

# THE ROLE OF TRUTH-TELLING IN INDIGENOUS JUSTICE

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## I. INTRODUCTION

Recent years have marked a public reckoning with injustice. Through social movements like Black Lives Matter and the #MeToo Movement, businesses, governments, and American society as a whole has been forced to acknowledge long histories of inequity and injustice within American culture. While these movements have been largely successful in generating public awareness and change, the American public is still largely ignorant to the historical and ongoing harms perpetrated against our nation's indigenous population.

Native Americans<sup>2</sup> have endured centuries of genocide, both at the direct hands of or sponsored by the United States government.<sup>3</sup> While the expansive extent of governmental harm against Native Americans is incapable of description within a brief essay, the egregious conduct ranges from the creation of Congressionally-funded boarding schools intended to forcibly assimilate Native Americans into white culture,<sup>4</sup> to the forced removal of Native Americans from their native lands,<sup>5</sup> and, of course, to the murders of Native Americans in

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<sup>2</sup> While the author uses the term Native American to describe all peoples indigenous to the continental United States, Alaska, and Hawaii, she recognizes that these peoples are composed of myriad tribes, all of which have their own culture and recognition.

<sup>3</sup> See, e.g., Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976 The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL LAW REVIEW 911, 944-54 (2002) (recognizing that the United States government has committed genocide against Native Americans by implementing "measures calculated to destroy, in whole or in part, the Native American population").

<sup>4</sup> *Boarding Schools*, UPSTANDER PROJECT, <https://upstanderproject.org/firstlight/boarding> (last visited Feb. 15, 2022).

<sup>5</sup> See Jeffrey Ostler, *Genocide and American Indian History*, 10 OXFORD RSCH. ENCYCS., AM. HIST. (Mar. 2, 2015), <https://oxfordre.com/amERICANHISTORY/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-3> (explaining the 19th century policy formalized under the Indian

more than 1,500 government authorized “wars, attacks, and raids” that nearly destroyed the entire Native American population in the late 19th Century.<sup>6</sup>

Yet despite these severe human rights violations, relatively little societal and governmental attention is given to the harms committed against Native Americans. In June 2018, the Reclaiming Native Truth Project, a two-year public opinion research project, released a report concluding that Native peoples are largely invisible to most Americans.<sup>7</sup> To fill their void of actual knowledge and interaction with Native Americans, the report determined that Americans are much more willing to accept a narrative of Native Americans crafted by non-Natives that is “primarily deficit based and guided by misperceptions, assumptions and stereotypes.”<sup>8</sup> This lack of knowledge is not surprising, given the scope of Native American history in American school curricula. According to a 2019, report, “in most schools, information about Native peoples is either completely absent from the classroom or relegated to brief mentions, negative information, antiquated references, or inaccurate stereotypes.”<sup>9</sup> In fact, the 2019 report concluded that 27 states make no mention of a single Native American in their K-12 curriculum, and 87% of state history education standards do not mention Native American history after 1900.<sup>10</sup> Moreover, those students who do learn about Native Americans as part of their school curricula are often taught the “myth” of the settlement of North America, which “dismisses or simply

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Removal Act of 1830 of forcibly removing Native Americans living east of the Mississippi River to Indian Territory).

<sup>6</sup> *Mass Killings of Native Americans*, EQUAL JUST. INITIATIVE (Sept. 20, 2019), <https://eji.org/news/history-racial-injustice-mass-killings-of-native-americans>; Donald L. Fixico, *When Native Americans were Slaughtered in the Name of ‘Civilization’*, HISTORY (Oct. 25, 2021), <https://www.history.com/news/native-americans-genocide-united-states>.

<sup>7</sup> *See generally*, Research Findings: Compilation of all Research, Reclaiming Native Truth, ILLUMINATIVE (June 2018), <https://illuminatives.org/reclaiming-native-truth/> [hereinafter Reclaiming Native Truth Report].

<sup>8</sup> *Id.* at 18.

<sup>9</sup> *Becoming Visible: A Landscape Analysis of State Efforts to Provide Native American Education for All*, NATIONAL CONGRESS OF AMERICAN INDIANS 9 (2019), [https://www.ncai.org/policy-research-center/research-data/prc-publications/NCAI-Becoming\\_Visible\\_Report-Digital\\_FINAL\\_10\\_2019.pdf](https://www.ncai.org/policy-research-center/research-data/prc-publications/NCAI-Becoming_Visible_Report-Digital_FINAL_10_2019.pdf).

<sup>10</sup> *Id.* at 8.

ignores the devastation colonialism inflicted on the continent's original inhabitants."<sup>11</sup>

As a result, many of the vast government-sponsored human rights violations against Native Americans have gone "largely ignored" by the American public,<sup>12</sup> and most Americans "underestimate the degree of current discrimination" against Native Americans.<sup>13</sup> Almost inconceivably, this lack of knowledge extends into the federal government. As the Reclaiming Native Truth Project recognized, "even in Congress, most members have little knowledge of Native issues and rely heavily on peers with greater interest and expertise when casting votes."<sup>14</sup>

In light of this widespread ignorance of the centuries of genocide and related human rights violations that Native Americans have endured, it is not altogether unsurprising that the federal government has taken relatively minimal action to formally recognize or provide transitional justice to Native communities for past and ongoing harms.<sup>15</sup> In fact, the only formal apology the federal government has issued to Native Americans was "buried" in Congress's 2010 Department of Defense Appropriations Act,<sup>16</sup> which has never been read publicly by any president.<sup>17</sup> Indeed, "few people are aware" that Congress even implicitly made this formal apology,

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<sup>11</sup> Tanya H. Lee, *Truth-Telling in American History: Groups Fight for Indigenous Peoples Day*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/truth-telling-in-american-history-groups-fight-for-indigenous-peoples-day>.

