indian Boarding Schools in the United States*, THE NAT'L NATIVE AM. BOARDING SCH. HEALING COAL. (2020), <https://boardingschoolhealing.org/list> for a list of residential schools by state.

80. Mary Annette Pember, *Death by Civilization*, THE ATLANTIC (March 8, 2019), <https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293/>.

81. Nicholas Flood David, *Report on Industrial Schools for Indians and Half-Breeds*, THE INDIAN RESIDENTIAL SCH HIST. & DIALOGUE CTR. (Mar. 14, 1879), <https://collections.irshdc.ubc.ca/index.php/Detail/objects/9427>.

82. Richard H. Bartlett, *The Indian Act of Canada*, 27 BUFF. L. REV. 581 (1977–1978).

83. TRC, AVS, Mary Courchene, STATEMENT TO THE TRUTH AND RECONCILIATION COMMISSION OF CANADA, Pine Creek First Nation, Manitoba, (Nov. 28, 2011), Statement Number: 2011-2515. ("Their only mandate was to Christianize and civilize; and it's written in black and white. And every single day we were reminded.")

84. Noni E. MacDonald & Richard Stanwick, *Canada's shameful history of nutrition research on residential school children: The need for strong medical ethics in Aboriginal health research*, PAEDIATRICS & CHILD HEALTH 19(2), 64 (Feb. 2014); Ian Mosby, *Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942–1952*, 46 SOC. HIST., 91 (May 2013). In 1975, the Children's Defense Fund (CDF) inquired as to whether Native children were subject to medical experiments for drugs to treat trachoma, a disease that stems from eye infections, without parental consent. H.R. Doc. No. 77-3, at 11 (1976). The Proctor Foundation for Research in Ophthalmology at the University of California, San Francisco, performed research on boarding school students from 1967–1968 and 1972–1973. *Id.* at 12.

85. Antonio Buti, *The Removal of Indigenous Children from Their Families - US and Australia Compared*, 8 U.W. SYDNEY L. REV. 125 (2004); see Gustaf Kilander, *Researchers say that TB at residential schools for indigenous children in Canada wasn't accidental*, INDEPENDENT (July 20, 2021),

manifestations of trauma and disease, the residential schools inflicted insidious internal trauma by stripping all vestiges of Native life.⁸⁶ Officials at the school facilitated the destruction of Native cultures. They cut children's braids, denied the wearing of traditional clothes, and doled out harsh punishments if children spoke their native languages.⁸⁷ Children were forcibly taken from their families and placed in schools that were more akin to prisons.⁸⁸ As a former student of a residential school described it, "[the school is] what I imagine jail to be."⁸⁹

As is often the case with controversial programs, the children's experiences were complex.⁹⁰ Some former students wrote Carlisle and asked to enroll their children.⁹¹ Pratt's headstone seems to indicate that former students helped erect it.⁹² Yet, the underlying purpose of the schools, despite a few positive experiences, should always be brought to the foreground. Children as young as four were forcibly taken away from their families and placed in a residential school far away from their tribal land.⁹³ The distance was an intentional effort to further

<https://www.independent.co.uk/news/world/americas/tb-indigenous-children-canada-schools-b1887503.html> (last visited April 22, 2022) ("Deaths caused by TB in First Nations communities [...] were 700 per 100,000 individuals [. . .]. [T]hese were some of the highest rates recorded. But the number of TB deaths in residential schools was a staggering 8,000 per 100,000 children.").

86. Cindy Blackstock, *Social Movements and the Law: Addressing Engrained Government-Based Racial Discrimination against Indigenous Children*, 19 AILR 6, 8 (2015) (citing Canadian historian John Milloy "residential schools cut 'the artery of culture'").

87. Rosemary L. Nagy, *The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission*, THE INT'L J. OF TRANSITIONAL JUST., 63 (2012).

88. Hilary Beaumont, *Inside the US push to uncover Indigenous boarding school graves*, AL JAZEERA (Dec. 17, 2021), <https://www.aljazeera.com/news/2021/12/17/inside-us-push-to-uncover-indigenous-boarding-school-graves> (A survivor of one of the schools said, "[t]hey really were concentration camps, they really were prisons.")

89. LINDA JAINE, RESIDENTIAL SCHOOLS: THE STOLEN YEARS, 11 (Linda Jaine ed., 1993).

90. Brenda J. Child, *U.S. boarding schools for Indians had a hidden agenda: Stealing Land*, THE WASH. POST (Aug. 27, 2021), <https://www.washingtonpost.com/outlook/2021/08/27/indian-boarding-schools-united-states/>

91. JACQUELINE FEAR-SEGAL ET AL., CARLISLE INDIAN INDUSTRIAL SCHOOL: INDIGENOUS HISTORIES, MEMORIES, AND RECLAMATIONS, 51 (2016).

92. *Id.*

93. Dr. Denise K. Lajimodiere, *The sad legacy of American Indian boarding schools in Minnesota and the U.S.*, MINNPOST (June 14, 2016), <https://www.minnpost.com/mnopedia/2016/06/sad-legacy-american-indian-boarding-schools-minnesota-and-us/>.

destroy communal ties and minimize contact between children and their families.⁹⁴ For communities in which land is intertwined with identity, the removal to distant locations was another layer of harm.⁹⁵ The purpose of these residential boarding schools was assimilation through cultural genocide.⁹⁶ It was never about education.⁹⁷ It was always about dispossession.

a. *Canadian Residential Boarding Schools*

At the heart of Canadian and American Indian policies was institutionalized assimilation, motivated by an underlying spirit of Social Darwinism.⁹⁸ Government officials operated under a belief that First Nations' cultures were inferior to Christian European civilizations.⁹⁹ Duncan Campbell Scott is largely regarded as the architect of the Indian Residential School System in Canada.¹⁰⁰ Scott is paradoxically remembered both as an admirer of First Nations' culture who wrote poetry about First Nations' cultures¹⁰¹ and as the key bureaucrat behind Indigenous cultures' destruction.¹⁰² Noting that First Nations children were not assimilating to white dominant culture upon return from the schools, Scott urged parliament to pass an

94. Neyla Berry, *Exploring Canada's Disturbing History of the Residential School System*, THE ORG. FOR WORLD PEACE (June 11, 2021), <https://theowp.org/reports/exploring-canadas-disturbing-history-of-the-residential-school-system/>. ("Parents would often camp outside schools in an attempt to be closer to their children, prompting Indian Commissioner Hayter Reed to petition for schools to be moved to a greater distance.")

95. CHRISTINA HUTCHINSON, *NEW FRAMINGS ON ANTI-RACISM AND RESISTANCE*, 35–55 (2017).

96. Ann Piccard, *Death by Boarding School: The Last Acceptable Racism and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137, 151 (2013).

97. President Theodore Roosevelt, First Annual Message (Dec. 3, 1901) (transcript available at The American Presidency Project). ("In the schools, the education should be elementary and largely industrial. The need of higher education among the Indians is very, very limited.")

98. ANDREA SMITH, *INDIGENEITY, SETTLER COLONIALISM, WHITE SUPREMACY IN RACIAL FORMATION IN THE TWENTY-FIRST CENTURY* (2019).

99. *Id.*

100. BRIAN TITLEY, *A NARROW VISION: DUNCAN CAMPBELL SCOTT AND THE ADMINISTRATION OF INDIAN AFFAIRS IN CANADA*, 22 (1986).

101. Note that Scott's supposed admiration for First Nations' culture is belied by assumptions of racial superiority and exploitation. "[N]ineteenth century notions of Social Darwinism and the survival of the fittest, and the high confidence in Western Civilization's achievement and its future are the underlying assumptions of the poetry." E. Palmer Patterson II, *ONTARIO HISTORY* Vol. 59, No. 2, June 1967 (73).

