

SEARCHING FOR INDIGENOUS TRUTH: EXPLORING A RESTORATIVE JUSTICE APPROACH TO REDRESS ABUSE AT AMERICAN INDIAN BOARDING SCHOOLS

Abstract: After the discovery of mass graves at Residential Schools in Canada, the United States reevaluated its own history with Indian Boarding Schools. The nation will likely grapple with the issue of finding appropriate solutions for historical mass atrocities in the near future as it too discovers the remains of Native American children who died at federal Indian boarding schools. Indian boarding schools have a long and abusive history that still today affects descendants of the students who attended these institutions in the past. The United States and other nations turned to restorative justice to address harm to Indigenous people in the past, resulting in both successes in providing opportunities for survivors to share their stories and failures in effecting permanent change. This Note argues that, in the wake of the federal investigation into deaths at these schools, the U.S. federal government should employ a restorative justice approach to promote healing both within Indigenous communities and the country as a whole from the trauma of Indian boarding schools.

INTRODUCTION

In May 2021, the Tk'emlúps te Secwépemc First Nation of Canada received a chilling answer to the long unanswered question of the whereabouts of thousands of missing children.¹ With the assistance of new technology, the Tk'emlúps te Secwépemc First Nation discovered the remains of over two hundred Indigenous children buried on the grounds of the former Kamloops Indian Residential School in Canada.² “[N]o words can express the level of

¹ See Media Release, Tk'emlúps te Secwépemc Off. of the Chief (May 27, 2021), <https://tkemlups.ca/wp-content/uploads/05-May-27-2021-TteS-MEDIA-RELEASE.pdf> [<https://perma.cc/D64Y-ULTN>] (stating that the bodies of 215 children who were enrolled at the Kamloops Indian school were found at the grounds of the former school and that the discovery corroborates stories of loss); APTN News, *Kukpi7 Chief Rosanne Casimir Talks About the Findings at the Kamloops Residential School*, YOUTUBE (June 2, 2021), <https://www.youtube.com/watch?v=ku317kgszmM> [<https://perma.cc/92AC-ZR2V>] (stating that Tk'emlúps te Secwépemc heard stories from family members about friends or siblings that had gone missing during their time in residential schools and that the Tk'emlúps te Secwépemc had been searching for answers).

² Media Release, *supra* note 1. This Note uses the terms “Native American,” “Native,” “American Indian,” “Indian,” and “Indigenous” interchangeably. Various parties disagree over the best term to use. See Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels*, AM. INDIAN Q., Spring 1999, at 1, 3 (discussing a 1995 survey circulated by the Bureau of Labor Statistics in which it was discovered that Indigenous people had diverse terminology preferences with 49.8% of respondents preferring “American Indian” and 37.5%

grief and sorrow” Tk’emlúps te Secwepemc Chief Rosanne Casimir said after the discoveries of the graves during the summer of 2021.³ Members of the Nation had for years heard stories from their family members of friends and siblings who vanished during their time at residential schools.⁴ These familial stories brought about the investigation of Kamloops and ultimately led to the discovery of the school children’s graves.⁵ The discovery merely provided evi-

preferring “Native American”). On one hand, many people express a dislike for the terms American Indian or Indian. *See id.* (describing different preferences in 1995 with 37.5% preferring Native American); *see also* ICT Staff, *Native American vs. Indian*, INDIAN COUNTRY TODAY, <https://ictnews.org/archive/native-american-vs-indian> [<https://perma.cc/68CD-9N6B>] (Sept. 13, 2018) (describing a Navajo woman’s dislike of the term Indian and describing it as unacceptable). On the other hand, the federal government continues to use the term “Indian” to describe Indigenous people of the United States, including the Bureau of Indian Affairs, which lists its mission as overseeing the federal trust responsibility for “American Indians.” *See The Impact of Words and Tips for Using Appropriate Terminology: Am I Using the Right Word?*, NAT’L MUSEUM OF THE AM. INDIAN, <https://americanindian.si.edu/nk360/informational/impact-words-tips> [<https://perma.cc/YLN7-7UVB>] (explaining that variations of the terms American Indian and Native American are typically used in the United States but that Indigenous people have preferences for terminology and that one should inquire into a particular group or individual’s preference); *Mission Statement*, INDIAN AFFS., <https://www.bia.gov/bia> [<https://perma.cc/G4F9-LKF8>] (using the phrase “American Indians” in describing its goals). Further, Congress publishes a list annually of “federally recognized Indian tribes.” *See* Pub. L. No. 103-454, 108 Stat. 4791 (1994) (codified as amended at 25 U.S.C. § 5123) (emphasis added) (explaining the purpose of the law and using that terminology). Given the diversity of opinions on the correct terms and continued usage by the federal government, this Note uses all generally accepted terms.

³ Daybreak Kamloops, *Yearender Interview with Tk’emlúps te Secwepemc Chief Rosanne Casimir*, CAN. BROAD. CORP., at 00:38 (Dec. 16, 2021), <https://www.cbc.ca/listen/live-radio/1-108-daybreak-kamloops/clip/15884900-yearender-interview-tkemlups-te-secwepemc-chief-rosanne-casimir> [<https://perma.cc/RLZ8-VZQJ>]. Canadian press editors designated the Kamloops discovery news story as Canada’s “news story of the year.” *Id.* Chief Rosanne Casimir is also known as the Kúkpi7 for Tk’emlúps te Secwépemc. *Kúkpi7 Rosanne Casimir*, TK’EMLÚPS, <https://tkemlups.ca/chief-council/kukpi7/> [<https://perma.cc/H9LN-4YJT>].

⁴ APTN News, *supra* note 1 (stating that Tk’emlúps te Secwépemc heard stories from family members about people that had gone missing during at residential schools and that the Tk’emlúps te Secwépemc had been searching for answers to these missing children stories); *Kamloops Indian Residential School Missing Children*, TK’EMLÚPS, <https://tkemlups.ca/kirs/> [<https://perma.cc/62FD-S7H9>] (citing the Truth and Reconciliation Commission and noting that not all students who attended residential schools survived the ordeal and that those who did not return home are known as the “Missing Children”). The Missing Children Project, a creation of Canada’s Truth and Reconciliation Commission that collects information about children who disappeared while at residential schools and records them for future use, identified over 4,100 children who died during their time at a residential school. *Kamloops Indian Residential School Missing Children*, *supra*; *see Missing Children Project*, TRUTH & RECONCILIATION COMM’N OF CAN., <https://web.archive.org/web/20200721114633/http://trc.ca/events-and-projects/missing-children-project.html> [<https://perma.cc/9L9L-T8V6>] (setting out the goals of the Missing Children Project and how the public can contact the Project with their stories).

⁵ *Tk’emlúps te Secwépemc Release Final Report on Unmarked Graves at Former Kamloops Residential School*, RADIO CAN. INT’L (July 15, 2021), <https://ici.radio-canada.ca/rci/en/news/1809374/tkemlups-te-secwepemc-release-final-report-on-unmarked-graves-at-former-kamloops-residential-school> [<https://perma.cc/U842-WBC4>]. Because of these stories, the tribe chose to use new technology to survey a specific apple orchard located close to the site of the school. *Id.*

dence for a dark truth that was already suspected by many members of the Tk'emlúps te Secwépemc First Nation.⁶

The finding of the remains brought other survivors to share stories of their time at Kamloops.⁷ For example, survivor Evelyn Camille spoke of her disturbing time at Kamloops.⁸ She explained that students at Kamloops were forced to perform domestic chores.⁹ Furthermore, at the time that she graduated she had only received a fourth grade level of education.¹⁰

Garry Gottfriedson, another Kamloops survivor, detailed witnessing horrible abuse as a child at the school.¹¹ On one particular occasion, Gottfriedson witnessed a nun beat a child who could not speak English in an attempt to force the child to speak the language.¹² After hearing the news of the graves discovered in 2021, Gottfriedson and his brother visited the site in remem-

⁶ See Media Release, *supra* note 1 (explaining that the discovery “confirms [the] unthinkable”).

⁷ See Michael Potestio, *Survivors of Kamloops Indian Residential School Share Their Stories*, KAMLOOPS THIS WEEK (July 18, 2021), <https://www.kamloopsthisweek.com/local-news/survivors-of-kamloops-indian-residential-school-share-their-stories-4449001> [<https://perma.cc/A3XK-LBNK>] (describing how three female Kamloops survivors orated on their experiences at the school at a press conference held by Tk'emlúps te Secwépemc at which people disseminated details of the investigation). The institution operated between 1890 and 1978 and grew to be the largest school in the residential school system with an enrollment high of five hundred in the 1950s. *Kamloops Indian Residential School Missing Children*, *supra* note 4. To enforce an assimilation policy, Canada forced Indigenous children to attend residential schools apart from their parents. See generally THE 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 2 (2015) [hereinafter COMM'N SUMMARY] (“Canada separated children from their parents This was done . . . primarily to break their link to their culture and identity.”). Residential schools failed to educate students, causing the students who attended these schools to fall behind those that did not attend. See, e.g., *id.* at 71–72 (describing how 41.3% of students in Grade One did not ascend to Grade Two between 1940 and 1941 and how teachers did not expect students to be at an equal education level as white peers).

⁸ See Potestio, *supra* note 7 (describing the event and its speakers).

⁹ *Id.*

¹⁰ *Id.* Camille refused to describe Kamloops as a “school” due to its failure to educate students. *Id.* Leona Thomas, another survivor, described her experience of separation from her family at age six and receiving no solace from the school. *Id.* She also said that Kamloops beat her for speaking her native language. *Id.* Mona Jules, also a survivor, told the tragic story of her thirteen year old sister, who died while attending Kamloops. *Id.* Jules’ parents did not know that her sister had developed an illness while attending the school until after she had passed away. *Id.* Jules recalled her parents’ anger at the school, outraged that their child had not seen a doctor, especially when there was a nearby medical practice. *Id.* See generally COMM'N SUMMARY, *supra* note 7, at 95, 97 (explaining that the poor living conditions of the school allowed for easy spread of disease and that many schools did not have the ability to care for sick students).

¹¹ The Daily, *State-Sponsored Abuse in Canada*, N.Y. TIMES (July 16, 2021), <https://www.nytimes.com/2021/07/16/podcasts/the-daily/canada-indigenous-residential-schools.html?showTranscript=1> [<https://perma.cc/77XP-SAV9>].

¹² *Id.* Students at residential schools often faced severe punishments that were uncommon for non-Indigenous students at other schools. See COMM'N SUMMARY, *supra* note 7, at 102 (describing how an absence of a national policy on discipline led Indigenous students to face severe and corporal punishment).

branch of the children and encountered other men who were doing the same.¹³ One of the men present at the gravesite told Gottfriedson that the school forced other students to dig the graves for the deceased children.¹⁴ Gottfriedson believes that residential school investigations will cause the Indigenous community to suffer trauma but also expressed that there is a need to continue searching for answers.¹⁵

Since May 2021, the Tk'emlúps te Secwépemc First Nation, and Canada as a whole, have dealt with the fallout of discovering the remains of 215 Indigenous children at the site of the Kamloops Indian Residential School.¹⁶ In June 2021, while the Tk'emlúps te Secwépemc First Nation was still grappling with the discovery, news broke that over 700 more unmarked Indigenous children's graves were found at the former Marieval school in Saskatchewan, another residential school.¹⁷ These discoveries were two in a series of similar findings made throughout the summer.¹⁸

These horrifying discoveries not only rocked Canada, but also headlined news in the United States.¹⁹ On the heels of the discoveries in Canada, United

¹³ See The Daily, *supra* note 11 (explaining his and his brother's reaction to the news of the remains found at Kamloops).

¹⁴ *Id.* Another man explained that while he was a student, the school made him cut holes in the ice covering the river. *Id.*

¹⁵ See *id.* (agreeing with an assertion that identifying the discovered students would be disturbing but also maintaining that identification of the bodies will bring closure to family members). Gottfriedson elaborated, stating that families who erroneously believe that their loved one escaped the school and went missing could find their relative buried on the grounds, providing further closure. See *id.* ("[T]here's so many families out there that say, oh, my great uncle ran away never to come back. But maybe that great uncle is one of those bodies laying there."). See generally COMM'N SUMMARY, *supra* note 7, at 90 (stating that many records relating to student deaths at residential schools no longer exist). The government did not establish a policy for sharing and investigating student deaths until 1935. COMM'N SUMMARY, *supra* note 7, at 90. Canada's truth and reconciliation commission reported that traumatized attendees transferred their pain to their descendants, creating a continuing problem. See *id.* at 158 (describing the immediate and long-term health effects of residential school policies on attendees).

¹⁶ See *Kamloops Indian Residential School Missing Children*, *supra* note 4 (discussing Tk'emlúps te Secwépemc's discovery, the site, and its response). As a way of coping with the discovery, Tk'emlúps te Secwépemc organized an event on September 30, 2021, the first National Day of Truth and Reconciliation in Canada, which involved gathering people to drum in respect of the missing children. *Drum for the Children*, TK'EMLÚPS, <https://tkemlups.ca/drum/> [<https://perma.cc/P455-KSCR>].

¹⁷ Ian Austen & Dan Bilefsky, *Hundreds More Unmarked Graves Found at Former Residential School in Canada*, N.Y. TIMES, <https://www.nytimes.com/2021/06/24/world/canada/indigenous-children-graves-saskatchewan-canada.html> [<https://perma.cc/XP5U-XTLS>] (July 30, 2021).

¹⁸ See Associated Press, *More Than 160 Additional Indigenous Graves Have Been Found in Canada*, NAT'L PUB. RADIO (July 13, 2021), <https://www.npr.org/2021/07/13/1015823457/more-than-160-additional-indigenous-graves-have-been-found-in-canada> [<https://perma.cc/NT53-5B6W>] (describing the Penelakut Tribe's discovery of graves on the grounds of the Kuper Island Indian Industrial School and listing other similar discoveries made prior).

¹⁹ See, e.g., Austen & Bilefsky, *supra* note 17 (displaying a headline about the discovery at residential schools); Amanda Coletta, *What to Know About Canada's Residential Schools and the Unmarked Graves Found Nearby*, WASH. POST (June 25, 2021), <https://www.washingtonpost.com/world/>

States Secretary of the Interior, Debra Haaland, announced a federal investigation into Indian boarding schools in the United States, which resulted in a report published by the Assistant Secretary of Indian Affairs in May 2022.²⁰ Canada is not alone in its colonial past; the United States also utilized a system of separating Native American children from their parents and forcing them to attend abusive boarding schools.²¹ It is generally accepted that, similar to Canada, many Native children died at United States boarding schools.²² In the Summer of 2021, for example, activists commenced investigations for bodies at former schools in Colorado.²³ These schools were specifically identified for investigation for remains because deaths at these Colorado institutions were often listed in newspapers and other archives.²⁴ The report published by the

2021/06/25/canada-schools-unmarked-graves/ [https://perma.cc/6QFR-Y3EW] (exemplifying a headline about the residential school graves).

²⁰ See Memorandum from Debra Haaland, Sec'y of the Interior, to Assistant Sec'ys (June 22, 2021), <https://www.doi.gov/sites/doi.gov/files/secint-memo-esb46-01914-federal-indian-boarding-school-truth-initiative-2021-06-22-final508-1.pdf> [https://perma.cc/3KSR-BM4D] (explaining the Indian Boarding School Initiative and its goals of locating former schools, burial areas, and the identity of remains); BRYAN NEWLAND, DEP'T OF THE INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 5–10 (2022) (reporting the preliminary results of the investigation). Secretary of the Interior Haaland is the first Native American person to work in a president's cabinet, belonging to the Pueblo of Laguna. *Secretary Deb Haaland*, U.S. DEP'T INTERIOR, <https://www.doi.gov/secretary-deb-haaland> [https://perma.cc/Z9T6-6AVJ].