<sup>12</sup> David R. M. Beck, *'Truth and Healing Commission' could help Native American communities traumatized by government-run boarding schools that tried to destroy Indian culture*, THE CONVERSATION (Oct. 8, 2021), <https://theconversation.com/truth-and-healing-commission-could-help-native-american-communities-traumatized-by-government-run-boarding-schools-that-tried-to-destroy-indian-culture-169240>.

<sup>13</sup> Reclaiming Native Truth Report, *supra* note 7, at 8.

<sup>14</sup> Reclaiming Native Truth Report, *supra* note 7, at 8.

<sup>15</sup> Sara L. Ochs, *A National Truth Commission for Native Americans*, 36 WISC. J. LAW, GENDER & SOCIETY 1, 15 (2021).

<sup>16</sup> Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, 123 Stat. 3410.

<sup>17</sup> Emily McFarlan Miller, *An apology to Native Americans was buried in a 2010 defense bill. Now, some want the president to say it out loud*, WASH. POST (July 30, 2021, 5:14 PM), [https://www.washingtonpost.com/religion/an-apology-to-native-americans-was-buried-in-a-2010-defense-bill-now-some-want-the-president-to-say-it-aloud/2021/07/30/2094d60a-fl63-11eb-bf80-e3877d9c5f06\\_story.html](https://www.washingtonpost.com/religion/an-apology-to-native-americans-was-buried-in-a-2010-defense-bill-now-some-want-the-president-to-say-it-aloud/2021/07/30/2094d60a-fl63-11eb-bf80-e3877d9c5f06_story.html).

which does little to rectify the American public's lack of knowledge about Native Americans' human rights violations.<sup>18</sup>

However, recent developments at the federal level have provided cautious hope for a greater federal commitment to recognizing and providing healing for governmental harms against Native Americans.<sup>19</sup> The Biden Administration has repeatedly committed to supporting Tribal Nations and elevating Native Voices.<sup>20</sup> In furtherance of this commitment, President Biden selected Deb Haaland as the Secretary of the Department of the Interior, rendering her the first Native American Cabinet secretary in U.S. history,<sup>21</sup> and in October 2021, he issued a proclamation formally recognizing October 11<sup>th</sup> as Indigenous Peoples Day.<sup>22</sup> Yet much more can—and should—be done at the federal level, especially when it comes to providing redress and healing for centuries of trauma, a goal which is notably absent from the Biden Administration's Native American policy for strengthening “Nation-to-Nation engagement.”<sup>23</sup>

And in fact, there is currently a bipartisan bill pending in both houses of Congress calling for the creation of a truth and healing commission specific to one of the darkest periods of Native American history—the boarding school era, during which the U.S. government sponsored boarding schools used to forcibly assimilate Native American children into white culture.<sup>24</sup> Yet, despite being originally introduced in 2020, the bill has not yet been passed.<sup>25</sup> This essay advocates for further legislative action on the creation of the truth and healing commission to address the desperate need for truth, healing,

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<sup>18</sup> *Id.*

<sup>19</sup> See Fact Sheet: Building a New Era of Nation-to-Nation Engagement, WHITE HOUSE BRIEFING ROOM (Nov. 15, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/15/fact-sheet-building-a-new-era-of-nation-to-nation-engagement>.

<sup>20</sup> *Id.*

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

<sup>22</sup> A Proclamation on Indigenous Peoples' Day, 2021, WHITE HOUSE BRIEFING ROOM (Oct. 8, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/08/a-proclamation-indigenous-peoples-day-2021> (recognizing that the purpose of the day is to celebrate Native Americans' “contributions and resilience” and to “recognize their inherent sovereignty”).

<sup>23</sup> Fact Sheet: Building a New Era of Nation-to-Nation Engagement, *supra* note 19.

<sup>24</sup> H.R. 8420, 116th Cong. (2020); S. 4752, 116th Cong. (2020).

<sup>25</sup> See H.R. 8420, 116th Cong. (2020); S. 4752, 116th Cong. (2020).

and justice among our Native American communities that has for so long been lacking at the federal level.

Part I of this essay will explain the importance of truth-telling in providing transitional justice for past human rights violations, and Part II will specify the need for transitional justice measures focused on truth-telling to foster healing in Native American communities. Part III will introduce the pending bi-partisan bill calling for the establishment of a Truth and Healing Commission on Indian Boarding School Policies in the United States and will argue for Congress to take greater legislative action to turn this bill into law.

