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Settler Colonialism and Assimilative Education: Comparing Federal Reconciliation Efforts for Indigenous Residential and Boarding Schools in Canada and The United States

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Settler Colonialism and Assimilative Education: Comparing Federal Reconciliation Efforts for Indigenous Residential and Boarding Schools in Canada and the United States

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Abstract

This article compares the historical development, purpose and legacy, and subsequent reconciliation and reparations efforts of Indigenous residential and boarding schools in the United States and Canada. In both nations, these schools comprised but one piece of a carefully crafted network of federal policies aimed at the removal, assimilation, and cultural genocide of Indigenous peoples, and as a result, had destructive and lasting effects on those they oppressed. By taking a comparative approach and examining the laws and policies surrounding boarding schools in light of settler colonialism, this article hopes to illuminate the efficacy of reconciliation efforts of each nation. Additionally, this article attempts to draw some conclusions regarding possible next steps for each country. The article concludes that the implementation of boarding schools in the U.S. and Canada constituted a deliberate policy of cultural genocide, and that reconciliation and reparations efforts in both countries have not yet achieved important goals, including increased Indigenous involvement and support for Indigenous self-determination regarding the outcomes of these efforts.

Keywords

Indigenous, residential school, boarding school, Canada, United States, settler colonialism, cultural genocide, assimilation, education.

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I. Introduction

Residential schooling was always more than simply an educational program: it was an integral part of a conscious policy of cultural genocide.[1]

In May and June of 2021, Canadian officials discovered nearly one thousand unmarked graves on the sites of former residential schools for Indigenous children.[2] The harrowing legacy of these institutions has surfaced once again, inciting outrage, investigation, and renewed attempts at reconciliation and reparations.[3] The Canadian Truth and Reconciliation Commission ("TRC") has made some effort in the recent past to bring information about residential schools to light, as well as to make reparations for them, but these efforts still fall short.[4] In the United States, news of the unmarked graves prompted Secretary of the

[1] TRUTH AND RECONCILIATION COMMISSION OF CANADA, A KNOCK ON THE DOOR: THE ESSENTIAL HISTORY OF RESIDENTIAL SCHOOLS FROM THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 29 (2016) (explaining that the Royal Proclamation of 1763 mandated that any future transfer of "Indian land" would take the form of a Treaty between sovereigns) [hereinafter A KNOCK ON THE DOOR].

[2] In May of 2021, 215 unmarked graves of Canada's Tk'emlúps te Secwépemc First Nation were discovered at the Kamloops Indian Residential School, located about 160 miles northeast of Vancouver. U.S. SEC. OF INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE MEMORANDUM, at 1 (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 [hereinafter Haaland Memo]; *see also* Yuliya Talmazan, *Canada Pressured to Find All Unmarked Indigenous Graves after Children's Remains Are Found*, NBC NEWS (June 3, 2021), https://www.nbcnews.com/news/world/canada-pressured-find-all-unmarked-indigenous-graves-after-children-s-n1269456; *see also Canada: 751 Unmarked Graves Found at Residential School*, BBC NEWS (June 24, 2021), https://www.bbc.com/news/world-us-canada-57592243 (stating that in June of 2021, 751 more unmarked graves were discovered by the Cowessess First Nation at the Marieval Indian Residential School in Saskatchewan).

[3] *See* The Canadian Press, *UN Human Rights Experts Call on Canada to Investigate Residential School Burial Sites*, CITY NEWS TORONTO (June 4, 2021), https://toronto.citynews.ca/2021/06/04/un-human-rights-experts-call-on-canada-to-investigate-residential-school-burial-sites/ [hereinafter Canadian Press]; *see also* Noelle E. C. Evans, *A Federal Probe into Indian Boarding School Gravesites Seeks to Bring Healing*, NPR NEWS (July 11, 2021), https://www.npr.org/2021/07/11/1013772743/indian-boarding-school-gravesites-federal-investigation [hereinafter Noelle E. C. Evans].

[4] *See Truth and Reconciliation Commission of Canada*, GOV'T CAN., https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525#chp1 (last modified Sept. 29, 2022) (explaining that the TRC began to be implemented in 2007, with its main goal being to facilitate reconciliation among Indigenous peoples who were affected by residential schools) [hereinafter *Truth and Reconciliation Commission of Canada*]; *see also Healing Voices Movement – Stories*, NAT'L NATIVE AM. BOARDING SCH. HEALING COALITION, https://boardingschoolhealing.org/education/healing-voices-movement-stories/ (last visited Dec. 2, 2022) (stating that prior to the TRC, only 30% of people knew about residential schools in Canada. After the TRC, approximately 70%).

Interior Deborah Haaland to issue a memorandum outlining the Federal Indian Boarding School Initiative as an attempt to "shed light on the scope of [the] impact" of these schools on Indigenous children and families.[5] From 1860 until 1978, the U.S. maintained its own system of 367 Indigenous boarding schools, forcibly displacing thousands of children from both their families and their cultures.[6] In the roughly forty years that followed, few efforts have been made to address the consequences of these schools. In the meantime, Indigenous peoples have been left in a limbo of unanswered questions, inadequate apologies,[7] and generational trauma.[8]

In both nations, the creation of residential schools served a sweeping and essential purpose for the settler governments: to eradicate Indigenous culture and instead assimilate Indigenous peoples into the culture of the colonizers. While education is usually viewed as a tool for social progress, the case of residential schools in North America makes clear that this notion of "progress" is strictly defined by those in power. Schooling can indeed be a means to better people, but it can also be a means to force adherence dominant cultural norms, as well as to inculcate these beliefs over generations until the original cultures are entirely erased. To properly address the destruction they caused, the corresponding goal of any reconciliation or reparations effort must be to squarely acknowledge the cultural genocide and assimilation that was explicitly desired by the Canadian and American governments.

While calls to investigate the full scope of residential schools have been made by Indigenous peoples, historians, and even human rights experts,[9] most initiatives fail to fully rise to the task. By examining the settler colonial foundations of each nation, this comment compares the current treatment of Indigenous residential schools in Canada and the U.S. Section II provides a brief historical overview of settler colonial theory, then details the history of residential schools in both countries. Section III then discusses the current state of law and policy comprising each country's effort to investigate and make reparations for the atrocities that resulted. In Section IV, the article moves to critical analysis of various federal reconciliation and reparation efforts.[10] Section V concludes with the proposi-

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[5] Haaland Memo, *supra* note 2, at 3.

[6] David A. Love, *Residential Schools Were a Key Tool in America's Long History of Native Genocide*, THE WASH. POST (Aug. 10, 2021), https://www.washingtonpost.com/outlook/2021/08/10/residential-schools-were-key-tool-americas-long-history-native-genocide/.

[7] *See* Rob Capriccioso, *A Sorry Saga: Obama Signs Native American Apology Resolution; Fails to Draw Attention to It*, INDIAN COUNTRY TODAY (Jan. 13, 2010), https://indianlaw.org/node/529.

[8] *See* Erin Blakemore, *A Century of Trauma at U.S. Boarding Schools for Native American Children*, NAT'L GEOGRAPHIC (July 9, 2021), https://www.nationalgeographic.com/history/article/a-century-of-trauma-at-boarding-schools-for-native-american-children-in-the-united-states; *see also* Mary A. Pember, *Death by Civilization*, THE ATLANTIC (Mar. 8, 2019), https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293/.

[9] Canadian Press, *supra* note 3.

[10] There is an important distinction between the term "reconciliation" and the term "reparations." Reconciliation emphasizes restoring good relations or encouraging compatibility between two previously adversarial groups, while reparation centers making amends for a wrong committed, or compensating a party who has been injured in some way. While both are laudable goals for any commission addressing boarding schools, reconciliation-only goals have been criticized for being solely concerned with "rescu-

tion that even if best efforts are assumed on the part of both governments, the current settler colonial nature of each nation suggests that placing this responsibility in the hands of the colonizers will likely not provide adequate justice. Indigenous peoples[11] must be given the directive role and be supported in conducting investigations independent from the federal governments in order to have any chance of accomplishing meaningful reconciliation or reparations.[12]

II. Background

A. Researcher Positionality and Limitations

It must be noted at the outset that this article is limited by researcher perspective. My perceptions of this research are constrained by my positionality as a non-Indigenous, white American. Positionality describes "an individual's world view and the position they adopt about a research task and its social and political context."[13] It also affects the "totality of the research process," and it is essential for researchers to acknowledge their positionality in order to understand how their positionality both shapes their work and influences their understanding of that work.[14] In the case of researching issues facing Indigenous communities, it is crucial to reflect on one's own foundation of knowledge and recognize the ways in which Western thought, history, and methodology can affect research and analysis. Particularly when it comes to cultural research, the risk of misinterpretation and assumption runs high, and it is of the utmost importance to interrogate the ways in which one's own perspective, personal views, and implicit biases

ing settler normalcy" and "rescuing settler future" without forcing settlers to reckon with their own privilege and the settler norms they have established. Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y 35 (2012). This means that while reconciliation can and should be a goal, restoring good relations will not occur without settlers first acknowledging the harms they caused, and making reparations for those harms. *See also* Stephanie Irlbacher-Fox, *Traditional Knowledge, Co-Existence and Co-Resistance*, 3 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y 145 (2014).

[11] A note on terminology: throughout the article, the term "Indigenous peoples" is used to refer to the peoples Indigenous to both present-day Canada and the present-day United States. In Canada, the term "Aboriginal" is used in legal settings, such as lawmaking and case law, but the term "Indigenous peoples" is used to refer to the First Nations, Inuit, and Métis in all other situations. In the United States, the term "Indian" or "American Indian" is a settler-created legal term and is only used when discussing laws and policies in which the term already exists. In all other instances in this article, the term "Native American" is used. Additionally, the term "residential schools" was used primarily in Canada, and the term "boarding schools" was used primarily in the U.S. These are used interchangeably throughout, but both refer to the same type of institution.

[12] A note on scope: this article focuses only on federal law and policy in relation to the Indigenous peoples of Canada and the United States. This means that while several states and provinces have investigations and initiatives that go further than federal efforts, they will not be discussed here. Additionally, this means that relations with individual Tribal nations and Indigenous communities will similarly not be raised, as they fall outside the scope of the article. Finally, although only mentioned in this article in passing, UNDRIP and the Genocide Convention are among several international human rights instruments that could apply to the case of residential schools, and these remedies should not be forgotten in broader context.

[13] Andrew G. D. Holmes, *Researcher Positionality – A Consideration of Its Influence and Place in Qualitative Research – A New Researcher Guide*, 8 INT'L J. EDUC. 1, 1 (2020).

[14] *Id.* at 3.

may affect interpretation of findings. I have attempted to be cognizant of my own positionality throughout, and I encourage readers to try to do the same. It is crucial to also have awareness of the positionality of Aboriginal and American Indian policy in history, and to remember that each law and policy discussed herein was carefully crafted by white settlers with the purpose of controlling and destroying Indigenous peoples and their cultures. This promoted white settler status over time, and that privilege remains to this day. By making a conscious effort to recognize this context, one can more clearly see the ways in which residential schools, though no longer widely active in either country, manifested this will at the time and have since continued in legacy to perpetuate settler control and silence Indigenous voices.

B. Colonialism and Settler Colonialism in North America

North America as it exists today was created by colonization, a term that at its most abstract can be defined as "a broader process of territorial acquisition and establishment of the rule of one group of people over another."[15] Colonizers reject "cultural compromises with the colonized population" because they are "convinced of their own superiority and of their ordained mandate to rule."[16] Western colonialism in particular produced a hegemonic knowledge system in North America, an essential part of which was the invalidation of epistemological stances of the colonized Indigenous peoples, the aim being to create one single culture through which all knowledge is spread.[17] In Canada and the U.S., colonizers created a system of formal education through which they could exercise control over the Indigenous peoples, ensuring erasure of their own cultures and assimilation into a new, settler-colonial society.[18]

Colonial policy in North America was that of a civilizing mission,[19] meaning that when it came to education, all subjects given access to education were taught the colonial culture and language.[20] The ultimate goal of these schools was to turn the Indigenous peoples into rule-following, functioning citizens of the new governments in Canada and the U.S., meaning all aspects of Indigenous cultures

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[15] JÜRGEN OSTERHAMMEL, COLONIALISM: A THEORETICAL OVERVIEW 4 (Shelley Frish trans., Markus Wiener Publishers, 1997) (2005).

[16] *Id.* at 17.