102. E. BRIAN TITLEY, *A NARROW VISION: DUNCAN CAMPBELL SCOTT AND THE ADMINISTRATION OF INDIAN AFFAIRS*, 23–24 (1986).

amendment to the 1920 Indian Act, which made attendance at the residential boarding schools compulsory for children under fifteen years old.¹⁰³ By 1930, all Indigenous children between the ages of seven and sixteen were required by law to attend an Indian boarding school.¹⁰⁴ Scott was aware that First Nations children were dying from diseases like tuberculosis at epidemic rates.¹⁰⁵ Indeed, the local newspaper leaked an internal government report that called the schools “hotbeds of disease”¹⁰⁶ due to crowding, poor ventilation, and lack of sanitation.¹⁰⁷ It is estimated that between 4,000 and 6,000 children died at the residential schools, and Scott’s policies largely contributed to these preventable deaths.¹⁰⁸ Yet, Scott continued to push for increased enrollment stating that, “our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic.”¹⁰⁹ This practice of assimilation was an effort to dispossess First Nations people from their land, terminate treaties, and divest from any financial or legal obligations.¹¹⁰ It grew out of a need to

103. Amy Anderson, Dallas K. Miller & Dwight Newman, *Canada's Residential Schools and the Right to Family Integrity*, 41 DALHOUSIE L. J. 301, 314 (2018).

104. Titley, *supra* note 100, at 91–92.

105. Jeremiah Rodriguez, *This doctor tried to raise alarms about residential schools 100 years ago but was ignored*, CTV NEWS, (June 9, 2021), <https://www.ctvnews.ca/canada/this-doctor-tried-to-raise-alarms-about-residential-schools-100-years-ago-but-was-ignored-1.5462902>.

106. *Schools Aid White Plague*, THE EVENING CITIZEN (Nov. 15, 1907).

107. Kilander, *supra* note 85 (quoting Peter Henderson Bryce the chief medical officer of the Department of Indian Affairs, who stated, it was “almost as if the prime conditions for the outbreak of epidemics had been deliberately created.”).

108. The official Canadian TRC report documents 3,213 children who have died at residential schools, but the number is largely disputed. The National Centre for Truth and Reconciliation has documented 4,118 children but recognizes that the number is likely higher. Raymond Frogner, head of archives for the National Centre for Truth and Reconciliation in Winnipeg, has stated that the number they arrived at is “not even a fifth of our records that we’ve gone through.” Brenda Elias, *The challenge of counting the missing when the missing were not counted* (International Association of Genocide Scholars Conference: Time, Movement, and Space: Genocide Studies and Indigenous Peoples, 2014).

109. THE TRUTH & RECONCILIATION COMM’N OF CAN., (2015) *Honouring the truth, reconciling for the future: Summary of the final report of the Truth and Reconciliation Commission of Canada*, 3, retrieved from http://www.trc.ca/assets/pdf/Executive_Summary_English_Web.pdf (citing Library and Archives Canada, RG10, volume 6810, file 470-2-3, volume 7, Evidence of D. C. Scott to the Special Committee of the House of Commons Investigating the Indian Act amendments of 1920, (L-2)(N-3)).

110. *Id.* at 1–3.

“extinguish Aboriginal title to the land without violating the letter and spirit of established British law.”¹¹¹

The Canadian government viewed treaties as real estate transactions, exchanging the right to stay on Reserve land in exchange for the meager compensation and education that the Crown provided.¹¹² For example, Treaty One, which covers southern Manitoba, ceded Anishinaabe land to the Canadian government in exchange for a Reserve and an annual payment of \$3 per family.¹¹³ This perspective is in sharp discordance with First Nations’ oral history, which premises the Numbered Treaties on reconfirming friendly relationships between sovereign nations.¹¹⁴ According to Anishinaabe oral history, the agreement was for mutual protection and beneficial sharing of the land in accordance with *inaakonigewin*, Anishinaabe law.¹¹⁵ Unlike earlier accounts of treaty negotiations where the narrative seems to pit the naïve Native against the cunning Euro-settler, more recent scholarship suggests that First Nations people were competent legal actors and that treaty discrepancies were a result of purposeful mistranslations and cultural differences.¹¹⁶

After World War II, the Canadian government reevaluated its policies and transformed the residential school system into a child welfare system.¹¹⁷ The Joint Committee of the Senate and House of Commons cited a lack of success as a motivating factor in amending the Indian Act and, in 1951, the government removed the most egregious and anachronistic elements of the legislation while retaining

111. ROLAND D. CHRISJOHN AND SHERRI L. YOUNG, *CIRCLE GAME: SHADOWS AND SUBSTANCE IN THE INDIAN RESIDENTIAL SCHOOLS EXPERIENCE IN CANADA*, 45 (2006).

112. Isabelle Montpetit, *Treaties from 1760–1923: Two sides to the story*, CBC NEWS (May 26, 2011), <https://www.cbc.ca/news/canada/treaties-from-1760-1923-two-sides-to-the-story-1.1081839>.

113. Siku Allooooloo et. al, *Treaty Relations as a Method of Resolving IP and Cultural Heritage Issues*, U OF VICTORIA AND IPINCH 63 (Oct. 2, 2014).

114. Janna Promislow, *Treaties in History and Law*, 47 U.B.C. L. REV. 1085, 1114 (2014).

115. Aimée Craft, *Living Treaties, Breathing Research*, 26 CANADIAN J. OF WOMEN & THE L 1, 13 (2014).

116. Brittany Luby, *The Department Is Going Back on These Promises: An examination of Anishinaabe and Crown understandings of Treaty*, 30 CANADIAN J. OF NATIVE STUD. 203, 204 (2010).

117. Allyson Stevenson, *Intimate Integration: A Study of Aboriginal Transracial Adoption in Saskatchewan, 1944–1984*, U. OF SASKATCHEWAN 1, 23 (April 2015).

the overarching purpose of assimilation.¹¹⁸ The 1951 Act codified the government's paternalism and states that First Nation peoples were not "sufficiently advanced to manage their own affairs."¹¹⁹ The Second Joint Committee in 1960 declared that assimilation was not an objective of the legislation, yet in the same breath, the Committee advocated for the transfer of education and social services to the provincial governments.¹²⁰ This period of time from 1961 to the mid-1980s was coined the Sixties Scoop.¹²¹ It refers to the period when indigenous children were taken from their families, often without consent, and placed with non-Native families.¹²²

Patrick Johnson, a researcher for the Canadian Council on Social Development (CCSD), coined this term in 1983 for a report on child welfare after hearing testimonies that social workers "would literally scoop the children from reserves on the slightest pretext."¹²³ Child-welfare workers were not required to have training in First Nations' cultural practices or to be familiar with a tribe's unique history.¹²⁴ The lack of cultural competency and implicit biases caused enormous harm. Child-welfare workers would remove children after seeing cupboards with berries, fish, and dried game.¹²⁵ The government agents believed that this diet, contrary to a Western Canadian diet, was insufficient for a child's nutritional wellbeing and often removed children, who were well-taken care of, without notice

118. Among the amended changes to the Indian Act were suffrage for Indian women and the removal of the "manufacture, sale or consumption" of "intoxicants" upon the Reserve. *Indian Act: Hearing before Special Joint Committee of Senate and House of Commons on Indian Act*, 20th Parliament 187 (1948) (Can.).

119. *Id.*

120. *Indian Affairs: Hearing before Joint Committee of the Senate and the House of Commons on Indian Affairs*, 24th Parliament 678 (1960) (Can.).

121. Linda Mussell, *Intergenerational Imprisonment: Resistance and Resilience in Indigenous Communities*, 33 J.L. & SOC. POL'Y 15, 28 (2020).

122. *Id.*

123. Rachel Shabalin, *The "Sixties Scoop": A Dark Chapter in Canadian History*, LAWNOW, <https://www.lawnow.org/the-sixties-scoop-a-dark-chapter-in-canadian-history/> (Mar. 2, 2017).

124. Cathy Richardson & Bill Nelson, *A Change of Residence: Government Schools and Foster Homes as Sites of Forced Aboriginal Assimilation - A paper Designed to Provoke Thought and Systemic Change*, 75 FIRST PEOPLE'S CHILD & FAM. REV. 75, 79 (2007).