## II. TRUTH-TELLING IN TRANSITIONAL JUSTICE

While the definition of transitional justice varies by source, the United Nations has comprehensively defined the term as “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”<sup>26</sup> Transitional justice processes have been utilized in different forms for decades, including in Africa, Latin America, and Southeast Asia, to name only a few geographic areas.<sup>27</sup> While the concept of transitional justice has historically been focused on countries undergoing a transition—usually from an authoritarian government or a prolonged period of human rights violations—more recently, the concept has been utilized by established democratic nations built on systemic inequities, including within the United States.<sup>28</sup>

Rather than focusing exclusively on conducting criminal prosecutions—or the “white man’s” perception of justice—transitional justice seeks to deliver equity and healing in a way that conforms with the cultural norms and practices of the victimized community.<sup>29</sup>

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<sup>26</sup> Guidance Note of the U.N. Secretary-General: United Nations Approach to Transitional Justice, 2 (Mar. 2010), [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf); Marie Soueid et al., *The Survivor-Centered Approach to Transitional Justice: Why a Trauma-Informed Handling of Witness Testimony is a Necessary Component*, 50 GEO. WASH. INT’L L. REV. 125, 128 (2017).

<sup>27</sup> Soueid, et al., *supra* note 26, at 125.

<sup>28</sup> Jennifer J. Llewellyn, *Transforming restorative justice*, 4(3) INT’L J. RESTORATIVE JUSTICE 374, 374 (2021).

<sup>29</sup> Melissa S. Williams & Rosemary Nagy, *Introduction to TRANSITIONAL JUSTICE* 4 (Melissa S. Williams et al. eds., 2012).

Accordingly, the concept of transitional justice is comprehensive and interdisciplinary. It encompasses various process including truth-seeking, reparations, legal and institutional reform, and criminal or civil trials to achieve accountability, provide victims with access to justice, facilitate reconciliation between feuding entities, and foster greater respect for the rule of law.<sup>30</sup>

Central to the success of all these stated goals is the need to compile an accurate historical record accounting for the reasons and details of the abuses leading to the need for transitional justice.<sup>31</sup> In light of this, truth-telling has been recognized as a fundamental and “paradigmatic” concept of transitional justice since the field’s infancy.<sup>32</sup> Not only does truth-telling help satisfy the internationally recognized right to truth to which all victims and survivors of human rights violations and armed conflict are entitled,<sup>33</sup> but it also: (1) prevents authoritarian regimes from denying atrocities and manipulating history; (2) helps compile information for victims to learn about the fates that befell loved ones; (3) allows victims closure and healing; and (4) elicits information that can help prosecutors prepare future criminal cases against the perpetrators.<sup>34</sup> Moreover, in circumstances where traditional justice is impossible, truth may sometimes serve as a “substitute for justice.”<sup>35</sup>

The primary mechanism by which truth-telling is conceptualized within the field of transitional justice is through the establishment of truth commissions.<sup>36</sup> Truth commissions are non-judicial, governmental or independently created mechanisms designed to investigate and determine the causes, consequences, and perpetrators of periods of mass violence and/or prolonged human

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<sup>30</sup> *What is Transitional Justice?* INT’L CTR. TRANSITIONAL JUSTICE, <https://www.ictj.org/about/transitional-justice> (last visited Feb. 18, 2022).

<sup>31</sup> Matilda Keynes, *History Education for Transitional Justice? Challenges, Limitations and Possibilities for Settler Colonial Australia*, 13 INT’L J. TRANSITIONAL JUSTICE 113, 117.

<sup>32</sup> *Id.* at 117.

<sup>33</sup> Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law, U.N. GAOR 60/147 ¶ 24 (Dec. 16, 2005), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

<sup>34</sup> *Truth and Memory*, INT’L CTR. TRANSITIONAL JUSTICE, <https://www.ictj.org/our-work/transitional-justice-issues/truth-and-memory> (last visited Feb. 18, 2022).

<sup>35</sup> John Elster, *Justice, Truth, Peace* in TRANSITIONAL JUSTICE 78, 82 (Melissa S. Williams et al. eds., 2012).

<sup>36</sup> Keynes, *supra* note 31, at 117.

rights abuses.<sup>37</sup> Specifically, truth commissions seek “to uncover the truth in the hope that the exposure of past wrongs will prevent their recurrence in the future; [and] they allow victims to tell their stories so that, by cataloguing and denouncing instances of injustice, the values of the new society are affirmed.”<sup>38</sup> By allowing victims to share their stories of injustice, truth commissions have the power to correct “contested historical narratives,” foster reconciliation between feuding groups, facilitate acknowledgment of wrongdoing by political leaders, and even prompt perpetrators to accept responsibility for their wrongs.<sup>39</sup>

To achieve the goals set forth in their mandates, truth commissions engage in investigatory processes in which they consider personal accounts—both through live and written testimony—of perpetrators, victims, and other witnesses, as well as documentary evidence, archive research, and other data.<sup>40</sup> Following the investigation’s conclusion, the commission will generally issue a final written report that details its findings and provides concrete recommendations for reform to rectify the violence or abuses within the commission’s mandate and to prevent their recurrence.<sup>41</sup>

Recently, settler states have begun employing truth commissions to address and provide healing for past state harms committed against their indigenous peoples and to restore relationships between indigenous peoples and the states’ majority populations. Specifically, such truth commissions have operated or are in the process of being established in Canada, Greenland, Norway, Sweden, and Australia.<sup>42</sup> Notably, truth commissions have also been used at the

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<sup>37</sup> *Truth and Reconciliation Commissions*, INT’L JUST. RES. CTR., <https://ijrcenter.org/cases-before-national-courts/truth-and-reconciliation-commissions> (last visited Feb. 18, 2022).