[17] Tavis D. Jules et al., *Imperialism, Colonialism, and Coloniality in Comparative and International Education: Conquest, Slavery, and Prejudice, in* THE BLOOMSBURY HANDBOOK OF THEORY IN COMPARATIVE AND INTERNATIONAL EDUCATION 37, 41 (Tavis D. Jules, Robin Shields & Matthew A.M. Thomas, eds., 2020).

[18] There are two types of colonial policy in education: adaptive and assimilative. Adaptive is most commonly associated with British colonies in Africa and India, whereas assimilative was notably used by the French in northern Africa. Colonialism of Indigenous peoples in North America was assimilative as well, with the main goals being complete cultural erasure and assimilation into the new nations of Canada and the U.S. *Id.* at 46-47.

[19] *See also* A KNOCK ON THE DOOR, *supra* note 1, at 20 (explaining that the "civilizing mission" rested on a belief of cultural and racial superiority).

[20] Also known as a "mission civilastric," civilizing missions attempted to adopt colonized peoples as citizens and members of the new nation, chiefly by means of assimilative education policies. Jules et al., *supra* note 17, at 46.

(religion, language, values, etc.) were to be annihilated and replaced.[21] "The theoretical underpinning of colonialism is critical because educational policies are situated in their historical contexts, and the colonial education system is nested within larger colonial policies and structures."[22] For example, in Canada, the propagation of European values and beliefs was "the prime justification and rationale" for the implementation of residential schools for Indigenous peoples.[23]

However, many scholars also contend that the type of colonialism that occurred in North America was a unique form, which has been titled "settler colonialism."[24] Settler colonialism "destroys to replace;" because settlers colonize with the intent to stay, settler colonialism "strives for the dissolution of native societies," while also erecting "a new colonial society on the expropriated land base."[25] Moreover, "[t]erritoriality is settler colonialism's specific, irreducible element," meaning that by having their land forcibly taken, Indigenous peoples subjected to settler colonialism also have their identity forcibly taken, for "where they are *is* who they are, and not only by their own reckoning."[26] The permanence of settler colonialism is unique from other forms of colonialism, as "invasion is a structure and not an event."[27] Though isolated moments of invasion occur, settlers come to stay, thereby turning their moment of invasion into a long-lasting structure. One only needs to look at the existence of reservations or widespread loss of Indigenous languages (among many other things) for proof of this structure.

Settlers also romanticize themselves in order to preserve innocence.[28] This is a "way of erasing colonialism and Indigenous nations" and "characterizes the erasure of continued settler colonialism."[29] In the U.S., for example, by presenting America, then Western expansion, then even the moon landing as a "new frontier," settlers effectively spread an inspirational rhetoric that enabled them to reclaim the continent as their own without facing the realities of their genocidal practices. Specific also to the North America is "settler self-indigenization," which is a historical condition and "deep psychosis" that has rewritten the narra-

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[21] The unique effect of such education policy is to create a group of people whose culture has been effectively erased from their lives, but whose new culture does not belong to them. In French Algeria, these people were called "evolues," a people who were neither Muslim in a cultural sense, nor European like their colonizers. Jules et al., *supra* note 17, at 48; "Ultimately, colonial education was about gaining 'mental' control over subjects to ensure that bureaucratic apparatuses functioned to serve the colonial masters." Jules et al., *supra* note 17, at 49.

[22] Jules et al., *supra* note 17, at 49.

[23] A KNOCK ON THE DOOR, *supra* note 1, at 24.

[24] *See* ROXANNE DUNBAR-ORTIZ, NOT "A NATION OF IMMIGRANTS": SETTLER COLONIALISM, WHITE SUPREMACY, AND A HISTORY OF ERASURE AND EXCLUSION 18-50 (2021) [hereinafter DUNBAR-ORTIZ]; *see also* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDAL RES. 387 (2006); *see also* Mahmood Mamdani, *Settler Colonialism: Then and Now*, 41 CRITICAL INQUIRY 596 (2015).

[25] Wolfe, *supra* note 24, at 388.

[26] Wolfe, *supra* note 24, at 388 (emphasis in original).

[27] *Id.*

[28] DUNBAR-ORTIZ, *supra* note 24, at 34.

[29] *Id.*

tive; for example, in the U.S., instead of settlers who took over an already inhabited and deeply cultured continent, settlers were the "birth of something new and wondrous, literally, the US American race, a new people born of the merger of the best of both worlds, the Native and the European, not a biological merger but something more ephemeral involving the disappearance of the Indian."[30]

The distinction between colonialism and settler colonialism is particularly important in the case of residential and boarding schools because they are largely unmentioned in common historical knowledge, therefore making a lasting contribution to the cultural genocide of Indigenous peoples. "The objective of settler colonialism is to terminate Indigenous peoples as nations and communities with land bases in order to make the land available to European settlers. Extermination and assimilation are the methods used."[31] Residential schools were one of the most successful forms of assimilation ever employed in North America. Most important to note is that "settler colonialism as a mode of domination. . . has typically resisted formal decolonization."[32] This means that understanding the settler colonial history of Canada and the United States is absolutely crucial to the study of residential and boarding schools. Only by ultimate transparency about the settler version of history that has historically been reproduced, including the ways in which Indigenous history was silenced, will any steps towards reparations and decolonization occur. Moreover, settler people and their governments must acknowledge and dismantle their own white settler privilege. "Settler colonialism is an ongoing phenomenon; writing its history is charged with a presentist preoccupation."[33]

C. Historical Overview of Residential Schools in Canada

The development of residential school policy in Canada can be traced back to early Treaty negotiations, in which federal officials clearly expressed the government's intent to assimilate Indigenous peoples into Canadian society.[34] The legislation of the mid-1800s made this purpose very clear. The Canadian government did not shy away from assimilationist goals, first in 1857 with the Gradual Civilization Act,[35] then in 1869 with the Gradual Enfranchisement Act,[36] and finally in 1876 with the Indian Act,[37] which was subsequently revised multiple times. Most

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30 DUNBAR-ORTIZ, *supra* note 24, at 35-36.

31 *Id.* at 23.

32 Lorenzo Veracini, *Introduction: Settler Colonialism as a Distinct Mode of Domination, in* THE ROUTLEDGE HANDBOOK OF THE HISTORY OF SETTLER COLONIALISM 1, 3 (Edward Cavanaugh & Lorenzo Veracini, Eds., 2017).

33 Veracini, *supra* note 32, at 2.

34 A KNOCK ON THE DOOR, *supra* note 1, at 26.

35 *See* Amanda Robinson, *Gradual Civilization Act*, CAN. ENCYCLOPEDIA (Mar. 3, 2016), https://www.thecanadianencyclopedia.ca/en/article/gradual-civilization-act.

36 *See Background on Indian Registration*, GOV'T CAN., https://www.rcaanc-cirnac.gc.ca//1540405608208/1568898474141.

37 *See* A KNOCK ON THE DOOR, *supra* note 1, at 28, 37 (explaining that the Indian Act defined who was and who was not "Indian," as well as the process through which one could lose status as an "Indian"); *see also* Zach Parrott, *Indian Act*, CAN. ENCYCLOPEDIA (Feb. 7, 2006), https://

notably, the 1894 and 1895 Amendments to the Indian Act gave the government the authority to require schooling for Indigenous children until age eighteen,[38] and the 1920 Indian Act gave the federal government power to make it mandatory for every Indigenous child to attend residential school, while also making it illegal for them to attend any other educational institution.[39]

In 1879, a Canadian politician named Nicholas Davin conducted a brief study of boarding schools in the United States and recommended that Canada establish similar schools, but that Canada's residential schools should specifically be operated by the churches.[40] Some of the first residential schools were located in southern Ontario and were operated by Methodist missionaries through the 1850s, and the first of what would become a large string of Roman Catholic residential schools opened in current-day British Columbia in the early 1860s.[41] However, the federal government first opened such schools in 1883 and 1884, assuming all costs for running the schools, but delegating their operations to the Roman Catholic Church.[42]

By 1931, residential schools were nearing their peak, with eighty schools in operation. The Catholic and Protestant churches provided much of the direction for these schools, which is notably different from the civil service motivations in schools in the U.S.[43] Maximum enrollment was reached in the 1956-57 school year, with 11,539 students in attendance.[44] The late 1940s, directly following World War II, saw the beginning of the decline of residential schools in Canada, with a 1951 Amendment to the Indian Act recommending integration of Indigenous children into public schools.[45] A transition from a system of educational assimilation to a system of child welfare also took place during this time, with former residential schools increasingly being used as welfare facilities. This period is also called the "Sixties Scoop," which refers to the systematic removal of Indigenous children from their parents without consent, and was essentially the transfer of children from one institution, schools, to another, welfare facilities.[46]

The effects of the Sixties Scoop were felt far and wide, and by the time residential schools closed in the 1970s, the number of children taken into care by

www.thecanadianencyclopedia.ca/en/article/indian-act#:~:text=the%20Indian%20Act%20attempted%20to,identities%20through%20governance%20and%20culture.

[38] ANDREW WOOLFORD, THIS BENEVOLENT EXPERIMENT: INDIGENOUS BOARDING SCHOOLS, GENOCIDE, AND REDRESS IN CANADA AND THE UNITED STATES 73 (2015) [hereinafter THIS BENEVOLENT EXPERIMENT]; *see also* A KNOCK ON THE DOOR, *supra* note 1, at 35-36.

[39] A KNOCK ON THE DOOR, *supra* note 1, at 28 (noting additionally that the Indian Act of 1920 also gave the federal government the power to strip people of their status as an "Indian" against their will).

[40] *Id.* at 30.

[41] *Id.* at 25.

[42] *Id.* at 32 (explaining that these schools were built in present-day Saskatchewan and Alberta, and in 1884 there were only twenty-seven students in the three schools).

[43] WOOLFORD, *supra* note 38, at 93-94.

[44] A KNOCK ON THE DOOR, *supra* note 1, at 38.

[45] *Id.* at 43 (adding that by 1960, the number of students in "non-Indian" schools surpassed the number of students in residential schools).

[46] *Id.*

child-welfare agencies had skyrocketed.[47] Finally, in the late 1960s the federal government took control of all residential schools in southern Canada and began systematically closing the facilities.[48] Between 1995 and 1998, the last seven schools in southern Canada were closed. By the time the last residential school was shut down, the system had been in place for over 160 years.[49]

D. Historical Overview of Boarding Schools in the United States

In 1818, the House Committee declared, "[i]n the present state of our country, one of two things seems to be necessary: either that these sons of the forest should be moralized or exterminated."[50] The resulting "solution" was passing the 1819 Indian Civilization Act, which established funding for religious groups and other individuals to live among and educate the Indigenous peoples.[51] 1830 saw the passage of the Indian Removal Act, followed by *Cherokee Nation v. Georgia*[52] in 1831, in which Chief Justice John Marshall drew the now well-known analogy that the Indian Nations have a relation to the United States which resembles "that of a ward to his guardian."[53] Despite the Cherokee Nation's efforts to remain in their ancestral homeland, Congress authorized their forcible removal, resulting in the Trail of Tears.[54] When the remaining members of the Tribe reached the final destination, present-day Oklahoma, schools were established. By 1842, there were 52 "Indian schools" reporting an enrollment of 2,132 students, and in 1871 there were 286 schools with 6,061 students.[55]

Westward expansion in the United States led to a policy change in the 1860s and '70s, shifting the strategy from removing Indigenous peoples to the West to "segregating them on reservations and treating them as government wards."[56] In 1873, the Civilization Fund of 1819 was repealed and replaced with an appropriation by Congress of ten times the funds previously provided. The 1878 *Annual Report of the Commissioner of Indian Affairs* stated that education of Indigenous

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[47] A KNOCK ON THE DOOR, *supra* note 1, at 44 (noting that in 1977, Indigenous children accounted for 44 percent of children in care in Alberta, 51 percent of children in care in Saskatchewan, and 60 percent of children in care in Manitoba).

[48] *Id.* at 45-46.

[49] *Id.* at 46 (arriving at this figure by dating the beginning of the system with the opening of the Mohawk Institute in the 1930s); *see also* Erin Hanson et al., *The Residential School System*, INDIGENOUS FOUNDS. (2020), https://indigenousfoundations.arts.ubc.ca/the_residential_school_system/ (noting also that control over Indigenous peoples of Canada has not disappeared, but has shifted to other institutions. For example, as recently as 2018, Indigenous women have made reports of forced sterilization, and modern child welfare systems continue to disproportionately apprehend Indigenous children).