²¹ See Noelle E.C. Evans, *A Federal Probe into Indian Boarding School Gravesites Seeks to Bring Healing*, NAT'L PUB. RADIO (July 11, 2021), <https://www.npr.org/2021/07/11/1013772743/indian-boarding-school-gravesites-federal-investigation> [https://perma.cc/4H5J-LNAT] (explaining how the United States Department of the Interior oversaw Indian boarding schools and that schools took “hundreds of thousands” of Indigenous children from home and boarded them at schools, mainly in Oklahoma, Arizona, Alaska, and New Mexico). Although Indian boarding schools in the United States and residential schools in Canada are often equated, some argue that the comparison is imperfect. See Mary Annette Pember, *Canada, US Differ on Boarding Schools*, INDIAN COUNTRY TODAY (July 18, 2021), <https://indiancountrytoday.com/news/canada-u-s-differ-on-boarding-school-policies> [https://perma.cc/Z58H-X7HA] (asserting that likening the schools is akin to “comparing apples with oranges” because unlike in Canada, the United States has not taken steps to acknowledge or address the abuse that occurred at Indian boarding schools); ANDREW WOOLFORD, THIS BENEVOLENT EXPERIMENT 259 (2015) (discussing how strictly analogizing between boarding schools in the United States and Canada is ineffective but that comparisons of efforts to redress the issue between the countries can be useful).

²² See Rukmini Callimachi, *Lost Lives, Lost Culture: The Forgotten History of Indigenous Boarding Schools*, N.Y. TIMES, <https://www.nytimes.com/2021/07/19/us/us-canada-indigenous-boarding-residential-schools.html> [https://perma.cc/3ZVB-JKJU] (Nov. 17, 2021) (“That many children died in the schools on this side of the border is not in question.”) The Indian Boarding School Initiative Report published in May 2022 contains a section solely reporting the progress of finding graves. See NEWLAND, *supra* note 20, at 85 (listing “Marked and Unmarked Burial Sites Across the Federal Indian Boarding School System” as a section of the report).

²³ See Callimachi, *supra* note 22 (describing actions by schools in the United States following the discoveries in Canada).

²⁴ See *id.* (explaining the choice of certain former school sites for investigation). One of the former schools where investigations are taking place is now Fort Lewis College, where a committee decided to undertake the search. *Id.* A June 8, 2021 statement from an official at Fort Lewis cited the discoveries in Canada as the impetus for investigating the college's own former boarding school. See

Assistant Secretary of Indian Affairs reported fifty three gravesites currently found with more expected as investigations proceed.²⁵ Soon, Native Americans—and the United States as a whole—will have to grapple with the questions of how to address the tragedies uncovered by these efforts.²⁶

Restorative justice provides one potential avenue to address the trauma inflicted by Indian boarding schools.²⁷ Restorative justice is an alternative to traditional western justice systems, which focuses on finding truth and supporting victims as opposed to punishing perpetrators.²⁸ Although there are many models of restorative justice, the truth and reconciliation model, which usually takes the form of fact-finding organizations that seek to find the truth about abuses and promote healing, frequently gets used in state-run restorative justice programs.²⁹ In fact, legislators proposed the establishment of a truth and

Lee Bitsóí, *FLC Statement on the Kamloops Indian Residential School*, FORT LEWIS COLL. NEWS & EVENTS (June 8, 2021), <https://www.fortlewis.edu/fort-lewis-college-news/news-detail/flc-statement-on-the-kamloops-indian-residential-school> [<https://perma.cc/J2K8-SQ9J>] (issuing a statement to the Fort Lewis College community following the discovery of unmarked graves in Canada).

²⁵ NEWLAND, *supra* note 20, at 85–86 (“To date, across the Federal Indian boarding school system, the Department investigation has identified approximately 53 marked or unmarked burial sites. As the investigation continues, the Department expects the number of sites to increase.”). The report notes that grave identification is incomplete and ongoing due to monetary restrictions but also states that the federal government took additional measures to continue the process. *See id.* (explaining how and why the current number of gravesites found does not accurately represent the actual number of gravesites).

²⁶ *See* Memorandum from Debra Haaland, *supra* note 20 (concluding that government will place focus on cemeteries or burial places and noting that the probe will highlight the impact of boarding schools on descendants). Although many victims of Indian boarding schools in the United States have since died, scholars argue that the trauma inflicted at these schools can have intergenerational effects, making this an ongoing problem. *See* Rosemary Barnes & Nina Josefowitz, *Indian Residential Schools in Canada: Persistent Impacts on Aboriginal Students’ Psychological Development and Functioning*, 60 CAN. PSYCH. ASS’N 65, 72 (2019) (explaining that the conditions of the schools may have caused survivors difficulty in providing certain parental aspects to their children, who in turn could pass it on to their children). “Studies on intergenerational transmission of trauma have described how trauma experienced by parents can continue through generations to negatively impact children.” *Id.*

²⁷ *See infra* notes 63–128 and accompanying text (setting out potential legal remedies for victims of Indian boarding schools); *infra* notes 155–173 and accompanying text (discussing Canada’s Truth and Reconciliation Commission in response to its residential schools).

²⁸ *See infra* notes 63–105 and accompanying text (explaining the general concepts that comprise restorative justice).

²⁹ *See, e.g., infra* notes 133–173 and accompanying text (describing the truth and reconciliation models used in Maine and Canada); INT’L CTR. FOR TRANSITIONAL JUST., TRUTH COMMISSIONS 1–2 (2008), <https://www.ictj.org/sites/default/files/ICTJ-Global-Truth-Commissions-2008-English.pdf> [<https://perma.cc/Q52Q-99V8>] (stating that over thirty nations used truth and reconciliation commissions to address human rights abuses, including Morocco, Argentina, South Africa, and Peru); FANIA E. DAVIS, THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE 76 (2019) (describing the truth and reconciliation model and presenting the example of the South African Truth and Reconciliation Commission). The South African Truth and Reconciliation Commission popularized this model, and it enjoys continued popularity. *See Independent Lens: Dawnland* (PBS television broadcast Nov. 5, 2018) (describing the influence of the South African truth and reconciliation process on the founders of the Maine Truth and Reconciliation Commission); ONUR BAKINER, TRUTH COMMISSIONS 38

reconciliation commission in the United States to address boarding school abuses, but the proposed bill has not progressed beyond legislative hearings.³⁰ Given the challenges of securing other legal remedies for victims, this Note argues that a truth and reconciliation restorative justice remedy should be explored as the proper way to address the abuses perpetrated by Indian boarding schools against Native Americans.³¹

Part I of this Note sets out the history of Indian boarding schools in the United States, provides a brief introduction to restorative justice and its association with Indigenous American beliefs and practices, and explains facets of other legal remedies.³² Part II evaluates previous examples of restorative justice used for Indigenous matters in North America and discusses their successes and failures.³³ Part III argues that a restorative justice model provides the best remedy for the abuses experienced at Native American boarding schools.³⁴

I. INDIAN BOARDING SCHOOLS IN THE UNITED STATES AND LEGAL FACTORS PERTAINING TO THEIR INVESTIGATION

The history of both the development of Indian boarding schools and the abuses suffered by Native Americans at these institutions must be discussed before considering potential remedies.³⁵ Then, the basics of restorative justice must be explored to examine the potential benefits of this remedy.³⁶ Section A of this Part surveys the history of Indian Boarding Schools in the United States.³⁷ Section B sets out a brief introduction to restorative justice and its connection to North American Indigenous practices.³⁸ Section C explains the legal remedies potentially available to victims and their families.³⁹

(2016) (“Truth commissions are no passing fashion.”). Six countries created truth commissions between 2009 and 2012: Thailand, Canada, Brazil, Kenya, Togo, and the Ivory Coast. BAKINER, *supra*, at 38.

³⁰ See generally H.R. 5444, 117th Cong. (2021) (proposing the establishment of a truth and reconciliation commission); S.2907, 117th Cong. (2021) (acting as the identical bill in the Senate); *H.R.5444 - Truth and Healing Commission on Indian Boarding School Policies Act*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/5444/> [<https://perma.cc/GU3P-BZVL>] (noting that the bills were not passed into law).

³¹ See *infra* notes 106–128 and accompanying text (describing potential legal solutions for victims of Indian boarding schools); *infra* notes 185–217 and accompanying text (analyzing why restorative justice should be pursued in this matter).

³² See *infra* notes 35–128 and accompanying text.

³³ See *infra* notes 129–184 and accompanying text.

³⁴ See *infra* notes 185–217 and accompanying text.

³⁵ See *infra* notes 40–62 and accompanying text (setting out the history and legacy of Indian boarding schools in the United States).

³⁶ See *infra* notes 63–105 and accompanying text (explaining the basics of restorative justice and its connection to Indigenous Peoples).

³⁷ See *infra* notes 40–62 and accompanying text.

³⁸ See *infra* notes 63–105 and accompanying text.

³⁹ See *infra* notes 106–128 and accompanying text.

A. History of Indian Boarding Schools in the United States

American Indians have a long history of strife and conflict with European settlers.⁴⁰ Prior to the establishment of Indian boarding schools, the United States federal government removed tribes from their ancestral home lands to government created reservations.⁴¹ Following the removal of tribes, the government's policy with respect to Native Americans shifted to assimilation.⁴² The objective of this assimilation-based policy was to separate Native Americans from their Indigenous cultures and replace it with white American culture.⁴³ The government forced assimilation through the Bureau of Indian Af-

⁴⁰ See DEE BROWN, *BURY MY HEART AT WOUNDED KNEE*, at xv, 3–6 (1970) (explaining that expansion into the western part of America in the nineteenth century demolished Native American society and detailing negative interactions between Native Americans and white settlers beginning with Christopher Columbus); see also *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (holding that Indians had some rights to their land, including occupancy, but they did not have the power to alienate their land because the doctrine of discovery gives that right to those people who discovery the land, meaning the Europeans). Justice Marshall's reasoning in his opinion reaches back into the early days of settlement of colonial America to justify stripping tribes of their full property rights to their land. See *Johnson*, 21 U.S. at 574 (finding that the various colonizing European nations respected the native right to occupancy but had "ultimate dominion" and that the "[h]istory of America, from its discovery to the present day, proves . . . the universal recognition of these principles"); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1, 16–17 (1831) (finding that Indian tribes are not foreign nations and are instead "domestic dependent nations" and that their relationship to the United States federal government is like that "of a ward to his guardian").

⁴¹ Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 51–52 (2006); see Ken Drexler, *Indian Removal Act: Primary Documents in American History*, LIBR. OF CONG., <https://guides.loc.gov/indian-removal-act> [<https://perma.cc/23QH-VSYZ>] (May 14, 2019) (introducing the Indian Removal Act as a law enacted by President Andrew Jackson in 1830 that allowed him to give lands west of the Mississippi River to Indigenous groups in exchange for lands belonging to tribes that resided in already admitted states). The Library of Congress guide further explains that some tribes did not resist the act, but others, including the Cherokee, did and they were "forcibly" relocated west, an event known as the "Trail of Tears," during which approximately four thousand Cherokees died. Drexler, *supra*; see also Indian Removal Act of 1830, 4 Stat. 411–12 (giving the president power to divide territory west of the Mississippi River into regions and give it to Indians in return for their current tribal land).

⁴² See Curcio, *supra* note 41, at 52 (explaining that by the 1870s, Christians desired to "save" American Indians that had survived the removal period by way of assimilation); *Assimilate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/assimilate#h1> [<https://perma.cc/L3SF-6UJY>] (defining the word assimilate as "to absorb into the cultural tradition of a population or group"). This change in policy to salvation via assimilation came only after many Native Americans died. See Curcio, *supra* note 41, at 51–52 (stating that by the end of the 1900s, the population of Native Americans in the United States decreased to between two hundred and thirty seven thousand and three hundred and thirty thousand and that some people believed the population would eventually become extinct).

⁴³ Curcio, *supra* note 41, at 52. One particular way in which the United States forced assimilation was the 1887 Dawes Act, wherein the federal government allocated Indian Land that was formerly collectively owned into individual property. *Id.* Allotment supposedly motivated Native Americans to participate in individual land ownership and a capitalist economy, but it additionally diminished the size of reservations and opened formerly Native land for non-Native people to acquire. See *id.* at 52–53 (describing the dual motives of the Dawes Act and stating that the policy caused Native Americans

fairs' prohibition on feasts, languages, cultural traditions, spiritual practices, and eventually boarding schools.⁴⁴

To further erase Indigenous identity from Native Americans, the government established boarding schools for Native American children predicated on an assimilationist policy.⁴⁵ In 1878, the Annual Report from the Commissioner of Indian Affairs contended that the best way to assimilate Indigenous children was separating them from their families via government created Indian boarding schools.⁴⁶ The Carlisle Indian School was the first boarding school designed to implement this assimilation policy.⁴⁷ The founder and first superintendent of the Carlisle Indian School, Captain Richard Henry Pratt, famously espoused his educational ideology in 1879, stating that one must "kill the Indian in him, and save the man."⁴⁸

to lose approximately two-thirds of their land). Indian boarding schools specifically facilitated assimilation through forcing Native American children to abandon their language, traditions, and religions. Sarah L. Surface-Evans, *A Landscape of Assimilation and Resistance: The Mount Pleasant Indian Industrial Boarding School*, 20 INT'L J. HIST. ARCHAEOLOGY 574, 574 (2016).

⁴⁴ See Curcio, *supra* note 41, at 53 (describing the myriad ways in which the government attempted to eliminate everything unique to Indigenous cultures). The Bureau of Indian Affairs aimed to make Indigenous Peoples ashamed of their culture through these acts of elimination. See Ann Piccard, *Death by Boarding School: "The Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137, 152–53 (2013) (describing the effects of assimilationist policies including forcing students to adopt "white" customs).

⁴⁵ Curcio, *supra* note 41, at 53. More than 100 treaties with Indigenous Peoples contained clauses relating to education. *Id.* at 53–54. Although assimilation via education initially occurred on reservations through missionaries, by the latter part of the 1800s, the federal government determined that assimilation was best achieved through off-reservation schools that removed students from their culture. *Id.* at 54.

⁴⁶ *Id.* at 54–55; *Kill the Indian in Him, and Save the Man*, CARLISLE INDIAN SCH. DIGIT. RES. CTR., <https://carlisleindian.dickinson.edu/teach/kill-indian-him-and-save-man-r-h-pratt-education-native-americans> [<https://perma.cc/9U87-9448>] (explaining how this method of assimilation existed in boarding schools throughout the United States); Jacqueline Fear-Segal & Susan D. Rose, *Introduction* (describing founder Richard Henry Pratt's goal of assimilating children by separating them from their families and cultures), in *CARLISLE INDIAN INDUSTRIAL SCHOOL: INDIGENOUS HISTORIES, MEMORIES, AND RECLAMATIONS* 1, 1 (Jacqueline Fear-Segal & Susan D. Rose, eds. 2016).

⁴⁷ Curcio, *supra* note 41, at 54. The Carlisle Indian School existed from 1879 to 1918 and reportedly educated more than 8,000 students. Frank Vitale IV, *Counting Carlisle's Casualties: Defining Student Death at the Carlisle Indian Industrial School, 1879–1918*, 44 AM. INDIAN Q. 383, 386 (2020). Carlisle acted as the example for other boarding schools to follow. See *id.* (explaining that Carlisle was the "flagship school" and that it "set the template"). Carlisle famously also had "celebrity students" and popular athletic teams. *Id.* Some people posit that Carlisle's athletic history, particularly the achievement of Jim Thorpe, can hide the harm done by the forced assimilation done by the school. See John Bloom, *The Imperial Gridiron: Dealing with the Legacy of Carlisle Indian School Sports* (explaining how the school's stellar athletic track record, especially that of the football and track team can camouflage the abuse), in *CARLISLE INDIAN INDUSTRIAL SCHOOL*, *supra* note 46, at 124, 124. Jim Thorpe's achievement in sports included winning the gold medal in the pentathlon and decathlon events in the Olympics as well as playing football and semiprofessional baseball. *Id.* at 129–30.

⁴⁸ See Captain R.H. Pratt, *The Advantages of Mingling Indians with Whites*, in *PROC. NAT'L CONF. CHARITIES & CORR.*, June 23–29, 1892, at 45, 45–46 (describing how association of a Comanche and Cheyenne man with white Americans resulted in them adopting some European customs).