<sup>38</sup> Jeremy Webber, *Forms of Transitional Justice* in TRANSITIONAL JUSTICE 78, 82 (Melissa S. Williams et al. eds., 2012).

<sup>39</sup> Keynes, *supra* note 31, at 118; Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT’L & COMPAR. L. 1017, 1023 (2001).

<sup>40</sup> *Truth Seeking: Elements of Creating an Effective Truth Commission*, INT’L CTR FOR TRANSITIONAL JUST. 11 (Eduardo González & Howard Varney eds., 2013), <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf>.

<sup>41</sup> Weston, *supra* note 39, at 1026.

<sup>42</sup> For a more detailed analysis of these different truth commissions, see Ochs, *supra* note 15.

state level in the United States to address harms against Native Americans.<sup>43</sup>

### III. THE ROLE OF TRUTH-TELLING IN NATIVE AMERICAN JUSTICE

Until recently, transitional justice for Native Americans was notably absent in the United States. This is in spite of a breadth of research recognizing that Native Americans today suffer from historical trauma—"the collective emotional wounding across generations that results from massive cataclysmic events"<sup>44</sup>—due to the generations of violence, colonization, discrimination, and human rights abuses they, their relatives, and their ancestors have endured.<sup>45</sup> This historical trauma has been connected with higher rates of suicide, psychological distress, poverty, and violence than those experienced by white Americans.<sup>46</sup> Yet despite these extensive issues across Native American communities, the federal government has failed to take measures to provide transitional justice to Native Americans and foster healing from this historical trauma. However, in recent years, several states in the United States, including Maine and California, have

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<sup>43</sup> See, e.g., *Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission*, WABANAKI REACH, [https://www.wabanakireach.org/maine\\_wabanaki\\_state\\_child\\_welfare\\_truth\\_and\\_reconciliation\\_commission](https://www.wabanakireach.org/maine_wabanaki_state_child_welfare_truth_and_reconciliation_commission) (last visited Mar. 23, 2022); *About the California Truth & Healing Council*, CAL. OFFICE OF THE TRIBAL ADVISOR, <https://tribalaffairs.ca.gov/cthc/about/> (last visited Mar. 23, 2022).

<sup>44</sup> Ana Sandoiu, *The impact of historical trauma on American Indian health equity*, MEDICALNEWS TODAY (Nov. 27, 2020), <https://www.medicalnewstoday.com/articles/the-impact-of-historical-trauma-on-american-indian-health-equity> (as defined by Dr. Donald Warne).

<sup>45</sup> See, e.g., Kathleen Brown-Rice, *Examining the Theory of Historical Trauma Among Native Americans*, THE PRO. COUNS. (Oct. 15, 2014) <https://tpcjournal.nbcc.org/examining-the-theory-of-historical-trauma-among-native-americans>; Linda Nahulu, Mary Hasbah Roessel, & Samra Sahl, *Stress & Trauma Toolkit for Treating Indigenous People in a Changing Political and Social Environment*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/psychiatrists/cultural-competency/education/stress-and-trauma/indigenous-people> (last visited Feb. 18, 2022); Maria Yellow Horse Brave Heart et al., *Historical Trauma Among Indigenous Peoples of the Americas: Concepts, Research, and Clinical Considerations*, J. PSYCHOACTIVE DRUGS, 282 (2011), <https://www.governor.wa.gov/sites/default/files/documents/Article%20-%20Historical%20Trauma%20Indigenous%20Peoples%20Meeting%206.pdf>.

<sup>46</sup> Brown-Rice, *supra* note 45; Iris PrettyPaint & Corrine Taylor, *Native Aspirations: Addressing the Contagion of Violence in the Context of Historical Trauma*, in QUESTION OF VIOLENCE: WORKSHOP SUMMARY 83, 83-85 (Inst. Of Med. et al. eds., 2013), [https://www.ncbi.nlm.nih.gov/books/NBK190337/pdf/Bookshelf\\_NBK190337.pdf](https://www.ncbi.nlm.nih.gov/books/NBK190337/pdf/Bookshelf_NBK190337.pdf).



undertaken to establish and operate truth commissions designed to unearth the truths about and provide healing and reconciliation measures to affected Native Americans for past governmental harms.<sup>47</sup>

The first truth commission created and concluded in the United States with these goals was the Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission (the Maine Wabanaki Commission), which was jointly established in 2012 by the State Government of Maine and tribal chiefs of the Wabanaki People who are native to the lands of present-day Maine.<sup>48</sup> The Maine Wabanaki Commission was designed to investigate past and ongoing discriminatory practices pertaining to child welfare and suspected violations of the federal 1978 Indian Child Welfare Act (ICWA) that resulted in an inordinate amount of child removals from Wabanaki homes.<sup>49</sup> Specifically, the Commission's stated goals included: "creat[ing] and [establish]ing a more complete account of the history of the Wabanaki people in the state-child welfare system," improving child-welfare practices, and "promot[ing] individual, relational, systemic and cultural reconciliation."<sup>50</sup>

Between 2013 and 2015, the Commission reviewed archival data, obtained 159 individual statements taken from both members of the Wabanaki Tribe and child welfare representatives, and conducted 15 informal interviews, including with the Chief Justice of Maine.<sup>51</sup> The Commission also conducted a number of "focus groups" in various Wabanaki communities, in which Wabanaki and non-Native individuals shared their experiences with the Maine child welfare system.<sup>52</sup> Following this investigation, the Commission released its final report in 2015, in which it recognized that Wabanaki children in Maine enter the foster care system at 5.1 times the rate of non-Native

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<sup>47</sup> See, e.g., *supra* note 43.