[50] JON REYHNER ET AL., AMERICAN INDIAN EDUCATION: A HISTORY 45 (2006) [hereinafter REYHNER ET AL.].

[51] *Id.* at 53; *see also* WOOLFORD, *supra* note 38, at 53.

[52] Cherokee Nation v. Georgia, 30 U.S. 1, 12 (1831).

[53] *Id.*

[54] It is estimated that 4,000 of the 11,500 Native Americans who started on this journey died along the way. REYHNER ET AL., *supra* note 50, at 55.

[55] About half of these schools were in present-day Oklahoma, comprised of the Cherokee, Choctaw, Chickasaw, and Creek Nations. REYHNER ET AL., *supra* note 50, at 47.

[56] *Id.* at 71.

children was the quickest way to "civilize Indians," and that such education could only be given "to children removed from the examples of their parents and the influence of the camps and kept in boarding schools."[57] The object of education policy was "unquestionably the gradual absorption of the Indians in the great body [of] American citizenship."[58]

By 1887, there were 68 government boarding schools with 5,484 students in attendance, and an additional 41 schools with 2,553 students were operated under contract with the Indian Bureau, mostly by religious organizations.[59] While much of the curriculum of residential schools in the U.S. was influenced by civil goals rather than religious ones, Christian organizations played a large part in the running of these schools.[60] However, because of the constitutional separation of church and state, federal funding for mission schools was phased out from 1894 to 1900. Although the schools won the right to get tribal funds held in trust by the United States, the number of mission schools gradually declined after this period.[61]

However, the majority of residential schools in the U.S. were government boarding schools, which were often located in old forts and run like military organizations.[62] From 1890 to 1930, the number of boarding schools increased from 60 to 136, with the student population eventually reaching 28,333. One such school was the Carlisle Indian School, whose headmaster, Richard Henry Pratt, became famous for his saying, "kill the Indian, save the man."[63] It is estimated that by 1926, nearly 83 percent of Indigenous school-age children were attending boarding schools.[64] The end of World War II, however, saw a renewed call to "set the American Indian free."[65] Congress found a "final solution" in terminating reservations and with them, their federal trust status. Instead, States were to assume responsibility for the education of all Indigenous children in public schools, and gradually, this is what occurred.

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[57] REYHNER ET AL., *supra* note 50, at 71.

[58] *Id.* at 75.

[59] There were also day schools, but 94 percent of funding went to the boarding schools. REYHNER ET AL., *supra* note 50, at 72-73.

[60] From 1837-1893, for example, the Presbyterian Church's Board of Foreign Missions sent 450 missionaries to 19 Tribes. *Id.* at 112.

[61] *Id.* at 137-38.

[62] *Id.* at 132.

[63] "'A great general has said that the only good Indian is a dead one,'" Capt. Richard H. Pratt, the founder of one of the first boarding schools, wrote in 1892. 'In a sense I agree with the sentiment, but only in this: That all the Indian there is in the race should be dead. Kill the Indian in him and save the man.'" Rukmini Callimachi, *Lost Lives, Lost Culture: The Forgotten History of Indigenous Boarding Schools*, N.Y. TIMES (July 19, 2021), https://www.nytimes.com/2021/07/19/us/us-canada-indigenous-boarding-residential-schools.html; *see also* Northern Plains Reservation Aid, *History and Culture: Boarding Schools*, AM. INDIAN RELIEF COUNCIL (last visited July 17, 2022), http://www.nativepartnership.org/site/PageServer?pagename=Airc_hist_boardingschools.

[64] *U.S. Indian Boarding School History*, NAT'L NATIVE AM. BOARDING SCH. HEALING COAL. (last visited July 17, 2022), https://boardingschoolhealing.org/education/us-indian-boarding-school-history/.

[65] REYHNER ET AL., *supra* note 50, at 232.

III. Discussion

This section examines the current status of laws and policies regarding investigating and making reparations for residential schools in both Canada and the United States. It also explores what, if any, remedial quality these laws have had for Indigenous peoples.

A. Discussion of Current Law in Canada

Section 35 of the Constitution Act explicitly contains a provision outlining Aboriginal peoples' rights, including treaty rights, land claims, and the right to participation in constitutional conferences.[66] Aboriginal peoples are defined as including "the Indian, Inuit and Métis peoples of Canada" and the section clarifies that all rights are guaranteed equally to both sexes.[67] However, the Section recognizes only *existing* rights; it does not delineate or define which rights fall under the category of "existing," and importantly, it does not extend to Aboriginal rights that had been extinguished prior to the section's passing in 1982.[68] As explained in detail below, interpretation of this provision came largely in the form of Supreme Court cases such as *Calder*[69] and *Sparrow*.[70] "Existing" has come to mean that any Aboriginal rights that had been extinguished by treaty prior to 1982 were effectively lost; as they were not in existence when the section was passed, in the eyes of Canadian law, they no longer existed and are currently not protected by the Constitution. Additionally, Section 35 does not enumerate Aboriginal rights like Sections 1 through 34 do for Canadian citizens, leaving Aboriginal rights to be defined by the courts on a case-by-case basis.[71] Section 35 also exists separately from the Charter of Rights and Freedoms,[72] meaning that while separating these rights reinforces the unequal position of Indigenous peoples in Canadian society, Section 35 is not subject to the "notwithstanding clause"[73] and the federal government may not override Aboriginal rights.

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[66] Rights of the Aboriginal Peoples of Canada, Part II of the Constitution Act, 1982, C. 11 (U.K.) §§ 35-35.1 [hereinafter Rights of the Aboriginal Peoples of Canada].

[67] *Id.* §§ 35(2) & 35(4).

[68] *Id.* § 35(1); *see also* Erin Hanson, *Constitution Act, 1982: Section 35*, INDIGENOUS FOUNDS. (last visited July 17, 2022), https://indigenousfoundations.arts.ubc.ca/constitution_act_1982_section_35/.

[69] Calder v. British Columbia, [1973] S.C.R. 313 (Can.).

[70] R v. Sparrow, [1990] 1 S.C.R. 1075 (Can.).

[71] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, C. 11 (U.K.) §§ 1-34.1 [hereinafter Canadian Charter of Rights and Freedoms]; *see also* John P. McEvoy, *Aboriginal Activities and Aboriginal Rights: A Comment on R v. Sappier; R v. Gray*, 6 INDIGENOUS L. J. 1 (explaining more recent cases that refine the term "existing" right even further, including that Canadian courts have taken a more expansive approach regarding the rights themselves, yet less expansive when it comes to the exercise of those rights).

[72] Canadian Charter of Rights and Freedoms, *supra* note 71; Rights of the Aboriginal Peoples of Canada, *supra* note 66.

[73] Canadian Charter of Rights and Freedoms, *supra* note 71, § 33 (allowing Parliament or the Legislature of a province to derogate from sections of the Charter, specifically from section 2 (fundamental freedoms), sections 7 to 14 (legal rights) and section 15 (equality rights). If invoked, Section 33 precludes judicial review of legislation under the listed Charter sections).

However, Section 35, along with other iterations of Indigenous rights, have been the subject of much judicial interpretation. The Supreme Court of Canada has an established body of case law mostly decided after the enactment of Section 35 in 1982,[74] which has set some parameters for Indigenous rights, mostly concerning land ownership and use, but without having broader reparative effects for survivors of residential schools. For example, in *Calder v. Attorney-General of British Columbia*, which predates Section 35, the Supreme Court first grappled with Aboriginal title to land that existed prior to colonization and was not merely granted by statute.[75] Calder and Nisga'a Elders sued the government of British Columbia, claiming that Nisga'a title to their lands had never lawfully been extinguished. Although they did not win in any of the lower courts, Calder and the Nisga'a appealed to the Supreme Court, hoping to provide all Indigenous peoples with title affirmation.[76] While the Court did not rule in their favor, it did find that Aboriginal title had indeed existed at the time of colonization of the continent, independent of colonial law.[77] This was the first time that the Canadian government had recognized the original existence of Aboriginal title to land, and the decision served both as an important foothold for Indigenous peoples in their fight to claim title to their land, as well as an initial foray into the recognition of Indigenous peoples' rights.

Perhaps one of the most landmark cases is *R. v. Sparrow*, in which the Supreme Court delineated criteria to determine whether government infringement upon Indigenous rights was justifiable, and then laid out a test that has come to be known as "the Sparrow test."[78] The Court set the test as an interpretation of the language contained in Section 35, specifically the terms "existing" rights and "recognized and affirmed" rights.[79] The plaintiff, Musqueam band member Ronald Sparrow, had been arrested for using a fishing net that was longer than was permitted by license.[80] The Musqueam band decided to defend Sparrow's charge, arguing that Section 35 reinforced Sparrow's right to fish.[81] Because the Court

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[74] Only four consequential decisions will be elaborated upon here due to their unique holdings and relevance to this article. The Supreme Court of Canada has nine judges representing the four major regions of the country. It hears appeals from all appeal courts in all the provinces and territories, and its judgments are final. *The Judicial Structure*, GOV'T CAN., https://www.justice.gc.ca/eng/csj-sjc/just/07.html (last visited Aug. 19, 2022).

[75] Calder v. British Columbia, *supra* note 69, at 413.

[76] *Id.*; *see also* Tanisha Salomons, *Calder Case*, FIRST NATIONS STUD. PROGRAM, https://indigenousfoundations.arts.ubc.ca/calder_case/ (last visited Aug. 19, 2022).

[77] Calder v. British Columbia, *supra* note 69, at 314 (holding that while the "area in question did not come under British sovereignty until the Treaty of Oregon in 1846" meaning that the Nisga'a were outside the scope of the Proclamation in 1763, the Nisga'a territory became part of the Colony of British Columbia when it was established in 1858).

[78] *See* R. v. Sparrow, *supra* note 70 at para. 67-83 (constructing the Sparrow test); *see also* Tanisha Salomons & Erin Hanson, *Sparrow Case*, FIRST NATIONS STUD. PROGRAM, https://indigenousfoundations.arts.ubc.ca/sparrow_case/ (last visited Aug. 19, 2022).

[79] Rights of the Aboriginal Peoples of Canada, *supra* note 66, § 35(1).

[80] R. v. Sparrow, *supra* note 70, at para. 3.

[81] *Id.* (arguing that the Musqueam retained the right to fish in the area, their rights to the land had never been extinguished by treaty, any infringement on Aboriginal fishing rights was invalid, and the restriction on net length was not justified by reasons of conservation).

found that the Aboriginal right to fish had not been extinguished, this right was "existing" at the time of Sparrow's arrest.[82] This holding affirmed the notion that any right that had been previously extinguished, by treaty or otherwise, is not within the protection of the Constitution. Additionally, the Court held that the words "recognized and affirmed" as they appear in Section 35 mean that the government must have sufficient justification in order to override Aboriginal rights.[83] The "Sparrow test" first defines whether a right has been infringed, then explains what could justify such an infringement such that it does not amount to a constitutional violation.[84] As with the enactment of Section 35, the *Sparrow* ruling was met with mixed reactions. While the decision affirmed important Aboriginal rights, it also confirmed that those rights are not absolute, and that the Canadian government may infringe upon them so long as the second part of the test is met. Additionally, the Court left many questions regarding different elements of adequate justification unanswered.[85]

Though the previous two cases helped to define the extent of Indigenous peoples' rights more clearly, the decisions did not directly address the harm done to generations of people at the hands of residential schools. *Mowatt v. Clarke* was a significant victory for survivors of physical and sexual abuse seeking justice against their former residential schools.[86] A former student of St. George's Indian Residential School in Lytton, British Columbia, brought suit against the federal government, the diocese, and the Anglican Church of Canada, citing grievous harms of sexual abuse during their time at the school and alleging breach of fiduciary duty, negligence, and vicarious liability.[87] Clarke, the dormitory supervisor at the school, had already pleaded guilty at the time of this suit and was in prison, but the trial court judge held that the plaintiff could recover damages from all defendants. This meant that the government of Canada and the Anglican Church could be held vicariously liable for the individual actions of a residential school employee.[88]

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[82] R v. Sparrow, *supra* note 70, at para. 24.

[83] *Id.* at para. 62.