The methods employed at Indian boarding schools in an attempt to assimilate Native American children to “white culture” were abusive.⁴⁹ First, the government coerced parents into sending their children to the schools.⁵⁰ In 1893, Congress allowed the Bureau of Indian Affairs (BIA) to use forceful measures to make parents send children to schools, including allowing the BIA to retain rations and annuities from families who resisted sending children to schools.⁵¹ Once children arrived at the boarding schools, the institutions set out to dismantle Indigenous cultural influences.⁵² To extinguish tribal cultural identity, the schools cut boys’ hair, removed tribal clothing and personal items in favor of uniforms, renamed students with English names, forbid the use and practice of native languages and religions, and taught only white history and culture.⁵³ Schools imposed these assimilationist rules by physically punishing students, and many students also experienced sexual and psychological mistreatment at the hands of their school.⁵⁴

Along with specific policies meant to erase cultural ties, schools often forced children to live in poorly kept facilities.⁵⁵ For example, school buildings generally lacked proper ventilation and light, had no soap or toilet paper, and exposed students to fire hazards.⁵⁶ Additionally, some schools compelled stu-

Before his time at Carlisle, Pratt oversaw imprisoned leaders from the Cheyenne, Kiowa, Comanche, Arapaho, and Caddo tribes at Fort Marion at which many of the leaders learned to read and write, influencing Pratt’s ultimate mission. *See* Fear-Segal & Rose, *supra* note 46, at 6–7 (describing Pratt’s actions prior to presiding over the Carlisle Indian School).

⁴⁹ *See, e.g.*, Curcio, *supra* note 41, at 55 (characterizing assimilation tactics at schools as “horrendous”); *infra* notes 50–58 (describing the various cruel practices used at boarding schools).

⁵⁰ *See* Curcio, *supra* note 41, at 55–56 (describing the mandatory attendance policy of the boarding schools). Though the federal government undertook efforts to coerce parents into sending their children to the schools, Native parents also frequently desired an education for their children. *See* WOOLFORD, *supra* note 21, at 126 (discussing how Indigenous parents in both the United States and Canada saw education as a way for their children to adjust to changing culture and even negotiated for schools in their treaty agreements). Despite parents’ want for education, the reality of the schools did not align with these desires. *Id.* In response, some parents encouraged their children to absorb certain school lessons, such as speaking English, but to disregard others. *Id.* at 126–27.

⁵¹ *See* Curcio, *supra* note 41, at 56 (describing the 1893 Act of Congress). Though this Act later changed, many schools still followed the assimilationists methods and coerced students into attending the schools. *Id.* Parents who refused to send their children away to schools faced consequences, including having children removed by the military and even incarceration. *Id.* at 56–57. In the late twentieth century, these abusive practices became less obvious, and the government relied on the poverty of reservations to entice parents into sending children to schools. *Id.* at 57.

⁵² *See id.* at 58–59 (listing the stripping of Native American cultural identities from students as a method of assimilation).

⁵³ *See id.* at 59–61 (describing various methods for decimating Indigenous cultures in children).

⁵⁴ *See* NEWLAND, *supra* note 20, at 54, 56 (setting out the ways schools punished children who failed to conform with assimilationist policies).

⁵⁵ *See infra* notes 57–58 and accompanying text (describing the poor facility conditions).

⁵⁶ *See* Curcio, *supra* note 41, at 62–64 (explaining how the facilities created a hazardous and unsanitary environment for children).

dents to perform laborious tasks, such as laundry, with dangerous machines.⁵⁷ These conditions often led to the death of students at the schools.⁵⁸

A Brookings Institution 1928 report found the Indian boarding schools inadequate and that the policy and theory underlying their administration was faulty.⁵⁹ The report described the theory of boarding schools as going against the “modern point of view in education” which opposed removing children from their families and communities.⁶⁰ Indian boarding schools, however, persisted in the United States until the 1970s.⁶¹ Discussion on trauma caused by boarding schools still continues today, and family members and descendants still feel their effects.⁶²

B. Restorative Justice

Because of the unique trauma caused by schools, restorative justice provides one possible remedy.⁶³ This Section sets out the general tenets of restora-

⁵⁷ *Id.* The May 2022 report from the Department of the Interior reported that boarding schools forced students to engage in physical labor that would otherwise violate state laws. *See* NEWLAND, *supra* note 20, at 59–61.

⁵⁸ *See* Curcio, *supra* note 41, at 63 (describing how poor sanitary conditions, dangerous facilities, and malnutrition caused students to succumb). Disease was a major reason for the death of students. *See id.* at 65–66 (describing causes of death). Tuberculosis, influenza, and trachoma affected many students among other diseases. *Id.* at 66. In addition to disease, malnourishment, and dangerous facilities, students also often faced physical and sexual abuse. *Id.* at 67. One scholar discussed the torture alleged in *Zephier v. United States*, in which students chronicled events of beatings by boards and straps as well as allegations of sexual trauma. *Id.* (citing Complaint, *Zephier v. United States*, No. 03-768L (Fed. Cl. Oct. 29, 2004)) (describing the filings in the case).

⁵⁹ *See* Brackeen v. Haaland, 994 F.3d 249, 283 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (2022) (describing a report by the Brookings Institution that the federal government commissioned). The Brookings Institution is an organization that researches public policy topics and issues recommendations. *See About Us*, BROOKINGS INST., <https://www.brookings.edu/about-us/> [<https://perma.cc/2YES-DJ9Z>] (describing the background and purpose of the Brookings Institution).

⁶⁰ *See* Brackeen, 994 F.3d at 283 (quoting LEWIS MERIAM, *THE PROBLEM OF INDIAN ADMINISTRATION* 346 (1928)) (explaining that the prevailing view of educational theory held that learning should take place near the child’s home where the child can interact with family).

⁶¹ *See id.* (describing how Native children still attended federal boarding schools in the 1970s, even though the BIA was at that time releasing some of its responsibility regarding Native American childhood education).

⁶² *See, e.g., Resources for Self-Care and Trauma*, NAT’L NATIVE AM. BOARDING SCH. HEALING COAL., <https://boardingschoolhealing.org/self-care-resources/> [<https://perma.cc/9NTK-XRVY>] (explaining that the National Native American Boarding School Healing Coalition offers resources to address “historical and intergenerational trauma”); WOOLFORD, *supra* note 21, at 260–61 (describing how historical abuses suffered at residential schools are partially to blame for the ongoing suffering in Indigenous communities in Canada).

⁶³ *See Resources for Self-Care and Trauma*, *supra* note 62 (asserting that “historical and intergenerational trauma” are problems affecting boarding school survivors); WOOLFORD, *supra* note 21, at 260 (explaining how many people use the concepts of “historical trauma” or a “soul wound” to describe the intergenerational trauma inflicted on Indigenous peoples from colonialism in the United States and Canada); RONALD NIEZEN, *TRUTH & INDIGNATION: CANADA’S TRUTH AND RECONCILIATION COMMISSION ON INDIAN RESIDENTIAL SCHOOLS* 2 (2013) (explaining that the abuses committed

tive justice⁶⁴ and then discusses the connection between restorative justice and Indigenous Peoples.⁶⁵

1. Restorative Justice Generally

The study and practice of restorative justice emerged in the United States in the mid 1970s as a result of rampant political discontent.⁶⁶ In the last few decades it has been a growing area of legal study and practice.⁶⁷ Definitions of restorative justice vary, but generally restorative justice focuses the pursuit of justice on healing individuals and the community as opposed to retribution against the wrongdoer.⁶⁸ Three core elements of restorative justice are: (1) harms and needs; (2) obligations; and (3) engagements.⁶⁹ Restorative justice first focuses on the harms done to victims and what those victims need to recover from that harm.⁷⁰ It then places importance on the obligation of those

through the Canadian residential school system necessitated a truth and reconciliation commission as a legal remedy beyond just criminal and financial penalties). The term “historical trauma” uniquely emphasizes the experiences of a group and events that occurred in the past. NIEZEN, *supra*, at 113. Using the term “historical trauma” contributes an additional dimension to the discussion of mental illness, focusing on the effects of trauma carried out over generations and the passage of trauma between community members. *See id.* at 114 (describing the benefits of using the term “historical trauma”). The concept of historical trauma allows for a connection between a mental illness and a historical event. *See id.* (explaining how the idea of historical trauma allowed for links between mental illness and historical events that cause intergenerational trauma including the Holocaust and slavery).

⁶⁴ *See infra* notes 66–93 and accompanying text.

⁶⁵ *See infra* notes 94–105 and accompanying text.

⁶⁶ HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 6 (rev. and updated ed. 2015) (describing restorative justice as gaining prominence in the 1970s throughout the world). The Truth and Reconciliation Commission in South Africa influenced the employment of restorative justice in response to mass atrocities. *Id.*

⁶⁷ *See* DAVIS, *supra* note 29, at 1, 19 (explaining the emergence of this type of justice in the United States, but clarifying that it was a reemergence of an old kind of justice); ZEHR, *supra* note 66, at 6 (describing restorative justice as a way forward in the future of justice).

⁶⁸ *See* Katherine Beaty Chiste, *The Origins of Modern Restorative Justice: Five Examples from the English-Speaking World*, 46 UBC L. REV. 33, 34 (2016) (explaining that there are conflicts over what is considered to be restorative and how restorative justice can be used in the overall justice system); DAVIS, *supra* note 29, at 24, 26 (describing restorative justice as a “paradigm shift” that changes the justice system “from a justice that harms to a justice that heals” and explaining that restorative justice aligns with indigenous justice, which is centered more on “communal concern”). Although there are varying understandings of the definition of restorative justice, many practices demonstrate similar ideas about decolonization and social justice. Chiste, *supra*, at 35.

⁶⁹ *See* ZEHR, *supra* note 66, at 31 (setting out three “pillars” of restorative justice).

⁷⁰ *Id.* at 32. The traditional adversarial legal system often neglects the victim’s needs in favor of punishing the perpetrator, and although restorative justice prioritizes the needs of the victim, it as a practice also explores any harms experienced by the wrongdoer or harm experienced by the wider community. *Id.* at 32–33. By focusing on all harmed parties, restorative justice strives for a balanced justice and encourages all parties to engage and understand each other. *See* DAVIS, *supra* note 29, at 26–27 (describing the point of addressing all harmed parties during the restorative process). Analyzing harms done to the wrongdoer does not absolve the wrongdoer but instead aims to prevent future of-

involved in committing the harm for accountability and understanding the harm they caused.⁷¹ Lastly, restorative justice provides for those involved in the harm, both the wrongdoer and the victim, the opportunity to take active participation in the healing process.⁷² One longtime scholar and restorative justice activist argues that Eurocentric justice tends to center only on the person who caused the harm.⁷³ In contrast, restorative justice considers not only the person who committed the harm, but also the individuals directly harmed, and the greater affected community.⁷⁴ Instead of an adversarial system, restorative justice has “no sides,” placing both the wrongdoer and the aggrieved party on an even playing field.⁷⁵ Proponents of restorative justice critique the current adversarial system for worsening societal problems and not healing the individuals involved.⁷⁶ Despite popular opinion, reconciliation is not the main objective of restorative justice.⁷⁷ Instead, success occurs when victims share their truths.⁷⁸ Restorative justice instead aims to provide victims with the ability to participate in the justice process and allow the wrongdoers to take accountability for their actions.⁷⁹

fense. See ZEHR, *supra* note 66, at 41 (describing how the characterization of the wrongdoer as a victim is a source of dispute and explaining how it does not negate the wrongdoer’s harmful actions).

⁷¹ See ZEHR, *supra* note 66, at 33–34 (describing how it is a responsibility for the wrongdoer and other participants to understand the realities of the harm committed). Not only should the wrongdoer understand the harm caused, but the wrongdoer should also undertake an obligation to repair that harm figuratively and literally. *Id.* at 33. This method aims at preventing further harms. *Id.*

⁷² *Id.* at 34. Active participation in the process affords all affected by the harm major roles in the justice process. *Id.*

⁷³ See DAVIS, *supra* note 29, at 26 (explaining the qualities of the traditional justice system of the United States).

⁷⁴ See *id.* (explaining the difference between the two justice systems).

⁷⁵ *Id.* at 27; see also Robert Yazzie, “Hozho Nahasdlíi”—*We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, 119–20 (1996) (explaining that police justice is adversarial in that parties each argue their side). Police justice is a conflict driven “win-lose” system, where one side prevails and the other does not. Yazzie, *supra*, at 119 (quoting Robert Yazzie, “Life Comes from It”: *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 177–79 (1994)). Judge Yazzie uses a pyramid to analogize the adversarial system, with the powerless at the bottom and the elite at the top, with justice flowing from the top to the bottom. *Id.*

⁷⁶ ZEHR, *supra* note 66, at 6 (describing supporters of restorative justices’ opinion of the traditional adversarial system).

⁷⁷ See *id.* at 13 (explaining that some people oppose restorative justice because they think it always entails reconciliation but stating that reconciliation is not the main point of the restorative justice process); DAVIS, *supra* note 29, at 28–29 (describing that forgiveness is not dispositive of the success of restorative justice). Although reconciliation appears to happen more often during restorative justice processes than in traditional justice processes, it is not a requirement. ZEHR, *supra* note 66, at 13.

⁷⁸ See DAVIS, *supra* note 29, at 29 (explaining that success in restorative justice practices occurs when victims can share their truths and needs and wrongdoers take responsibility, which may not entail forgiveness). Restorative justice is also not mediation, despite surface similarities between the two methods. ZEHR, *supra* note 66, at 15. Unlike mediation, which uses neutral language, in restorative justice, there must be a participant who committed a wrong. *Id.* at 15–16.

⁷⁹ See DAVIS, *supra* note 29, at 29 (explaining that successful justice in a restorative process happens when victims have the ability to tell their truths and present their needs to the community and

There are different methods of restorative justice, some methods address small, individual, harms involving only two people whereas other restorative justice practices aim to address long-term, systemic, issues such as the trauma created by the apartheid regime in South Africa or Canada's residential schools.⁸⁰ Although there are different methods of practicing restorative justice, a common process often follows four phases.⁸¹ First, the parties enter into the process with each other to figure out the best way to effectively heal after the harm.⁸² Ideally, healing will occur for all involved, not just the victim.⁸³ Second, each party tells the truth of their experience, which builds a connection between those involved.⁸⁴ Third, the parties embark on truth telling and take accountability for actions and emotions.⁸⁵ Finally, the parties may seek reparations.⁸⁶ Although all parties may not meet in person, the restorative jus-

wrongdoer, and when wrongdoers take responsibility, which may not involve forgiveness). Restorative justice's focus on the victim centers on the idea that victims feel empowered by taking part in restorative practices. See Daniela Bolívar, *Deconstructing Empowerment in Restorative Justice* ("Restorative Justice (RJ) is expected to be an empowering experience, because victims and offenders can identify their needs and actively participate in identifying, defining and actually constructing the way they want to meet their needs."), in CRITICAL RESTORATIVE JUSTICE 29, 29 (Ivo Aertsen & Brunilda Pali eds., 2017). One scholar argues that restorative justice must go beyond asking victims to merely participate and instead ask parties to participate in dialogue that truly engages with the victim's perspective in order to promote healing. See *id.* at 41 (describing how restorative justice can fail to empower the victim by focusing on the wrongdoer and suggesting that one solution is to present all parties with the chance to "learn to participate").

⁸⁰ Chiste, *supra* note 68, at 34.

⁸¹ See *infra* notes 82–86 and accompanying text (describing Davis's explanation of a restorative justice process).

⁸² See DAVIS, *supra* note 29, at 27 (explaining how the parties must enter together and pursue the key question of how to resolve the harm).

⁸³ See *id.* (describing that restorative justice tries to achieve "a healing for all versus a victory for one"). The focus on healing for all parties involved reflects restorative justice's understanding of wrongdoing as something done against people rather than the government. See MARGARITA ZERNOVA, RESTORATIVE JUSTICE: IDEALS AND REALITIES 1 (2007) (explaining how restorative justice differs from the traditional adversary system and why healing for victim, community, and wrongdoer are pursued).

