CULTURAL LOSS IN THE CONTEXT OF INDIAN RESIDENTIAL SCHOOL LITIGATION: EXPLORING THE ROLE OF TORT LAW AS A TOOL FOR TRANSFORMATIVE REPARATIONS

by
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The issue of restitution for sexual and physical abuse of survivors of Indian residential schools has gained litigative traction, leaving the issue of reparations for cultural loss in the shadows. This Comment explores the idea of a new tort of cultural loss to more holistically address the systematized harm experienced by Aboriginal children forced into residential schools in Canada. Based on the qualitative experiences of survivors of residential schools, this Comment suggests a taxonomy of cultural loss that may further inform efforts to use tort law as a vehicle for reparative justice. Ultimately, this tort theory demands further inquiry and scholarship, particularly from Aboriginal stakeholders, but may serve as a starting point for future reparations innovations in the face of systematic cultural violence.

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I release you, my beautiful and terrible fear.
I release you.
—Joy Harjo

I. INTRODUCTION

This Comment will propose that a new and nuanced tort claim of cultural loss may serve a reparative role for survivors of the Indian residential schools in Canada. While the Indian Residential School Settlement Agreement (IRSSA) attempted to address the widespread physical and sexual abuse that occurred to children at the schools, it did not go far enough. Residential school survivors suffered profound cultural loss as a result of being forced to attend the schools and the Canadian government's approach to address cultural harms has been limited and lackluster.

This Comment will begin by outlining a brief history of residential schools as an inherently assimilationist program that was meant to deconstruct Native identities. Next, the Comment will explore the deficiencies of current legal remedies providing restitution for cultural loss for survivors, including the Indian Residential Schools Settlement Agreement and past attempts at proving cultural loss as a tort. The majority of the Comment will then focus on what will be called a "new tort of cultural loss." First, the Comment will suggest a substantive taxonomy of cultural loss in the context of Indian residential schools, focusing on the linguistic, spiritual, and familial–ancestral losses survivors experienced. Next, the Comment will explore the procedural aspects of the proposed new tort, suggesting concrete elements that plaintiffs would have to prove, and walking through a claim for a hypothetical survivor. While monetary restitution certainly plays an important role for survivors, the Comment will also explore the idea of the tort claim as a vehicle for transformative reparations. This approach seeks not merely to place the survivor in the same position as they were prior to the harm (i.e., back to the status quo), but to actually deconstruct the systems and policies that caused the harm in the first place. Finally, the Comment will acknowledge the limitations and challenges the tort would face and will suggest the need for further scholarship on the issue.

While the tort of cultural loss would theoretically be available to any individual, group, or community that has been oppressed by state-sponsored violence, it will be analyzed in this Comment exclusively in the context of Indian residential school litigation.

II. HISTORY: RESIDENTIAL SCHOOLS AS AN ASSIMILATIONIST PROGRAM

In order to fully assess the concept of reparations, whether in tort or another form, it is important to briefly discuss the legislative and policy frameworks that made the Indian residential school project possible. In 1920, through a crucial amendment to the Indian Act,[1] the Canadian government made attendance at residential schools mandatory for many Aboriginal[2] children.[3] The attendance of residential schools was thus a state-sponsored program that relied heavily on the bureaucratic and governance mechanisms made possible by the federal Parliament. One key proponent of the Indigenous-focused amendments passed during this time period, Deputy Minister Duncan Campbell Scott, made the intention of ongoing legislation quite clear, saying:

> I want to get rid of the Indian problem. . . . [O]ur object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department that is the whole object of this Bill.[4]

This colonial-assimilationist mentality was integrated into every aspect of the functioning of the residential schools, even their geographic location. Schools were often established in urban areas purposefully far away from the reservations where students were originally from, deterring their return post-education.[5] Residential schools were effectively the education-youth prong of the colonial-assimilationist policy the government had in mind. Such a wholesale attempt at the deconstruction of Aboriginal identity through the forced removal of Aboriginal children is, in many ways, representative of accepted theories on social repression.[6] A somewhat unin-

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[1] An Act to Amend the Indian Act, S.C. 1919–1920, ch. 50 § 1 (Can.), *reprinted in* 2 CONSOLIDATION INDIAN LEGIS.: INDIAN ACTS & AMENDS., 1868–1975.

