Corrective Justice for American Indians

I. INTRODUCTION

As is thoroughly documented, from the early sixteenth century until well into the twentieth century, American Indians\(^1\) suffered extreme hardship and death from the policies and practices of European settlers and governments of the United States. The recognition of these abuses – and the desire to redress these historic wrongs – has led to a range of proposals for corrective justice. These mechanisms include apology, reparations, criminal prosecution, and truth and reconciliation commissions.

II. HISTORICAL OVERVIEW

There is no common body of knowledge in the United States about this shameful part of the country’s history.\(^2\) Between the pre-Columbian era and the late nineteenth century, because

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\(^1\) While some of the literature about American Indians uses the term “Native Americans,” this paper does not do so because “‘Native American’ is a [‘politically correct’] term…[that] perpetuates colonial efforts to subordinate indigenous sovereignty to mere ethnicity….” William Bradford, “With a Very Great Blame on our Hearts”: Reparations, Reconciliation, and an American Indian Plea for Peace with Justice, 27 Am. Indian L. Rev. 1, 9 n.37 (2002) (internal citations omitted) (modifications in original). Instead, this paper uses “American Indian” or “Indian” “to describe the living descendants of the aboriginal inhabitants of the American continent.…[N]ative people generally refer to themselves as members of their own particular nation, tribe, community, pueblo, or village and frequently use the term for themselves found in their own language. If the need arises to refer to themselves as part of the greater population of indigenous people, the chosen term is invariably ‘Indian.’” Robert B. Porter, Strengthening Tribal Sovereignty Through Peacemaking: How The Anglo-American Legal Tradition Destroys Indigenous Societies, 28 Colum. Hum. Rts. L. Rev. 235, 236 n.7 (1997).

\(^2\) See 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 & Comp. Law 1017, 1041 (2001) ("[T]he complete history of westward expansion in the United States and the overall fate of the Indigenous inhabitants of the North American continent has not been widely known and understood by average citizens in past or current generations. In the United States, misinformation and lack of information is the norm when it comes to understanding and acknowledging the history of the country and the treatment of Native Americans over the last several hundred years …. [As a consequence of the revisionist history taught in schools], many American children grow into adults who continue to believe myths, defend false accounts, and deny basic truths that are well known to historians.")
of government and European settler actions, the Indian population in what is now the United States was reduced from millions – estimates range between five and ninety-four million – to three hundred thousand.\(^3\) A range of policies and practices of the US government and settlers contributed to this drastic population decrease.

Germ warfare decimated many Indian tribes. In 1763, Commander General Lord Jeffery Amherst planned to “‘extirpate this execrable race’ by collecting blankets and handkerchiefs from small pox hospitals and distributing them as gifts among Native Americans.”\(^4\) Slavery was another atrocity committed against Indians. This slave trade “involved all the horrors long associated with the worst images of slavery, including beatings, killings, and tribal and family separation…”\(^5\)

Many Indian tribes were massacred, which was legal under state and federal law at that time.\(^6\) For example, in 1874, in the Sand Creek Massacre in eastern Colorado, US troops killed between four and five hundred Indian people.\(^7\) Government officials were in the process of peace negotiations with members of several Indian tribes. One day, the officials sent the adult men away on an expedition, and early the next day, “about seven hundred government soldiers brutally attacked the women, elderly people, children, and remaining men who were asleep in the camp [despite their attempts at surrender]…[and] mutilate[ed]…all or nearly all of the victims’ bodies.”\(^8\)

Beginning in the 1930s, the Bureau of Indian Affairs and the Indian Health Services began a secret forced sterilization program targeting Indian women.\(^9\) Sterilization was

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\(^3\) Bradford, “With a Very Great Blame on our Hearts,” supra note 1, at 22.

\(^4\) Weston, supra note 2, at 1045.


\(^7\) Weston, supra note 2, at 1039; see also Christopher Buck, “Never Again”: Kevin Gover´s Apology for the Bureau of Indian Affairs, 21 Wicazo Sa Review 97, 102 (2006).

\(^8\) Weston, supra note 2, at 1039 (citations omitted).