<sup>48</sup> Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission Mandate (June 29, 2012), <https://static1.squarespace.com/static/5c2e615b4611a08076e730e4/t/5cdc67814785d36f890b5370/1557948290076/Maine+Wabanaki-State+Child+Welfare+Truth+and+Reconciliation+Commission+Mandate.pdf>.

<sup>49</sup> *Beyond the Mandate: Continuing the Conversation*, REPORT OF THE MAINE WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMMISSION 12-13 (June 14, 2015), [https://d3n8a8pro7vbm.cloudfront.net/mainewabanakireach/pages/17/attachments/original/1468974047/TRC-Report-Expanded\\_July2015.pdf?1468974047](https://d3n8a8pro7vbm.cloudfront.net/mainewabanakireach/pages/17/attachments/original/1468974047/TRC-Report-Expanded_July2015.pdf?1468974047).

<sup>50</sup> *Id.* at 13.

<sup>51</sup> *Id.* at 14.

<sup>52</sup> *Id.* at 78,79.

children, a disparity that the Commission concluded stemmed from causes including “institutional racism in state systems and the public [and] the effects of historical trauma.”<sup>53</sup> Moreover, in a move that held great symbolic weight, the report also labeled the discriminatory child welfare practices against Wabanaki families as “cultural genocide” pursuant to the definition of genocide set forth in the United Nation’s 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>54</sup> The Commission’s report also included a list of fourteen recommendations to prevent the continued use of discriminatory child welfare practices against the Wabanaki and to promote healing among tribal members.<sup>55</sup> Notably, one of these recommendations recognized the good done through the truth-telling processes included within the Commission, and recommended the continued utilization of means to “keep truth-telling conversations flowing at every level: in tribal communities, among the general public and within agencies that work with Wabanaki people.”<sup>56</sup>

The Maine Wabanaki Commission’s truth-telling work has been widely heralded by participants and commentators for prompting a means of working through trauma and towards healing for the Wabanaki people.<sup>57</sup> For example, in talking about her experience with the Maine Wabanaki Commission, Denise Altvater, a co-founder of and participant in the Commission, said the following:

The most important [aspect] was having the space where my voice and others’ voices could be heard and believed in a place where we knew that something was going to happen. So it was so life-changing to tell your story in that type of an atmosphere, and it

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<sup>53</sup> *Id.* at 64.

<sup>54</sup> Specifically, the Commission recognized that the practices against the Wabanaki included “causing serious bodily or mental harm” to the Wabanaki and “forcibly transferring children of the [Wabanaki] to another group,” which had been performed with an “intent to destroy, in whole or in part,” the Wabanaki Peoples. *Id.* at 8.

<sup>55</sup> *Id.* at 66-67.

<sup>56</sup> *Id.* at 67.

<sup>57</sup> See, e.g., Valerie Vande Panne, *Reflecting on the Maine-Wabanaki Child Welfare TRC Commission Five Years Later*, NATIVE NEWS, (Nov. 5, 2020), <https://nativenewsonline.net/currents/reflecting-on-the-maine-wabanaki-child-welfare-trc-commission-five-years-later>; Michel Martin, *Healing U.S. Divides Through Truth and Reconciliation Commissions*, NPR (Oct. 11, 2020, 4:57 PM), <https://www.npr.org/2020/10/11/922849505/healing-u-s-divides-through-truth-and-reconciliation-commission>.

transformed me into somebody who started having courage that I never had before. And it just transformed my life.<sup>58</sup>

The perceived success of the Maine Wabanaki Commission has sparked the creation of other state truth commissions in the country, including the California Truth & Healing Council.<sup>59</sup> California Governor Gavin Newsome created the Council through an executive order, in which he included a formal apology to California Native Americans for the “violence, maltreatment and neglect” the California Government has inflicted on them through its history.<sup>60</sup> The Executive Order specifically established the Council “to bear witness to, record, examine existing documentation of, and receive California Native American narratives regarding the historical relationship between the State of California and California Native Americans in order to clarify the historical record of this relationship in the spirit of truth and healing.”<sup>61</sup> The Council anticipates submitting its written report to the California Governor’s Office in 2025.<sup>62</sup>

Yet, despite the successes these truth commissions have obtained at the state level, there has yet to be a truth commission created at the federal level.

#### IV. A TRUTH COMMISSION ON INDIAN BOARDING SCHOOLS

Since 2020, a bill has been pending in both houses of Congress for the creation of a Truth and Healing Commission on Indian Boarding School Policies in the United States.<sup>63</sup> Yet, since it was originally introduced in September 2020, little action has been taken on the bill, and the concept of a federal truth commission for Native Americans continues to lie just out of reach.<sup>64</sup> This section will briefly detail the history of the United States’ Indian Boarding School Policy

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<sup>58</sup> *Id.*

<sup>59</sup> See generally, *About the California Truth & Healing Council*, *supra* note 43.