[84] *Id.* at para. 70, 74 (holding that a right is infringed upon if it: imposes undue hardship on the First Nation, is considered by the court to be unreasonable, or prevents the right-holder from exercising that right. An infringement might be justified if: it serves a valid legislative objective (such as conservation of natural resources), there has been as little infringement as possible in order to achieve the desired result, fair compensation has been provided, and Aboriginal groups were consulted or at least informed); *see also* Salomons & Hanson, *supra* note 78.

[85] *See* Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550; *see also* Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511 (holding that the government has a duty to consult tribes, but not explicitly defining what "adequate consultation" is).

[86] Mowatt v. Clarke, [1999] 11 W.W.R. 301; *see also* Erin Hanson et al., *The Residential School System*, FIRST NATIONS STUD. PROGRAM, https://indigenousfoundations.arts.ubc.ca/the_residential_school_system/#survivors-demand-justice (last visited Aug. 19, 2020) (explaining that before 1980, fewer than 50 convictions were obtained of more than 38,000 claims of sexual and physical abuse submitted for independent adjudication).

[87] Mowatt v. Clarke, *supra* note 86, at para. 1.

[88] *Id.* at para. 2, 204.

Recently, legislative efforts to investigate residential schools have been amplified, likely due to increased discoveries of unmarked graves at former schools.[89] However, attempts by the Canadian government to make reparations for the past began in earnest in 1998 with the establishment of the Aboriginal Healing Foundation ("AHF").[90] The AHF was federally funded with grant money, as well as managed and run by Indigenous peoples, and had an eleven-year mandate given by the federal government to direct healing initiatives addressing the legacy and impact of residential schools.[91] Although the AHF officially closed in 2014, when the mandate was up, it provided essential services to Indigenous communities such as healing centers, while also fulfilling a research mandate to establish a knowledge base regarding long-term health impacts of the residential schools.[92]

The closing of the AHF was mitigated by the establishment of the Truth and Reconciliation Commission ("TRC"). In 2007, the largest class-action settlement in Canadian history, the Indian Residential Schools Settlement Agreement, took place. One element of the settlement was the creation of the TRC, with the goal of creating an investigative organization to facilitate reconciliation among Indigenous communities affected by residential schools.[93] The TRC, like the AHF, was given a mandate with a specified ending date, however, when the TRC closed in 2015, it transferred all historical documents and records to the National Centre for Truth and Reconciliation ("NCTR") at the University of Manitoba. This process allowed the mandate given to the TRC to endure, meaning that research, protection of histories, and education of the public continue via this organization to this day.[94]

The official mandate of the TRC outlined seven specific goals of the Commission, as well as the powers, duties, procedures, and positions included in the Commission.[95] Additionally, the mandate required the completion of "three essential event components" including national events, community events, and individual statement-taking and truth-sharing. Near the end of the mandate, it established the National Research Centre (the aforementioned NCTR), specifying that it shall be made available to "former students, their families and communities, the general public, researchers and educators who wish to include this his-

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[89] *See, e.g.*, The Canadian Press, *UN Human Rights Experts Call on Canada to Investigate Residential School Burial Sites*, CITYNEWS (June 4, 2021), https://toronto.citynews.ca/2021/06/04/un-human-rights-experts-call-on-canada-to-investigate-residential-school-burial-sites/.

[90] *FAQs*, ABORIGINAL HEALING FOUND., https://www.ahf.ca/faqs (last visited Aug 19, 2022).

[91] *Id.* (stating that $350 million in federal grant money was initially given to the Foundation, then they received an additional $125 million from the Indian Residential School Settlement Agreement in 2007).

[92] *About Us*, ABORIGINAL HEALING FOUND., https://www.ahf.ca/about-ushttps://www.ahf.ca/about-us (last visited Aug. 19, 2022).

[93] *Truth and Reconciliation Commission of Canada*, *supra* note 4; *About the NCTR*, NAT'L CTR. FOR TRUTH & RECONCILIATION, https://nctr.ca/about/ (last visited Aug. 19, 2022) [hereinafter *About the NCTR*].

[94] *About the NCTR*, *supra* note 93.

[95] Mandate for Truth and Reconciliation Commission, *Schedule N*, Indian Residential Schools Settlement Agreement, 1-2, (May 8, 2006), https://www.residentialschoolsettlement.ca/SCHEDULE_N.pdf [hereinafter *Schedule N*].

toric material in curricula."[96] In its eight years of operation, the TRC traveled to all parts of Canada, heard from more than 6,500 witnesses, hosted seven national events across the country, and presented and published its findings in a final report, including ninety-four recommendations to further reconciliation efforts between Canadians and Indigenous peoples.[97] The government of Canada has since promised "to be committed to a renewed nation-to-nation relationship with Indigenous peoples," as well as "to design a national engagement strategy for developing and implementing a national reconciliation framework" informed by the TRC's findings.[98]

While the continued existence of the NCTR does indeed create an essential space for healing and reparations,[99] the Canadian government has recently taken additional legislative steps to address the harms of residential schools and the cultural genocide they caused. Bills C-8 and C-15 are remarkable and necessary pieces of legislation that move the country further towards increased reconciliation. Bill C-8 officially recognizes Indigenous status and rights as part of the oath that all Canadians take when becoming citizens.[100] The Act amended the Citizenship Act in order to include "a solemn promise to respect the Aboriginal and treaty rights of the First Nations, Inuit and Métis peoples" in the Oath or Affirmation of Citizenship.[101] This new oath recognizes the fact that Indigenous rights are both affirmed by Section 35 of the Constitution, as well as derived from historic use of the land by Indigenous peoples.[102]

Bill C-15 establishes the framework for adopting and implementing into federal legislation the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), requiring that all levels of government recognize and affirm

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[96] *Schedule N*, *supra* note 95, at 11.

[97] *Truth and Reconciliation Commission of Canada*, *supra* note 4; *Truth and Reconciliation Commission of Canada*, NAT'L CTR. FOR TRUTH & RECONCILIATION, https://nctr.ca/about/history-of-the-trc/truth-and-reconciliation-commission-of-canada/ (last visited Aug. 28, 2022).

[98] *Truth and Reconciliation Commission of Canada*, *supra* note 4.

[99] *See generally About the NCTR*, *supra* note 93 (showing that the NCTR houses thousands of records and documents, and its website contains teaching resources, educational programs, research opportunities, and much more regarding continued investigation and sharing of the knowledge base built by the TRC); the continued mandate of the NCTR states it will be a steward for the experiences of survivors of residential schools, will continue the research begun by the TRC, and will build a foundation for reconciliation through promoting public education on the history of residential schools. *Our Mandate*, NAT'L CTR. FOR TRUTH & RECONCILIATION, https://nctr.ca/about/about-the-nctr/our-mandate/ (last visited Dec. 2, 2022).

[100] Sarah El Gharib, *Canada Just Passed 2 New Laws to Affirm Rights of Indigenous Peoples*, GLOB. CITIZEN (June 22, 2021), https://www.globalcitizen.org/en/content/canada-laws-national-indigenous-peoples-day/ [hereinafter El Gharib].

[101] The Oath now fully reads: "I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada, including the Constitution, which recognizes and affirms the Aboriginal and treaty rights of First Nations, Inuit and Métis peoples, and fulfil my duties as a Canadian citizen." Citizenship Act, R.S.C. 1985 c 29, amended by S.C. 2021 c 13 (Can.) at § 24.

[102] *See* Immigration, Refugees and Citizenship Canada, *Canada's Oath of Citizenship Now Recognizes First Nations, Inuit and Métis Rights*, CISION (June 21, 2021), https://www.newswire.ca/news-releases/canada-s-oath-of-citizenship-now-recognizes-first-nations-inuit-and-metis-rights-826712179.html.

those rights as well.[103] The United Nations adopted this document in 2007, but Canada and only a few other countries have formally enacted the principles contained within.[104] Additionally, the bill requires all levels of government to carry out implementation of UNDRIP by means of policies and programs, all in cooperation with Indigenous peoples, and to make sure that the laws of Canada are consistent with the rights recognized in the document. Previously, Section 35 afforded Indigenous peoples with a bare minimum of recognized rights, and the only path to prove and fight for individual rights was lengthy, costly litigation in the courts on a case-by-case basis. However, Bill C-15 enumerates and explains many specific rights, adopting all forty-six articles contained in UNDRIP.[105] From the right to traditional medicines[106] to the right of dignity and diversity of their cultures,[107] Bill C-15 is the most comprehensive and extensive piece of legislation recognizing and affirming Indigenous rights in Canada, and is the first concrete step towards aligning law with previously made promises, declarations, and mandates. Through enacting this bill, Canada has also presented itself as an example of a nation that was not only willing, but also able, to implement a crucial international human-rights instrument.

B. Discussion of Current Law in the U.S.

The United States Constitution only mentions the word "Indian" three times, and all references are economic or operational in nature rather than regarding human rights. Two of the three uses are in Article I, first in Section 2 as a clarification on enumeration for determining a state's number of representatives in Congress ("excluding Indians not taxed"),[108] and second in Section 8, providing Congress the power to regulate commerce "with the Indian Tribes."[109] The third reference is in Section 2 of the Fourteenth Amendment, again regarding apportionment of Representatives and "excluding Indians not taxed."[110] Indigenous peoples are now of course American citizens, and therefore are granted all individual rights delineated in the Constitution, but there is no explicit, separate provision within the Constitution recognizing and affirming Indigenous rights. Because of this, the Supreme Court developed a large body of law defining the status of Indigenous peoples and Tribes within the dual federal and state system.

Case law has served as the foundation of Indigenous rights in the United States, beginning in the early 1800s with the Marshall trilogy. *Johnson v.*

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[103] United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c 14 (Can.) [hereinafter C 14]; *see also* El Gharib, *supra* note 100.

[104] El Gharib, *supra* note 100.

[105] *See* Perry Bellegarde, *The Passage of Canada's UNDRIP Bill Is a Triumph We Should All Celebrate*, GLOBE & MAIL (June 21, 2021), https://www.theglobeandmail.com/opinion/article-the-passage-of-canadas-undrip-bill-is-a-triumph-we-should-all/.

[106] C 14, *supra* note 103, art. 24.

[107] *Id.* at art. 15.

[108] U.S. CONST. art. I, § 2.

[109] U.S. CONST. art. I § 8.

[110] U.S. CONST. amend. XIV, § 2.

M'Intosh,[111] *Cherokee Nation v. Georgia*,[112] and *Worcester v. Georgia*[113] were the first essential cases decided regarding rights of Indigenous peoples, especially in relation to the new, colonial government. These cases were the genesis of the trust doctrine, claiming that Indian Tribes are "domestic dependent nations"[114] of the United States, and also establishing extremely limited Tribal land rights.[115] Further case law established the federal government's jurisdiction over enumerated "major" crimes committed within Indian territory and explained that Congress's authority over Indigenous peoples flows from a relationship akin to a "guardian and his ward."[116] The body of case law continued to establish parameters around Indigenous peoples through paternalistic and controlling underlying policies. For example, in *Lone Wolf v. Hitchcock*,[117] the Court held that in cases involving a controversy between Indigenous Tribes and the government, Congress has the power to unilaterally abrogate an Indian treaty. The basic reasoning was this: since the U.S. had always acted with authority over Indigenous peoples, it would continue to do so.[118] The Court also denied Tribes criminal jurisdiction over non-Indians who committed crimes within reservation boundaries in *Oliphant v. Suquamish Indian Tribe*.[119] In this decision and later in *Montana v. United States*,[120] the Court found there to be implied limitations on Tribal sovereignty due to their dependent status, and that Tribes do not have "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations" unless Congress explicitly grants it.[121]

Although most case law has historically gone to defining the legal status of Indigenous peoples as a whole within the United States, a handful of cases discuss cultural practices. For example, *Lyng v. Northwest Indian Cemetery Protective Association*[122] considered whether a logging project would violate Indigenous rights to free exercise of religion. Although it was conceded that the project would have "devastating effects on traditional Indian religious practices," the Court held that the Government could not be entirely divested "of its right to use what is, after all, *its* land."[123] *Lyng* can be best understood alongside *Oregon v. Smith*,[124] in which the Court upheld a state law prohibiting religious use of

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111 Johnson v. M'Intosh, 21 U.S. 543 (1823).

112 Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

113 Worcester v. Georgia, 31 U.S. 515 (1831).

114 Cherokee Nation, *supra* note 112.

115 *See generally* Johnson, *supra* note 111.

116 *Ex Parte* Crow Dog, 109 U.S. 556 (1883) led to Congress passing the Major Crimes Act; United States v. Kagama, 118 U.S. 375 (1886) affirmed Congress's power to pass the Act and represented a clear shift away from Tribal sovereignty.