\(^9\) Lindsay Glauner, The Need for Accountability and Reparation: 1830-1976, 51 DePaul L. Rev. 911, 938-939 (2002) (The forced sterilization policy extended to many low-income women of color. “By 1973, an estimated 100,000 to 150,000 indigent women had been sterilized annually under federally funded programs.”).
performed “under the guise of medical necessity…or…without the woman’s knowledge or consent.”¹⁰ Scholars believe that during the mid-1970s, 25 to 50 percent of Indian women were sterilized.¹¹

Between 1891 and 1978, congressionally funded religious schools forcibly removed Indian children from their homes and placed them in boarding schools where they were forced to stop wearing tribal clothing, speaking tribal languages, and practicing tribal religions. They were forced to do manual labor and were subjected to physical, emotional, and sexual abuse.¹² Indian children were often placed in white families’ homes “to [be] indoctrinate[d]…in the American way of life…..”¹³ Although there has not yet been an extensive study of the long-term impact of boarding schools on American Indian children, it could well have led to mental health problems, mental illness, and substance abuse.¹⁴ Substance abuse can lead to termination of parental rights, thereby perpetuating the cultural destruction of Indian tribes by the US government.¹⁵

The United States routinely broke treaties it made with Indian tribes.¹⁶ Although the government granted Indians rights to certain land through treaties, it often broke these

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¹⁰ Id.
¹¹ Jane Lawrence, The Indian Health Service and the Sterilization of Native American Women, 24 Am. Ind. Q. 400, 410 (2000).
¹² Id. at 942-943 (“In 1891, Congress passed the Indian Appropriation Act, which required all Native American children to attend school and authorized the Bureau of Indian Affairs to withhold federal rations from any Indian family who refused to send their child away to school…. The Indian Child Welfare Act of 1978 brought about the end of the federal government’s policy of forcibly transferring Native American children to boarding schools and white families.”); see also Bradford, “With a Very Great Blame on our Hearts,” supra note 1, at 43.
¹³ Glauner, supra note 9, at 942 (“[T]wenty-five to thirty-five percent of Native American children were transferred from their homes into foster care or adoptive families.”).
¹⁴ See 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, 72-73 (2006) (“[I]n Canada, which had a similar boarding schooling system, studies indicate that many boarding school attendees suffer from…PTSD…[,] half of [whom] were comorbid with related mental illness, such a[s] substance abuse disorder, major depression, and dysthmic disorder…. Suffering from the trauma induced by their schooling, many boarding school attendees were unable to give their own children the nurturing they needed.”).
¹⁵ Id. at 73 (“American-Indian alcoholism, along with lack of ‘parenting skills,’ has been used as an excuse to take American-Indian children from their parents and place those children in either white adoptive or foster homes or in boarding schools, thus perpetuating the destruction of the American-Indian peoples as such.”).
¹⁶ Weston, supra note 2, at 1046-1047 (“The United States government has rewritten or ignored lawful treaties between it and tribes of Native Americans, breaking promises assuring property and hunting rights; courts have failed to uphold the rights of Native Americans, and this has contributed to a broad sense of cultural imperialism with its whole range of exclusionary practices.”).
agreements, arguing “that as ‘discoverers,’ their rights superceded [sic] that of the Native Americans.”\textsuperscript{17} In the late eighteenth century, the federal government granted the Cherokee Nation seventy thousand square miles of land in the southeastern United States, while also promising money to the Cherokees for any land the tribe gave up.\textsuperscript{18} Although pursuant to treaty, the Cherokees ceded a significant amount of land to the federal government, they were never paid.\textsuperscript{19}

In 1830, Congress passed the Indian Removal Act (“IRA”), which allowed the United States government to force Indians from the East to the West.\textsuperscript{20} Two years later, in \textit{Worcester v. Georgia}, the Supreme Court found that state laws did not apply on Indian territory, thereby bolstering the Cherokees’ argument that the federal government could not use the IRA to force them to relocate.\textsuperscript{21} However, President Andrew Jackson refused to enforce this ruling and instead ordered federal troops to force the removal of Indian tribes.\textsuperscript{22} In 1838, the infamous Trail of Tears ensued, when the US military forced the entire Cherokee Nation out of North Carolina, Tennessee, Georgia, and Alabama, forcing them to walk fifteen to twenty miles a day in below-freezing temperatures until they reached Oklahoma.\textsuperscript{23} The march lasted five months,\textsuperscript{24} and about half of the tribe – approximately 4,000 people – died.\textsuperscript{25} This is perhaps the most notorious example of the removal process forced on many Indian tribes. Once Indians were relocated, they were placed on “reservations on marginal or worthless land deliberately [created] to isolate and