<sup>60</sup> Exec. Order N-15-19, Exec. Dep’t State of Cal. (June 18, 2019), <https://tribalaffairs.ca.gov/cthc/about/>.

<sup>61</sup> *Id.*

<sup>62</sup> *About the California Truth & Healing Council*, *supra* note 43.

<sup>63</sup> See H.R. 8420, 116th Cong. (2020); S. 4752, 116th Cong. (2020).

<sup>64</sup> H.R. 8420 – Truth and Healing Commission on Indian Boarding School Policy Act, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/8420/actions> (last visited Mar. 23, 2022); S. 4752 – Truth and Healing Commission on Indian Boarding School Policy Act, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/4752/actions> (last visited Mar. 23, 2022).

that prompted the introduction of this bill, outline the goals of and minimal progress made on the bill, and advocate for further legislative action.

### A. A Brief History of Indian Boarding School Policies

In the 1800s, through various treaties and federal laws, the United States government turned its attention to eliminating Native American culture by forcibly assimilating the relatively small percentage of Native Americans who had survived centuries of violent settler warfare.<sup>65</sup> A cornerstone of this assimilation policy was the indoctrination of Native American children into white American culture through the use of governmentally funded boarding schools.<sup>66</sup> While some Native families sent their children to these schools voluntarily, many others were either coerced into turning over their children upon threat of government's withholding of rations, clothing, or other essentials, or were restrained as police and soldiers forcibly removed their children from them.<sup>67</sup>

The purpose of these boarding schools was fairly clear; as famously stated by Captain Richard Henry Pratt, who established the first off-reservation Indian boarding school in 1879, "the only good Indian is a dead one ... Kill the Indian in him, and save the man."<sup>68</sup> At these schools, Native children were "banned from acting in any way that might be seen to represent traditional or cultural practices, [and] stripped of traditional clothing, hair and personal belongings and behaviors reflective of their native culture."<sup>69</sup> In addition, at these schools, Native American children were subjected to inadequate living conditions, forced labor, high rates of death and disease, and physical and sexual abuse.<sup>70</sup> These schools often did not return the bodies of the many children who died while at the boarding schools to their families,

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<sup>65</sup> Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L. J. 45, 52 (2006).

<sup>66</sup> See Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 939.

<sup>67</sup> Curcio, *supra* note 65, at 56.

<sup>68</sup> Fletcher & Wenona, *supra* note 66, at 939-40.

<sup>69</sup> *U.S. Indian Boarding School History*, NAT'L NATIVE AM. BOARDING SCHOOL HEALING COALITION, <https://boardingschoolhealing.org/education/us-indian-boarding-school-history> (last visited Feb. 17, 2022).

<sup>70</sup> Curcio, *supra* note 65, at 62-68.

choosing instead to bury them in unmarked graves and off-campus cemeteries.<sup>71</sup>

By 1926, approximately 83% of Native American school-aged children were attending 367 known boarding schools across 30 states.<sup>72</sup> Even after these boarding schools stopped being widely used, they left behind a legacy of historical trauma among the Native American population, severely impacting the mental, emotional, and physical health of the boarding school students and their relatives.<sup>73</sup> Yet despite the severe harm the United States government's reliance on these boarding schools has caused, the general public is relatively uninformed about this dark blight on American history. In fact, the National Native American Boarding School Healing Coalition estimates that less than ten percent of Americans know about the country's use of boarding schools to forcibly assimilate Native Americans.<sup>74</sup>

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<sup>71</sup> H.R. 5444 at 7.

<sup>72</sup> *U.S. Indian Boarding School History*, *supra* note 69. For a list of boarding schools by state, see *List of Indian Boarding Schools in the United States*, NAT'L NATIVE AM. BOARDING SCHOOL HEALING COALITION, <https://boardingschoolhealing.org/list> (Feb. 18, 2022).

<sup>73</sup> See generally, Trigger Points: Current State of Research on History, Impacts, and Healing Related to the United States' Indian Industrial/Boarding School Policy (2019), <https://www.narf.org/nill/documents/trigger-points.pdf> (detailing the wide range of consequences the boarding school policy had on individuals, families, and communities); see also Rukmini Callimachi, *Lost Lives, Lost Culture: The Forgotten History of Indigenous Boarding Schools*, N.Y. TIMES (updated Nov. 17, 2021), <https://www.nytimes.com/2021/07/19/us/us-canada-indigenous-boarding-residential-schools.html> (including stories from former boarding school students who noted that their experience in the boarding schools caused them to experience alcoholism, marriage troubles, and a reluctance to speak their native language).

<sup>74</sup> *Healing Voices Movement-Stories*, NAT'L NATIVE AM. BOARDING SCHOOL HEALING COALITION, <https://boardingschoolhealing.org/education/healing-voices-movement-stories> (last visited Feb. 18, 2022). Additionally, Sam Torres, a director at the Native American Boarding School Healing Coalition, noted that as of 2021, he had identified only five states that even mention Indian boarding schools in their state education content standards. Jenna Kunze, *The vast majority of Americans don't learn about Indian boarding schools growing up. These Native leaders and educators want to change that*, NATIVE NEWS ONLINE (Sept. 13, 2021), <https://nativenewsonline.net/education/the-vast-majority-of-americans-don-t-learn-about-indian-boarding-schools-growing-up-these-native-leaders-and-educators-want-to-change-that>.