117 Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

118 *Id.* at 565.

119 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

120 Montana v. United States, 450 U.S. 544 (1981).

121 *Id.* at 564.

122 Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

123 *Id.* at 453 (emphasis in original).

124 Oregon v. Smith, 494 U.S. 872 (1990).

peyote. Finding that an individual's religious beliefs do not excuse him from following an otherwise valid law, the Court also held that "to permit this would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[125] In both *Lyng* and *Smith*, the Court refused to apply the heightened standard of scrutiny requested, that there be a compelling government interest. Though the Supreme Court has undoubtedly developed a comprehensive body of case law since the founding of the country, it has consistently defined Indigenous rights as either equivalent to non-Indigenous, individual rights, or as even less (*i.e.*, language specifying dependency or guardianship). The legislative branch has taken some ameliorative measures in an effort to move towards reconciliation.

In 1992, the U.S. Senate passed Joint Resolution 222, which designated that year as the "Year of Reconciliation Between American Indians and non-Indians."[126] The document recognized the 500th anniversary of the arrival of Christopher Columbus on the continent and as such, offered the year as "an opportunity for the United States to honor the indigenous peoples of this continent" in an effort to "develop trust and respect."[127] The resolution called upon the people to "lay aside fears and mistrust" and to "strive towards mutual respect and understanding."[128] The attempt to reconcile the quincentennial celebration of the arrival of colonization in America with proclaiming it to also be the "Year of the American Indian" largely fell flat. Columbus Day was still met with public protests, and nothing substantive changed regarding Indigenous peoples' rights.

Years later, during the Obama administration, the Senate passed another resolution, this time issuing an historic apology "to all Native Peoples on behalf of the United States."[129] The bill acknowledges a "long history of official depredations and ill-conceived policies by the Federal Government regarding Indian tribes" and offers a corresponding apology.[130] It recognizes many of the harms done to Indigenous peoples, such as violating treaties, while also expressing the contribution of Indigenous peoples to the country as people who have "honored, protected, and stewarded this land we cherish."[131] The resolution then goes on to lay out the formal acknowledgement of "former wrongs," an apology for "violence, maltreatment, and neglect," and to commend State governments "that have begun reconciliation efforts."[132] Yet with all the noble intentions of the bill, it contained no foundation for concrete action towards reconciliation, nor did it contain any specific reparations. In fact, at the very end of the document, placed in the last three lines is the following disclaimer:

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[125] Oregon v. Smith, *supra* note 124, at 879.

[126] S.J. Res. 222, 102nd Cong. (1992) (enacted).

[127] *Id.*

[128] *Id.*

[129] S.J. Res. 14, 111th Cong. (2009) (enacted).

[130] *Id.*

[131] *Id.*

[132] *Id.*

Nothing in this Joint Resolution –

(1) authorizes or supports any claim against the United States; or

(2) serves as a settlement of any claim against the United States.[133]

While the disclaimer severely limits its use, the resolution is still an historic apology by Congress, albeit not from the government directly, but "on behalf of the people of the United States." However, when President Obama signed the bill into law, Indigenous peoples and other critics were quick to correctly point out that there were no public announcements and no press conferences, and it was buried in a defense appropriation spending bill.[134] Further, the apology did not mention boarding schools and had no legal effect on Indigenous peoples' rights.

It was not until very recently that any meaningful developments took place at the federal level, specifically with the proposed establishment of the Truth and Healing Commission on Indian Boarding School Policy Act.[135] This marks the first federal effort in the United States "to formally investigate and document. . . cultural genocide, assimilation practices, and human rights violations of Indian Boarding Schools."[136] The purpose of the Act is also to research the ongoing impact of the boarding schools on Indigenous families and communities, and to develop recommendations for the government in order to "heal the historical and intergenerational trauma" caused.[137] The Act also requires representatives from different Tribes and geographic areas, mental-health practitioners, members of Indian organizations with expertise in boarding schools, boarding school survivors, and family members of current students.[138] The Commission must "locate, document, analyze, and preserve" boarding school records and survivors' stories, as well as submit reports and proposals for legislative and administrative action. Although not yet passed, the Act stands to bring about a true turning point in the history of Indigenous rights and reconciliation in the U.S. The inclusion of the terms "cultural genocide" and "human rights" in the text of the bill are important signifiers of acknowledgment, considering that the United States has never admitted that it attempted to commit a cultural genocide with its boarding school policies.[139] Additionally, it will educate the American public as to the true history surrounding the boarding schools, bringing much-needed transparency and

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[133] S.J. Res. 14, *supra* note 129.

[134] *See, e.g.*, Rob Capriccioso, *A Sorry Saga: Obama Signs Native American Apology Resolution; Fails to Draw Attention to It*, INDIAN COUNTRY TODAY (Jan. 13, 2010), https://indianlaw.org/node/529.

[135] S. 4752, 116th Cong. (2020) (noting identical bills introduced simultaneously in both House and Senate); *see also* Harvard Law Review, *Recent Legislation: Truth and Healing Commission on Indian Boarding School Policy Act*, HARV. L. REV. BLOG (Nov. 21, 2020), https://blog.harvardlawreview.org/recent-legislation-truth-and-healing-commission-on-indian-boarding-school-policy-act/ [hereinafter HARVARD LAW REVIEW BLOG].

[136] S. 4752, *supra* note 135.

[137] *Id.*

[138] HARVARD LAW REVIEW BLOG, *supra* note 135.

[139] *Id.*

understanding to the issue. While the bill awaits passage and enactment, it has since been reintroduced to the 117th Congress.[140]

In the meantime, the Department of the Interior launched an investigation (the Federal Indian Boarding School Initiative) into over 365 boarding schools, aiming "to address the intergenerational impact" of the schools and to "shed light on the unspoken traumas of the past."[141] In a secretarial memo, Secretary of the Interior Deborah Haaland acknowledged that the purpose of the boarding schools was to culturally assimilate Indigenous children and that severe traumas resulted.[142] The Federal Indian Boarding School Initiative's primary goals are identification of boarding school facilities and sites, as well as the location of student burial sites at or near those facilities. The investigation is planned to proceed in two phases: Collect Relevant Information, and Tribal Consultation.[143] Over the course of the investigation, the aim is to uncover and record experiences of Indigenous children who were placed into boarding schools and to "shed light on the scope of that impact."

In late 2021, President Biden issued a proclamation naming October 11 Indigenous Peoples' Day, which is observed the same day as Columbus Day.[144] While officials across the country, including school board leaders, governors, and entire cities, had already named the holiday and observed it accordingly, the recent presidential proclamation is significant because it acknowledges and celebrates Indigenous peoples on a federal level. Additionally, the 117th Congress has proposed several bills that would potentially affect Indigenous rights, including a bill to establish Native American language resource centers,[145] a bill to enhance protection of cultural heritage,[146] and the reintroduction of the bill to establish the Truth and Healing Commission.[147]

IV. Analysis

A. Analysis of Canadian Law

Certainly, Canada can be seen as a progressive example in relation to U.S. constitutional and court-created law. The existence of Section 35 alone places Canada far ahead of the U.S. when it comes to basic recognition of rights specific only to Indigenous peoples. However, the separation of Section 35 from the Ca-

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

[141] Noelle E. C. Evans, *supra* note 3.

[142] Haaland Memo, *supra* note 2.

[143] *Id.*

[144] *See* Allison Prang, *Indigenous Peoples' Day and Columbus Day: What to Know*, WALL ST. J. (Oct. 11, 2021), https://www.wsj.com/articles/columbus-day-indigenious-peoples-day-what-to-know-11633787027.

[145] S. 989, 117th Cong. (2021); H.R. 2271, 117th Cong. (2021).

[146] S. 1471, 117th Cong. (2021); H.R. 2930, 117th Cong. (2021).

[147] S. 2907, 117th Cong. (2021); H.R. 5444, 117th Cong. (2021).

nadian Charter of Rights and Freedoms is significant, because instead of enumerating and protecting specific rights of Indigenous peoples, the Canadian government instead limited the scope to those rights existing at the time of ratification in 1982. The inclusion of Section 35 was therefore a double-edged sword: it recognized and affirmed rights inherent only to Indigenous peoples, yet severely underrepresented and constrained those rights by defining them as "existing" and leaving any further clarification to the courts. Moreover, there has also been some debate among scholars regarding the actual value of Section 35, with some arguing that acceptance of the Constitution amounts to acceptance of a colonial form of rule based in non-Indigenous ideologies such as private property ownership and individual rights. By complying with Section 35, critics say, Indigenous peoples also conform to the notion that colonial power is the supreme law of the land.[148] However, others claim that Section 35 at minimum settles a tumultuous relationship between Indigenous peoples and the Canadian government, with at least basic rights now having guaranteed protection from government infringement with zero consequences.[149]

Generally, Supreme Court rulings regarding Indigenous rights have established that Aboriginal title to land did originally exist independent of colonial law, which was an essential recognition.[150] However, the overall effect of doing so remained a narrow avenue for Indigenous peoples claiming original title to land, with costly and lengthy case-by-case litigation as the only option for recourse. Additionally, the Supreme Court of Canada did eventually define what an "existing" right was in *R. v. Sparrow*, which again was a landmark decision affirming the existence of Indigenous rights.[151] However, *Sparrow* also served a much weightier and longer-lasting purpose for the Canadian government: by defining Indigenous rights and outlining the *Sparrow* test (which delineates when such a right has been violated), the Supreme Court provided a legal blueprint for purposely structuring laws around Indigenous rights. So long as the government did not violate the *Sparrow* test, they would not violate existing Indigenous rights. This case is an excellent example of the tenacious survival skills of colonial structures; while affirming and defining Indigenous rights, the Court also wrote into law a nearly permanent workaround for legislatures across Canada to continue to override them. By passing the test, such violations have now become completely unchallengeable in a court of law. A further example of colonial perpetuation can also be found in *Mowatt v. Clarke*.[152] There, while the court provided an essential path to justice for survivors of the horrific abuses at residential schools, the ruling still stands largely alone in the larger body of case law ad-

148 *See, e.g.*, Lee Maracle, *The Operation Was Successful, but the Patient Died, in* ARDITH WALKEM & HALIE BRUCE, EDS., BOX OF TREASURES OR EMPTY BOX? TWENTY YEARS OF SECTION 35, at 309-315 (2003).

149 *See, e.g.*, John Borrows, *Measuring a Work in Progress: Canada, Constitutionalism, Citizenship and Aboriginal Peoples, in* ARDITH WALKEM & HALIE BRUCE, EDS., BOX OF TREASURES OR EMPTY BOX? TWENTY YEARS OF SECTION 35, at 225 (2003).

150 *E.g.*, Calder, *supra* note 69.

151 R. v. Sparrow, *supra* note 70.

152 Mowatt v. Clarke, *supra* note 86.

dressing Indigenous rights and residential schools. While the courts of course cannot draft and enact new law like the legislature can, the holding of *Mowatt* could have extended much further and provided an easier, more accessible course of relief for survivors.

Legislatively, Canada has been fairly active in the realm of Indigenous rights since the passage of Section 35 in 1982. Beginning with the establishment of the Aboriginal Healing Foundation ("AHF") in 1998, Canada has consistently made a country-wide effort to investigate, document, and preserve Indigenous histories and how grievously they were harmed by residential schools. Most importantly, the AHF was federally funded, but run by Indigenous peoples, meaning that those overseeing the processes of information gathering and recordation were Indigenous. This was an important turning point in the overarching story of colonialism in Canada, because starting with the AHF, the colonizers (the Canadian government) were no longer in sole direction of affairs affecting Indigenous peoples. By placing the first efforts at reconciliation and reparations in the control of those directly affected by residential schools, Canada's government took an essential step towards meaningful reconciliation. Though the AHF had a limited mandate, its long-term success was ensured by the establishment of various healing centers and record housing centers across the country.

The creation of the Truth and Reconciliation Commission ("TRC") represents a crucial point in the exposure and dismantling of colonial systems in Canada. This legislation was substantial, as it outlined many Indigenous-defined research and reconciliation mandates. However, it is notable that the TRC did not arise naturally from the legislative body of the federal government. Instead, it was the direct result of the largest class-action lawsuit by Indigenous peoples in Canada's history, which in turn led to the Indian Residential Schools Settlement Agreement. While any such step towards reconciliation is of course positive, it is both disappointing and unsurprising that the creation of the TRC only occurred because of painstaking, grassroots Indigenous efforts, and was not at all initiated by the government of the colonizers. This underscores the notion that settler colonialism persists to this day, meaning that any reconciliation or reparations effort will not be effective if all decisions and definitions of progress are left to the colonial governments and not placed squarely in the hands of Indigenous peoples.