\textsuperscript{17} Glauner, \textit{supra} note 9, at 929-930.
\textsuperscript{18} \textit{Id.} at 932.
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.} at 931 (citing the Indian Removal Act of 1830, in Documents of United States Indian Policy 52, 52 (Francis Paul Prucha ed., 3rd ed. 2000)).
\textsuperscript{21} \textit{Id.} at 933 (citing and quoting \textit{Worcester v. Georgia}, 31 U.S. 515 (1832) (“The Cherokee nation is then, a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”)).
\textsuperscript{22} Glauner, \textit{supra} note 9, at 933.
\textsuperscript{23} \textit{Id.} at 933-934; National Park Service, \textit{The Trail of Tears and the Forced Relocation of the Cherokee Nation}, \url{http://www.nps.gov/history/nr/twhp/wwwlps/lessons/118trail/118trail.htm} (last visited August 10, 2011).
\textsuperscript{24} Utah Education Network, \textit{Trail of Tears Timeline}, \url{http://www.uen.org/Lessonplan/preview.cgi?LPid=379} (last visited August 8, 2011).
\textsuperscript{25} Glauner, \textit{supra} note 9, at 934.
control [them]….” 26  Even today, over one third of American Indians and indigenous Alaskans live on state or federal reservations or other state or federal designated lands.27

In sum, boarding schools, germ warfare, forced sterilization, relocation, land theft, and broken treaties all contributed to millions of Indians’ deaths over several centuries; harms for which advocates today continue to seek justice.

III. JUSTICE-SEEKING APPROACHES

Failure to do justice festers in the national conscience as ‘toxic guilt’ that degrades the attractive force of citizenship. By initiating intergroup dialogue and denaturing pernicious group attachments in favor of mutual identification with past tragedies as well as a collective stake in the future, the process of redress can encourage a politics of reidentification in which relegitimized national citizenship and universal concepts of justice become chief repositories of individual loyalties and a nation is born again.
- William Bradford, Chiricahua Apache legal scholar 28

Many justice-seeking approaches have been employed or proposed for redressing the centuries of harm that Indian peoples have suffered at the hands of the United States government and European colonists. 29 These include criminal prosecution, truth and reconciliation commissions (“TRCs”), apologies, and reparations. While there have been small scale apologies and larger scale reparations given, proposals to establish TRCs to provide redress to Indians have been considered but not realized.30

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26 Weston, supra note 2, at 1046.
29 See, e.g., id.
30 See generally, Weston, supra note 2 (A TRC could be a useful model to use to deal with past mistreatment of Indians in part by “sett[ling] factual disputes about the past in order to promote healing among the cultures that continue to coexist in the United States.”).
A. Apology

In spite of the many and long-lasting atrocities committed against American Indians by the US government, the government has never apologized for those wrongs. However, there have been smaller scale, nonetheless significant apologies. In September 2000, Kevin Gover, then Assistant Secretary for Indian Affairs, described the horrors that the US government and the Bureau of Indian Affairs (“BIA”) committed against Indian tribes, and he apologized on behalf of the BIA. His apology was not on behalf of the federal government as a whole, and it was not endorsed or even acknowledged by President Clinton’s White House.

In 2004, then Senator Sam Brownback of Kansas proposed a Senate Joint Resolution to “acknowledge a long history of official depredations and ill-conceived policies by the United States Government regarding Indian tribes and offer an apology to all Native Peoples on behalf of the United States.” This resolution was reported out of congressional committee again in 2007, but Congress never voted on it. In 1993, Congress passed and President Clinton signed the Hawaii Apology Resolution “to acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.” No US president or Congress has ever passed a comparable resolution to apologize to the peoples indigenous to North America.

31 Glauner, supra note 9, at 958.
32 Kevin Gover, Assistant Secretary-Indian Affairs, Address To Tribal Leaders (September 8, 2000), available at http://jaie.asu.edu/v39/V39I2A1.pdf (last visited August 9, 2011) (“As the nation looked to the West for more land, this agency participated in the ethnic cleansing that befell the western tribes…. [T]he deliberate spread of disease, the decimation of the mighty bison herds, the use of the poison alcohol to destroy mind and body, and the cowardly killing of women and children made for tragedy on a scale so ghastly that it cannot be dismissed as merely the inevitable consequence of the clash of competing ways of life. This agency and the good people in it failed in the mission to prevent the devastation…. [T]he legacy of these misdeeds haunts us…. Poverty, ignorance, and disease have been the product of this agency's work…. On behalf of the Bureau of Indian Affairs, I extend this formal apology to Indian people for the historical conduct of this agency.”).
33 Buck, supra note 7, at 97-98 (“Thus, although he was the top BIA official under Clinton’s administration, Gover could not officially speak on behalf of that administration.”).
B. Reparations

Apology and reparations can go hand in hand. Apologies might serve a variety of restorative purposes but arguably do not have any legal force. Reparations appear to be a more concrete outcome of legal process; however, they too can be largely symbolic. Nevertheless, in the international community, reparations are considered one of the remedies to which victims of human rights violations have a right.