125. Erin Hanson, *Sixties Scoop*, BC: FIRST NATIONS STUDIES PROGRAM (2009), http://indigenousfoundations.arts.ubc.ca/sixties_scoop/.

or warning.¹²⁶ White child-welfare workers, encumbered with implicit biases that preferred a Western conception of a nuclear family, implemented a child welfare program with policies rooted in white supremacy and discrimination.¹²⁷

This is not to say that all Native children taken from their families and placed in the child welfare system were taken on false or flimsy pretenses. In some cases of neglect and abuse, removal was in the best interest of the child.¹²⁸ Yet, the very conditions the child-welfare officers were shocked by were caused by the same agency that employed them.¹²⁹ Cindy Blackstock, executive director of the First Nations Child and Family Caring Society of Canada, further explains that child-welfare workers would “walk onto these reserves, see all this poverty and devastation and children from the residential school system—who are now parents in a lot of trauma—and, instead of seeing that for what it was [...], remove[] the kids all over again.”¹³⁰ The Sixties Scoop was another iteration of the residential boarding schools.¹³¹ Instead of transferring children to residential schools, state officials removed children from families inflicted by intergenerational trauma and transferred them into the child-welfare system.¹³² By the 1970s, the number of First Nations children in the child welfare system

126. SUZANNE FOURNIER & ERNIE CREY, *STOLEN FROM OUR EMBRACE* 30 (Douglas & McIntyre Ltd. 1997).

127. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada* (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2, 4 (Can.) (declaring that the First Nations Child and Family Services (FNCFS) Program made “assumptions [that] ignore[d] the real child welfare situation in many First Nations communities on reserve” and that the Canadian Human Rights Act (the CHRA) was designed to “meet the problem of systemic discrimination.”).

128. Keri B. Lazarus, *Adoption of Native American and First Nations Children: Are the United States and Canada Recognizing the Best Interests of the Children*, 14 ARIZ. J. INT'L. & COMP. L. 255, 267 (1997).

129. Patricia A. Monture, *A Vicious Circle: Child Welfare and the First Nations*, 3 CAN. J. WOMEN & L. 1, 1 (1989).

130. Anna Bokma, *Adoptees Seeking Redress: Canada Confronts the Sixties Scoop*, INDIAN COUNTRY TODAY (2018), <https://indiancountrytoday.com/archive/adoptees-seeking-redress-canada-confronts-sixties-scoop>.

131. Anya Zoledziowski, *The Residential School System Didn't End – It Just Became Foster Care*, VICE NEWS (June 9, 2021), <https://www.vice.com/en/article/7kvkb9/the-residential-school-system-didnt-endit-just-became-foster-care>.

132. *Id.*

was staggeringly high.¹³³ In 1977, First Nations children accounted for forty four percent of the children in care in Alberta, fifty one percent of the children in care in Saskatchewan, and sixty percent of the children in care in Manitoba, despite constituting less than five percent of the population.¹³⁴ This trend has continued today in the so-called “Millennium Scoop” where Indigenous children compose only seven percent of the population in Canada but make up nearly half of the population of children in foster care.¹³⁵

ii. Current United States Native Child Welfare Policies

In the United States, Congress enacted the Indian Child Welfare Act (ICWA) in 1978 as a response to forced adoptions and the residential boarding schools that separated families and destroyed communities.¹³⁶ From 1958 to 1967, the Indian Adoption Project (the Project), a federal program run by the Bureau of Indian Affairs, placed large numbers of Indian children with white families.¹³⁷ The motivation behind the adoptions was multifaceted. In the postwar period, there was a renewed emphasis on promoting the nuclear family.¹³⁸ The media promoted the Project, highlighting the ease with which Native children assimilated with white families in comparison to African American children.¹³⁹ There was also an element of white

133. Matthew L.M. Fletcher, *The Origins of the Indian Child Welfare Act: A Survey of the Legislative History*, MICH. STATE UNIV. COLL. OF LAW INDIGENOUS L. & POL’Y CTR. 1, 2 (2009).

134. TRUTH AND RECONCILIATION COMM’N OF CAN., *Summary of the Final Rep. of the Truth and Reconciliation Commission of Canada*, at 69 (2015).

135. The percentages vary by province. In the Western Provinces, seventy six percent of the children in foster care are Indigenous; in Manitoba and Saskatchewan, this number is above eighty five percent. Almost all children in foster care in Nunavut, Yukon, and the Western Territories are Indigenous, but the populations of these areas are largely Indigenous peoples. Annie Turner, *Insights on Canadian Society: Living arrangements of Aboriginal children aged 14 and under*, STATISTICS CAN., no. 75-006 (April 13, 2016).

136. Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes, H.R. Rep. 95-1386, at 1 (July 24, 1978).

137. Barbara Ann Atwood, *Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 603 (2002).

138. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54 (1989) (“An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.” (quoting H. R. Rep. No. 95-1386 at 10 (1978))).

139. DAVID FANSHEL, *FAR FROM THE RESERVATION* 119 (1972).

saviorism where white families were “rescuing” Native children from terrible conditions on the reservation.¹⁴⁰ The Director of the Indian Adoption Project, Arnold Lyslo, described the Indian child as “the ‘forgotten child,’ left unloved and uncared for on the reservation, without a home or parents he can call his own.”¹⁴¹ By evoking the imagery of the “forgotten child” and unfit Native parents, the Project justified its adoption policies to white families while not extending the same “benevolence” to tribal communities.¹⁴²

Testimonies, however, paint a different picture. Indian women were hounded by social workers and forced to sign parental release paperwork without informed consent.¹⁴³ Cheryl DeCoteau (Sisseton-Wahpeton) testified that a male social worker, “kept coming over to the house [...] every week [...] and they kept talking to me and asking if I would give him up for adoption and said that it would be best.”¹⁴⁴ The social worker continued to apply this pressure, visiting DeCoteau in the hospital right after she gave birth and having her come to his office to sign paperwork when she “didn’t know what [she] was signing.”¹⁴⁵ After she had signed the paperwork, DeCoteau’s four-month-old son was taken away from her.¹⁴⁶ Cheryl DeCoteau’s testimony is one of many where government agents coerced women to

140. President Lyndon Johnson punctuated these conditions saying in a Presidential statement, “fifty thousand Indian families [living] in unsanitary dilapidated dwellings: many in huts, shanties, even abandoned automobiles. The unemployment rate among Indian [being] nearly 40 percent, more than ten times the national average among the lowest in the nation; the rates of sickness and poverty [being] among the highest.” President Lyndon Johnson, Special Message to the Congress on the Problems of the American Indian: “The Forgotten American” (Mar. 6, 1968) (transcript available at The Presidents Project).

141. Margaret D. Jacobs, *Remembering the “Forgotten Child”: The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN QUARTERLY 136–159 (citing “Indian Adoption Project,” April 1960, 1, box 17, folder 3, CWLA Papers).

142. *Id.*

143. Patrice H. Kunesh, *Borders beyond Borders - Protecting Essential Tribal Relations off Reservation under the Indian Child Welfare Act*, 42 NEW ENG. L. REV. 15, 31 (2007).

144. Jacobs, *supra* note 141, at 146.

145. MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 72 (2014).

146. “Indian Child Welfare Program,” Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, United States Senate, 93rd Cong., 2nd sess., “Problems That American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction,” April 8 and 9, 1974 (Washington dc: US Government Printing Office, 1975), 68, 69. See *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425 (1975) (finding that DeCoteau won her case due to questions about jurisdiction).

relinquish parental rights and took children prior to any hearing to determine abuse or neglect.¹⁴⁷ In *Killing the Black Body*, Dorothy Roberts argues that “[b]laming Black mothers [...] is a way of subjugating the Black race as a whole.”¹⁴⁸ Similarly, the Indian child welfare policies served as a mechanism of racial subjugation that did nothing to address structural injustices.¹⁴⁹

Under pressure from Indian law activists, the U.S. Congress held a series of hearings about federal and state adoption policies that removed Indian children and placed them with white families in an effort of assimilation.¹⁵⁰ Congress passed the ICWA in 1978 which reversed the Indian Adoption Project.¹⁵¹ The legislative intent behind ICWA is to right a wrong, to promote tribal stability, and break a governmental policy of removing children¹⁵² that goes back nearly one hundred years.¹⁵³ ICWA affirmed tribal jurisdiction and acknowledged that tribes knew what was best for the children within their tribe.¹⁵⁴ It also established that the preservation of tribal and family unity was essential to the stability of the tribe.¹⁵⁵ ICWA is based on the unique political status of Indian tribes and is not a race-based law.¹⁵⁶ Under ICWA the adoption placement preferences were:

147. Jacobs, *supra* note 141, at 72.

148. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 10 (2000).