Regardless, the work the TRC performed over the course of its federal mandate was irreplaceable and of the utmost importance. By conducting thousands of interviews, performing extensive research, and thoroughly documenting all its findings, the TRC established a large body of data concerning the harmful effects of residential schools on Indigenous peoples of Canada, then formed recommendations for reconciliation based upon their extensive research. Any effort to repair harms done in the past must begin with in-depth research that exposes all histories with the maximum amount of transparency. The TRC fulfilled this goal, beginning a massive information collection process that allowed the Canadian government to operate on well-informed and most importantly, Indigenous-led, recommendations. Following the end of the TRC's mandate, the establishment of the National Centre for Truth and Reconciliation ("NCTR") served to continue

the commitment of collecting Indigenous perspectives and histories surrounding the residential school movement. By maintaining this body of research, the government manages to maintain efforts at meaningful reconciliation – so long as that body of research is managed and overseen by members of Canada's Indigenous communities.

The recent passage of bills C-8 and C-15 is certainly the most groundbreaking and promising legislative effort regarding Indigenous rights in North America, and the bills are also positive examples for countries founded on colonialism across the world. Though C-8 is largely a ceremonial gesture (including a recognition of Indigenous rights in the Oath of Citizenship), such a move cannot be understated. Had Canada only passed C-8 but not C-15, then the effects and positivity surrounding Bill C-8 alone would be lessened and likely met with critiques of all form and no substance. Again, Canada has made a significant effort to recognize Indigenous rights and place them in an important and status elevated (at least within the Oath of Citizenship) equal to that of a settler Canadian citizen. Though C-8 does not contain anything more substantial in a legal regard, the ceremonial inclusion of a clause concerning Indigenous rights does send a message to Indigenous peoples and to the broader world that the federal government does indeed prioritize making Indigenous rights and recognition of those rights an essential part of what it means to be a citizen of Canada.

However, the bulk of reconciliatory legislation comes in the form of Bill C-15, which adopts into law the standards set by the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP").[153] What Section 35, Supreme Court case law, and previous legislative efforts lack, C-15 seems to make a legitimate effort to make up for. According to the government, the purpose of C-15 is "to affirm the Declaration as an international human rights instrument that can help interpret and apply Canadian law."[154] By doing so, the government hopes that referencing UNDRIP as a framework can help lawmakers across the country "address injustices. . . [and] promote mutual respect and understanding."[155] The enactment of the declaration into law provides Canada with a "clear vision for the future" and ensures that all federal laws adhere closely to the rights and standards set out in UNDRIP.

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[153] Interestingly, when UNDRIP was overwhelmingly adopted by the UN in 2007, the votes were 143 for, 11 abstentions, and 4 against. The four countries to vote against its passage were Canada, the United States, Australia, and New Zealand. Press Release, General Assembly, General Assembly Adopts Declaration of Rights of Indigenous Peoples; 'Major Step Forward' towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sep. 13, 2007); Canada then "shed its objector status" and expressed support for UNDRIP in 2016. Veronica Martisius, *Bill C-15 & Implementing UNDRIP: What Should this Mean for the First Nations, Inuit and the Métis in Relationship to Canada?* B.C. CIV. LIBERTIES ASS'N (May 20, 2021), https://bccla.org/2021/05/bill-c-15-implementing-undrip-what-should-this-mean-for-the-first-nations-inuit-and-the-metis-in-relationship-to-canada/; the United States expressed support for UNDRIP in 2011, stating that the Declaration, "while not legally binding or a statement of current international law" has "both moral and political force." *Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples,* U.S. DEP'T STATE (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm.

[154] *Backgrounder: United Nations Declaration on the Rights of Indigenous Peoples Act*, GOV'T CAN., https://www.justice.gc.ca/eng/declaration/about-apropos.html (last visited Aug. 12, 2022).

[155] *Id.*

Notably, however, C-15 does not directly enshrine UNDRIP into law, but instead establishes a framework for the implementation of the rights enumerated within. This means that a minister will be made responsible for preparing and creating a plan to achieve the objectives of UNDRIP "in consultation and cooperation with Indigenous peoples."[156] So while C-15 is certainly remarkable, it does not go as far as many would hope by directly enacting UNDRIP into law.[157] David Lametti, Canada's current Minister of Justice and Attorney General who introduced the bill in the House of Commons, said, "Bill C-15 is not intended to change Canadian law immediately. Rather, it is an attempt to establish a process that could make federal laws and policies consistent with UNDRIP."[158] Here, Canada is again running the risk of perpetuating colonial structures if the minister appointed to monitor the implementation of the bill is not Indigenous, and if Indigenous peoples are not sufficiently consulted and deferred to. Regardless, the effort to align Canadian law with what has been called the "minimum"[159] of standards for Indigenous rights represents an essential push forward towards meaningful recognition of inherent rights that have been violated for hundreds of years.

However, the people of Canada are divided on their perspectives of C-15. Proponents and supporters see the bill as a long-awaited opportunity for Canada to finally meet its objectives regarding Indigenous rights. One Indigenous scholar said that C-15 is a chance "to actually break with the colonial status quo," while also maintaining skepticism because of the bill's inherent colonial origins in federal government.[160] UNDRIP contains, perhaps most importantly, an inherent right to self-determination, a right that is taken for granted by white settlers and a right that has been stripped from Indigenous peoples in different ways for hundreds of years. Where the majority of Indigenous support for C-15 seems to come from is the history of UNDRIP itself, as it was uniquely driven and formed by Indigenous peoples from around the world.[161]

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156 Cameron French, *C-15: What You Need to Know about Law that Could Redefine Indigenous-Government Relations in Canada*, CTV NEWS (May 21, 2021), https://www.ctvnews.ca/politics/c-15-what-you-need-to-know-about-law-that-could-redefine-indigenous-government-relations-in-canada-1.5438215.

157 Martisius, *supra* note 153. For example, in 2009, Bolivia became the first country in the world to implement UNDRIP directly into its Constitution.

158 *Id.*

159 French, *supra* note 156.

160 "Like most Indigenous land defenders, I view anything the government does with skepticism. We have witnessed many Indigenous-led movements that spark resistance to colonialism be quelled by promises that wind up broken. Recommendations to improve and respect the inherent human rights of Indigenous Peoples — such as the Truth and Reconciliation Commission's Calls to Action or various Supreme Court decisions (albeit narrowly defined) — fail to be implemented." Katsi'tsakwas Ellen Gabriel, *Ellen Gabriel: Bill C-15 Is Chance 'To Actually Break with the Colonial Status Quo'*, RICOCHET (Apr. 12, 2021), https://ricochet.media/en/3593/ellen-gabriel-bill-c-15-is-chance-to-actually-break-with-the-colonial-status-quo.

161 "The Declaration represents a clear expression, for the 21st century, of what Indigenous Peoples have been fighting for all along: our right to live in peace and dignity, to overcome the impacts of colonization through exercise of our rights to self-determination, and to have our own Indigenous laws and traditions respected, instead of vilified." Gabriel, *supra* note 160.

Critics of C-15 seriously question whether the bill will have any substance. The Association of Iroquois and Allied Indians ("AIAI") issued a letter vehemently opposing the passage of the bill due to inadequate consultation with Indigenous peoples.[162] Stating that "Canada has not adequately engaged with Indigenous peoples," the Deputy Grand Chief of AIAI stated that "[m]eetings were capped, time was restricted, and engagement periods were not extended to make proper use of time and information."[163] The organization strongly opposed passing C-15 as is, citing the importance of "not having our rights dictated to us as [the Federal Government] see[s] fit rather than recognize our right to self-governance."[164] Other groups have pointed out rather large flaws in the lack of external oversight and international review by the United Nations,[165] and the bill's reliance on a racist premises that Canada has ownership of the land. Chief Donny Morris of Kitchenuhmaykoosib Inninuwug stated that the racist foundations of the bill "provide that our inherent rights to our Homelands, and the accompanying natural resources, are subservient to the Crown's presumed underlying title to our Homelands and natural resources."[166]

What will be interesting to watch unfold is how the Supreme Court reconciles the implementation of this legislation with their body of case law already interpreting Section 35 and the idea of "existing" Aboriginal rights. Terence Sakohianisaks Douglas, a lawyer who helped draft a letter in opposition of Bill C-15, said, "[t]aking these rights from the international perspective, where these are supposed to be universal human rights, and then putting them into the box of Section 35 is very much watered down, because they can still be manipulated. They can still be controlled by the government and the courts."[167] While *Sparrow* is still good law, the government need only pass the test set by the Court in order to violate Indigenous rights without violating Canadian law. Will C-15 change this standard and provide an accessible enough avenue for survivors of residential schools to obtain justice for violations of their inherent rights? Additionally, where land rights are concerned, will C-15 extend so far to protect Indigenous

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[162] *See* Ira Timothy, *AIAI Opposes a Canadian UNDRIP that Acts without Consent and Consultation*, ASS'N IROQUOIS & ALLIED INDIANS (Apr. 1, 2021), https://www.aiai.on.ca/aiai-opposes-a-canadian-undrip-that-acts-without-consent-and-consultation/; Treaty 8 Grand Chief Arthur Noskey, along with Treaty 6 and Treaty 7 Chiefs, opposed the Assembly of First Nations' (AFN) exclusive negotiations with the Canadian government, stating that the AFN is a lobbyist group and is overshadowing the right of each individual nation to consult on the implementation of UNDRIP. *See* Chris Stewart, *Grand Chief in Alberta Says AFN Shouldn't Be Consulting on UNDRIP Bill with Canada*, APTN NAT'L NEWS (Apr. 20, 2021), https://www.aptnnews.ca/national-news/grand-chief-in-alberta-says-afn-shouldnt-be-consulting-on-undrip-bill-with-canada/.

[163] Timothy, *supra* note 162.

[164] *Id.*

[165] *See* Russ Diabo, *UNDRIP Bill C-15 Deeply Flawed and Must Be Rejected Say Indigenous Networks and Land Defenders*, MEDIA CO-OP (Dec. 11, 2020), https://mediacoop.ca/story/undrip-bill-c-15-deeply-flawed-and-must-be-rejecte/37046.

[166] Logan Turner, *Kitchenuhmaykoosib Inninuwug Opposes Federal Government's Proposal to Implement UNDRIP*, CBC NEWS (Jan. 26, 2021), https://www.cbc.ca/news/canada/thunder-bay/ki-rejects-federal-undrip-bill-1.5887344.

[167] *Id.*

lands from economic development and the newest form of cultural control by means of resource colonialism?

B. Analysis of U.S. Law

Upon reading the plain text of the U.S. Constitution, it is apparent that the Framers had no intention of considering Indigenous peoples as citizens of the newly formed government and were only concerned with proper representation for taxes and with acquiring land by means of coercion and force. There is nothing in the U.S. Constitution akin to Section 35 of Canada's Constitution, and the word "Indian" is only used three times. Moreover, the constitutional amendment process is extremely slow, and the hurdles are significant. As provided in Article V, any proposed amendment must first be proposed either by Congress with a two-thirds majority vote in both the House of Representatives and the Senate, or by a constitutional convention called for by two-thirds of the State legislatures.[168] Then, if the proposed amendment receives the requisite two-thirds vote from both houses of Congress, it must be ratified by three-fourths (thirty-eight of fifty) of the States.[169] The last time this process successfully occurred was in 1992, when the Twenty-Seventh Amendment was ratified, which dealt with congressional pay.[170] However, an amendment guaranteeing equal rights for Native Americans, as well as additional inherent rights, is extremely unlikely to be introduced, passed, and then ratified. After all, the U.S. has yet to ratify the Equal Rights Amendment, introduced in 1972, which would guarantee constitutional protection for women's rights, ensuring that "[e]quality of rights under the law" are not hindered by the United States or any State.[171]

Simply put, the U.S. is a nation that is extremely resistant to changing its Constitution, even for reasons like equality and restorative justice. Writer and Indigenous rights activist Roxanne Dunbar-Ortiz states, "[i]n other constitutional states, constitutions come and go, and they are never considered sacred in the manner patriotic U.S. citizens venerate theirs."[172] Dunbar-Ortiz points out that most U.S. citizens take great pride in "exceptionalism" and that historians and legal theorists categorize the U.S. as being a "nation of laws," making the argument that the Constitution, the writings of the Founding Fathers, and even Martin Luther King Jr.'s "I Have a Dream" speech are all "bundled into the covenant as sacred documents that express the U.S. state religion."[173] Indeed, it is difficult to find a nation elsewhere on Earth with quite the amount of patriotism that most

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168 U.S. CONST. art. V.