⁸⁴ See DAVIS, *supra* note 29, at 27 (explaining the steps in a typical restorative justice session). By meeting with the wrongdoer and discussing the harm, the victim benefits by being able to ask questions that only the wrongdoer can answer and by having the opportunity to personally tell the wrongdoer the impact of his or her harm. See ZERNOVA, *supra* note 83, at 9 (describing the benefits of in-person meetings between victims and wrongdoers).

⁸⁵ See DAVIS, *supra* note 29, at 27 (describing the restorative justice process); ZEHR, *supra* note 66, at 25, 101 n.3 (explaining that accountability allows for an acknowledgement of the harms caused by one's actions, promotes understanding of the victim, and manages shame). Shame generally encourages people to commit crimes, but shame may be helpful when it condemns the harm caused but not the person who did the harm. *Id.* So, shame should be handled, not pushed on the wrongdoer. *Id.*

⁸⁶ DAVIS, *supra* note 29, at 27. In a restorative practice where victim and wrongdoer meet and discuss their healing needs, it is meaningful that the victim has some say in the reparations administered. See ZERNOVA, *supra* note 83, at 9 (explaining the compensation element to restorative meetings).

tice process still attempts to attain all elements.⁸⁷ Unlike the traditional criminal justice system, restorative justice seeks to remove the operation of justice from professionals, like judges and lawyers, and place it into the hands of those harmed and the community as a whole.⁸⁸

Another major difference between restorative justice and the typical justice system is that it does not support punitive responses to harm.⁸⁹ Advocates of restorative justice see punishment as a continuation of the original harm done, creating a cycle of harm that leads to community diminishment.⁹⁰ Furthermore, although forgiveness is welcome in restorative justice, it is not necessary or dispositive of the process's success.⁹¹ Restorative justice can meet its goals without requiring forgiveness and it can likewise fail to meet its objectives if forgiveness is offered.⁹² Due to variance in methods employed to carry out restorative justice, it may be more effective to visualize the process with the aid of a real-world example, the Navajo Peacemakers.⁹³

⁸⁷ See DAVIS, *supra* note 29, at 27 (explaining that the objectives and methods of the restorative justice process are pursued regardless of whether all parties participate in the process).

⁸⁸ See *id.* at 27–28 (describing how bringing the community together moves justice from dependence on professionals to supporting community involvement in a justice process primarily overseen by the community itself); ZEHR, *supra* note 66, at 35–36 (describing the importance of both acknowledging the need for professionals in the justice process and including those harmed). Because a goal of restorative justice is to shift the focus from punishing the wrongdoer to the needs of the victims, lessening the presence of justice professionals helps center the process on the victim and the larger community. See DAVIS, *supra* note 29, at 27 (discussing why restorative justice diverges from the traditional adversarial system in diminishing the role of professionals).

⁸⁹ See DAVIS, *supra* note 29, at 28 (“Restorative justice views a vengeful and punitive response to harm unacceptable . . .”). Rejecting punitive responses to harm does not necessarily mean that the wrongdoer will not experience discomfort during the restorative process, but rather the discomfort or pain that flows from the restorative processes is not intentionally inflicted for the sake of punishing the wrongdoer. See ZERNOVA, *supra* note 83, at 38 (explaining how some restorative justice scholars view restorative justice as a substitution for punishment).

⁹⁰ See DAVIS, *supra* note 29, at 28 (describing the “negative feedback [loop]” created by vengeful punishment); ZEHR, *supra* note 66, at 41 (describing how many wrongdoers perceive themselves as victims and that punishment often affirms this perception, which will not change their harmful behavior). This negative feedback loop not only perpetuates harm in the community but also harm in the mind of the person. See DAVIS, *supra* note 29, at 28 (asserting that punitive measures lead to the dissolution of community safety nets and social connection as well as attaching individuals to suffering, which sustains the cycle of hurt and anger).

⁹¹ See DAVIS, *supra* note 29, at 28–29 (explaining the irrelevancy of forgiveness because restorative justices succeeds when victims can share their stories and when parties create plan to fix the harm).

⁹² See *id.* at 29 (explaining the complexities of forgiveness in the restorative justice process). A successful restorative justice process occurs when the parties establish a method of fixing the harm, which may not entail forgiveness between the parties. *Id.*

⁹³ See *infra* notes 95–102 and accompanying text (explaining the role of Navajo Nation Peacemaker Courts).

2. Restorative Justice's Indigenous Roots

Restorative justice is particularly pertinent in the case of Indian boarding schools because restorative justice has Indigenous American roots.⁹⁴ For example, the Navajo Nation uses restorative practices in its Peacemaker Courts, which act as a complementary system to Western-style Navajo courts.⁹⁵ This dual court system blends restorative justice-style Navajo peacemaking with the traditional adversarial system.⁹⁶ Aggrieved parties bring Peacemakers, third parties with connections to the community, to Navajo courts to assist them in getting to a peaceful state regarding their conflict.⁹⁷ A meeting with a Peacemaker often begins with the Peacemaker praying for spiritual help in centering the participants on the process.⁹⁸ Families and community members who have

⁹⁴ See DAVIS, *supra* note 29, at 19 (explaining that restorative justice has Indigenous principles, including Indigenous African and Indigenous American principles); ZEHR, *supra* note 66, at 18 (explaining that a lot of Indigenous practices contain aspects of restorative practices). Restorative justice has roots in a number of Indigenous cultural groups in the Americas. See DAVIS, *supra* note 29, at 19–20 (describing restorative justice's ties to North America). The Tlingit and Tagish First Nations, for example, helped spread the circle concept in which parties arrange themselves in a circle and undertake a communicative healing process. See *id.* (describing the Tlingit and Tagish connection to restorative justice circles); ZERNOVA, *supra* note 83, at 16 (discussing defining features of restorative justice circles). The Mi'Kmaq First Nation's traditional justice system also shares certain principles with restorative justice. See L. Jane McMillan, *Colonial Traditions, Co-optations, and Mi'kmaq Legal Consciousness*, 36 LAW & SOC. INQUIRY 171, 181 (2011) (describing Mi'Kmaq goals of justice as bringing a person back to a state of peace or calm in his or her community in line with other restorative justice values). Mi'Kmaq justice also follows a concept called "Apikistoagen," which includes dissecting the conflict, a period of calming-down, rethinking of behaviors, and reconnecting through forgiving one another, which is similar to many restorative justice practices. See *id.* (describing the elements of "Apikistoagen"). Another example of Indigenous influences on restorative justice practices is the concept of "ubuntu," an African value reflecting that the individual exists only as an interconnected part of their community. DAVIS, *supra* note 29, at 17–18. This value became well known across the world after wide use by the Archbishop Desmond Tutu and Nelson Mandela in South Africa following the end of the apartheid system. *Id.* "Ubuntu" is a value practiced by many African Peoples including the Zulu, Xhosa, Tswana, and Venda. *Id.* The Lakota, a North American Indigenous group, also practice a similar value called "Mitákuye Oyás'in," which holds that all people live with each other on the earth and must learn from, and take care of, each other. *Id.* at 18.

⁹⁵ Marianne O. Nielsen, *Navajo Nation Courts, Peacemaking and Restorative Justice Issues*, 31 J. LEGAL PLURALISM & UNOFFICIAL L., 105, 109 (1999).

⁹⁶ *Id.* Modern Navajo Peacemaker Courts emerged after the Navajo Nation had already established western-style courts. *Id.* The Navajo peacemaking courts, therefore, operate in conjunction with western-style courts and incorporate traditional Navajo beliefs. *Id.*

⁹⁷ See *id.* at 110 (explaining that the police or social services may refer the Peacemakers to the parties first). Courts choose Peacemakers for their role out of the greater community because they have shown that they have the proper character and ability to act in the best interest of the community at large. See ZERNOVA, *supra* note 83, at 19 ("Within Peacemaker courts, respected community leaders organize and preside over the traditional to resolve problems and conflicts, which the Western culture conceptualizes as criminal."). The person presiding over the process does not occupy a neutral role but instead steers the parties along Navajo beliefs. See *id.* (explaining the role of peacemakers).

⁹⁸ See Nielsen, *supra* note 95, at 111 (describing the beginning of the Peacemaking process); ZERNOVA, *supra* note 83, at 20 ("The peacemaking process begins with a prayer in order to summon supernatural help and to focus the participants in the process on the conciliation."). Praying prepares

some interest in the conflict are invited to join, but professional members of the adversarial system are not invited to participate.⁹⁹ Peacemakers try to help people change their relationships by getting to the heart of the conflict so that they can return to balance.¹⁰⁰ They assist participants in setting out the problem, encourage them to express their feelings surrounding the situation, discuss both the situation and their emotions in depth, and use Navajo spirituality to give their opinion on the practical results of the session.¹⁰¹ If successful, the session will end with a plan developed by the parties to ensure that the victim receives “nalyeeh,” or payment for their injury, and a change to the parties’ relationship.¹⁰² The family of the wrongdoer takes responsibility for making sure that the wrongdoer follows the agreed upon plan, and if they do not follow through, they are referred back to the adversarial system.¹⁰³

the session to start because it sets out the issues, gives respect to all involved, and places the parties in the frame of mind where they are reminded that they exist as part of the spiritual world. *See* Nielsen, *supra* note 95, at 111. Navajo religion plays a major role in the Peacemaking process, setting it apart from other restorative practices or alternative dispute resolution such as mediation. *See id.* at 113–14 (describing how the inclusion of the Peacemaker differs from other practices). Relatedly, the process can also end with a meal to signify the settlement of the issue. *See id.* at 111 (describing a possible conclusion to the Peacemaking process).

⁹⁹ *See* Nielsen, *supra* note 95, at 111 (describing which community members are invited to the session); *see also* ZERNOVA, *supra* note 83, at 19 (explaining how Peacemakers typically invite the clans of both the victim and the wrongdoer); ZEHR, *supra* note 66, at 35 (explaining that the traditional legal system is carried out by professionals who stand in place of the wrongdoer and the state). Restorative justice often excludes professionals because it champions the participation of those who were directly involved in the conflict. ZEHR, *supra* note 66, at 36. Peacemakers do not fall into the same category of justice professionals because they fulfill communal duties and acquire their expertise through living in the Navajo community as opposed to formal education or training. *See* Nielsen, *supra* note 95, at 120 (describing the difference between Peacemakers and traditional legal professionals). The Navajo Peacemaker Courts are also unique in that the Peacemaker is often not a neutral party and may even be a relative. *Id.* at 113. Critics of the Peacemaker courts assert that participation by the victim may not always be voluntary, whereas voluntary victim participation is a key part of restorative justice. *See id.* at 115 (explaining that in a study, a small percentage of victims expressed they felt forced into participating); ZEHR, *supra* note 66, at 34 (stressing the importance of participation in restorative practices). The victim’s knowledge of the wrongdoer may also compel them to participate in the Peacemaking process. *See* Nielsen, *supra* note 95, at 115 (explaining how pressure to help a wrongdoer they know avoid penalties may compromise the restorative process).

¹⁰⁰ *See* Nielsen, *supra* note 95, at 110 (explaining the purpose of Peacemakers).

¹⁰¹ *Id.* at 110–11. During the process, Peacemakers use Navajo beliefs and customs to suggest resolutions for the parties. ZERNOVA, *supra* note 83, at 20. Condemning the wrongdoer is not an element of the process. Nielsen, *supra* note 95, at 111. Further, it is not the Peacemaker’s duty to make the ultimate resolution decisions for the parties. *Id.*

¹⁰² Nielsen, *supra* note 95, at 111.

¹⁰³ *See id.* (explaining the process of accountability in Peacemaking sessions). Formal court orders can implement these final plans, but generally participants choose not to rely on the courts. *See* ZERNOVA, *supra* note 83, at 20 (describing the legal avenues available to ensure compliance with the Peacemaking process). Punishing the wrongdoer is not the Peacemaker courts’ goal, so the process rarely leads to incarceration for the wrongdoer unless the parties agree it will benefit the wrongdoer. *See* Nielsen, *supra* note 95, at 120 (explaining the relationship between the Peacemaker courts and the prison system).

Given the Indigenous history and principles present in restorative justice practices, proponents and Indigenous scholars suggest restorative justice as a possible remedy for injustices suffered by Indigenous people in the Americas.¹⁰⁴ Other foreign governments have already used restorative justice to address harms suffered by their own Indigenous peoples.¹⁰⁵

C. Other Potential Legal Remedies

Although some scholars and proponents propose restorative justice as one solution for historic state abuse against Indigenous peoples, other remedies could be pursued.¹⁰⁶ A number of domestic and international laws may provide potential remedies for Indigenous peoples whose relatives died at Indian boarding schools.¹⁰⁷

One potential avenue for providing remedies to the relatives of those who died at Indian boarding Schools is the Native American Graves Protection and Repatriation Act (NAGPRA).¹⁰⁸ NAGPRA explicitly gives ownership of Native American remains and related objects found on federal or tribal land to descendants of the person or the affiliated Native American tribe.¹⁰⁹ Though NAGPRA is often thought of in terms of historical remains acquired by museums and used

¹⁰⁴ See, e.g., Sara L. Ochs, *A National Truth Commission for Native Americans*, 36 WIS. J.L. GENDER & SOC'Y 1, 5 (2021) (arguing for a national truth commission to tackle historical and present practices by the federal government of forcibly taking Native children from their families and biased child welfare practices); *Indian Residential Schools Settlement Agreement*, GOV'T OF CAN., <https://www.rcaanc-cirnac.gc.ca/eng/1100100015576/1571581687074> [<https://perma.cc/KR93-UUNZ>] (listing the creation of a Truth and Reconciliation Commission as one of the five requirements set by the Indian Residential Schools Settlement Agreement to address the history and impact of Canadian residential schools). See generally *infra* notes 155–173 and accompanying text (discussing the background and activities of Canada's Truth and Reconciliation Commission).

¹⁰⁵ See *infra* notes 133–173 and accompanying text.

¹⁰⁶ See *supra* note 104 (giving examples of proposals for a restorative justice solution to address Indian boarding schools); *infra* notes 108–128 and accompanying text (discussing other potential legal remedies).

¹⁰⁷ See *infra* notes 108–128 and accompanying text.

¹⁰⁸ See 25 U.S.C. § 3002(a)(1)–(2) (setting out that ownership of American Indian remains belongs to either “lineal descendants” if able to be determined).

¹⁰⁹ See *id.* (setting out the chain of ownership of remains or objects). NAGPRA pertains to both human remains and cultural objects. See *id.* (setting out the specifics of NAGPRA parameters). The statute defines these objects as including “associated funerary objects,” which includes items used in conjunction with death ceremonies and placed with the body. See *id.* § 3001(3) (same). The statute also includes “sacred objects,” which are objects used by Native American religious leaders. *Id.* § 3001(3)(c). Lastly, the statute also covers objects of “cultural patrimony,” which have a specific societal importance to that Native American culture. See *id.* § 3001(3)(D) (describing cultural patrimony as meaning an object that has historical or cultural importance for the Native American group or culture).

for display, NAGPRA may also apply to more recent Native American remains, like those found in Indian boarding school investigations.¹¹⁰

Under NAGPRA, remains must be returned to the deceased person's descendants, who must be determined as culturally affiliated with the remains by a preponderance of evidence.¹¹¹ NAGPRA's relevancy to any remains found at burial sites of former Indian boarding schools is currently unclear, but it could provide an avenue for remedies for the descendants of the deceased.¹¹²

¹¹⁰ See Alix Rogers, *Owning Geronimo but Not Elmer McCurdy: The Unique Property Status of Native American Remains*, 60 B.C. L. REV. 2347, 2349–50 (2019) (explaining that Congress enacted NAGPRA to stop the acquirement and display of American Indian remains, but that Native American remains in general are legal property). Although Native American remains are legal property, other human remains are generally considered to be non-property or quasi-property. *Id.* at 2350. Generally, NAGPRA tends to apply to the repatriation of old or ancient, rather than recent Native American remains due to the long history of people appropriating those remains for their collections or for display. *Id.* at 2355. For example, early European settlers often collected ancient and contemporary Native remains and objects. *Id.*

¹¹¹ See Jerry Williams, *Provinces of Meaning: Determining Cultural Affiliation Under the Native American Graves Protection and Repatriation Act*, 45 AM. INDIAN Q., 272, 277 (2021) (chronicling the intricacies of the NAGPRA repatriation process). A circuit split exists over whether the term “human remains” in NAGPRA applies to all Native American remains or only some, older remains. See Rogers, *supra* note 110, at 2350–51 (describing a circuit split over the definition of Native American remains). In 2014, in *Thorpe v. Borough of Thorpe*, 770 F.3d 255, 262–64 (3rd. Cir. 2014), the Third Circuit Court of Appeals found that NAGPRA's definition of human remains applied to Jim Thorpe's remains, which the court considered recent remains given that Thorpe died in the 1950s. See Rogers, *supra* note 110, at 2351 & n.11 (stating the findings of *Thorpe*); *Thorpe*, 770 F.3d at 262–64 (reasoning that NAGPRA applied to Thorpe's remains despite his year of death). Conversely, in 1999, the United States District Court for the Western District of Texas in *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644, 651 (W.D. Tex. 1999), held that NAGPRA does not apply to recent American Indian remains. See Williams, *supra*, at 2351 & n.11 (discussing the *Kickapoo* court's holding that NAGPRA's applicability is limited to older remains); *Kickapoo*, 46 F. Supp. 2d at 651 (reasoning that the Tribe's construction of NAGPRA would allow any individual to escape an inquest by getting a corpse and burying it on tribal lands). In *Kickapoo*, a tribal member died on March 2, 1999, and her body was buried that same month on tribal land. See 46 F. Supp. 2d at 646–47 (describing the facts of the case). The State of Texas requested the tribe disinter the member's body and subject the body to an autopsy, but the Tribe's religious beliefs prevented the autopsy. *Id.* at 645. The tribe argued that the requested disinterment was invalid under NAGPRA. See *id.* at 647 (describing the tribe's NAGPRA-centered argument).