[2] I will use the term "Aboriginal" throughout this Comment to include First Nations, Metis, and Inuit peoples in Canada.

[3] Mayo Moran & Kent Roach, *Introduction* to Symposium, *The Residential Schools Litigation and Settlement*, 64 U. TORONTO L.J. 479, 480 (2014); Erin Hanson, Daniel P. Gamez & Alexa Manuel, *The Residential School System*, INDIGENOUS FOUNDS., https://indigenousfoundations.arts.ubc.ca/the_residential_school_system (Sept. 2020).

[4] TRUTH & RECONCILIATION COMM'N OF CAN., CANADA'S RESIDENTIAL SCHOOLS: THE HISTORY, PART 1: ORIGINS TO 1939, at 288–89 (2015) (quoting *Evidence of D.C. Scott to the Special Committee of the House of Commons Investigating the Indian Act Amendments of 1920*, *in* NAT'L ARCHIVES CAN., RG 10, vol. 6810, file 470-2-3, vol. 7, at (L-2) (N-3)).

[5] *Id.* at 297.

[6] *See* PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 74 (Myra Bergman Ramos trans., 30th anniversary ed. 2000). In Freire's seminal text on the oppressor–oppressed dynamic he explains, "the interests of the oppressors lie in 'changing the consciousness of the oppressed, not the

tended method—at least in terms of its future voracity and consequences on Aboriginal cultural identity—occurred, however, when the government realized it would cost much more to run and staff the schools than originally intended. At this point, the government outsourced the administration of the schools to churches, where labor by unpaid missionaries and the students themselves would offset costs.[7]

Deputy Minister Scott's colonial-assimilationist vision of absorption thus came full circle, unraveling Aboriginal identity through spiritual, linguistic, familial–ancestral, and geographic means—all within the sphere of the residential school system. As the Royal Commission on Aboriginal Peoples stated, "Residential schools were more than a component in the apparatus of social construction and control. They were part of the process of nation building and the concomitant marginalization of Aboriginal communities."[8]

An estimated 6,000 children died while in residential school, with their bodies often buried in unmarked graves.[9] In total, what has been described by many as "mass human rights violations" occurred to over 150,000 Aboriginal children in Canada.[10] While scholarship has focused on the physical and sexual abuse experienced by survivors of residential school,[11] this Comment will focus on the depth of cultural loss that occurred and how to mitigate that loss in the future.

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situation which oppresses them[.]' . . . [T]he oppressed are regarded as the pathology of the healthy society, which must therefore adjust these 'incompetent and lazy' folk to its own patterns by changing their mentality. These marginals need to be 'integrated,' 'incorporated' into the healthy society that they have 'forsaken.'" *Id.* (quoting SIMONE DE BEAUVOIR, EL PENSAMIENTO POLÍTICO DE LA DERECHA 34 (1963)).

[7] TRUTH & RECONCILIATION COMM'N OF CAN., *supra* note 4, at 290.

[8] 1 RENÉ DUSSAULT, GEORGES ERASMUS, PAUL L.A.H. CHARTRAND, J. PETER MEEKISON, VIOLA ROBINSON, MARY SILLETT & BERTHA WILSON, ROYAL COMM'N ON ABORIGINAL PEOPLES, LOOKING FORWARD, LOOKING BACK 334 (1996), https://publications.gc.ca/collections/collection_2016/bcp-pco/Z1-1991-1-1-eng.pdf.

[9] Kathleen Mahoney, *Indigenous Legal Principles: A Reparation Path for Canada's Cultural Genocide*, 49 AM. REV. CAN. STUD. 207, 208 (2019).