169 Office of the Federal Register, *Constitutional Amendment Process*, NAT'L ARCHIVES, https://www.archives.gov/federal-register/constitution (last visited Sep. 1, 2022).

170 *See Congressional Compensation*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxvii/interps/165 (last visited Sep. 1, 2022).

171 Alex Cohen & Wilfred U. Codrington III, *The Equal Rights Amendment Explained*, BRENNAN CTR. FOR JUST. (Jan. 23, 2020), https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained.

172 DUNBAR-ORTIZ, *supra* note 24, at 50.

173 *Id.*

American citizens promote, and though this sense of pride certainly can contribute positively to the fabric of the nation, the perception of the Constitution as a sacred document parallels dangerously with the "nation of immigrants" mantra. Interestingly, an essential piece of this sacred document's history is rarely exposed: the Constitution was significantly based off the existing government of the Haudenosaunee Indian Nation,[174] yet the "nation of immigrants" had to first be "cleansed" of its Indigenous inhabitants.[175] In the U.S., adding an amendment that fundamentally alters the core of the Constitution is in theory not impossible, but in practice, it is essentially unworkable.

Shortly after the founding of the U.S., the Supreme Court immediately concerned itself with laying a bedrock of land acquisition laws which would enable the U.S. to forcibly take Indigenous lands for years to come. The Supreme Court spent years crafting a very elaborate trap, thus empowering the U.S. government to assume original title to Indigenous lands, provide little to no legal recourse for the Tribes from whom they took the land, and then removing Indigenous peoples onto reservations, leaving them with inferior land and human rights status in the eyes of federal law. By enshrining the doctrine of discovery into law, the Supreme Court provided a legal excuse for theft of land, enabling settler colonial practices to devastate Indigenous communities in the name of divine conquering right. With their decision in *Johnson v. M'Intosh* in 1823, the Court with one fell swoop declared white settlers to have exclusive discovery rights, Native Americans to only have a "title of occupancy," and the federal government to have the unrestricted right to take Native land free of the just compensation required by the Fifth Amendment.[176] Because these cases have not yet been critically examined and dismantled, they provide a legal, moral, and even colloquial foundation for further settler colonial structures, such as pipelines across Indigenous lands,[177] destructive and devastating mining practices on Indigenous sacred sites,[178] and extensive logging projects in violation of Indigenous religions.[179]

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[174] *Influence on Democracy*, HAUDENOSAUNEE CONFEDERACY, https://www.haudenosauneeconfederacy.com/influence-on-democracy/ (last visited Sept. 9, 2022) (detailing how, among other things, the Haudenosaunee used systems of checks and balances and invented population-based representation in government).

[175] DUNBAR-ORTIZ, *supra* note 24.

[176] *Id.* at 199-201; Lyng, *supra* note 122, at 453 (stating that certain cases stand out from others, such as *Lyng*, decided in 1988, in which the Court declared that the federal government could log forested land against Indigenous religious beliefs because it was "after all, *its* land").

[177] *See, e.g.*, Steven Mufson, *Keystone Pipeline's Path Cuts across Native American Land, History*, WASH. POST (Jul. 21, 2014), https://www.woodwardnews.net/keystone-pipelines-path-cuts-across-native-american-land-history/article_1b56d969-293d-5f5a-a3c9-7c70bf5e53cc.html (detailing the Keystone XL pipeline and its path through Canada and the U.S., and across Indigenous lands).

[178] *See, e.g.*, Ernest Scheyder, *Native Americans Say U.S. Does Not Own Land It Is about to Give to Rio Tinto*, REUTERS (Jan. 14, 2021), https://www.reuters.com/article/us-usa-mining-resolution/native-americans-say-u-s-does-not-own-land-it-is-about-to-give-to-rio-tinto-idUSKBN29J2R9 (explaining Rio Tinto's mining project on the sacred land of the San Carlos Apache – Rio Tinto previously destroyed a 46,000-year-old sacred Aboriginal site in Western Australia).

[179] *See, e.g., G-O Road*, SACRED LAND FILM PROJECT, https://sacredland.org/g-o-road-united-states/ (last visited Sep. 9, 2022) (explaining the background of the *Lyng* case, where against Native religious principles, the Supreme Court found the necessity of taking sacred land outweighed religious freedom of the Tribe).

The Supreme Court has also consistently defined the relationship between Indigenous peoples and the federal government in the context of a ward and a guardian, which has further diminished already unequal rights of Indigenous peoples.[180] Tribal sovereignty has always been incredibly restricted, with cases like *Montana v. United States* and *Oliphant v. Suquamish Indian Tribe* adding to a long list of decisions that have gradually chipped away at the bounds of sovereignty.[181] Recently, in *Oklahoma v. Castro-Huerta*, the Supreme Court overturned a long-held understanding that individual states do not have the authority to prosecute non-Indians who commit crimes against Indians in Indian country.[182] By giving the States concurrent jurisdiction with the Federal Government over such crimes, the ruling all but eliminated Tribal sovereignty over crimes committed on their own lands.[183] Interestingly enough, this decision came only a few months after the Violence Against Women Act was reaffirmed, in which Congress firmly supported Tribal sovereignty and Tribal criminal jurisdiction.[184]

The disconnect between the Supreme Court and Congress is likely to continue for the foreseeable future. The current makeup of the Court is strongly conservative; there are six conservative Justices to three liberals. Moreover, the current Court has already established a bold reputation for itself, not hesitating in the least to strike down previous rulings on women's rights,[185] suggesting the retraction even more rulings on other civil rights,[186] and even retool and redefine the very meaning of *stare decisis*.[187] When viewing the trajectory of the Court in comparison to the standards set by UNDRIP, it is evident that the U.S. seems committed to undermining, rather than fortifying, Indigenous rights. Tribal sovereignty has long been respected by the State governments, but with the ruling in *Castro-Huerta*, that is at risk. Moreover, sovereignty is an extension of the crucial right to Indigenous self-determination. The consequences of restricting sovereignty will be felt far and wide. It will almost certainly exacerbate the problem of Missing and Murdered Indigenous Women and will significantly hinder individual Tribes' abilities to achieve justice for their own people. Regarding residential schools, the Supreme Court is an unsympathetic forum. Though Tribes

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[180] *See* Cherokee Nation, *supra* note 112; *see also* Worcester v. Georgia, *supra* note 113.

[181] Montana v. United States, *supra* note 120 (holding that the Crow Tribe could not exclude by regulation non-Indians from fishing and hunting on reservation lands held in fee by non-Indians); Oliphant, *supra* note 119 (holding that Tribes cannot have criminal jurisdiction over non-Indians who commit crimes within reservation boundaries).

[182] Oklahoma v. Castro-Huerta, No. 21-429, slip op. 597 (U.S. June 29, 2022).

[183] "Now, the State seeks to claim for itself the power to try crimes by non-Indians against tribal members within the Cherokee Reservation. Where our predecessors refused to participate in one State's unlawful power grab at the expense of the Cherokee, today's Court accedes to another's." Oklahoma v. Castro-Huerta, *supra* note 182, at 2 (U.S. June 29, 2022), (Gorsuch, J., dissenting); "But this declaration comes as if by oracle, without any sense of the history recounted above and unattached to any colorable legal authority. Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom" *Id.* at 12; *see also NARF/NCAI Joint Statement on SCOTUS Ruling on Castro-Huerta v. Oklahoma,* NATIVE AM. RTS. FUND, (July 7, 2022), https://www.narf.org/castro-huerta-v-oklahoma-scotus-ruling/.

[184] *Id.*

[185] Dobbs v. Jackson Women's Health, No. 19-1392, slip op. 597 (U.S. June 24, 2022).

[186] *Id.* (Thomas, J., concurring).

[187] *Id.* (Roberts, J., concurring).

have taken matters into their own hands previously, calling for testimonies and maintaining many of their own records, it is highly unlikely that they will receive any support in the way of Supreme Court law.

The two Joint Resolutions passed by the Senate, first in 1992 and later in 2009 during the Obama Administration, served as grand gestures for peacemaking and recognition of the unique status of Indigenous peoples in the U.S. In reality, however, they carried little to no weight regarding legal reparations or meaningful reconciliation. An apology with no attempt at justice or rectifying moral wrongs is no apology at all, it is merely meant to placate, distract, and waste valuable time. Moreover, both resolutions are made even more hollow by the lack of consultation or care for Indigenous opinions and input.

However, with the appointment of the current Secretary of the Interior, Deborah Haaland (the first Indigenous person to serve as a cabinet secretary), perhaps the U.S. will see some meaningful progress towards reparations for Indigenous rights' violations in residential schools. Haaland created the aforementioned Federal Boarding School Initiative on June 22, 2021, which was to "undertake an investigation of the loss of human life and lasting consequences of the Federal Indian boarding school system."[188] Important goals of the Initiative included: identifying boarding schools and the names and Tribal identities of Indian children placed in the schools; identifying locations of burial sites of remains of Indian children located at or near school facilities and; incorporating Tribal and individual viewpoints, including those of descendants, on the experiences in, and impacts of, the Federal Indian boarding school system.[189] The final report of the initial investigation was issued in May of 2022 and totaled 106 pages. The Executive Summary states in part:

> The Federal Indian boarding school system deployed systematic militarized and identity-alteration methodologies to attempt to assimilate American Indian, Alaska Native, and Native Hawaiian children through education, including but not limited to the following: (1) renaming Indian children from Indian to English names; (2) cutting hair of Indian children; (3) discouraging or preventing the use of American Indian, Alaska Native, and Native Hawaiian languages, religions, and cultural practices; and (4) organizing Indian and Native Hawaiian children into units to perform military drills.[190]

The Department also identified 33 marked burial sites, 6 unmarked burial sites, and 14 marked and unmarked burial sites present at a school location, as well as stated that the number is expected to increase as the investigation continues.[191] Approximately 500 deaths were attributable directly to the boarding

[188] U.S. Dep't of Interior, Federal Indian Boarding School Initiative Investigative Report, at 3, (May 2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf [hereinafter DOI Report].

[189] *Id.*

[190] *Id.* at 7.

[191] *Id.* at 8.

schools, and that number is also expected to increase.[192] It contains the methodology used by the Department in gathering information, an historical overview of U.S. law and policy regarding Indian territorial dispossession and Indian assimilation, a history of the boarding schools and their various nuances, a list of all identified boarding schools, the legacy impact of the boarding school system, and several findings and conclusions.[193]

The Report was deliberately explicit when summarizing the history of Indian education policy, a necessity that has long been missing from U.S. history and government documents. For example, it states:

> Beginning with President Washington, the stated policy of the Federal Government was to replace the Indian's culture with our own. This was considered "advisable" as the cheapest and safest way of subduing the Indians, of providing a safe habitat for the country's white inhabitants, of helping the whites acquire desirable land, and of changing the Indian's economy so that he would be content with less land. Education was a weapon by which these goals were to be accomplished.[194]

The Report further illuminates how the United States viewed education as the most effective tool for conquering the Indigenous Peoples:

> Past experience goes far to prove that it is cheaper to educate our wards than make war on them, or let them grow up in ignorance, to say nothing of the humanity of the act, or the results attained. Federal records document that the United States considered the Federal Indian boarding school system a central part of its Indian assimilation policy. The Department has described the role of Indian assimilation policy coupled with Indian land dispossession policy as follows: "The essential feature of the Government's great educational program for the Indians is the abolition of the old tribal relations and the treatment of every Indian as an individual. The basis of this individualization is the breaking up of tribal lands into allotments to the individuals of the tribe. This step is fundamental to the present Indian policy of the Government. Until their lands are allotted, the Government is merely marking time in dealing with any groups of Indians."[195]

The findings of the Investigation demonstrate the lasting impact of settler colonialism on the Indigenous peoples of the present-day United States. Generations of Native Americans "went on to attend" the schools, "leading to an intergenerational pattern of cultural and familial disruption under direct and indirect support by the United States."[196] Additionally, the "twin Federal policy

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[192] DOI Report, *supra* note 188, at 9. This number is expected to increase to the thousands or tens of thousands.