149. George F. Will, *The brutal racial politics of the Indian Child Welfare Act*, THE WASH. POST. (Jan. 5, 2022), <https://www.washingtonpost.com/opinions/2022/01/05/brutal-indian-child-welfare-act/>.

150. Sixteen states surveyed that about eighty five percent of Indian children in foster care were adopted by non-Indian families. Lindsey Brekke, *Native Children in Foster Care Part II*, U. OF MINN. (Nov. 10, 2011), https://cascw.umn.edu/policy/native_children_in_foster_care_1/.

151. Gabby Deutch, *A Court Battle Over a Dallas Toddler Could Decide the Future of Native American Law*, THE ATLANTIC (Feb. 21, 2019), <https://www.theatlantic.com/family/archive/2019/02/indian-child-welfare-acts-uncertain-future/582628/>.

152. Shreya A. Fadia, *Adopting Biology Plus in Federal Indian Law: Adoptive Couple v. Baby Girl's Refashioning of ICWA's Framework*, 114 COLUM. L. REV. 2007, 2011-13 (2014).

153. Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 356 (1986).

154. Harman Bual, *Native American Rights & Adoption by Non-Indian Families: The Manipulation and Distortion of Public Opinion to Overthrow ICWA*, 6 AM. INDIAN L.J. 270, 271 (2018).

155. *Id.*

156. Emily Hudson, *The Constitutionality of the Indian Child Welfare Act*, 47 OHIO N.U. L. REV. 359 (2021) citing *Bernhardt I*, 937 F.3d at 426. *Id.*

1. Extended family
2. Other members of the Indian child's tribe
3. Other Indian families¹⁵⁷

Behind these preference categories was an underlying policy shift from segregation to integration.¹⁵⁸ Canada similarly adopted this policy preference and supported stronger tribal autonomy over child welfare decision making.¹⁵⁹

iii. Current Canadian Child Welfare Policies

Canada, responding to lawsuits and the findings of its Truth and Reconciliation Commission, proposed a new bill to revamp its child welfare system.¹⁶⁰ In 2019, Parliament passed a bill, C-92 “An Act Respecting First Nations, Inuit, and Metis Children, Youth and Families”, that promised to address the disparities in the Canadian child-welfare system.¹⁶¹ Bill C-92 incorporates Canada’s duties under the United Nations Declaration on the Rights of Indigenous Peoples, the U.N. Convention on the Rights of the Child, and the International Convention on the Elimination of All Forms of Racial Discrimination.¹⁶² Unlike previous legislation in which control over family and services remained firmly within the hands of the federal government, this bill affirmed the right of Indigenous peoples to make decisions for members of their own communities.¹⁶³ Bill C-92 affirmed “the right and jurisdiction of Indigenous peoples in relation to child and family services and [set] out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children, such as the best interests of the child, cultural

157. Placement of Indian children, 25 U.S.C. § 1915 (b)(i)-(b)(iii) - [hereinafter “ICWA”].

158. Helen Raptis, *Exploring the Factors Prompting British Columbia’s First Integration Initiative: The Case of Port Essington Indian Day School*, 51 HISTORY OF ED. Q., 519, 526 (Nov. 2011).

159. Sebastien Grammond, *Issue 1: Federal Legislation on Indigenous Child Welfare in Canada*, 28 YORK UNIVERSITY J. OF L. & SOC. POL’Y 132–51 (2018).

160. *Id.* at 146.

161. Bill C-92 An Act respecting First Nations, Inuit and Metis Children, Youth and Families (Sep. 2019) (Can.), available at <https://openparliament.ca/bills/42-1/C-92/?tab=mentions&singlepage=1>.

162. An Act Respecting First Nations, Inuit and Metis Children, Youth and Families, S.C. 2019, c.24 (Can.) (June 21, 2019).

163. *Id.*

continuity and substantive equality."¹⁶⁴ Bill C-92 recognizes the value of a child's continual connection with their culture, but there is some concern that this cultural connection is not tied to the "best interests of the child."¹⁶⁵ Decision-makers could find that the best interest of the child involves removing children from their tribal communities, despite the stated value of cultural heritage.¹⁶⁶

ICWA in the United States and Bill C-92 in Canada are the legislative responses to address past harm and to ensure that child-welfare decision making remains with the tribes.¹⁶⁷ In both the United States and Canada, the federal government almost solely placed Native children with middle-class, non-Native families out of a belief that white families were in better positions to raise a Native child than either extended family or other members of the child's band.¹⁶⁸ The Sixties Scoop further shattered Indigenous identities, as siblings were separated and children were placed in new environments without explanation and without access to cultural elements, such as language and connection to the land.¹⁶⁹ Today, generations of survivors of the residential boarding schools and the child-welfare policies are faced with intergenerational trauma as government intervention has destroyed cultural, familial, and community ties.¹⁷⁰ Both Canadian and United States governments have begun to address the harms caused to the Stolen Generations¹⁷¹ with limited success, but with a potentially

164. *Id.*

165. *The Promise and Pitfalls of C-92: An Act Respecting First Nations, Inuit, and Metis Children, Youth and Families*, YELLOWHEAD INST. (July 4, 2019).

166. *Id.*

167. Erin Dougherty Lynch & Dan Lewerenz, *Brackeen v. Bernhardt – Indian Child Welfare Act, Native American Rights Fund*, NATIVE AM. RTS. FUND <https://www.narf.org/cases/brackeen-v-bernhardt/> (last visited May 6, 2022); Sarah Fryer & Marlisa Tidemann, *Legislative Summary of Bill C-92: An Act respecting First Nations, Inuit and Metis Children, Youth and Families*, LIBR. OF PARLIAMENT (Nov. 7, 2019), https://lop.parl.ca/sites/DefaultWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/421C92E.

168. Harman Bual, *Native American Rights & Adoption by Non-Indian Families: The Manipulation and Distortion of Public Opinion to Overthrow ICWA*, 6 AM. INDIAN L.J. 270, 279 (2018).

169. *Id.* at 280.

170. Ann Piccard, *Death by Boarding School: The Last Acceptable Racism and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137 (2013).

171. "Stolen Generation" is a term coined by Australian historian Peter Read that originally referred to the generations of Australian Aboriginal children forcibly removed from their families under a government policy of assimilation. Anthony Buti, *The Stolen Generations and Litigation Revisited*, 32 MELBOURNE U.L.R. 382, 383 (2008).

disruptive lawsuit on the horizon, any progress in child welfare in the United States remains tenuous.¹⁷²

iv. Brackeen v. Haaland

Since ICWA's passage, several organizations, including the Goldwater Institute and the National Council for Adoption, filed federal lawsuits in an attempt to overturn ICWA.¹⁷³ *Brackeen v. Haaland*¹⁷⁴ is the latest iteration of this effort to dismantle ICWA and is a serious threat to tribal sovereignty.¹⁷⁵

In 2016, Chad and Jennifer Brackeen, a white evangelical couple from the Dallas, Texas suburbs, fostered a ten-month-old Native child, referred to as ALM in court documents.¹⁷⁶ A year later, a Texas family court terminated ALM's biological parents' parental rights due to substance abuse problems.¹⁷⁷ The Brackeens moved to adopt the toddler but were faced with a challenge—ALM's mother is Cherokee, and his father is Navajo.¹⁷⁸ According to ICWA, Native children must remain with their Nation or, if no adoptive family is available, the non-Native family must receive express tribal permission to adopt the child.¹⁷⁹ Navajo Nation found a Navajo family willing to adopt ALM.¹⁸⁰ However, the Brackeens received legal help.¹⁸¹ The Brackeens argued that ICWA discriminates on the basis of race because it denies the adoption of Native children to non-Native

172. Rebecca Nagle, *This Land Season 2*, CROOKEDMEDIA (Aug. 16, 2021), available at <https://crooked.com/podcast/this-land-season-2-coming-august-23rd/>.