[10] *Id.*; *see also* Jennifer J. Llewellyn, *Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice*, 52 U. TORONTO L.J. 253, 266 (2002) ("This is particularly important in the residential school situation, where the very impetus for the schools was the eradication of Native spirituality, traditions, and culture, things that are understood today as basic human rights.").

[11] *See, e.g.*, Bruce Feldthusen, *Civil Liability for Sexual Assault in Aboriginal Residential Schools: The Baker Did It*, 22 CAN. J.L. & SOC'Y 61 (2007); Kent Roach, *Blaming the Victim: Canadian Law, Causation, and Residential Schools*, 64 U. TORONTO L.J. 566 (2014).

III. WHY CURRENT LEGAL REMEDIES FOR CULTURAL LOSS ARE DEFICIENT

A. The Common Experience Payment Scheme

The two main compensatory schemes of the Indian Residential School Settlement Agreement were the Common Experience Payment (CEP), meant to address language and cultural loss, and the Independent Assessment Process (IAP), meant to address sexual and physical abuse.[12] While the IRSSA used a multi-prong approach to address wrongs experienced by survivors,[13] this Comment will focus on the CEP because of its focus on cultural loss mitigation. The CEP consisted of a $1.9 billion fund to compensate all former students who could prove their attendance at a residential school with a $10,000 payment, plus a $3,000 payment for each additional year of school attendance.[14]

The CEP scheme meant to address, in an aggregate form, the mounting claims of cultural loss that, in the pre-IRSSA era, were often unsuccessful or set aside for more traditionally successful physical or child abuse claims.[15] The lack of success in individual litigation was largely due to claims being based on the concept of cultural loss *writ large*, often referred to as "diminution of aboriginal language or culture,"[16]

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[12] Mahoney, *supra* note 9, at 219; *Indian Residential Schools Settlement Agreement*, GOV'T OF CAN., https://www.rcaanc-cirnac.gc.ca/eng/1100100015576/1571581681571 (June 9, 2021) [hereinafter *IRSSA*]; Carole Blackburn, *Culture Loss and Crumbling Skulls: The Problematic of Injury in Residential School Litigation*, 35 POLAR 289, 292 (2012).

[13] The IRSSA included five unique elements to address the wrongs survivors experienced:

- a Common Experience Payment (CEP) to all eligible former students of Indian Residential Schools
- an Independent Assessment Process (IAP) for claims of sexual or serious physical abuse
- measures to support healing, such as the Indian Residential Schools Resolution Health Support Program and an endowment to the Aboriginal Healing Foundation
- commemorative activities [and]
- the establishment of the Truth and Reconciliation Commission.

IRSSA, *supra* note 12. These five elements attempted to effectuate reconciliation after the traumatic impact of the residential schools, using both Alternate Dispute Resolution techniques and variations on formal tort law.

[14] *Mahoney, supra* note 9, at 219.

[15] Zoë Oxaal, *"Removing That Which Was Indian from the Plaintiff": Tort Recovery for Loss of Culture and Language in Residential Schools Litigation*, 68 SASK. L. REV. 367, 369–70 (2005) ("[T]he federal government has continued to 'vigorously oppose' cultural loss claims in court." (quoting Settlement Agreement Between the Gov't of Can. and the Presbyterian Church in Can. ¶ 6.3 (Feb. 13, 2003), https://web.archive.org/web/20071115052635/http://www.irsr-rqpi.gc.ca/english/pdf/Presbyterian-FINAL-agreement.pdf [hereinafter Presbyterian Settlement Agreement]).