[193] *Id.*

[194] *Id.* at 21.

[195] *Id.* at 37.

[196] *Id.* at 90.

of Indian territorial dispossession and Indian assimilation through Indian education" extended far beyond the boarding school system; this policy included over one thousand other Federal and non-Federal institutions, such as asylums and orphanages.[197] One of the more condemning findings of the Investigation was that funding for the boarding school system included those funds obtained from Tribal trust accounts managed by the United States for the benefit of Indians.[198]

Importantly, the Report states that thus far, the Federal Government has not provided any forum or opportunity for survivors or descendants to voluntarily detail their experiences in the Federal boarding school system.[199] The Report concludes that further review is necessary to "determine the reach and impact of the violence and trauma inflicted on Indian children" and that the policy of Indian assimilation contributed to the loss of: "(1) life; (2) physical and mental health; (3) territories and wealth; (4) Tribal and family relations; and (5) use of Tribal languages."[200] Finally, the Report recommends the completion of the full investigation, identification of all surviving boarding school attendees, documentation of experiences, development of a records repository, engagement of other Federal agencies to support the investigation, advancement of Native language revitalization, promotion of Indian health research, and recognition of the generations of affected children with a Federal memorial.[201]

Reactions to the Report were largely positive, though many noted that there is still much work to be done. First Vice President of the National Congress of American Indians ("NCAI") Mark Macarro acknowledged the Report as a signal of progress, stating that boarding schools are "not an issue of the past as the stark reality of generational trauma lives on today. . . there is still much truth, justice, and reconciliation needed in our communities."[202] Others note that the Report only "scratches the surface on the schools" and question the role that religious institutions played.[203] Some have criticized the Report for not completely detailing how the children died or who was responsible, and many agree that "the report is a good first step, but more work is needed."[204] "The children aren't home," and until they are, we will not "get to the bottom of it."[205]

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197 DOI Report, *supra* note 188, at 91-92.

198 *Id.* at 92.

199 *Id.*

200 *Id.* at 94.

201 *Id.* at 95-99.

202 *U.S. Department of the Interior Releases Historic Report on Federal Indian Boarding Schools*, NAT'L CONG. AM. INDIANS, (May 11, 2022), https://www.ncai.org/news/articles/2022/05/11/u-s-department-of-the-interior-releases-historic-report-on-federal-indian-boarding-schools.

203 Krystal Nurse, *Anishinaabe Welcome, Question Boarding School Investigation by Department of Interior*, LANSING ST. J. (June 16, 2022), https://www.lansingstatejournal.com/story/news/local/2022/06/16/anishinaabe-mixed-dept-interiors-boarding-school-findings-haaland-native-american/7613667001/.

204 Kimmy Scherer, *DOI Report Details Disgraceful Unconstitutional Federal Indian Boarding School History*, W. RIVER EAGLE (May 19, 2022), https://www.westrivereagle.com/articles/doi-report-details-disgraceful-unconstitutional-federal-indian-boarding-school-history/.

205 *Id.*

Finally, the Executive Branch could offer more relief than it previously has. Though funds from the Consolidated Appropriations Act will continue through fiscal year 2023 at the President's request, maintaining funding for the Federal Boarding School Initiative,[206] the President, as the head of the Executive, has other powers at his disposal that could alleviate, or at least acknowledge and apologize for, the Federal boarding schools. For example, the President could issue a formal, standalone apology, or even designate a Remembrance Day or national monument in memory of the Native American children lost.

V. Proposal

A. Lessons from Comparison

Employing comparison in the international legal landscape can be incredibly beneficial because of its ability to allow researchers to view the legal treatment of similar situations in different cultural and historical contexts. "Comparisons are required in order to understand what the essential conditions may be of whatever we are trying to understand,"[207] meaning that if we can isolate the specifics of what causes a certain law to be created, we are more likely to be able to successfully replicate parts or all of that law in other countries. In the context of residential schools in Canada and the U.S., both countries could benefit greatly from an in-depth comparative study and analysis of the development, enactment, implementation, and ultimate effects of the body of law surrounding residential schools. Moreover, a comparative approach leaves open the possibility to apply findings and methodology to other countries with a history of settler colonialism and violence against Indigenous peoples, such as Australia and New Zealand. The following subsections contain suggestions for Canada and the U.S. in turn, and by viewing these proposals in comparative fashion, any similarities or differences between the two nations can be more easily identified, and larger trends can be analyzed together.

B. Proposal for Canada

The swiftest and most promising method for effecting change at the federal level is of course through the legislature. Until very recently, Indigenous peoples have largely been trapped in the court system, litigation their only option for recourse on a case-by-case basis, fought slowly in a system structured by colonialism and with uncertain outcomes. However, C-15 may represent a real opportunity to alter that course by providing specific guidance to lawmakers regarding the bare minimum of respect for Indigenous rights. It is a remarkable piece of legislation that places Canada at the forefront of a global effort to finally make reparations for the atrocities done to Indigenous peoples by means of colonialism. Yet, with all its trailblazing promise, C-15 must be implemented carefully and mindfully if it is to not fall in line with the colonial history of Canada. Many

[206] DOI Report, *supra* note 188, at 95.

[207] CHARLES WRIGHT MILLS, THE SOCIOLOGICAL IMAGINATION 163 (1970).

fear that it is yet another empty promise, a new bill full of aspirations and hopes that serve only to pacify activists and cover up insidious colonial projects like resource development.

If Canada is to break with the past, it should ensure that as suggested by the AIAI, the implementation of C-15 is overseen externally and internationally, likely by the United Nations. The nature of settler colonialism suggests that in a system of oppressors and oppressed, the oppressors will never willingly change a status quo that so heavily benefits only them. For Canada, this means that the reconciliation efforts for residential schools must continue to be overseen and led by Indigenous peoples, and the minister in charge of implementing C-15 must be Indigenous. It is illogical to trust the system that created current injustices to properly rectify them with no external, neutral oversight or internal, Indigenous directives wholly independent from the government.

C. Proposal for the U.S.

At minimum, the U.S. would make meaningful and sincere steps towards reconciliation and reparations by reissuing an apology for the wrongs done by boarding schools, this time without burying it in an unrelated bill and with far greater media attention. However, the best path for the U.S. to take is to follow Deborah Haaland's recommendations regarding establishing the Truth and Healing Commission ("THC"). It is imperative that the collection of information, stories, and histories of Indigenous Peoples affected by the residential school system begins as soon as possible. Additionally, by creating a commission which operates very deliberately outside the sphere of direct government control, the U.S. would be able to better ensure that the THC is following the Indigenous agenda and not continuing down the well-established path of colonial control. However, the bill is proving difficult to pass into law, having failed in 2020 and then been reintroduced in 2021. The survivors of boarding schools are growing older, and with each survivor's story lost, the U.S. falls further from reconciliation.

In the meantime, Haaland has attempted to take matters into her own hands by creating the DOI investigation of the boarding schools. While this effort is certainly necessary, it must be approached cautiously because the entirety of the investigation will occur within a branch of the federal government. Though an Indigenous woman is leading the investigation, she will likely be somewhat restrained by structures built into the government by colonial ideals, and such an investigation will have its limits. Passing the THC and creating the organization is the single most important step the U.S. can take. Without the establishment of a long-term commitment to investigation and documentation, the U.S. risks the loss of hundreds or even thousands of first-hand accounts, alternate and more accurate versions of American and Indigenous history, and an opportunity to achieve justice for countless Indigenous people.

Additionally, because the U.S. seems to be following suit after Canada's creation of the TRC, the U.S. can certainly use its northern neighbor as a comparative study. For example, in Canada, the creation of the NCTR directly following the TRC enabled all the records collected during the research mandate to be pre-

served at a university for public access. This is essential to retaining and passing on the cultures that were targeted by the residential school cultural genocide. The U.S. can further look to the implementation of UNDRIP via Bill C-15 as a long-term goal, while also learning some valuable lessons from the criticisms of Indigenous peoples in Canada. If the U.S. were to ever undertake passing such legislation, it would be very well served by looking to the retrospective opinions of Indigenous peoples, as well as the effectiveness of C-15's implementation.

D. Proposals for Legal Education and Law Schools

History has shown that the most effective bringer of change is not the government, but often the people themselves, participating in grassroots movements and banding together to defend their rights. However, in the case of residential schools, more can and should be done by allies, especially allies in the legal field, that has not yet occurred. For example, in the U.S., American Indian Law is not tested on the bar exam, nor is it an ABA-required course for any law school in the country. The third sovereign of the nation, who existed before any semblance of the U.S. government did, is entirely swept under the rug in the education of every single law student. The hegemony of settler knowledge has effectively excluded Native Americans from American legal education. In Canada, where courses in Aboriginal Law are far more common due to a TRC mandate,[208] questions have been raised as to whether these courses can be properly taught in English, or how to organize such a complex and multifaceted topic into just one class.[209] The risk of committing a misstep and further alienating Indigenous voices from the classroom runs high. And in both nations, elevation of Indigenous perspectives in law schools is crucial; to teach a class in Indigenous law from the perspective of the U.S. or Canadian legal system only serves the purpose of furthering settler colonial domination over Indigenous cultures and traditions. Similarly, to teach property law without also teaching the genocidal practices that accompanied "legal" land theft only perpetuates current settler hegemony in legal knowledge. These are the seemingly small, yet absolutely essential, things that law students, law professors, and legal professionals need to interrogate every day. While we wait for the federal governments to address their pasts, those of us in the legal profession should take matters into our own hands and practice culturally responsive teaching and learning in a conscious and deliberate manner.

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[208] "We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and antiracism." Mandate 28, TRUTH AND RECONCILIATION COMMISSION OF CANADA: CALLS TO ACTION, TRUTH & RECONCILIATION COMM'N CAN., at 3 (2015), https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf.

[209] *See* John Borrows, *Heroes, Tricksters, Monsters and Caretakers: Indigenous Law and Legal Education*, 64 MCGILL L. J. (2016), https://lawjournal.mcgill.ca/article/heroes-tricksters-monsters-and-caretakers-indigenous-law-and-legal-education/.

VI. Conclusion

Have the U.S. and Canada made efforts to promote reparations for residential schools? Yes, but the degree to which they are successful can only be answered by Indigenous peoples themselves. However, it is worth gathering the histories and legal treatments of these attempted cultural genocides together in a comparative fashion in order to better understand them, and in turn, be able to better see the way forward. Additionally, extensive research should be done to collect current perspectives, opinions, and needs of Indigenous peoples, particularly in the U.S. For hundreds of years, the dominant tellers of the story have been the settlers. Both nations should change the way they talk about the past, and they must change the way they record the present. A body of research should be further grown and utilized from respecting the Indigenous right to self-determination rather than from what the colonizers have determined Indigenous Peoples to be. In the context of residential schools, this means that both nations must adequately address the past as well as the present and future. The U.S. must create the Truth and Healing Commission in order to collect and preserve the histories of residential school survivors, Canada must be rigid in its commitment to Indigenous involvement and leadership in the implementation of C-15. Both nations should also look to each other and themselves critically in an effort to see the perpetuation of colonial structures by means of land and environmental control.

Residential and boarding schools are but one component in a massive, settler colonial machine. When their history is examined in detail, it is evident that they played an essential role in larger policies of Indigenous assimilation and attempted cultural genocide. The scope of necessary acknowledgement, reconciliation, and reparations may seem impossibly broad, but by examining each piece of the colonial regimes in a fully transparent manner, both nations have the chance to make meaningful progress. This starts with full disclosure of every policy and every law aimed at removing or assimilating the continent's Indigenous inhabitants in order to make way for the alleged saviors. The United States and Canada have both spent hundreds of years intentionally obscuring and destroying much of Indigenous history, and residential schools are only one piece of a much larger story. To reach any meaningful reconciliation, every government initiative must acknowledge its position of white settler privilege and defer to Indigenous leadership. In Canada, this means staying the course and remaining committed to the goals of the TRC and NCTR, while also intentionally privileging Indigenous voices in the narrative. In the U.S., this means finally conducting comprehensive research regarding boarding schools, including the gathering of firsthand accounts, and promoting Indigenous guidance along the way. Finally, in the broader context of the law in North America, reconciliation and reparations will not easily succeed without getting legal education right; the issues facing Indigenous communities must be centered, and the ways in which the law perpetuates these issues must be critically examined.