173. Timothy Sandefur, *Ensuring Equal Protection – Regardless of Race Brackeen v. Zinke*, GOLDWATER INST. (April 26, 2018), <https://goldwaterinstitute.org/brackeen-v-zinke/>.

174. *Brackeen v. Haaland*, 994 F.3d 249, 445 (5th Cir. 2021).

175. Sarah Rose Harper & Jesse Phelps, *Texas, Big Oil Lawyers Target Native Children in a Bid to End Tribal Sovereignty*, LAKOTA PEOPLE'S L. PROJECT (Sep. 17, 2021), <https://lakotalaw.org/>.

176. *Haaland v. Brackeen, et al.* Appendix to the Petition for a Writ of Certiorari, Appendix A: United States Court of Appeals for the Fifth Circuit, No. 18-11479 at 47a.

177. *Id.*

178. *Id.*

179. ICWA, *supra* note 157.

180. Jan Hoffman, *Who Can Adopt a Native American Child? A Texas Couple v. 573 Tribes*, NY TIMES (June 5, 2019).

181. Nick Estes, *Why is the US right suddenly interested in Native American adoption law?*, THE GUARDIAN (Aug. 23, 2021), <https://www.theguardian.com/commentisfree/2021/aug/23/why-is-the-right-suddenly-interested-in-native-american-adoption-law>.

families.¹⁸² On October 4, 2018, district court Judge Reed O'Connor¹⁸³ ruled that ICWA was unconstitutional and violated the equal protection clause of the Constitution.¹⁸⁴ The federal government and tribal nations quickly filed an appeal.¹⁸⁵ In April 2021, the Fifth Circuit Court of Appeals issued a 325-page *en banc* opinion without a majority.¹⁸⁶ The Fifth Circuit rejected Judge O'Connor's claim that ICWA was race-based but split on whether Congress had "commandeered" state adoption in violation of the Tenth Amendment.¹⁸⁷ Four different petitioners filed for certiorari with the Supreme Court to determine the constitutionality of ICWA.¹⁸⁸ On February 28, 2022, the Supreme Court decided it will grant cert and hear the appeal in the next session.¹⁸⁹

ICWA could be the next domino to fall in a move to claim valuable oil land and natural resources by dismantling tribal sovereignty.¹⁹⁰ What the Brackeens and the special interest groups seem to have misinterpreted is that ICWA is a *political* distinction, not

182. Gabby Deutch, *A Court Battle Over a Dallas Toddler Could Decide the Future of Native American Law*, THE ATLANTIC (Feb. 21, 2019), <https://www.theatlantic.com/family/archive/2019/02/indian-child-welfare-acts-uncertain-future/582628/>.

183. Judge O'Connor was appointed by the Bush Administration to the Northern District of Texas in 2007. Some critics say that Judge O'Connor is a "go-to" judge when special interest groups or the Attorney General have ideological suits and go forum shopping. Manny Fernandez, *In Weaponized Courts, Judge Who Halted Affordable Care Act is a Conservative Favorite*, N.Y. TIMES (Dec. 15, 2018). Others say Judge O'Connor gives "a fair shake" and is tough on both prosecutors and defense attorneys. Kevin Krause, *A look at the low-key Texas judge who tossed Obamacare shows a history of notable conservative cases*, THE DALLAS MORNING NEWS (Dec. 18, 2018), <https://www.dallasnews.com/news/courts/2018/12/18/a-look-at-the-low-key-texas-judge-who-tossed-obamacare-shows-a-history-of-notable-conservative-cases/>.

184. John Sciamanna, *District Court Ruling Threatens ICWA*, CWLA (2019), <https://www.cwla.org/district-court-ruling-threatens-icwa/>.

185. Noah Y. Kim, *Understanding the battle over the Indian Child Welfare Act*, POLITIFACT (Nov. 1, 2021), <https://www.politifact.com/article/2021/nov/01/understanding-battle-over-indian-child-welfare-act/>.

186. *Brackeen v. Haaland*, 994 F.3d 249, 445 (5th Cir. 2021).

187. *Id.*

188. *Haaland v. Brackeen*, U.S. Supreme Court Petition for a Writ of Certiorari, Sep. 3, 2021, https://www.supremecourt.gov/DocketPDF/21/21-376/191447/20210903170102285_Brackeen%20090221.8.pdf.

189. No. 21-380 Chad Everet Brackeen, et al., *Petitions. v. Deb Haaland*, Secretary of the Interior, et al. Supreme Court Docket Files, SCOTUS, <https://www.supremecourt.gov/docket/docketfiles/html/public/21-380.html>.

190. Rebecca Nagle, *This Land Season 2*, CROOKEDMEDIA (Aug. 16, 2021), available at <https://crooked.com/podcast/this-land-season-2-coming-august-23rd/>.

a racial one, aimed to remedy hundreds of years of institutionalized genocide.¹⁹¹

v. Transitional Justice in the United States and Canada

Transitional justice is the study of past wrongdoings and the application of mechanisms to respond to serious violations of human rights that occur in an imperfect world.¹⁹² Transitional justice is a way to bridge the irreparable harms of the past with the rule of law. Some of the more common transitional justice measures include criminal trials, reparations, lustration, memorialization, and truth commissions. These measures cannot be traded off one for the other but must be implemented holistically.¹⁹³ For example, criminal trials that lead to convictions of human rights abusers are only effective if there is vetting of the judicial system and government.¹⁹⁴ Reparations without truth-telling can be seen as “blood money,”¹⁹⁵ paying off victims for their silence.¹⁹⁶ Thus, transitional justice measures form an intricate web where effectiveness of transitional justice depends upon the mechanisms being implemented together.¹⁹⁷

III. TRANSITIONAL JUSTICE IN CANADA AND THE UNITED STATES

A. *Canadian Context*

In 1998, the Canadian government issued a “Statement of Reconciliation” and apologized for the physical and sexual abuse that

191. The Goldwater Institute, in its Amicus Brief, wrote that ICWA “erect[s] a race- or national-origin-based distinction of the sort that is ‘odious to a free people.’” Brief for Goldwater Institute, et al. as Amici Curiae Supporting Respondents, *Haaland v. Brackeen*, 994 F.3d 249 (2021) (No. 18-11479) (citing *Rice v. Cayetano*, 529 U.S. 495, 517 (2000)). The CATO Institute expands and says that if ALM “were of any other ethnicity, his adoption would quickly have been approved” and that “ICWA says Texas must remove him from his foster parents because they are the wrong race.” Timothy Sandefur, Ilya Shapiro, and Walter Olson, *Haaland v. Brackeen*, CATO INST. (Oct. 12, 2021), <https://www.cato.org/legal-briefs/haaland-v-brackeen>.

192. Pablo de Greiff calls an imperfect world “one in which there is no spontaneous generation compliance with even basic norms.” Pablo de Greiff, *Theorizing Transitional Justice*, 51 NOMOS: AM. SOC’Y POL. LEGAL PHIL 31, 35 (2012).

193. *Id.*

194. *Id.*

195. *Id.* at 37.