[16] *Id.* at 369 (quoting Presbyterian Settlement Agreement, *supra* note 15 ¶ 6.2).

which did not cleanly fit into any traditional category of tort and was largely undefined.[17]

The CEP was deficient in three distinct ways: (1) it was impenetrably bureaucratic, both to initiate and to corroborate one's claim;[18] (2) it was unavailable to family members of deceased survivors or family members who were affected by their children's forced institutionalization at a residential school; and (3) it was time-limited and has since concluded, disallowing the possibility of restitution to any survivors who are only now reckoning with their cultural loss.[19]

The CEP scheme proved to thwart many survivors because of their lack of evidentiary paperwork or simply an inability to have their claim heard.[20] Many survivors reported that despite multiple calls to obtain the necessary paperwork to apply for the scheme, the right person could never be reached, or the proper contact person was difficult or impossible to find.[21] When survivors did reach an individual who screened for CEP payments, they reported that their accounts of their experiences in residential schools—which were required to be reported—were often met with skepticism or disbelief.[22] Finally, when the September 19, 2011, deadline for filing CEP applications drew nearer, "a series of news reports revealed that a significant lack of documents had led to the denial of many claims."[23] This is all for a program that promised payment, pending only a showing that a survivor attended a residential school.

Additionally, family members of those who survived residential schools were ineligible for restitution or to join CEP applications of survivors.[24] This is a serious limitation of the scheme because it denies that cultural harm to an individual who attended residential school is also communal harm. As will be discussed in Section IV.A.3, children were ripped from their homes to attend residential schools,

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[17] Blackburn, *supra* note 12, at 294.

[18] *See* Robyn Green, *Unsettling Cures: Exploring the Limits of the Indian Residential School Settlement Agreement*, 27 CAN. J.L. & SOC. 129, 139 (2012).

[19] *Id.*

[20] *Id.* at 139–40.

[21] *Id.* at 139.

[22] *Id.*

[23] *Id.* (citing *Lack of Documents Frustrates Residential School Survivors*, CTV NEWS (Sept. 23, 2011, 7:26 AM), https://www.ctvnews.ca/lack-of-documents-frustrates-residential-school-survivors-1.701743; *Lack of Documents Leads to Denied Claims for Residential School Survivors*, GLOB. NEWS (Sept. 22, 2011, 2:29 PM), https://globalnews.ca/news/158124/lack-of-documents-leads-to-denied-claims-for-residential-school-survivors; Jennifer Graham, *School Survivors Can't Get Papers: Feds, Churches Lost Documents*, WINNIPEG FREE PRESS (Sept. 23, 2011, 1:00 AM), https://www.winnipegfreepress.com/canada/2011/09/23/school-survivors-cant-get-papers).

[24] *Id.* at 139–40.

often at young ages, and this type of forcible taking was traumatic for families and children alike.[25]

The final major limitation of the CEP is that the scheme itself has concluded; the application deadline was September 19, 2011.[26] It is unclear what type of institutional redress is available to survivors if they were too uncomfortable or simply unable to successfully apply for the CEP scheme by the 2011 deadline. Evidence about the ongoing health of Indian residential school survivors suggests that they have continued to experience negative health and wellbeing consequences.[27] Survivors who are only now dealing with the effects of cultural loss, or the effect of cultural loss on their kin or children, are effectively barred from any type of recompense.

B. Deficiencies of Existing Cultural Loss Tort Claims

Cultural loss claims pre-IRSSA often failed because of two interrelated facets: the lack of a defined basis in Canadian law, and the rigid reliance of both courts and of the Canadian government and church institutions on this fact. In a 2003 liability-sharing agreement between the Canadian government and the Presbyterian and Anglican churches, the parties found that "no basis exist[ed] at law to [find] a cause of action for the loss or a diminution of aboriginal language or culture arising from or connected to the operation of an [Indian residential school]."[28] Upon the launch of the IRSSA, the Canadian government proposed that to participate in the dispute resolution process (including the CEP and other payment mechanisms for physical and sexual abuse), "claimants would have to sign a release giving up all rights to pursue legal claims for loss of culture and language."[29] While this proposition was eventually abandoned, it elucidates the posture that Canada brought to the IRSSA

[25] *See id.* at 141; Amy Bombay, Kimberly Matheson & Hymie Anisman, *The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical Trauma*, 51 TRANSCULTURAL PSYCHIATRY 320, 321 (2014) ("Although it is important to identify individual reactions to specific historically traumatic events or periods, there has been less attention focused on the interrelated effects of trauma experiences on family dynamics and on whole communities (citation omitted).").