### **B. The Proposed Truth and Healing Commission on Indian Boarding School Policy Act**

On September 29, 2020, then Representative Deb Haaland of New Mexico—who now serves as U.S. Secretary of the Interior and whose own grandparents were forcibly removed from their families and placed in Indian boarding schools<sup>75</sup>—and Senator Elizabeth Warren jointly introduced legislation in the House of Representatives and Senate, respectively, calling for the establishment of a Truth and Healing Commission on Indian Boarding School Policy.<sup>76</sup> Specifically, the bill sought to establish a commission to “formally investigate and document” the practices and human rights violations perpetrated through the Indian Boarding School Policies as well as the historical and intergenerational trauma these policies have caused in Native communities.<sup>77</sup> The bill also acknowledged the truth-telling aspect of the commission, explaining that the commission intended to “hold culturally respectful and meaningful public hearings for [Native American] survivors, victims, families, communities, organizations, and Tribal leaders to testify, discuss, and add to the documentation of, the impacts of the physical, psychological, and spiritual violence of Indian boarding schools.”<sup>78</sup>

In addition to its investigatory and truth-telling obligations, the proposed legislation further tasked the Commission with drafting and delivering a report detailing the Commission’s findings and conclusions, along with their recommendations for the United States government to “adequately hold itself accountable for, and redress and heal, the historical and intergenerational trauma inflicted by the Indian Boarding School Policies,” including recommendations addressed at protecting unmarked graves and preventing the continued removal of native children “from their families and reservations under modern-day assimilation practices.”<sup>79</sup>

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<sup>75</sup> Deb Haaland, *Opinion: My grandparents were stolen from their families as children. We must learn about this history*, WASH. POST (June 11, 2021), <https://www.washingtonpost.com/opinions/2021/06/11/deb-haaland-indigenous-boarding-schools>.

<sup>76</sup> H.R. 8420, 116th Cong. (2020); S. 4752, 116th Cong. (2020).

<sup>77</sup> H.R. 5444 at 13,14.

<sup>78</sup> *Id.* at 14.

<sup>79</sup> *Id.* at 26, 29-31.

Under the proposed legislation, the Commission would be advised by an advisory committee staffed with members of different Native American tribes from throughout the United States, including Alaska and Hawaii; health care or mental health care practitioners; boarding school alumni and family members of boarding school students; and representatives from organizations who have expertise in and/or have specialized in rectifying the harms caused by the Indian Boarding School Policies, including those from the National Native American Boarding School Healing Coalition.<sup>80</sup>

Upon introduction, the bill was highly regarded by Native American organizations and legal scholars.<sup>81</sup> However, after its introduction and referral to congressional committees, no further action was taken on either the Senate or House of Representatives legislation.<sup>82</sup> Congresspeople symbolically reintroduced the legislation again on September 30, 2021, the National Day of Remembrance for U.S. Indian Boarding Schools.<sup>83</sup> Yet, as of the publication of this paper, the bill has still not become law.<sup>84</sup>

Despite the lack of progress on the legislation, Deb Haaland—in her role as Secretary of the Department of the Interior—has not given up on efforts to unearth the truths surrounding the Indian Boarding Schools.<sup>85</sup> In June 2021, she announced a Federal Indian

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<sup>80</sup> *Id.* at 21-24.

<sup>81</sup> 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>; *The Truth and Healing Commission on Indian Boarding School Policies in the U.S. Act (H.R. 5444 and S.2907)*, NAT'L NATIVE AM. BOARDING SCHOOL HEALING COALITION, <https://boardingschoolhealing.org/truthcommission> (last visited Feb. 18, 2022).

<sup>82</sup> H.R. 8420 – Truth and Healing Commission on Indian Boarding School Policy Act, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/8420/actions> (last visited Mar. 23, 2022); S. 4752 – Truth and Healing Commission on Indian Boarding School Policy Act, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/4752/actions> (last visited Mar. 23, 2022).

<sup>83</sup> The legislation was reintroduced as H.R. 5444 and S.2907. H.R. 5444, 117<sup>th</sup> Cong. (2021); S. 2907, 117<sup>th</sup> Cong. (2021).

<sup>84</sup> H.R.5444 – Truth and Healing Commission on Indian Boarding School Policy Act, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/5444/actions?r=11&s=1> (last visited Feb. 18, 2022); S.2907 – Truth and Healing Commission on Indian Boarding School Policy Act, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-bill/2907/actions> (last visited Feb. 18, 2022).