196. *Id.*

197. *Id.*

occurred at the Indian Residential Schools but did not address its role in creating a system that caused cultural, socioeconomic, and psychological harms.¹⁹⁸ It was not until 2002, when the Canadian government felt increasing pressure from the more than 12,000 legal claims against the Canadian government and churches, that the federal government began to seriously address allegations of abuse.¹⁹⁹ In 2006, the federal government approved the largest class action settlement in Canadian history, the Indian Residential Schools Settlement Agreement (IRSSA).²⁰⁰

The compensatory program under IRSSA provided reparations for physical and sexual abuse but did not address structural harms related to the dissolution of familial and community ties or the loss of culture.²⁰¹ Chief Dr. Robert Joseph (Kwagiulth Nation) spoke to the limitations of the process in his testimony before the Truth and Reconciliation Commission:

For an apology to work, it must be understood and performed symbolically in terms of the ritual that it is. It must offer the potential for transformation of all involved. With a nationally imposed system like the residential school system, transformation cannot occur unless the key players in the ritual are involved—the apology, the Prime Minister, and the House of Commons [...]. With respect to lump sum compensation, survivors are entitled to and want financial redress for the pain and suffering—loss of language and culture, loss of family and childhood, loss of self-esteem, addictions, depression and suicide—we've endured [...]. By neglecting to address residential school survivors and forcing them through an onerous process like ADR, Canada accepts the risk of being accused of institutionalized racism yet again.²⁰²

198. Jeff Corntassel and Cindy Holder, *Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru*, HUM. RTS. REV. 9(4) (2008): 472.

199. Mayo Moran, *The Residential Schools Litigation and Settlement: The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools*, 64 UNIV. OF TORONTO L.J. 529 (2014).

200. *Id.*

201. *Id.*

202. Jeff Corntassel and Cindy Holder, *Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru*, 9 HUM. RTS. REV. 465, 472 (2008).

The reparations provided by the Canadian government proved largely ameliorative and symbolic.²⁰³ While reparations do demonstrate a commitment to right past wrongs, in the Canadian context, reparations emerged out of litigation and negotiated settlements and not out of a commitment to transform political structures.²⁰⁴ The Canadian reparations process can be best characterized as “affirmative repair,” which is when a dominant group applies pressure on the minority group to accept neoliberal norms.²⁰⁵ It is not justice-provoking but is subtly coercive for the purpose of maintaining current power structures.²⁰⁶ Affirmative repair seeks to assimilate the claimant group within the preexisting social order.²⁰⁷ The Canadian offer of reparations under IRSSA was a means to protect the existing hierarchies of power without exploring the root causes of the harm.²⁰⁸ First Nations were coalesced into the Canadian judicial system, where the federal government set the terms and the First Nations claimants negotiate within the preexisting structure.²⁰⁹ There was no exploration of Indigenous sovereignty, revisiting broken treaties, or negotiating under tribal laws.²¹⁰

Another body that arose out of IRSSA was the government-sponsored truth commission. The Canadian Truth and Reconciliation Commission was met with mixed emotions; some Indigenous peoples found the official apology and promises for justice affirming.²¹¹ Others

203. R. Murray Thomas, *Can Money Undo the Past? A Canadian Example*, 39 *COMPARATIVE EDUC.* 331-343 (Aug. 2003).

204. *Id.*

205. Andrew Woolford, *The Limits of Justice: Certainty, Affirmative Repair and Aboriginality*, 3 *J. OF HUM. RTS.*, 429, 429 (2004).

206. Deborah McGregor, *From ‘Decolonized’ to Reconciliation Research in Canada: Drawing from Indigenous Research Paradigms*, 17 *ACME: AN INT’L J. FOR CRITICAL GEOGRAPHIES YORK U.* 810–31 (2018).

207. Andrew Woolford, *The Limits of Justice: Certainty, Affirmative Repair and Aboriginality*, 3 *J. OF HUM. RTS.* 429–30 (2004).

208. Deborah McGregor, *From ‘Decolonized’ to Reconciliation Research in Canada: Drawing from Indigenous Research Paradigms*, 17 *ACME: AN INT’L J. FOR CRITICAL GEOGRAPHIES YORK U.* 810–31 (2018).

209. James Youngblood Henderson, *First Nations Legal Inheritances in Canada: The Mikmaq Model*, 23 *MAN. L.J.* 1 (1995).

210. *Id.*

211. Saba Aziz, *1st National Day for Truth and Reconciliation draws mixed feelings from Indigenous community*, *GLOBAL NEWS* (Sep. 30, 2021), <https://globalnews.ca/news/8229228/national-day-truth-reconciliation-sept-30-indigenous/>.

viewed the Canadian reconciliation response with suspicion.²¹² Perhaps this suspicion was warranted. Out of the “94 Calls to Action,” the Canadian government has only completed five.²¹³ At the current rate of completion of two and a quarter calls per year, Canada can complete the Calls to Action by 2057.²¹⁴ Among the Calls to Action in which there has been little to no movement are Calls #71–76 which fall under the heading of missing children and burial information.²¹⁵ The Call is to identify, document, maintain, and commemorate burial sites where residential school children are buried, which has been a particular blight on the federal government after the discovery of the Kamloops mass grave in British Columbia.²¹⁶ Other Calls have a low likelihood of ever coming to completion.²¹⁷

Other actions in which there have been no steps taken suggest a larger discordance between rhetoric around reconciliation and what it means to put it into practice.²¹⁸ For instance, calls to adopt legal principles regarding First Nations’ land claims and repudiate concepts of Doctrine of Discovery and *terra nullius* point to a hesitancy in making structural changes.²¹⁹ While recognizing a National Day for Truth and Reconciliation as a holiday (Call #80) and increasing funding to CBC/Radio-Canada to reflect First Nations cultures (Call #84) are public manifestations of recognition, they do not address structural problems that could be disruptive to the federal government’s dominion of power.²²⁰ The Calls the Canadian

212. Anne-Marie Reynaud, *Dealing with Difficult Emotions: Anger at the Truth and Reconciliation Commission of Canada*, 56 *ANTHROPOLOGICA* 369–82 (2014).

213. Jewell, *supra* note 17.

214. *Id.*

215. Truth and Reconciliation Commission of Canada: Calls to Action, at 8–9 (2015).

216. Tom McMahon, *Two TRC Calls to Action Are a Litmus Test for Governments. They’re Failing*, THE TYEE (June 3, 2021), <https://thetyee.ca/Analysis/2021/06/03/Two-TRC-Calls-To-Action-Government-Litmus-Test-Failing/>.

217. Carmen Wong, et al., *Towards reconciliation: 10 Calls to Action to Natural Scientists working in Canada*, FACETS (Oct. 1, 2020), <https://doi.org/10.1139/facets-2020-0005>.

218. Kim Stanton, *Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission*, 26 *J. OF L. & SOC. POL’Y* 21, 38 (2017).

219. *Id.*

220. Christopher Nardi, *Much work remains on the Truth and Reconciliation Commission’s 94 Calls to Action*, NAT’L POST (June 5, 2021),

government has completed are largely performative.²²¹ Canadian Prime Minister Stephen Harper, while listing Canada's accomplishments, proudly stated at the G20 that "we" (Canada) "have no history of colonialism."²²² This came only a year after Harper's government issued a formal apology for its residential school policies.²²³ The discrepancies between political rhetoric and the lack of sustainable actions call into question the sincerity of Canada's willingness to make reconciliation.²²⁴

Perhaps because Canada's Truth and Reconciliation Commission arose out of a class-action lawsuit there will be inherent disparities within the TRC framework.²²⁵ The IRSSA settlement reinforced the dyad relationship of appellant and respondent, pinning groups against each other, which seems almost antithetical to the goals of bringing communities together under the auspice of reconciliation.²²⁶ Furthermore, IRSSA left entire swaths of people out of the TRC process because only those who were part of the class in the class-action were guaranteed restitution.²²⁷ Framing the TRC in the form of a settlement agreement that preferences restitution for victims of physical and sexual abuse does not address underlying structural issues and intergenerational harm.²²⁸ Finally, the most overarching

<https://nationalpost.com/news/much-work-remains-on-the-truth-and-reconciliation-commissions-94-calls-to-action>.

221. Eva Jewell and Ian Mosby, *Calls to Action Accountability: A Status Update on Reconciliation*, YELLOWHEAD INST. (Dec. 17, 2019), <https://yellowheadinstitute.org/2019/12/17/calls-to-action-accountability-a-status-update-on-reconciliation/>.