¹¹² See *Interior Department to Hold Tribal Consultations on the Federal Boarding School Initiative*, INDIAN COUNTRY TODAY (Sept. 30, 2021), <https://indiancountrytoday.com/the-press-pool/interior-department-to-hold-tribal-consultations-on-the-federal-boarding-school-initiative> [<https://perma.cc/XC6Q-EZJJ>] (explaining that the United States government planned to consult with tribes to discuss the proper way to address Indian boarding schools and listing NAGPRA as one issue to be discussed). The Department of the Interior has already marked NAGPRA as a factor in the federal probe of Indian boarding schools. See *id.* (including NAGPRA in a list of topics that participants in the tribal consultations should speak about, demonstrating the law's relevancy to the federal investigation of boarding school sites). On September 30, 2021, the Department of the Interior issued a news release stating that it would begin tribal consultations related to Indian boarding schools, including repatriation of human remains pursuant to NAGPRA. See *id.* (describing the process of the probe). The Department of the Interior also flagged the issues of management of former school sites, privacy, and the compilation of records as topics of discussion for the tribes. See *id.* (listing topics of discussion for tribes to consider when meeting with the government).

Another possible source for remedies is the Tucker Act, which allows victims to plead a claim against the United States for breaching a common clause in treaties between tribes and the government.¹¹³ Many treaties between Native American tribes and the United States include language that charge the United States with the responsibility to punish any “bad men among whites” who wrongs a tribe.¹¹⁴ A major issue in using the Tucker Act in regards to addressing boarding school problems, however, is its statute of limitations, which limits claims to six years.¹¹⁵ There are potential avenues that do not run afoul of the statute of limitations, but their viability is unclear.¹¹⁶ Further, although the

¹¹³ See Curcio, *supra* note 41, at 77 (describing how the Tucker Act allows for claims brought for a “breach of treaty”); 28 U.S.C. § 1491(a)(1) (providing that the United States Court of Federal Claims has jurisdiction over claims against the United States relating to the Constitution, Acts of Congress or regulations, or on any contract with the United States). The Tucker Act gives the federal court jurisdiction over claims against the United States for breach of contract. See Curcio, *supra* note 41, at 79 (explaining the Tucker Act’s use to bring claims against the federal government). The Supreme Court of the United States has held that treaties between the federal government and tribes constitute a contract. See *id.* (explaining how the Tucker Act applies to treaties); *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675 (1979) (“A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.”). Because the Supreme Court of the United States interprets these treaties as contracts, the Tucker Act could potentially provide victims of Indian boarding schools with a legal remedy. See Curcio, *supra* note 41, at 79 (describing the legal recourse victims could pursue with the Tucker Act).

¹¹⁴ See Curcio, *supra* note 41, at 78 (describing the clause in treaties that claimants can plead the United States breached). Nine treaties between the United States and Indian tribes contain this “bad men” clause. See Note, *A Bad Man Is Hard to Find*, 127 HARV. L. REV. 2521, 2521 (2014) (explaining the origin of the “bad men” clause). This provision of the law has not enjoyed wide use. See *id.* at 2521–22, 2527 (describing only a few cases being brought on a “bad men” claim since the mid-1800s). Although litigation based on the “bad men” provision is rarely pursued, courts appear to reject the argument that the inactivity surrounding the clause evidences its irrelevancy. See *id.* at 2530 (explaining how the relevancy of the clause and rejection of the argument for obsolescence appears settled by courts).

¹¹⁵ See Curcio, *supra* note 41, at 82–83 (explaining how the fact that most boarding schools closed more than twenty years ago poses problems regarding the Tucker Act’s six-year statute of limitations).

¹¹⁶ See *id.* at 84 (exploring the nuances of using the Tucker Act). If courts find that the “bad men” provision requires “mandatory exhaustion of administrative remedies,” then victims must file first with the relevant administrative agencies and only after those agencies issue their final decisions will the statute of limitations on Tucker Act claims begin to run, allowing flexibility. See *id.* (describing the Tucker Act’s procedures). Laches may also present a hurdle for plaintiffs should the government raise the defense. See *id.* (describing how the government could harness laches to its advantage); *Laches*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Unreasonable delay in pursuing a right or claim—almost always an equitable one—in a way that prejudices the party against whom relief is sought.”). Additionally, although the Tucker Act covers claims related to physical abuse suffered at the schools, it is unclear if the Tucker Act covers emotional injury claims for descendants and relatives. See Curcio, *supra* note 41, at 79–80 (describing how it is unclear if the Tucker Act applies to non-physical injuries caused by the poor conditions at the schools). Although the Tucker Act could provide a legal hook for tribes, it also does not provide for monetary damages, limiting its potential sufficiency. See *id.* at 79 (explaining that the Tucker Act does not provide for a substantive right for money damages, which must stem from a different source of law). The Federal Circuit Court of Appeals, however, found that the “bad men” treaty clause orders monetary damages, allowing tribes to

“bad men” clause is a common clause in many Indian treaties, it is not in all treaties, excluding some tribes from this remedy altogether.¹¹⁷

In addition to the Tucker Act, the Federal Tort Claims Act (FTCA) may also provide a legal solution for victims of the Indian boarding school system.¹¹⁸ The FTCA provides a negligence tort claim against government employees.¹¹⁹ Indian boarding school victims could potentially claim that government employees violated their duty to protect students by running dangerous boarding schools.¹²⁰ Potential road blocks to bringing claims under the FTCA include its two year statute of limitations and the government’s level of discretion in administering the boarding schools.¹²¹ Arguments to overcome the statute of limitations would have to rely on tolling similar to ones previously used in cases of therapist-related child abuse.¹²² Plaintiffs also face difficulty due to

potentially receive compensation through Tucker Act claims. *See id.* (describing the source of law tribes can use to create a right for money damages); *Tsosie v. United States*, 825 F.2d 393, 402–03 (Fed. Cir. 1987) (allowing a tribal member to recover monetary damages for a breach of such a clause).

¹¹⁷ *See Curcio, supra* note 41, at 86 (stating that tribes that have treaties containing the “bad men” clause could use the Tucker Act to file a claim against the government); Note, *supra* note 114, at 2526–27 (describing nine treaties that contain a “bad men” clause including treaties between the United States and the, Navajo, Kiowa, Sioux, Ute, and Apache, among others).

¹¹⁸ *See Curcio, supra* note 41, at 86–87 (describing how the Federal Tort Claims Act provides another avenue for legal recourse for abuses at Indian boarding schools).

¹¹⁹ *See id.* at 87 (describing the source of claim under the FTCA); 28 U.S.C. § 2675(a) (providing for a claim against the United States for injury caused by negligence by a government employee).

¹²⁰ *See Curcio, supra* note 41, at 87 (explaining that victims of human rights violation can only use the FTCA if they can assert a negligence claim). Successful FTCA claimants may receive the damages allowed for negligence as defined by the state in which they bring the claim, which is commonly damages for past, present, and future physical and emotional suffering, lost wages, and all medical expenses. *See id.* at 96 (explaining that the last element of a negligence claim is assessing damages, which differs based on what states allow).

¹²¹ *See id.* (setting out potential defenses to FTCA claims); *infra* notes 122–124 and accompanying text (discussing the details of each major defense to FTCA claims).

¹²² *See Curcio, supra* note 41, at 96 (describing the statute of limitations and characterizing it as “one of the biggest hurdles” plaintiffs face). The claim begins to accrue when the plaintiff “actually knew, or in the exercise of reasonable diligence should have known, the cause and existence of his injury.” *See id.* (quoting *Wherman v. United States*, 830 F.2d 1480, 1482–83 (8th Cir. 1987)) (setting out the details of the statute of limitations on federal tort claims). There is no tolling provision in the FTCA, and few cases allow for tolling. *Id.* Courts that did allow for tolling involved plaintiffs who were unaware that the abuse was a substantial cause of his or her injuries. *See id.* (describing which situations allowed for tolling). To overcome the two-year statute of limitations, parties desiring to make an FTCA claim could argue that they did not know of the tortfeasor’s wrongdoing when it occurred, arguing that due to the age of boarding school victims, they were unaware of psychological harm. *See id.* at 98 (describing one method for overcoming the statute of limitations). Plaintiffs could alternatively argue that the transference phenomenon occurred, which previously had applied to cases involving therapists who abused their young patients. *See id.* at 99–100 (describing a second method for overcoming the statute of limitations). The transference phenomena involved young patients transferring feelings they had for their parents onto their therapists, which the therapists then used to sexually abuse the patients. *See id.* (explaining the psychological phenomenon). Because patients did not realize that the abuse of the transference phenomena caused their later injury, courts have allowed for

statutes that release the federal government from liability for any claim rooted in the exercise or the failure to exercise a discretionary function on the part of a federal agency.¹²³ Both government defenses provide major obstacles for victims seeking to mount FTCA claims.¹²⁴

Lastly, victims could potentially bring claims based on violations of international law.¹²⁵ Claims that victims could assert include genocide claims, torture and cruel and inhuman treatment claims, claims of violations of the fundamental rights of children, and others.¹²⁶ Like other discussed potential legal claims, international law claims pose challenges for plaintiffs including statutes of limitations and the political question doctrine.¹²⁷ Further, many do-

tolling of the statute of limitations. *See id.* at 100 (describing the legal implications of the psychological phenomenon). This phenomenon could also potentially apply to boarding school victims. *See id.* (describing how the transference phenomenon, priorly used in cases of therapist related child abuse could apply in this different situation).

¹²³ *See id.* at 100 (describing the government's potential discretionary function defense). If the law proscribes a course of action for a government employee to follow, and that employee does not follow that action, the discretionary function exception does not apply. *See id.* at 100–01 (setting out the situation in which the government cannot use a discretionary function defense). But, if there is no violation of a mandatory rule, courts must determine if the action is the type contemplated by Congress when passing the discretionary function exception to the FTCA. *See id.* at 101 (setting out the circumstances in which the government can use a discretionary function defense). Although the discretionary function defense presents a challenge to FTCA claimants, said claimants may overcome the defense. *See id.* (explaining that it may be difficult to overcome the defense but that there are methods to do so). First, claimants may attempt to overcome the defense by citing regulations or rules that the government employees violated. *See id.* (describing one method plaintiffs can pursue). A second method claimants can attempt is an argument that the decisions were not based on social, economic, or political policy. *See id.* at 102 (describing a second argument plaintiffs may try to overcome the defense).

¹²⁴ *See infra* notes 121–123 and accompanying text (discussing the obstacles to FTCA claims and the difficulties of overcoming those obstacles).

¹²⁵ *See* Curcio, *supra* note 41, at 104 (setting out international claims as another potential route for legal redress for Indian boarding schools). The Supreme Court of the United States recognizes international law as part of U.S. law, but courts in the United States often resist citing international law. *See id.* at 105 (describing the legal landscape of international law in the United States). Redress for human rights abuses is a major part of international law. *See id.* (setting out the foundation of international law claims on which victims could rely).

¹²⁶ *See id.* at 109, 115, 118, 120–21 (listing potential international claims including genocide claims; torture, cruel and inhuman treatment violations; claims arguing a violation of rights of children; and claims relating to the destruction of culture and perpetuation of intergenerational abuse); Piccard, *supra* note 44, at 156 (“It is hard to see any way that the [United Nation] Convention’s definition of genocide does not describe with complete accuracy the United States’ use of Indian boarding schools to obliterate the indigenous peoples in every conceivable way: physically, culturally, racially, ethnically, and religiously.”).

¹²⁷ *See* Curcio, *supra* note 41, at 122–23 (discussing potential defenses to claims brought on an international law basis including a statute of limitations and the political question doctrine). The political question doctrine entitles the federal government to exercise a right to act unilaterally, enabling the government to argue that its action posed a “political question,” which allows the government to act with that power. *See id.* at 123–24 (explaining how the political question doctrine may allow the government to excuse conduct relating to tribes).

mestic courts resist applying international law, adding an additional hurdle for victims wishing to pursue an international claim.¹²⁸

II. EVALUATING RESTORATIVE JUSTICE METHODS USED IN SIMILAR CONTEXTS

To evaluate a potential restorative justice remedy in response to Indian boarding schools in the United States, it is helpful to analyze the use of restorative justice solutions in other Indigenous contexts.¹²⁹ Section A of this Part discusses the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission.¹³⁰ Section B discusses Canada's Truth and Reconciliation Commission.¹³¹ Section C discusses criticism of truth and reconciliation commissions.¹³²

A. Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission

The State of Maine is perhaps the best domestic example of a government using a restorative justice method to address injustice against Indigenous groups.¹³³ In 1999, a federal government investigation found Maine noncompliant with the Indian Child Welfare Act (ICWA).¹³⁴ To resolve the widespread practice of removing Native children from their families through state child welfare agencies, Congress passed ICWA in 1978, which emphasized the importance of maintaining Native families and culture.¹³⁵ A federal government

¹²⁸ See *id.* at 105 (stating that U.S. courts are often resistant to international law). International law claims may also seem more complicated than a domestic law charge because many legal professionals are not well-versed in international law. See *id.* at 106 (explaining why many people choose not to pursue international law claims).

¹²⁹ See *infra* notes 133–173 and accompanying text. (examining instances of restorative justice in response to state abuse against Indigenous Peoples in Maine and Canada).

¹³⁰ See *infra* notes 133–154 and accompanying text.

¹³¹ See *infra* notes 155–173 and accompanying text.

¹³² See *infra* notes 174–184 and accompanying text.

¹³³ See *Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission*, WABANAKI REACH, <https://www.maine-wabanakireach.org/maine-wabanaki-state-child-welfare-truth-and-reconciliation-commission> [<https://perma.cc/PBA5-M42U>] (describing the basics of the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission that employed restorative justice methods).