[26] *Common Experience Payments*, GOV'T OF CAN., https://www.rcaanccirnac.gc.ca/eng/1100100015594/1571582431348 (Apr. 22, 2013).

[27] Bombay et al., *supra* note 25, at 323.

[28] Presbyterian Settlement Agreement, *supra* note 15, ¶ 6.2; Settlement Agreement Between the Gov't of Can. and the Anglican Church in Can. ¶ 6.2 (2002).

[29] Thomas L. McMahon, *The Horrors of Canada's Tort Law System: The Indian Residential School Civil Cases*, SOC. SCI. RSCH. NETWORK 1, 15 (June 30, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2983995.

process despite its public acknowledgement that Residential Schools caused cultural harm to children.[30]

The lack of legal basis for a tort of cultural loss was the crux of unsuccessful claims for cultural or linguistic loss. Because of this, survivor-plaintiffs would attempt to join claims of physical and sexual abuse with assertions of cultural loss.[31] These claims, however, were rarely successful, and in some cases would lead to decreased restitution amounts for physical and sexual abuse.[32] This unfortunate outcome was the product of the central conceit of the tort "but for" theory of causation, which asks whether a certain outcome would have occurred but for the existence of a specific alleged cause.[33] The catch-22 of a tort claim for cultural loss was that upon plaintiffs successfully explaining the depth of their cultural loss, judges were often convinced that the harm would have happened *regardless* of the alleged causes (i.e., physical or sexual abuse).[34] Restitution for connected claims of physical or sexual abuse was thus lessened because of the inclusion of a cultural loss claim. Despite recognition by courts in these few cases, the tort itself was never enshrined in law—Canadian policymakers created the CEP-prong of the Settlement Agreement rather than attempt to create a new and substantive tort itself.[35]

IV. A NEW TORT OF CULTURAL LOSS

Prior cultural loss claims in residential school litigation focused on the loss of language or a generalized version of "culture" writ large.[36] This Part will outline the proposed new tort in terms of (1) a substantive taxonomy of cultural loss; (2) procedural mechanics; (3) use as a vehicle for transformative reparations; and (4) its limitations and the need for further scholarship on the subject. The proposed taxonomy of cultural loss or a similar framework[37] accounts for the unique linguistic,

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[30] *See* Stephen Harper, Prime Minister, Can., Statement of Apology to Former Students of Indian Residential Schools (June 11, 2008), https://www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655.

[31] *See* Oxaal, *supra* note 15, at 377.

[32] *Id.* ("[I]f cultural loss is found to be non-compensable, then the 'but for' test must be applied as part of the compensatory principle in damages assessment, and it will lead to significantly reduced damages for a claimant who has argued convincingly of the damages accrued due to cultural loss. In other words, a plaintiff may to some extent have shot himself in the foot by raising the cultural loss damage.") (citing KEN COOPER-STEPHENSON, PERSONAL INJURY DAMAGES IN CANADA 776–77 (2d ed. 1996)).

[33] COOPER-STEPHENSON, *supra* note 32, at 776–77.

[34] Oxaal, *supra* note 15, at 377.

[35] *See generally* Kathleen Mahoney, *How Indigenous Legal Principles Created the Largest Settlement in Canadian Legal History: The Untold Story*, 69 U.N.B. L.J. 198, 222–23 (2018).

[36] Oxaal, *supra* note 15, at 377.