222. *Really Harper, Canada has no history of Colonialism?* THE VANCOUVER SUN (Sep. 27, 2009), <https://vancouversun.com/news/community-blogs/really-harper-canada-has-no-history-of-colonialism>.

223. *Government apologies for residential schools in 2008*, CBC (June 25, 2018), <https://www.cbc.ca/archives/government-apologizes-for-residential-schools-in-2008-1.4666041>.

224. Robyn Green, *Unsettling Cures: Exploring the Limits of the Indian Residential School Settlement Agreement*, 27 CAN. J.L. & SOC. 129, 140–41 (2012).

225. Kathleen Mahoney, *The Untold Story: How Indigenous Legal Principles Informed the Largest Settlement in Canadian Legal History*, 69 U.N.B.L.J. 198, 222 (2018).

226. See generally Rosemary Nagy, *Settler Witnessing at the Truth and Reconciliation Commission of Canada*, 21 HUM. RTS. REV. 219, 237 (2020).

227. Nic Meloney, *Day school claimants say lessons about trauma should have been learned from residential schools settlement*, CBC NEWS (Feb. 23, 2020), <https://www.cbc.ca/news/indigenous/indian-residential-day-schools-survivors-lessons-learned-1.5471425>.

228. Robyn Green, *Unsettling Cures: Exploring the Limits of the Indian Residential School Settlement Agreement*, 27 CAN. J.L. & SOC. 129, 130 (2012).

challenge in Canada's TRC is that the process is set in a colonial framework that does little to destabilize the settler–native–slave relationship.²²⁹ The state-centric TRC is not transformative because it does not challenge internalization of colonialism nor does it acknowledge the structural settler violence.²³⁰ As cathartic and healing truth-telling can be on a grassroots level, these processes are not effective without larger, community-centered decolonizing action.²³¹

Canada's Truth and Reconciliation Commission roots its work for reconciliation as establishing a "mutually respectful relationship" and bringing awareness to and atoning for past actions.²³² The problem is that Canada's approach fails to acknowledge the need for ongoing healing and does not address how past actions are rooted in systemic harm with continual consequences.²³³ This Western concept of forgiveness and letting the past go or letting bygones be bygones is a convenient method to remove responsibility for ongoing trauma and to avoid making decolonial changes.²³⁴ By framing injustices as an element of the past, there is a temporal separation between what happened long ago and what continues to occur in the present-day.²³⁵ This provides little incentive to make lasting changes because of the sentiment that one cannot change the past.²³⁶ Thus, reconciliation in

229. *Id.* at 129.

230. Anna Cook, *Unable to Hear: Settler Ignorance and the Canadian Truth and Reconciliation Commission*, 11, 49 (Sep. 2018) (dissertation for the Department of Philosophy and the Graduate School of the University of Oregon); *see also* Rosemary Nagy, *Truth, Reconciliation and Settler Denial: The Canada-South Africa Analogy*, 13 *HUM. RTS REV.* 349 (2012).

231. Jeff Cornassel, Chaw-win-is, and T'lakwadzi, *Indigenous Storytelling, Truth-telling, and Community Approaches to Reconciliation*, 35 *ENG. STUD. IN CAN.* 137, 139 (2009).

232. The Truth and Reconciliation Commission of Canada (2015). *Honouring the truth, reconciling for the future: Summary of the final report of the Truth and Reconciliation Commission of Canada*, TRUTH & RECONCILIATION COMM'N OF CAN., at 6–7 (2015).

233. Catherine Bell & Hadley Friedland, *Law, Justice, and Reconciliation in Post-TRC Canada*, 56 *ALTA. L. REV.* 659, 661 (2019).

234. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 *HARV. L. REV.* 762, 824 (2004).

235. Augustine S.J. Park, *14 Settler Colonialism, Decolonization and Radicalizing Transitional Justice*, 31 *INT'L J. OF TRANSITIONAL* 216, 229 (March 19, 2020).

236. Rosemary L. Nagy, *The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission*, 7 *THE INT'L J. OF TRANSITIONAL J.*, 52 (2013).

these colonial contexts reinforces hierarchies of power rather than disrupts them.²³⁷

There can be no true reconciliation when the groups involved are predicated on deep-seated, dominant-subordinate relationships.²³⁸ Instead, Canada and the United States need to make space for Indigenous knowledge to confront institutions of power and disrupt colonial norms.²³⁹ White settlers need to shed layers of privilege and co-exist as a means to co-resist.²⁴⁰ Indigenous Elders who gathered as survivors of the Canadian Indian Residential Schools commented on the discrepancies in relationship roles.²⁴¹ An aspect of the Canadian TRC they found lacking was the absence of rhetoric on the family.²⁴² Nuu-chah-nulth Elder, Barney Williams Jr., states that within his Indigenous community, the process to unravel challenges begins with the family.²⁴³ The Canadian state-centric TRC does not create space for community-based healing practices that center on the family and homeland.²⁴⁴ Lastly, it is important to challenge the assumption that the story of Indigenous peoples in Canada, the United States, and worldwide is a story about disenfranchisement and despair.²⁴⁵ Allowing colonization to be the only narrative places the settler in the position of power as a point of reference and “limit[s] Indigenous freedom [by] imposing a view of the world that is but an outcome or perspective on that power.”²⁴⁶

237. *Id.*

238. See generally Justin Schwartz, *Relativism, Reflective Equilibrium, and Justice*, 17 LEGAL STUD. 128, 153 (1997). A dominant group “will not be motivated by this [radical] justice” and this group’s “own interests in domination preclude such a [genuine] reconciliation.”

239. *Id.* at 64.

240. Stephanie Irlbacher-Fox, *Traditional knowledge, co-existence and co-resistance*, *Decolonization: Indigeneity*, 3 EDUC. & SOC’Y 145, 153 (2014).

241. Corntassel, *supra* note 231, at 145.

242. *Id.*

243. *Id.*

244. Rosemary Nagy, *Settler Witnessing at the Truth and Reconciliation Commission of Canada*, 21 HUM. RTS. REV. 219, 237 (2020).

245. Cheryl Suzack, Associate Professor at the Dep’t of Eng. & Aboriginal Stud. Program, Fac. of Law at the Univ. of Toronto, The Ctr. for Int’l L. & Pol’y at New Eng. Law, *Transitional Justice in the USA Speakers Series Part II, Panel 1: How do we honor indigenous ways of knowing in the quest for truth, justice and healing for American Indian boarding schools?* (Nov. 3, 2021).

246. Jeff Corntassel, Chaw-win-is, and T’lakwadzi, *Indigenous Storytelling, Truth-telling, and Community Approaches to Reconciliation*, 35(1) ENGLISH STUDIES IN CANADA, 137, 139 (2009).

B. United States Context

Local communities have taken it upon themselves to seek the truth and to find healing on a grassroots level.²⁴⁷ These local movements are a response to “top-down”²⁴⁸ transitional justice approaches, which provide broad sweeping changes but often overlook the needs and priorities of the individual.²⁴⁹ Community-based truth commissions in the United States have found success.²⁵⁰

The Maine Wabanaki Commission (the Commission) investigated the Maine Indian child welfare policies to “promote individual, relational, systemic and cultural reconciliation.”²⁵¹ The Wabanaki truth commission is a joint effort between Indigenous communities and the state government and is the result of the work of Indigenous advocates.²⁵² Unlike top-down approaches, the Maine Wabanaki Commission was a grassroots effort that interpreted findings through “a web of interconnected causes, including the presence of institutional racism[;] the effects of historical trauma; and a long history of contested sovereignties and jurisdictions between the state and the tribes.”²⁵³ The Wabanaki Truth Commission focused on

247. While the United States has conducted a few state-led truth and reconciliation commissions, this paper will draw inspiration from local, grassroots efforts. An example of a United States state-led truth commission is the Tulsa Race Riots Commission established in 2000 by the State of Oklahoma. The name itself belies a state-influence by removing the name “Tulsa Race Massacre” and sanitizing a piece of history. Kendrick Marshall, *Tulsa Race Massacre: For years it was called a riot. Not anymore. Here’s how it changed.*, TULSA WORLD (May 31, 2020), https://tulsaworld.com/news/local/racemassacre/tulsa-race-massacre-for-years-it-was-called-a-riot-not-anymore-heres-how-it/article_47d28f77-2a7e-5b79-bf5f-bdfc4d6f976f.html.