¹³⁴ *History*, WABANAKI REACH, <https://www.wabanakireach.org/history> [<https://perma.cc/W6T7-ATVV>]. Congress passed the Civilization Fund Act in the nineteenth century with the purpose of removing Indian children from their homes to place into boarding schools and disconnecting them from their Native American traditions. Penthea Burns, *Truth and Reconciliation: The Findings on Wabanaki Child Welfare in the State of Maine*, CULTURAL SURVIVAL Q., Dec. 2015, at 16, 16. Continuing this tradition, in the 1950s, the federal government established the Indian Adoption Project, which resulted in many Native children being removed from their families and relocated with white families. *Id.*

¹³⁵ See Burns, *supra* note 134, at 16 (describing the purpose of ICWA); Indian Child Welfare Act, 25 U.S.C. §§ 1901–1902 (explaining the importance of keeping Native American families together,

investigation found that Maine did not comply with ICWA because it placed Native American children in foster care at a higher rate than many other states.¹³⁶ Further internal investigation found that Maine placed Wabanaki children in foster care at a rate five times that of non-Wabanaki children, in effect removing the Wabanaki people from their homes via the foster care system and resulting in numerous Indigenous children being adopted by white families.¹³⁷ To resolve this, the Wabanaki—the dominant Indigenous group in Maine—and the state government formed a working group to correct the high rates of Native children entering foster care.¹³⁸ The working group compiled data regarding compliance with ICWA and considered policy solutions to fix the problems stemming from noncompliance.¹³⁹ The working group discovered that a great level of distrust existed between foster care administrators and Indigenous communities and that something needed to be done to correct the relationship.¹⁴⁰

recognizing the large number of Native children removed from their family, and establishing the federal policy of keeping Native children with their families when possible).

¹³⁶ Burns, *supra* note 134, at 16.

¹³⁷ See *id.* at 16–17 (relaying statistics regarding the numbers of Native children placed in the foster care system); ME. WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMM’N, BEYOND THE MANDATE 6 (2015) (setting out statistics showing a high rate of Native children in foster care in Maine); Esther Altwater Attean et al., *Truth, Healing, and Systems Change: The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission Process*, 91 CHILD WELFARE 15, 19 (2012) (explaining how more Wabanaki people felt affected by the adoption system in Maine than were affected by the boarding school system). The Association on American Indian Affairs conducted studies between 1969 and 1974 that found that up to thirty-five percent of all Indian children faced removal from their communities. Attean et al., *supra*, at 19. Many consider this policy of removing Native children from their biological families and communities through the foster care system to be genocide. See *id.* (“The foster care system was another wave of assimilation and epistemological genocide that Native people endured . . .”).

¹³⁸ See Burns, *supra* note 134, at 16–17 (describing the teamwork between the Wabanaki tribes and Maine). See generally *About the Wabanaki Nations*, ABBE MUSEUM, <https://www.abbemuseum.org/about-the-wabanaki-nations> [<https://perma.cc/CB7F-FLD6>] (explaining that the Wabanaki consists of four Indian tribes residing in Maine: the Aroostook Band of Micmacs, the Houlton Band of Maliseets, the Passamaquoddy Tribe at Motahkokmikuk and the Passamaquoddy Tribe at Sipayik, and the Penobscot Nation). The Wabanaki have resided in parts of New England and Canada for more than 12,000 years. See Attean et al., *supra* note 137, at 15, 17 (describing the background of the Wabanaki people). The populations of the Wabanaki tribes declined significantly following the arrival of non-Indigenous Peoples. *Id.* This population decline was caused not only by disease, but also by removal from their homes, forced assimilation, and violence at the hands of Europeans and settlers. *Id.* There used to be more than twenty tribes comprising the Wabanaki. *Id.* Today, there are only four. *Id.*

¹³⁹ See Burns, *supra* note 134, at 17 (“The working group trained caseworkers, developed policy, and gathered data about compliance in many Maine communities.”).

¹⁴⁰ See *id.* (describing the underlying racism the Commission found in the state child welfare system); ME. WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMM’N, *supra* note 137, at 34–35 (describing the presence and effects of institutional racism and historical trauma within the Maine child welfare system). A 2009 case review by the Maine Office of Child and Family Services (OCFS) found that state employees had to better their partnership with tribes. Attean et al., *supra* note 137, at 21. Further, in 2010, the Maine Human Rights Commission discovered evidence that the Maine OCFS and one of its staff members discriminated against a Penobscot person because of her status as an Indigenous person. *Id.*

In response to the findings from the investigation and the working group, Maine formed the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission also known as Maine-Wabanaki REACH: Reconciliation, Engagement, Advocacy, Change and Healing (Wabanaki REACH or REACH).¹⁴¹ Wabanaki REACH drew upon truth and reconciliation restorative justice processes used after apartheid in South Africa, as well as the Canadian truth and reconciliation commission.¹⁴²

REACH held community events in which people would gather at a local building and share their stories and experiences with staff along with other community members.¹⁴³ The tribal members brought cultural experiences into the truth and reconciliation process whereas the Office of Children and Family Services (OCFS) members provided perspective as government employees.¹⁴⁴ OCFS employees were forced to look beyond their employment status to develop a relationship with tribal members based on mutual respect and openness.¹⁴⁵ The Commission gave community members space to voice any concerns about the process, and some did, voicing doubt at how healing would be achieved by the commission and expressing frustration at both the process and the history of abuse.¹⁴⁶ The Commission utilized traditional Indigenous prac-

¹⁴¹ *History*, *supra* note 134. The Commission's report found that to address this high rate of foster care placement, the state had to: (1) combat the racism endemic in state institutions and the general public; (2) address the consequences of intergenerational trauma on Wabanaki people; and (3) tackle varying interpretations of tribal sovereignty and jurisdiction between the tribes and the state. *See Burns*, *supra* note 134, at 17 (setting out the steps Maine and the tribes should take to address non-compliance with ICWA).

¹⁴² *See Independent Lens: Dawnland*, *supra* note 29 (explaining how the Maine Truth and Reconciliation Commission drew from the South African truth and reconciliation process). REACH, which is part of Maine's Truth and Reconciliation Commission's name, stands for: restoration, engagement, advocacy, change, and healing. *History*, *supra* note 134.

¹⁴³ *See Independent Lens: Dawnland*, *supra* note 29 (showing REACH visiting different Indigenous communities and hosting sessions in community buildings with commissioners); DAVIS, *supra* note 29, at 78–79 (explaining that Wabanaki REACH is the Maine Wabanaki-state Truth and Reconciliation Commission's partner in the community).

¹⁴⁴ *See Attean et al.*, *supra* note 137, at 24 (explaining the different perspectives and interests of the parties during the process). Members of the tribe felt like the process transcended status as a job and in fact represented the survival of their community and traditions. *See id.* (describing tribal members' thoughts on the process). On the other hand, OCFS employees felt conflicted with their status as staff members. *See id.* (contrasting the thoughts of the tribal members and the thoughts of state employees on the process). The Commission also collected individual statements from survivors, and the survivors could choose the level of anonymity they preferred for their statement. *See Independent Lens: Dawnland*, *supra* note 29 (showing REACH interviewing and recording people and asking whether the interviewee wanted to have their name and face associated with their statement or remain anonymous).

¹⁴⁵ *See Attean et al.*, *supra* note 137, at 24 (describing how OCFS staff members worked to transcend their status as employees). An OCFS employee, Martha Proulx, expressed her understanding that the benefit of the truth and reconciliation process lay in the construction of the intra-government relationship between the Wabanaki and the Maine state government. *Id.*

¹⁴⁶ *See Independent Lens: Dawnland*, *supra* note 29 (depicting Commissioners speaking with a survivor who voiced skepticism of the process and who became emotional recounting that she and her

tices in the process, including drum circles and sacred fires.¹⁴⁷ At the end of one community visit, one woman explained to everyone that the staff had collected the tissues used by everyone sharing their stories, that the tears shed on the tissues were sacred, and that by burning the tissues in the sacred fire, the tears would reach their ancestors, demonstrating the care taken to include Indigenous values and practices in the truth and reconciliation process.¹⁴⁸ Throughout the truth and reconciliation process, the Commission placed emphasis on the value and importance of decolonization in the process, and this approach allowed the Commission to collect the number of statements it did over a wide range of communities and issue sufficient recommendations in its final report.¹⁴⁹

REACH's efforts persist, furthering the restorative process on a continual basis.¹⁵⁰ The Maine Wabanaki Truth and Reconciliation Commission's purpose was to promote healing and change from the abuses of the Maine child welfare agencies.¹⁵¹ Though these goals are relatively amorphous compared to the retributive goals of the adversarial system, the Commission arguably achieved its objectives.¹⁵² The Commission promoted healing by providing the opportunity for those wronged by the state child welfare agencies to share their stories and connect with their community.¹⁵³ The Commission also promoted change with

peers had grown up in an abusive foster system and that it had taken the state many years to attempt reconciliation). Similarly, some events, like the event held for the Aroostook Band of Micmacs, suffered from low turnout that could be attributed to skepticism in the process. *See id.* (showing few people joining the meeting). A Commissioner explained that it could be difficult for people to share their stories with people they do not know. *See id.* (theorizing why people may choose not to attend community events).

¹⁴⁷ *See id.* (showing community members holding hands around a traditional drum and explaining the process of the sacred fire); DAVIS, *supra* note 29, at 79 (explaining that REACH conducted ceremonies for the Commission).

¹⁴⁸ *See Independent Lens: Dawnland*, *supra* note 29 (depicting a woman who was involved in conducting a truth session explaining the significance of collecting the tissues used by survivors and their families throughout the day).

¹⁴⁹ *See id.* (stating that decolonization is required to allow Maine to change from being an "occupier to a neighbor"); DAVIS, *supra* note 29, at 79 (explaining that one of the recommendations made by the Commission's final report was "decolonization" of the relationship between the two governments).

¹⁵⁰ *See Ochs*, *supra* note 104, at 20–21 (describing REACH's continuing efforts); *Programs, Events & Resources*, WABANAKI REACH, <https://www.wabanakireach.org/education> [<https://perma.cc/9NTZ-DGZJ>] (setting out REACH's goal of creating a community aware of the harms done to Indigenous Peoples and providing continuing activities including educational programs, resources, and events). Some tribal members state that the Commission initiated more conversations regarding the topic, and some Maine staff have noted that the state has made changes to the child welfare system. *See Ochs*, *supra* note 104, at 20 (describing the results of the Maine commission).

¹⁵¹ *See History*, *supra* note 134 (describing the purpose of the Commission).

¹⁵² *Compare id.* (describing the Commission's goals as "Truth, Healing, and Change"), with ZERNOVA, *supra* note 83, at 7 (describing the adversarial system's goals as "retributive").

¹⁵³ *See supra* notes 143–149 (discussing truth telling opportunities provided by the Commission).

its final recommendations, which suggested specific changes to the state agencies based on its experiences and through its continued restorative practices available to the community.¹⁵⁴

B. Canada's Truth and Reconciliation Commission

Canada has a similar history to the United States in compelling Native citizens to attend abusive boarding schools.¹⁵⁵ Unlike the U.S., however, it has used restorative justice to address this wrong.¹⁵⁶ As part of the Indian Residential Schools Settlement Agreement, in 2007, the Canadian government was required to create a Truth and Reconciliation Commission to address the impact of residential schools on the country.¹⁵⁷ The Canadian government allotted seventy-two million dollars to the Commission, which traveled across Canada between the years of 2007 and 2015 to hear from thousands of witnesses.¹⁵⁸

¹⁵⁴ See *supra* notes 149–150 (discussing recommendations and the current status of the Commission).

¹⁵⁵ See generally Mayo Moran, *The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools*, 64 U. TORONTO L.J. 529, 531 (2014) (discussing the Indian Residential School system in Canada).

¹⁵⁶ See *id.* at 529–30 (explaining that the Indian Residential Schools Settlement Agreement represents an effort to address historic injustice in Canada). The Canadian government removed around one hundred and fifty thousand Indigenous children from their communities and relocated them to residential schools. *Id.* at 531. At the schools, students were not allowed to speak their native languages and were punished for practicing their religious beliefs. See *id.* (describing the assimilationist methods used at residential schools).

¹⁵⁷ See *Truth and Reconciliation Commission of Canada*, GOV'T OF CAN., <https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525> [<https://perma.cc/V93R-MPD2>] (explaining the origin of the Truth and Reconciliation Commission). The Indian Residential Schools Settlement Agreement is a settlement between the attorneys representing former students of Canada's residential schools, counsel for the involved religious organizations, the Assembly of First Nations, the Canadian government, and additional indigenous organizations. See *Indian Residential Schools Settlement Agreement*, GOV'T OF CAN., <https://www.rcaanc-cirnac.gc.ca/eng/1100100015576/1571581687074> [<https://perma.cc/4RG6-82FZ>] (describing the basics of the Settlement Agreement). The Settlement Agreement was a product of a massive influx in litigation relating to residential schools at the end of the 20th century, with over twelve thousand legal claims filed against the federal government by 2002. See Moran, *supra* note 155, at 531 (describing the circumstances that led to The Settlement Agreement). In total, more than seventy parties signed the Agreement. *Id.* at 529. It is the largest class action settlement in the history of Canada and is valued at approximately five billion dollars. *Id.* The agreement required a "Common Experience Payment" for all former students; an "Independent Assessment Process" for sexual or physical abuse claims; establishment of measures to support healing; commemorative events; and the creation of the Truth and Reconciliation Commission. See *Indian Residential Schools Settlement Agreement*, *supra* (setting out the terms of the Settlement Agreement). Many consider the agreement one of the most progressive efforts by a government to respond to historic abuses. See Moran, *supra* note 156, at 329–30 (describing perspectives on the Settlement Agreement). It is the first Truth Commission established by the government of a country that was not in a state of political transition. See DAVIS, *supra* note 29, at 77 (describing the difference between Canada's commission and other similar commissions).

¹⁵⁸ See *Truth and Reconciliation Commission of Canada*, *supra* note 157 (describing the efforts of the Commission to collect statements); DAVIS, *supra* note 29, at 77 (explaining that the Commission

The Commission's first goal was to give a safe space for people to share their experiences at residential schools by organizing national and community events.¹⁵⁹ The Commission further sought to publicize the topic and educate the public about the residential school system through the creation of a publicly accessible historical record.¹⁶⁰ The Commission was also formally tasked with composing a report with recommendations for the Canadian government regarding the history, impact, and legacy of the residential school system.¹⁶¹ To facilitate these objectives, the mandate authorized the Commission to receive and use documents from survivors, preserve these documents, and hold public events.¹⁶²

used ground-up strategies by traveling to many different communities to hear the stories from survivors, establishing an advisory counsel comprised of Indigenous people, and working with an Indigenous NGO). Schedule N of the Residential Schools Settlement sets out the mandate establishing the Truth and Reconciliation Commission. *See generally* RESIDENTIAL SCH. SETTLEMENT, SCHEDULE "N": MANDATE FOR THE TRUTH AND RECONCILIATION COMMISSION, https://residentialschoolsettlement.ca/schedule_N.pdf [https://perma.cc/BG79-8YGN] [hereinafter SCHEDULE N] (explaining that the truth and reconciliation process is one part of a larger approach responding to the impact of Residential Schools). Schedule N lists the principles of the Commission as: "accessible; victim-centered; confidentiality . . .; do no harm; health and safety of participants; representative; public/transparent; accountable; open and honourable process; comprehensive; inclusive; educational, holistic, just and fair; respectful; voluntary; flexible; and forward looking . . ." *Id.* at 1. It set out to achieve a renewed relationship between Indigenous and Non-Indigenous Canadians. *Id.* Schedule N also sets out the procedures and objectives of the Commission. *See id.* at 1–2 (listing the logistics of the Commission to complete its goals within the listed timeframe).

¹⁵⁹ *See* SCHEDULE N, *supra* note 158, at 1–2 (listing out the Commission's goals as to "acknowledge" the experience and consequences of residential schools; provide an adequate setting for survivors and their communities to reach out to the Commission; and "witness, support, promote and facilitate" events across the country and locally). People giving statements and sharing their stories spoke with few disruptions or restrictions. *See* NIEZEN, *supra* note 63, at 59 (describing how the Commission did not restrain or guide speakers at events when issuing their statements, which complicated the matter of whose voices were included versus excluded in the process). One scholar, however, has criticized the Commission for promoting some perspectives while excluding others. *See id.* (stating that stories from employees of the school were often not showcased at the same level as stories from former students).

¹⁶⁰ *See* SCHEDULE N, *supra* note 158, at 2 (further listing out the Commission's objectives as spreading knowledge about the residential school system and locating sources to create a record of residential schools and their impact).