<sup>85</sup> See Press Release: Secretary Haaland Announces Federal Indian Boarding School Initiative, U.S. DEP'T OF THE INTERIOR (June 22, 2021),

Boarding School Initiative, by which the Department of the Interior, with formal consultations with Native American tribes and communities, agreed to identify and collect “records and information regarding the Department of the Interior’s own oversight and implementation of the Indian boarding school program.”<sup>86</sup> The Department of the Interior issued its report on the Initiative in May 2022.<sup>87</sup>

### C. The Need for a Federal Truth Commission on Boarding Schools

While the establishment of the Federal Indian Boarding School Initiative and its cumulative report is a step towards transitional justice and the creation of a reliable historical record pertaining to U.S. Indian Boarding Schools, its benefits fall far short of those available through a federal truth commission. As the National Native American Boarding School Coalition has recognized, while the Initiative is a “an important first step,” the Truth and Healing Commission on Indian Boarding School Policy would be “the most comprehensive approach” to truth and healing, in that it would “bring together boarding school survivors with a broad cross-section of tribal representatives and experts in education, health, and children and families to fully express and understand the impacts of this federal policy of Indian child removal.”<sup>88</sup> The Initiative does not provide for public hearings in which victims, survivors, and their relatives can publicly share their stories and the impact the boarding schools had on them, their families, and their communities, as the proposed Commission would.

Congress’s failure to act on the proposed legislation to create the Truth and Healing Commission deprives survivors and their families of the opportunity to tell their stories in a safe, public environment as well as the healing, closure, and empowerment that

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<https://www.doi.gov/pressreleases/secretary-haaland-announces-federal-indian-boarding-school-initiative>.

<sup>86</sup> *Id.*

<sup>87</sup> See generally, *Federal Indian Boarding School Initiative Investigative Report*, U.S. DEP’T INTERIOR INDIAN AFFAIRS (May 2022), [https://www.bia.gov/sites/default/files/dup/inline-files/bsi\\_investigative\\_report\\_may\\_2022\\_508.pdf](https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf).

<sup>88</sup> *The Truth and Healing Commission on Indian Boarding School Policies in the U.S. Act*, *supra* note 81.



comes with that truth-telling. Without the Commission's public hearings, those affected by Indian Boarding Schools will not have the "life-changing" opportunity that participants in the Maine Wabanaki Commission experienced upon being able to tell their story in a "space where [their] voice and others' voices could be heard and believed."<sup>89</sup>

A failure to act on the Truth and Healing Bill also has implications that extend far beyond individuals personally affected by the Indian Boarding Schools. As discussed at length earlier, Native Americans have become largely "invisible" in American culture, and when they *are* recognized it is through a smeared lens of biases and stereotypes.<sup>90</sup> Moreover, Americans specifically have little knowledge of Indian boarding schools, with less than ten percent of the population familiar with this era of history.<sup>91</sup> The Truth and Healing Commission's public hearings would provide Native Americans with a very public platform through which to share their stories and acknowledge the truths of the governmental harms perpetrated against them. Not only would this foster healing among Native American communities, but it would educate the American majority and force the country to acknowledge and accept public accountability for these past wrongs. And this prediction is not mere conjecture. As the National Native American Boarding School Coalition documented, prior to the use of a Truth and Reconciliation Commission in Canada, only 30% of the Canadian population was aware of Canada's use of Indian boarding schools similar to those used in the United States; after the Truth and Reconciliation's work, 70% of the country knew the truth about the human rights violations perpetrated with regard to those schools.<sup>92</sup>

Without the Commission and the potential platform for Native American voices that would be offered through its public hearings, the primary avenue for the public to learn the truth about the U.S. Indian Boarding School Policies will be largely limited to the report issued as part of the Federal Indian Boarding School Initiative. Relatively little of the American public is likely to read a dense, data-driven report issued by the Department of the Interior, whereas public hearings conducted by a Congressional commission would garner much more

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<sup>89</sup> See Martin, *supra* note 57.

<sup>90</sup> See Introduction, *infra* notes 2-18

<sup>91</sup> *Healing Voices Movement-Stories*, *supra* note 74.

<sup>92</sup> See *id.*

public attention, especially if they are televised.<sup>93</sup> Relying solely on the Federal Indian Boarding School Initiative to provide truth and healing for the harms and related trauma caused by the Indian Boarding School Policies would prioritize statistics over stories, and it would provide yet another opportunity for the federal government to craft its own narrative, rather than allowing Native voices to shape their own history.

## V. CONCLUSION

For one of the first times in our nation's history, Native Americans are close to receiving transitional justice for one of many periods of human rights violations committed against them by the United States government. The possibilities provided through the potential Truth and Healing Commission on Indian Boarding School Policy are immense: it could provide victims of the boarding school with closure and a means to start healing; it could help craft an accurate and detailed historical record of boarding school era; and it could provide a public platform on which to elevate Native American voices and their stories. Congress's failure to act on the pending bill for the Truth and Healing Commission on Indian Boarding School Policy Act is just one more blow to Native American communities after decades of harms and trauma. Congress needs to create the Truth and Healing Commission to give Native American survivors a chance to share their stories and be heard and to give the American public an opportunity to listen and learn. As Secretary Haaland has so eloquently stated, "though it is uncomfortable to learn that the country you love is capable of committing such acts, the first step to justice is acknowledging these painful truths and gaining a full understanding of their impacts so that we can unravel the threads of trauma and injustice that linger."<sup>94</sup>

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<sup>93</sup> See generally, Noha Aboueldahab, *The United States Needs a Truth Commission. It Should Be Televised*. FOREIGN POLICY (Jul. 24, 2020), <https://foreignpolicy.com/2020/07/24/united-states-racism-truth-commission-televis-south-africa-tunisia> (explaining the benefits of truth commissions' televised public hearings).

<sup>94</sup> Haaland, *supra* note 75.