[37] The adoption of such a taxonomy or framework without the input of Aboriginal voices, continued scholarship, and survivor voices would be severely lacking. While this Comment

spiritual, and familial loss inflicted by residential schools. Next, the procedural elements of the tort and how to file a claim will be explained in detail. While successful cultural loss claims would obviously have a clear financial benefit for claimants, the tort could also serve as a vehicle for transformative reparations, which will be discussed in the subsequent Section. Finally, despite the advantages of a cultural loss claim, there are certainly limitations and a need for much more scholarship, particularly scholarship from Aboriginal voices, if this tort will ever be functionally recognized.

A. A Substantive Taxonomy of Cultural Loss

While cultural loss as a concept has been used in individual pre-IRSSA lawsuits, these claims were often eclipsed by what were deemed more understandable or traditional torts to address physical and mental abuse.[38] The claim of cultural loss is an important concept but is a thorny claim to prove. This Comment proposes the recognition of a new tort through a discussion of the unique subtypes of loss that would be involved, specifically in the residential school context, including: (1) spiritual loss; (2) linguistic loss; and (3) familial–ancestral separation. This Section, in particular, is grounded in the voices of survivors themselves through archived qualitative sources.[39]

1. Spiritual Loss

It would be impossible to accurately capture the depth and breadth of Aboriginal spiritual traditions throughout Canada in the scope of this Comment. Instead, this discussion is framed in a binary way, discussing Aboriginal spiritual practices and beliefs on the one hand and traditionally Eurocentric Christianity on the other. Framing these complex religious traditions in this binary way is not meant to be monolithic, but rather to show the stark spiritual contrast and tension for residential school survivors before and after their attendance.

Fred Kelly, from the Ojibways of Onigaming, is a member of the Sacred Law and Medicine Society of the Anishinaabe Nation, of which he is a citizen. Mr. Kelly is also "a survivor of St. Mary's Residential School in Kenora, Ontario, and St. Paul's

attempts to impute Aboriginal voices as much as possible into its discussion, the creation of new torts or new tort frameworks would be intellectually and equitably anemic without major substantive input from survivors, Aboriginal leaders, attorneys, and scholars.

[38] *See, e.g.*, Oxaal, *supra* note 15, at 372–73 (discussing courts' treatment of lawsuits based on cultural loss pre-IRSSA); Mahoney, *supra* note 35, at 210–12 (claiming that cultural loss was not an "actionable" harm under common law).

[39] Where possible, I have named the survivor's place and/or tribe of origin. Survivors who were kept anonymous in source documents were kept anonymous in this Comment as well.

High School in Lebret, Saskatchewan."[40] Mr. Kelly wrote about the innate connection between the Canadian settler-colonial project and Christianity in the context of residential school:

> Given the Eurocentric notion of the discovery of North America, finding the new lands was an act of divine providence that rewarded Christian explorers from the Old World . . . . For the Catholic Church, the prospect of saving untold multitudes of heathens from their godlessness was a daunting mission, yet, nevertheless, one that had to be done in the name of the European God.[41]

Mr. Kelly was only one of many children who were unwitting participants in a spiritual crusade that could not be divorced from the larger European colonial project. As Richard Kistabish, the Vice-Chair of the Aboriginal Healing Foundation, stated:

> In the beginning, we were in balance with the four elements: land, water, fire, and air. They took away our land and waters and repressed our fire (energy). All that was left to us was the air. Then the residential school was introduced to take over our souls and our freedom.[42]

The experience of taking the "souls and freedom" of residential school youth started from the moment they entered the school buildings. A highly symbolic and omnipresent experience for all new residential school youth was to have their long braids, which hold spiritual significance of life force and spirit for many Aboriginal communities, cut off.[43] Another seemingly ubiquitous experience of being a residential school survivor was to be made utterly terrified of going to hell.[44] Spirituality

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[40] Fred Kelly, *Confessions of a Born-Again Pagan*, *in* FROM TRUTH TO RECONCILIATION: TRANSFORMING THE LEGACY OF RESIDENTIAL SCHOOLS 11 (Marlene Brant Castellano, Linda Archibald & Mike DeGagné eds., 2008).