248. Patricia Lundy and Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom Up*, 35 J. OF L. & SOC’Y, 265, 265 (2008).

249. *Id.* at 275.

250. INT’L CTR FOR TRANSNAT’L JUST., *Is the United States Ready for a Truth-Telling Process?* (Aug. 9, 2017), <https://www.ictj.org/news/united-states-ready-truth-telling-process>.

251. *Beyond the Mandate: Continuing the Conversation, Report of the Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission* 6 (June 14, 2015), https://d3n8a8pro7vhm.cloudfront.net/mainewabanakireach/pages/17/attachments/original/1468974047/TRC-Report-Expanded_July2015.pdf?1468974047. (herein after, “*Beyond the Mandate*”).

252. Patricia Ochs, *A National Truth Commission for Native Americans*, 36 WIS. J.L. GENDER & SOC’Y 1, 18 (2021).

253. *Beyond the Mandate*, *supra* note 251, at 6.

decolonization and made space for leaders from all tribes within Maine.²⁵⁴

The Maine Wabanaki Commission reviewed archives and obtained statements from members of the Wabanaki Tribe, the Department of Health and Human Services, and child welfare representatives.²⁵⁵ At the conclusion of the investigation, the Commission created a report with fourteen recommendations, largely focused on the enforcement of ICWA, legal and judicial trainings that recognize bias, and an establishment of an archive at the local college.²⁵⁶

IV. RECOMMENDATIONS FOR THE UNITED STATES

Lessons can be drawn from the shortcomings of the Canadian Truth and Reconciliation Commission. The United States has an opportunity to learn from the Canadian TRC and has arguably even more freedom in the process because it is not a result of class-action lawsuits. The United States needs to incorporate Indigenous voices and methods so that victims have ownership and a voice in the process.²⁵⁷ Indigenous peoples need to be involved in every step of the transitional justice process, and oral history, as well as tribal law, need to be held tantamount (if not with more authority) to the state's concept of rule of law.²⁵⁸

Taking cultural practices into account, the United States' truth commission should place the focus on victims but must do so in a way that is trauma informed.²⁵⁹ Due to the lack of access to healthcare, including mental health resources, and the intergenerational trauma that many Indigenous peoples carry, victims must be allowed to testify

254. Patricia Ochs, *A National Truth Commission for Native Americans*, 36 WIS. J.L. GENDER & SOC'Y 1, 29–30 (2021).

255. *Beyond the Mandate*, *supra* note 251, at 6.

256. *Id.* at 66–67.

257. Patricia Ochs, *A National Truth Commission for Native Americans*, 36 WIS. J.L. GENDER & SOC'Y 1, 30 (2021).

258. Hope M. Babcock, "[This] I Know from My Grandfather": *The Battle for Admissibility of Indigenous Oral History as Proof of Tribal Land Claims*, 37 AM. INDIAN L. REV 19, 30 (2012).

259. Marie Soueid et al., *The Survivor-Centered Approach to Transitional Justice: Why a Trauma-Informed Handling of Witness Testimony is a Necessary Component*, 50 GEO. WASH. INT'L L. REV. 125, 127 (2017).

in a way that provokes healing, not just prosecution, and the tribal communities, with state resource support, should provide mental health safeguards.²⁶⁰

A hybrid truth commission may be more successful than a completely local, grassroots initiative when creating a national truth commission.²⁶¹ The United States' truth commission should not fall under the Department of the Interior but instead should be an independent national body composed of a variety of voices, especially those of Indigenous advisors.²⁶² It is vital for the United States' truth commission to not reinforce colonial practices of disenfranchising Indigenous knowledge or incorporate transitional justice measures without local input.²⁶³

Although it may be difficult to hold people criminally accountable for historical wrongs, there are several recommendations that the United States can adopt to still provide justice.²⁶⁴ A concrete recommendation that the United States can incorporate is to include educational materials about the Indian Boarding Schools in the public school curriculum so that there is greater awareness about the country's history that informs its future.²⁶⁵ The United States could issue a national apology and provide assistance, such as access to government records and other evidence, for those who wish to pursue class action lawsuits against government officials. While it is important to have state support in the process (to provide funding, to add legitimacy, and to raise the national consciousness), the state

260. Patricia Ochs, *A National Truth Commission for Native Americans*, 36 WIS. J.L. GENDER & SOC'Y 1, 30–31, (2021).

261. Ashley Quarcoo & Medina Husakovic, *Racial Reckoning in the United States: Expanding and Innovating on the Global Transitional Justice Experience*, CARNEGIE ENDOWMENT FOR INT'L. PEACE, Oct. 26, 2021, at 34, <https://carnegieendowment.org/2021/10/26/racial-reckoning-in-united-states-expanding-and-innovating-on-global-transitional-justice-experience-pub-85638>.

262. Joshua F. Inwood, *How Grassroots Truth and Reconciliation Movements can Further the Fight for Social Justice in U.S. Communities*, 105 NAT'L CIVIC R. 56, 57 (2016).

263. Olivia Ensign, *Speaking Truth to Power: An Analysis of American Truth-Telling Efforts Vis-a-Vis the South African Truth and Reconciliation Commission*, 42 N.Y.U. REV. L. & SOC. CHANGE 1, 40 (2018).

264. Maegan Hough, *The Harms Caused: A Narrative of Intergenerational Responsibility*, 56 ALTA. L. REV. 841, 860–61 (2019).

265. Incorporating materials into the public-school curriculum was one particularly popular initiative that came out of the Greensboro TRC. SPOMA JOVANOVIC, DEMOCRACY, DIALOGUE, AND COMMUNITY ACTION: TRUTH AND RECONCILIATION IN GREENSBORO 176 (2012).

authority needs to be independent and neutral. Furthermore, the truth commissions should work on a regional level, tailored to each tribe's specific experiences and needs. The information gathered from these truth commissions could then inform a mandate that defends ICWA, restores tribal lands, and provides services to Natives through a "robust and meaningful consultation with Tribal Nations."²⁶⁶ Secretary Haaland and Senator Warren's proposal, the "Truth and Healing Commission on Indian Boarding School Policy in the United States," should focus both on historic crimes and on the ongoing effects manifesting into intergenerational trauma within communities. By keeping the focus of the Commission narrow and on child welfare practices, the United States may be more successful in its TRC. It can then use this TRC as a model for future investigations, such as with environmental health disparities, violence against women, and access and control of natural resources, such as water.²⁶⁷

V. CONCLUSION

Transitional justice is long overdue to address the past and ongoing harms to Indigenous peoples affected by the residential boarding schools and child welfare policies in both Canada and the United States. The Canadian framework for truth and reconciliation had several shortcomings due to placing its mechanisms within a colonial framework and failing to address structural violence and intergenerational trauma. The United States has an opportunity to learn from Canada's truth and reconciliation commission and incorporate Indigenous knowledge, practice, and voices. The United States must face uncomfortable truths about its role in perpetuating injustices and how its institutions continue to uphold structures of power that disenfranchise and limit Indigenous freedom. Incorporating truth and reconciliation through a decolonial lens will allow actual healing and facilitate emancipation.

²⁶⁶ *Biden-Harris Plan for Tribal Nations*, JOE BIDEN (last visited Dec. 10, 2021), <https://joebiden.com/tribalnations/>.

²⁶⁷ These proposals are beyond the scope of this paper but speak to a few of the effects of a colonial legacy. For example, a local grassroots TRC, like the Wabanaki Truth Commission, could focus on the United States' role in contaminating groundwater on Navajo Nation. A TRC could issue reparations and investigate the United States government's role in past and ongoing uranium mining.