Although there has been no large scale reparations program for American Indians, tribes and individuals have sought reparations through litigation, and some of these attempts have been successful. Reparations claims can address two principle goals: first, distributional objectives, and secondly, correcting historical wrongdoing. These goals, which have been identified in the context of African American claims for reparations, could be useful in the American Indian context as well.

Although not a structured reparations scheme, “[i]n 1980, the Supreme Court ruled that the United States owe[d] the Sioux $122 million for stealing the Black Hills. This was the largest monetary judgment in Indian claims history….” The Sioux, however, refused to accept the cash settlement because the tribe wanted its land restored. The response of the Sioux

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37 See Buck, supra note 7, at 107-108 (Gover himself stated that his apology was not legally significant. He went on to say that “it was more of a marker that we had reached a new stage in the relationship between the BIA and the tribes…[and it was] meant to disavow certain policy ideas that are no longer on the table.” William Bradford believes that “the Gover apology is little more than a recognition of moral responsibility that would not be cognizable in a legal forum.”) (Internal citations omitted).
38 See id. at 118 (quoting Bradford, Beyond Reparations, supra note 28, at 48) (Any reparations given to Indians by the U.S. government must be “a symbolic act undertaken in further recognition of moral responsibility, rather than a settlement of claims.”).
39 Glauner, supra note 9, at 957 (“The United Nations has established that a victim’s right to a remedy includes not only access to justice, but also reparations for harm suffered and access to factual information concerning the violations.”) (citing U.N. Econ. & Soc. Council, Comm’n on H.R., The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, U.N. Doc. E/CN.4/62 (Jan. 18, 2000) (prepared by Special Rapporteur, Mr. M. Cherif Bassiouni)).
demonstrates that money is not always appropriate to remedy historic wrongs against Indians. As one scholar put it, “money simply cannot reach, let alone repair, land theft, genocide, ethnocide, and, above all, the denial of the fundamental right to self-determination.”

The Alaska Native Claims Settlement Act of 1971 was a smaller scale reparations scheme implemented for specific Indian tribes. Congress paid almost $1 billion to Alaskan tribes and returned over 40 million acres of stolen land. This money and land were traded for claims to other tribal land, which was used to build the Trans-Alaska pipeline.

Other attempts at reparations have been made. In 2003, a claimant with African American and American Indian ancestry brought suit in federal court seeking reparations from the federal government for its mistreatment of African American and Indian people throughout history. The court dismissed the claim for a variety of procedural reasons, including that “his racial heritage alone does not entitle him to the relief he seeks.”

The Indian Claims Commission (“Commission”), created by Congress in 1946, “was designed to consolidate and adjudicate Natives’ claims against the federal government…. And [Congress] provided that the commission could hear claims that had a moral basis only, not just those based on legal claims.” However, the monetary awards given by the Commission were mostly to individual Indians, which “considerably lessened the amount available to the tribe for such purposes as economic development.” In considering comprehensive reparations schemes, it is important to consider to whom the money is given and whether it is appropriate for reaching the goals of the reparations scheme.

$570 million. Still, the Sioux won't touch it. They say that would be a sellout of the Lakota nation, religion and culture.”); see also BARKAN, supra note 41, at 182-183.

43 Bradford, Beyond Reparations, supra note 28, at 103.
44 BROPHY, supra note 34, at 42.
45 Id.
46 Id.
48 Id.
49 BROPHY, supra note 34, at 41.
Although there have been critiques of the use of reparations to redress harms done to American Indians, reparations serve “to ‘restore’ or ‘repair’ damaged relationships[,]” a goal that is consistent with the restorative nature of indigenous justice systems.

IV. CONCLUSION

While there have been piecemeal justice-seeking approaches to redress the centuries of harm done to American Indians by the US government and European settlers, a host of corrective justice tools remain unused. The federal government can and should employ these on a larger scale. Significant and properly allocated reparations will serve as part of this scheme. There should also be an official federal government apology to American Indians for the harms suffered, and the US government should explore other forms of reparative justice, as appropriate. The creation of a national truth and reconciliation commission may be a promising measure, with reparations and apologies as part of the ultimate outcome. Arguably, “only a committed and holistic program of legal reformation as the capstone in a broader structure of remedies, including the restoration of Indian lands and the reconciliation between Indian and non-Indian peoples, can satisfy the preconditions for justice for the original peoples of the U.S.”

53 Bradford, Beyond Reparations, supra note 28, at 103.