[41] *Id.* at 18.

[42] *Id.* at 23 (Mr. Kistabish is Algonquin, from Val-d'Or, Quebec).

[43] TRUTH & RECONCILIATION COMM'N OF CAN., THE SURVIVORS SPEAK 32 (2015) [hereinafter THE SURVIVORS SPEAK].

[44] Kelly, *supra* note 40, at 24 ("Immediately upon entry into the school, the staff began to beat the devil out of us. Such was my experience. We were humiliated out of our culture and spirituality. We were told that these ways were of the devil."). Survivor Garnet Angeconeb, an Anishinaabe from the Lac Seul First Nation, describes the experience, years after leaving residential school and struggling with alcoholism, of still being "deeply confused about [his] spirituality" and his refusal to believe in Jesus Christ. Garnet Angeconeb & Kateri Akiwenzie-Damm, *Speaking My Truth: The Journey to Reconciliation*, *in* FROM TRUTH TO RECONCILIATION: TRANSFORMING THE LEGACY OF RESIDENTIAL SCHOOLS, *supra* note 40, at 303. Survivors Joseph Martin Larocque and Fred Kistabish discuss classroom situations where nuns and priests at their respective residential schools would explain that if they were "good," they would go to heaven, and if not, they were shown pictures of the devil and told they would go to hell. THE SURVIVORS SPEAK, *supra* note 43, at 87. Another survivor, Vitaline Elsie Jenner, details the experience of a priest bringing her to the front of the class when she was not paying attention and stabbing her hands with headpins so that she would feel the pain Jesus felt on the cross. *Id.* at 87–88.

in residential school thus became a mechanism for punishment rather than a source of solace, through which youth could acquiesce to a Eurocentric Christian God and be rewarded, or be insolently devoted to their original spiritual traditions and be punished.

2. Language Loss

It is difficult to overstate the complexity and importance of Aboriginal language as a foundation of cultural identity. According to the Royal Commission on Aboriginal Peoples, "[i]n Canada, there are 11 Aboriginal language families and more than 50 different languages."[45] The Royal Commission recognized that language, particularly Aboriginal language, is a key aspect of communication, cultural identity, survival, and belonging.[46] The "success" of the residential school program's assimilationist goals thus hinged in large part on the dismantling of Aboriginal languages.[47] Many residential school survivors describe the feeling, upon their first arrival at their respective school, of having no idea how to express themselves or ask for basic things because they did not speak English.[48] One survivor, Arthur Ron McKay, described urinating on himself because he did not know where the bathrooms in his school were and could not ask his teacher because of the language barrier.[49] Punishment was often meted out upon students for speaking their tribal language in lieu of English or French (depending on the school).[50] One survivor from Pine Creek school, Marcel Guiboche, described this experience in vivid detail:

> A sister, a nun started talking to me in English and French, and yelling at me. I did not speak English, and didn't understand what she, what she was asking. She got very upset, and started hitting me all over my body, hands, legs and back. I began to cry, yell, and became very scared, and this infuriated her more. She got a black strap and hit me some more. My brother, Eddie, Edward, heard me screaming, and came to get me.[51]

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[45] *Highlights from the Report of the Royal Commission on Aboriginal Peoples*, GOV'T OF CAN., https://www.rcaanc-cirnac.gc.ca/eng/1100100014597/1572547985018#chp1 (Sept. 15, 2010).

[46] *Id.*

[47] English was one of the main languages spoken in residential schools, but Spanish and French were also used. DUSSAULT ET AL., *supra* note 8, at 341 ("In fact, the entire residential school project was balanced on the proposition that the gate to assimilation was unlocked only by the progressive destruction of Aboriginal languages."); THE SURVIVORS SPEAK, *supra* note 43, at 194.