¹⁶¹ *See id.* (setting out the Commission's obligation to produce a comprehensive report surrounding residential schools for submission to the Canadian government and the parties of the Settlement Agreement). The Agreement required the Commission to engage in activities in support of commemoration of schools and survivors. *See id.* (providing additional tasks for the Commission to complete aside from conducting events and producing a report with recommendations).

¹⁶² *See id.* at 2–3 (listing the powers, duties, and procedures for the Commission). Further, the Commission could use interdisciplinary methods, engage experts, create a research center, prepare a report, and support commemorative activities. *See id.* at 4–5 (setting out the responsibilities of the Commission). The Commission was responsible for using methods of "social sciences, historical, oral traditional and archival methodologies for statement-taking, historical fact finding and analysis, report-writing, knowledge management and archiving" and any other methods it decided were necessary to accomplish its objectives. *See id.* at 4–5 (outlining the rules and standards expected of the Commission). Although the Commission had flexibility in its actions, the government restricted it from acting in

Truth telling was an essential part of Canada's Truth and Reconciliation Commission.¹⁶³ This restorative practice manifested in three event types held by the Commission: (1) national events, which involved former students sharing their stories and communities sharing in their experience; (2) community events, which responded to the needs of survivors and their communities on a smaller scale; and (3) individual statement taking or truth telling, which allowed individuals to file personal statements of their experience with the Commission.¹⁶⁴ Indigenous traditional knowledge and practices informed the structure of the national events, with sacred fires lit at the commencement of every event and a special ceremony starting each day of the event.¹⁶⁵

formal legal manners, such as conducting legal proceedings. *See id.* at 3 (explaining that the Agreement limits the Commission from conducting actual legal processes but rather allows it to engage only in the restorative truth process). Within two years, the Commission was to complete all national events and research. *See id.* at 7 (setting out the timeline in which the Commission was to complete its objectives and finalize its report). The Commission further had to write a report on historical findings and issue recommendations within this two-year time frame. *Id.* Within five years, the Commission was to complete all community events and individual statement collection, establish a research center, and conduct closing ceremonies. *See id.* (asserting the requirements for the Commission to achieve by the end of five years).

¹⁶³ *See id.* at 8 (describing the three components of the Truth and Reconciliation Commission as (1) national events; (2) community events; and (3) individual statement taking).

¹⁶⁴ *See id.* at 8–10 (listing the three types of events, their purposes, and differences). National events targeted the country more broadly, with the objective of spreading information from the affected communities and legacy of the residential school system to the larger public. *See id.* at 8 (explaining the strategy underlying the Commission's national events). In contrast, community events were focused on individual community groups of survivors and their needs. *See id.* at 9 (describing the alternate strategy pursued at community events). Where national events aimed to involve high-level government and church officials, community events intended to involve former church, school, and government employees requested by community members. *See id.* (comparing the benefits of hosting both national events and community events). The Commission's 2015 summary report explains in detail the process of national events. *See* COMM'N SUMMARY, *supra* note 7, at v (explaining that the report summarized the findings of the Commission's final report, which set out what the Commission did, what it heard from survivors, and its conclusions). National events lasted for four days each and served the dual purpose of both providing a space for survivors to share their story and spreading awareness of the issue to the general public. *See id.* at 30 (explaining the objectives of the national events). The report explains that this dual purpose fostered the "collective journey towards national healing and reconciliation," moving past just healing for survivors but for the country as a whole. *See id.* (describing how the goal of the Commission affected the entire country). The report asserts that this effort did not end with the commencement of the closing ceremony but is instead something that will continue in the future. *Id.*

¹⁶⁵ *See* COMM'N SUMMARY, *supra* note 7, at 30 (describing how traditional Indigenous knowledge influenced not only the national events but also the Commission itself). The Commission borrowed the Seven Sacred Teachings of the Anishinaabe to use as the guiding themes for the events: "respect, courage, love, truth, humility, honesty, and wisdom." *See id.* (giving examples of ways the Commission incorporated Indigenous knowledge into the events). The report further stresses that the Commission leaned on traditional cultural procedures and traditions of the Indigenous groups in the location of the events. *See id.* (further explaining how the Commission used Indigenous knowledge to further its goals).

In 2015, the Truth and Reconciliation Commission issued their final reports after undertaking the process.¹⁶⁶ The Commission held seven National events with over one hundred and fifty five thousand people attending and nine thousand survivors listed as taking part.¹⁶⁷ The Commission found that before the story-collecting efforts of the Commission, history lacked record of the experiences of survivors at residential schools.¹⁶⁸ To remedy this gap in knowledge, the Commission collected statements from survivors at public events and one-on-one meetings.¹⁶⁹ The Commission succeeded in establishing the National Centre for Truth and Reconciliation, where the public can learn about the legacy of residential schools.¹⁷⁰ The Commission also issued ninety-four calls to action, spanning a wide range of topics including child welfare, education including language and culture, reconciliation, and apologies from

¹⁶⁶ See *id.* at v (explaining that the Commission's final report is a multi-volume report that describes the intricacies of the Commission's work, what it learned, and what it recommends the government do to continue to redress the abuses carried out at residential schools). Its summary report spans over five hundred pages and outlines the Commission's activities, the history of the residential school system, the repercussions of the system, the obstacles to reconciliation, and calls to action from the Commission. *Id.* at iii.

¹⁶⁷ See *id.* at 25 (describing the attendance at national events held in Winnipeg, Inuvik, Halifax, Saskatoon, Montreal, Vancouver, and Edmonton). The report maintains that although only nine thousand residential school survivors registered, there were more survivors who attended national events without registering. See *id.* (explaining that the turnout for events was likely greater than initially appeared and therefore reached and affected many more people).

¹⁶⁸ See *id.* (listing the different methods the Commission used in its truth-collecting mission).

¹⁶⁹ See *id.* at 26 (describing how and why the Commission collected statements from survivors at events); see also ZEHR, *supra* note 66, at 64 (describing how restorative justice circles involve participants taking turns speaking and voicing a principle they would like to pursue in the discussion). In an attempt to recognize the high level of imprisonment of Indigenous people, statements were also received from survivors residing in correctional facilities. See COMM'N SUMMARY, *supra* note 7, at 26 (explaining that the Commission gathered statements from correctional facilities in Kenora, Ontario, Yellowknife, and the Northwest Territories and offering an explanation of why this practice was undertaken). The report stresses that the Commission visited survivors in correctional facilities in recognition of the contribution of the residential school system to high rates of incarceration for Indigenous Canadians. See *id.* (describing the measures the Commission took to account for results of intergenerational trauma on Indigenous peoples). Former employees of the schools also submitted statements to the Commission to round out the perspectives on the experience at residential schools. See *id.* (explaining why the Commission also sought out stories from former residential school staff). The Commission held over ninety interviews with former staff and received statements from former employees at the various events held across the country. See *id.* (describing efforts taken to acquire stories from non-students). Throughout the process, the Commission collected more than six thousand seven hundred and fifty statements from survivors and other affiliated persons. *Id.* at 25.

¹⁷⁰ See *Reconciliation Through Education*, NAT'L CTR. FOR TRUTH & RECONCILIATION, <https://nctr.ca/education/> [<https://perma.cc/5XEA-5AW3>] (providing educational resources for visitors to learn about residential schools); *Memorial*, NAT'L CTR. FOR TRUTH & RECONCILIATION, <https://nctr.ca/memorial/> [<https://perma.cc/XBP9-6DYG>] (displaying a searchable register to remember children who died at residential schools); *About the Archives*, NAT'L CTR. FOR TRUTH & RECONCILIATION, <https://nctr.ca/records/view-your-records/archives/> [<https://perma.cc/U7EX-CLJ3>] (listing archives of records collected mainly by the Commission to allow visitors to comprehend the legacy of Canada's mistreatment of Indigenous Peoples).

religious organizations.¹⁷¹ In response to some of the calls to action, the Commission helped establish the Canadian Reconciliation Barometer, which issues reports on the country's progress towards ultimate reconciliation to help guide and continue the Commission's work.¹⁷² The Canadian government has since expressed its commitment to accomplishing the Commission's calls to action and has taken some steps towards that goal.¹⁷³

C. Criticism of Truth and Reconciliation Commissions

Critics argue that truth and reconciliation commissions, like those used in Canada and Maine, focus more on the rebuilding of the state or governmental body rather than the remedies for victims.¹⁷⁴ One scholar argues that truth and reconciliation commissions mishandle negative emotions and downplay colonialism in favor of healing "the country."¹⁷⁵ Primarily, this scholar disagrees with these commissions' treatment of resentment or rage, asserting that instead of recognizing the validity of these emotions, commissions treat these emo-

¹⁷¹ See COMM'N SUMMARY, *supra* note 7, at 319–37 (listing all the calls to action by the Commission). The calls to action serve the purpose of addressing the history and ongoing impact of residential schools. See *id.* at 319 (describing why the Commission issued calls to action).

¹⁷² See CAN. RECONCILIATION BAROMETER, THE CANADIAN RECONCILIATION BAROMETER: 2021 REPORT 6–8 (2022) (explaining the origins of the Reconciliation Barometer, its goals, and what it reports); *infra* notes 174–184 and accompanying text (discussing criticism of truth and reconciliation commissions).

¹⁷³ See Ochs, *supra* note 104, at 12 (explaining that the Canadian government has expressed a desire to follow the Commission's calls to action and has made strides towards this goal through assisting with settlements in class action suits that relate to residential schools). Prime Minister Justin Trudeau also apologized for the residential school system in 2017. *Id.* at 12 & n.63. Prime Minister Trudeau made a similar apology more recently in 2021 on the heels of the discovery of over seven hundred unmarked graves at the former Marieval school, describing the school system as "incredibly harmful" and stating to members of the Cowessess First Nation, "[W]e are sorry. It was something that we cannot undo in the past, but we can pledge ourselves every day to fix in the present and into the future." See Rachel Gilmore, *Trudeau Sorry for 'Incredibly Harmful' Residential Schools as Advocates Call for Accountability*, GLOB. NEWS (June 25, 2021), <https://globalnews.ca/news/7980719/residential-schools-trudeau-apology-cowessess-751-unmarked-graves/> [<https://perma.cc/9XUF-YW89>] (describing Prime Minister Trudeau's apology in response to a discovery of student remains at a residential school site). Despite repeated commitments to the calls to action, as of 2019, the Canadian government had only completed nine of the calls. See Ochs, *supra* note 104, at 12 (explaining that the government has not achieved all calls of action).

¹⁷⁴ See Karine Vanthuyne, "I Want to Move Forward. You Can Move Forward Too." *Articulating Indigenous Self-Determination at the Truth and Reconciliation Commission of Canada*, 43 HUM. RTS. Q. 355, 356 (2021) (asserting that despite a victim-forward approach, most instances of truth and reconciliation commissions have instead focused on reconciliation for the state, rather than the victim).

¹⁷⁵ See GLEN SEAN COULTHARD, RED SKIN, WHITE MASKS 111, 127 (2014) (asserting that reconciliation practitioners view "reactive emotions like anger and resentment" negatively and as emotions that need to be controlled and further asserting that the Truth Commission, like others, "temporarily situates" colonialism in the past).

tions as if they should be controlled.¹⁷⁶ Critics assert that prioritizing reconciliation and a return to normalcy for the state or country tainted the Canadian truth and reconciliation process.¹⁷⁷ Canada's Commission set one of its goals as reconciliation, defined as a journey towards balance between Indigenous and non-Indigenous Peoples.¹⁷⁸ Some argue that the inclusion of this goal perpetuated abuses by not providing large scale compensation for historical injustice and cementing colonial wrongdoings.¹⁷⁹ Critics of the process say that the Commission fortified notions of Indigenous people as damaged and requiring Canada's help by holding large truth-telling events that employed language of trauma and healing.¹⁸⁰

Elements of this criticism presented themselves during Maine's Wabanaki Truth and Reconciliation Commission.¹⁸¹ While visiting Sipayik, an Indigenous community, the Commission encountered the issue of Indigenous community members refusing to participate in the process due to the number of non-Indigenous people present at the meetings, namely the staff.¹⁸² One member of the REACH board of directors and Sipayik responded to Native people feeling intimidated by the presence of outsiders by limiting the circle to only people from REACH, people from the Native community, and the Commissioner.¹⁸³ Despite this criticism, many participants expressed positive reactions

¹⁷⁶ See *id.* at 111 (explaining the place of negative emotions in reconciliatory practices). One scholar reasons that one of the roots of dismissing such emotions is Nietzsche's treatment of them in *On the Genealogy of Morals*, in which he presents these emotions as retrogressive and unnecessarily focused on the past at the expense of progress toward the future. See *id.* (quoting FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* (1887)) (describing Nietzsche's treatment of *ressentiment* and various scholars' interpretations of it).

¹⁷⁷ See Vanthuyne, *supra* note 174, at 356–57 (explaining that Canada's commission used language of healing and that the Commission promoted this objective of healing throughout the process).

¹⁷⁸ See *id.* (describing how some scholars think that Canada's commission placed greater emphasis on the restoration of normalcy for the country rather than on the healing of the victims).

¹⁷⁹ See *id.* (quoting Taiaiake Alfred's criticism of the inclusion of reconciliation as one of the goals of the Canadian Truth and Reconciliation Commission as perpetuating colonial injustice).

¹⁸⁰ See *id.* at 376 (explaining how the Commission's events may have negatively construed Indigenous people as needing help and unable to help themselves). Instead, some critics argue that there should have been more focus placed on the resilience of Indigenous Peoples. See *id.* at 357 (describing an alternative approach that Canada's commission could have taken).

¹⁸¹ See *infra* notes 182–183 and accompanying text (describing the situations present in *Dawnland* that display examples of common criticism of both Canada's Truth and Reconciliation Commission and truth and reconciliation processes in general).

¹⁸² See *Independent Lens: Dawnland*, *supra* note 29 (explaining that Native people had opened the door to the building in which the truth and reconciliation process was taking place and chose not to enter when faced with the number of non-Native people present).

¹⁸³ See *id.* (describing how competing state and Indigenous interests resulted in conflict while engaging in the truth and reconciliation process, and deciding how to address the intimidation or othering felt by Indigenous people during the truth and reconciliation process in Sipayik). She encountered significant debate from the staff members she had chosen to exclude, with those staff members and others asserting that the process necessarily involved members of all affected communities, including non-Indigenous people. See *id.* (asserting that all staff should be involved in the process and

to the process, demonstrating viability for the truth and reconciliation model.¹⁸⁴

III. FOLLOWING A RESTORATIVE JUSTICE APPROACH TO ADDRESS THE LEGACY OF INDIAN BOARDING SCHOOL ABUSE

The United States government's investigation into former boarding school sites will almost inevitably continue to unearth the remains of former students at the school, which necessitates a discussion of how to redress past abuses suffered at these schools.¹⁸⁵ Due to the extraordinary mass atrocity that Indian boarding schools caused, the United States federal government should pursue a restorative justice remedy modeled after the Maine Wabanaki Truth and Reconciliation Commission and the Canadian Truth and Reconciliation Commission.¹⁸⁶ Section A of this Part argues that the history of Indian boarding schools, the limitation of NAGPRA and other legal redress provisions, and the Indigenous roots of restorative justice justify the use of restorative justice to address remains found at boarding school sites.¹⁸⁷ Section B suggests that the restorative model the United States should follow is the truth and reconciliation model.¹⁸⁸

A. A Restorative Justice Approach Is Necessary Given the Unique Circumstances of Boarding Schools

The issue of abuse at Indian boarding schools is unique in that it began and ended over a half century ago but its impact is still felt by Indigenous

that there cannot be a resolution to the problem by "negotiating peoples' prejudices"). In contrast, this board member asserted that non-Native people are quick to rush into reconciliation, but that she need not seek reconciliation. *Id.* She said she strove to facilitate truth and healing for her fellow Native people. *Id.* (explaining that Indigenous people focus more on the truth portion of the process whereas the state tended to focus on reconciliation).

¹⁸⁴ See *supra* notes 144–149 and accompanying text (setting out multiple examples of progress and healing during restorative circles).

¹⁸⁵ See *supra* notes 20–25 and accompanying text (explaining the likelihood that the federal government's probe will discover remains similar to discoveries made in Canada during the Summer of 2021); *supra* note 26 and accompanying text (describing how the Secretary of the Interior's Memorandum asserts that the probe will highlight the impact of residential schools on Native Americans and their descendants).

¹⁸⁶ See *infra* notes 187–217 and accompanying text (arguing that the United States should follow the truth and reconciliation methods used by Canada and Maine because of the lack of alternative legal solutions and the templates for addressing state abuse against Indigenous Peoples set by Canada and Maine).

¹⁸⁷ See *infra* notes 189–197 and accompanying text (asserting that the unique history of Indian boarding schools naturally leans towards the adoption of restorative justice and that current legal avenues for redress are inadequate to properly address the historical trauma faced by American Indigenous Peoples at boarding schools).

¹⁸⁸ See *infra* notes 198–217 and accompanying text (arguing that the government should pursue this model).

Americans today.¹⁸⁹ The consequences of Indian boarding school policies that attempted to stamp out familial ties and Indigenous culture persist to this day.¹⁹⁰ In addition to this unique history, other available legal remedies available for family members of the deceased students have significant hurdles, particularly statutes of limitations.¹⁹¹ Evidence shows that, despite the conclusion of the boarding school policy many years ago, survivors and their descendants still suffer from historical and intergenerational trauma, which cannot be easily addressed by NAGPRA, the Tucker Act, the FTCA, or international law violation claims.¹⁹² Unlike these traditional legal remedies, restorative justice operates outside these formal channels and promotes healing rather than punishment, making it a more available and effective remedy than others.¹⁹³

In addition to the unique circumstances and history of Indian boarding schools, the Indigenous roots of restorative justice practices also justify the Unit-

¹⁸⁹ See Vitale, *supra* note 47, at 386 (stating that the Carlisle Indian School, the first Indian boarding school, existed from 1879 to 1918); Brackeen v. Haaland, 994 F.3d 249, 283 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (2022) (describing the end of official Indian boarding schools); WOOLFORD, *supra* note 21, at 260 (explaining that residential schools in Canada left students separated from familial and cultural ties, which led to the continuation of violence over generations); *supra* note 62 (stating that a goal of The National Native American Boarding School Healing Coalition is to cope with “historical and intergenerational trauma” on a country-wide scale). Although schools caused intergenerational trauma, there are other elements that contribute to impoverishment among Indigenous Canadians. See WOOLFORD, *supra* note 21, at 261 (explaining that people should consider contemporary structural issues when analyzing the causes of current struggles for Indigenous Canadians).

¹⁹⁰ See *Kill the Indian in Him, and Save the Man*, *supra* note 46 (describing the founder of the Carlisle Indian School’s policy of removing students from their Indigenous culture and forcing them into the dominant white culture); WOOLFORD, *supra* note 21, at 260 (explaining how, in the Canadian system, abuse by the schools resulted in student victims feeling removed from their communities and that those feelings continue to exist today).

¹⁹¹ See *Interior Department to Hold Tribal Consultations on the Federal Boarding School Initiative*, *supra* note 112 (including NAGPRA in a list of topics that participants in the tribal consultations should speak about); 25 U.S.C. § 3002(a) (stating that ownership of American Indian remains belongs to either “lineal descendants” if able to be determined or the deceased person’s related tribe); see also *supra* notes 106–128 and accompanying text (describing how NAGPRA, the Tucker Act, the FTCA, and claims of violation of international law are all legal avenues that the parties could pursue but that they all come with challenges stemming from the fact that boarding schools ended decades ago).

¹⁹² See *supra* note 63 and accompanying text (detailing the specifics of historical trauma and how boarding schools contribute to manifestations of that intergenerational historical trauma); *infra* notes 108–112 and accompanying text (setting out that the only remedy via NAGPRA is the repatriation of human remains to that person’s descendants, which would not work towards healing the intergenerational trauma); *infra* notes 113–124 and accompanying text (discussing the hurdles posed by statutes of limitations for the Tucker Act and the FTCA); *infra* notes 125–128 and accompanying text (describing the difficulties of pursuing international law claims, which many courts are reluctant to embrace fully in the United States). These same problems do not limit restorative justice, because it involves not only first-hand victims that suffered at schools, but could also include their communities and descendants that still feel the effects of the schools. See ZEHR, *supra* note 66, at 21, 26 (describing how restorative justice “expands the circle of stakeholders” beyond just those directly affected by the harm and asserting that the community of the person harmed could be seen as a “secondary victim”).

¹⁹³ See *supra* notes 82–93 and accompanying text (describing a restorative process outside of the traditional legal system that only requires that the affected parties meet).

ed States employing a restorative justice approach to addressing Indian boarding school abuses.¹⁹⁴ Many North American Indigenous groups already seek justice through restorative principles.¹⁹⁵ Because Indian boarding schools are a product of white colonization, it is better to use a type of justice that is not rooted in colonialism but instead focuses on traditional Indigenous values and practices.¹⁹⁶ A restorative justice model would allow the United States to address the victim's needs and historic colonial abuse without reinforcing a colonial perspective.¹⁹⁷

*B. The United States Should Follow the Models Used
by Maine and Canada*

The United States should follow a truth and reconciliation model of restorative justice to redress the abuses at Indian boarding schools similar to the models employed by the Maine Wabanaki Truth and Reconciliation Commission and the Canadian Truth and Reconciliation Commission.¹⁹⁸ Both Commissions were formed to address abuses by the government against Indigenous North Americans, the same type of abuses the United States will address following the Department of the Interior's continued investigation.¹⁹⁹

¹⁹⁴ See *infra* notes 195–197 and accompanying text (explaining the Indigenous roots of restorative practices and how they support a restorative justice remedy because it supports decolonization efforts); see also note 99 and accompanying text (describing how the Indigenous Navajo Nation Peacemaker process removes the system from the traditional professional western judicial system and brings in traditional Indigenous spirituality and knowledge that refocuses the process on the victim).

¹⁹⁵ See *supra* notes 94–103 and accompanying text (explaining the Navajo Nation Peacemaker Courts, their processes, and their success).

¹⁹⁶ See Nielsen, *supra* note 95, at 111 (stating that the Navajo Peacemaker Court sessions begin with prayer, which is intended to prepare the session by laying out the issues, giving respect to all people involved, and situating the parties in the frame of mind where they are reminded that they exist as part of the spiritual world); *Independent Lens: Dawnland*, *supra* note 29 (describing the use of a sacred fire which was used to burn tissues during the day to let the tears rise to meet the participants' ancestors and depicting drum circles in the sessions held by the Maine Wabanaki-State Truth and Reconciliation Commission); COMM'N SUMMARY, *supra* note 7, at 30 (describing how Indigenous traditions and customs influenced the Canadian Truth and Reconciliation's principles and how events were conducted). To guide the events, the Canadian Commission followed the Seven Sacred Teachings of the Anishinaabe, which are respect, courage, love, truth, humility, honesty, and wisdom. COMM'N SUMMARY, *supra* note 7, at 30.

¹⁹⁷ See *supra* notes 189–196 and accompanying text (explaining how restorative justice would further decolonization efforts by removing the influence of the western adversarial system in favor of Indigenous practices); *infra* notes 198–217 and accompanying text (arguing that Canada and Maine provide examples for the United States to follow).

¹⁹⁸ See *infra* notes 199–217 and accompanying text (explaining that the truth and reconciliation commission model should be followed because of its successes in both Maine and Canada and the similarities between those issues and the issue before the U.S. federal government regarding remains found at Indian boarding schools).

¹⁹⁹ See *Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission*, *supra* note 133 (explaining that the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission formed in order to discover the truth regarding the Maine child welfare system's treatment of the state's Indigenous Peoples); *Truth and Reconciliation Commission of Canada*, *supra* note 157 (ex-

The Maine Truth and Reconciliation Commission's successes demonstrate that the United States can properly address government-led abuse of Indigenous people through a truth and reconciliation commission.²⁰⁰ The Maine Commission successfully visited Indigenous communities and conducted truth-telling sessions in order to investigate abuses and give space for the victims.²⁰¹ This process could be similarly undertaken by the United States to promote healing surrounding Indian Boarding School abuses and begin to repair the relationship between Indigenous Americans and the United States, just as Maine strove to do.²⁰² Maine's Commission's recommendations to repair the Maine-tribal relationship could be emulated by a federal commission to better the United States government-tribal relationship.²⁰³ Given that the federal government neglected its educational responsibility to tribes when it failed to properly educate and protect Indigenous children, repairing this relationship should be a priority when addressing the legacy of these schools.²⁰⁴

Canada's Truth and Reconciliation Commission also provides a model of success that the United States can follow as it not only addressed the legacy of residential schools, but it also exemplifies a national response to government-

plaining that Canada's Truth and Reconciliation Commission formed via a mandate of the Residential Schools Settlement Agreement to address the abuses faced by Indigenous Peoples in Canada's Residential School system).

²⁰⁰ See Burns, *supra* note 134, at 17 (explaining that REACH worked with the state child welfare system to train caseworkers, establish policy, record data about compliance with ICWA, and issue recommendations for steps that the state should take to fix its relationship with Native Peoples). Further, the Commission expressed that their work is ongoing and the next steps towards redressing the state's issues is a matter for discussion. See *Independent Lens: Dawnland*, *supra* note 29 (depicting Commission members discussing next steps after the truth collecting process and expressing that "reconciliation" may not mean what the state initially intended when it used that word in the Commission's title).

²⁰¹ See Burns, *supra* note 134, at 17–18 (describing how many participants in the Maine Commission expressed gratitude for visiting them and collecting their stories). Other individuals used the Commission's efforts as an outlet to share the pain the state's practices caused them, which they had been unable to express before. See *Independent Lens: Dawnland*, *supra* note 29 (setting out the story of a woman who, after rejoining her Indigenous community after exiting the foster care system, felt like she did not belong in either community and mourned this absence of identity).

²⁰² See Burns, *supra* note 134, at 18 (describing the next steps recommended by the Commission); ME. WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMM'N, *supra* note 137, at 66–67 (setting out the Commission's recommendations going forward).

²⁰³ ME. WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMM'N, *supra* note 137, at 66–67 (recommending that Maine respect tribal sovereignty, support the tribes and their culture, develop specific trainings for the state welfare system, assist the ongoing work of REACH to promote the sharing of truth and healing, and archive the findings of the Commission for public access).

²⁰⁴ See *supra* notes 63–105 and accompanying text (detailing the abuse at United States Indian boarding schools); NEWLAND, *supra* note 20, at 90 (explaining that the Indian boarding schools led to a multi-generational cycle of trauma). Since committing this abuse, the United States has failed to give space for victims of the system to share their stories. NEWLAND, *supra* note 20, at 92.

led Indigenous abuse.²⁰⁵ Like the Canadian Commission, the United States too can hold events across the country to reach all affected groups.²⁰⁶ The Commission was able to achieve success in collecting many statements and saved them for use in the future, a practice which the United States should emulate.²⁰⁷ Canada succeeded in its recordkeeping and preservation for the future with its establishment of the National Centre for Truth and Reconciliation, a major step in ensuring not only that the public remembers the stories but also that the public never forgets them.²⁰⁸

The United States should pursue a truth and reconciliation model of restorative justice in the same vein as the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission and the Canadian Truth and Reconciliation Commission.²⁰⁹ Major criticisms of truth and reconciliation models posit that this model prioritizes the need of the state to repair its relationship over the needs of the victims to share their experiences and that it promotes colonialism because it paints victims as helpless.²¹⁰ Although this criticism is important in that one of the key aspects of some truth and reconciliation commissions is decolonization, it could arguably be avoided through emphasizing truth telling over ultimate reconciliation.²¹¹ An emphasis on truth finding rather

²⁰⁵ See *supra* notes 155–173 and accompanying text (explaining the creation of the Canadian Truth and Reconciliation Commission and how the national government funded its activities in order to address the history and impact of Canadian residential schools).

²⁰⁶ See COMM’N SUMMARY, *supra* note 7, at 25 (explaining that the Commission held seven National events with over one hundred fifty five thousand people in total attendance, nine thousand residential school survivors registered in attendance, and more survivors estimated to have attended without registering). To increase the scale, in addition to major national events, the Canadian Commission also held regional events, local hearings, and town halls. See *id.* (describing the extent of the Commission’s efforts to reach a variety of people).

²⁰⁷ See *id.* (describing how the Commission collected more than 6,750 statements from survivors and other affiliates of survivors, helping to expand the understanding of what happened at residential schools across Canada).

²⁰⁸ See *supra* note 170 and accompanying text (describing Canada’s National Center for Truth and Reconciliation).

²⁰⁹ See *infra* notes 210–217 and accompanying text (explaining why the United States should still pursue a truth and reconciliation restorative justice model despite criticisms of the approach).

²¹⁰ See Vanthuyne, *supra* note 174, at 356 (explaining the argument that truth and reconciliation models focus on rebuilding the state rather than helping the victim). Critics assert that the government’s significant role in the Commission furthered colonialist goals. See *id.* at 357, 376 (describing how including reconciliation as a goal for Canada’s commission arguably promoted colonialism because it characterized Indigenous people as helpless victims who needed the aid of the government to address their situation but also did not provide any real reparation for past injustice).

²¹¹ See DAVIS, *supra* note 29, at 79 (explaining that one of the recommendations made by the Maine Commission’s final report was decolonization of the relationship between the two governments); see also *Independent Lens: Dawnland*, *supra* note 29 (explaining how one of the REACH founders preferred truth telling over reconciliation in the process); ZEHR, *supra* note 66, at 13 (explaining that victims and their advocates often oppose restorative justice because they believe the purpose of restorative justice is to force them into forgiving the wrongdoer).

than reconciliation is in line with restorative principles.²¹² Additionally, although restorative justice frequently provides an environment in which reconciliation tends to occur, reconciliation is not required.²¹³ Instead, restorative judgement promotes forward movement, which will help victims tell their story in pursuit of closure.²¹⁴ Furthermore, restorative justice can help transform entire communities compared to traditional adversarial justice, which instead prizes returning to a potentially unjust status quo.²¹⁵ Important in regards to the colonial context of boarding schools, restorative justice promotes a transformation of the situation so as not to maintain harmful patterns of oppression.²¹⁶ It allows for healing without returning to the status quo power imbalances that allowed the harm to take place.²¹⁷

CONCLUSION

The United States government's probe into potential burial sites at the locations of former Indian boarding schools will require the government to address past abuses. Given the history of Indian boarding schools and the benefits and flexibility of restorative justice practices in the context of historical mass atrocities, a restorative justice approach should be considered as a potential remedy. The State of Maine and Canada both conducted restorative justice programs with great success. Both governments utilized a truth and reconciliation model of restorative justice, which the United States should follow. Historic abuse and mass atrocities are difficult to address, but the needs and emotions of the victims should be paramount in addressing them.

JULIA M. ZABRISKIE

²¹² See ZEHR, *supra* note 66, at 13 (explaining that restorative justice does not require forgiveness or reconciliation and that reconciliation is not necessarily a goal of the restorative process); DAVIS, *supra* note 29, at 28–29 (impressing that in a restorative process victims should not feel obligated to forgive and should not be coerced to forgive). Instead of forgiveness or reconciliation, success occurs when victims can express their stories and needs. DAVIS, *supra* note 29, at 29.

²¹³ ZEHR, *supra* note 66, at 13 (explaining that some form of forgiveness or reconciliation does happen more often in restorative justice than in traditional legal processes, but that it is not a requirement).

²¹⁴ See *id.* at 14 (describing how restorative practices can appear to imply a return to past circumstances as if the abuse or wrong never occurred in the first place).

²¹⁵ See *id.* at 14–15 (quoting one scholar who describes how restorative justice does not aim to restore the situation to its prior conditions, lending credence to the idea of restorative justice as a method of decolonization of the justice system).

²¹⁶ See *id.* at 14 (explaining how restorative practices stop the negative feedback loop of harm).

²¹⁷ See *id.* at 14–15 (describing how one scholar describes the process as going back to the goodness that is inherent in society).