[48] THE SURVIVORS SPEAK, *supra* note 43, at 47–49 (survivors discussing how their respective residential schools were monolingual environments, speaking either English or French depending on their location). Many students described the experience of being beaten or physically punished by teachers because they could not respond in English or because they did not understand what their teachers were saying. *Id.*

[49] *Id.* at 47.

[50] *Id.* at 47–49.

[51] *Id.* at 48.

In one particularly chilling fictionalization of the residential school experience, author Gordon D. Henry, Jr. describes the experience of a young man who was punished for continuously speaking his own language—he was tied to a post outside in the dead of winter and left overnight.[52] Henry encapsulates the depth of linguistic loss through the experience of this one man, emphasizing through his prose how intricately connected language, ancestry, family, nature, and self are:

> Even so, they heard the punished boy screaming in defiance all night, defending the language, calling wind, calling relatives, singing, so he wouldn't forget. The screaming went on all night, and in the morning, on a bright winter day, when the school fathers went out to untie him, the boy could speak no more.[53]

3. Familial–Ancestral Separation

The third and final facet of the taxonomy of cultural loss in the context of the Indian residential schools is disenfranchisement and separation from family. Residential school survivors often describe their lives as if they have gone to war—there is life before residential school and life after. Life before residential school, while certainly not generalizable to all survivors, is often described lovingly and nostalgically, defined by multi-generational households or communities with strong familial ties.[54] The unique loss brought on by separation from family was thus twofold: there was the initial trauma of being taken away, often at very young ages,[55] and then there were the effects of long-term estrangement.

Kiatch Nahanni, a survivor who attended residential school in the Northwest Territories, described the experience of visiting her father every summer and progressively losing her native language (Slavey), which caused a relational distance between her and her father.[56] Other survivors describe the surreal feeling of coming home after years in residential school to find parents that had remarried, families that moved to completely different regions, or that all of their possessions were lost or sold.[57] Other forms of family estrangement were more insidious and complex,

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[52] Gordon D. Henry, Jr., *The Prisoner of Haiku*, *in* CHILDREN OF THE DRAGONFLY: NATIVE AMERICAN VOICES ON CHILD CUSTODY AND EDUCATION 78 (Robert Bensen ed., 2001).

[53] *Id.* at 78–79.

[54] *See generally* THE SURVIVORS SPEAK, *supra* note 43; Stolen, *Episode 4: Not a Place to Be (S2 Surviving St. Michael's)*, GIMLET (May 31, 2022), https://gimletmedia.com/shows/stolen/49hnbj7/episode-4-not-a-place-to-be-s2-surviving (anonymous survivors from St. Michael's school recall life before residential school, describing visiting daily (or living with) their grandparents, playing with their pets, and living a "happy life").

[55] Stolen, *supra* note 54.

[56] THE SURVIVORS SPEAK, *supra* note 43, at 103.

[57] *Id.* at 104. Survivor Frederick Ernest Koe stated: "[T]hat year [at residential school] had a monumental effect on my life and my relationship with my family . . . . [E]verything that I thought I owned was gone and a month or so later my family moved." *Id.* Another survivor,

linking directly to the larger assimilationist goal of the residential schools, as another survivor described:

> When I was in residential school, then they told me I'm a dirty Indian, I'm a lousy Indian, I'm a starving Indian, and my mom and dad were drunkards, that I'm to pray for them, so when they died, they can go to heaven. They don't even know my mom had died while I was in there, or do they know that she died when I was in there? I never saw my mom drink. I never saw my mom drunk. But they tell me that, to pray for them, so they don't go to hell.[58]

This quote illustrates the complex interplay between the different contributing aspects of cultural loss. Here, spiritual replacement and family estrangement were used by residential school staff as co-informing strategies of de-personalizing and othering children from their own parents. Because the child was far away from family, she was able to be told lies about her mother and father, which were obviously troubling to her; then the same people stating these lies conveniently supplied the antidote: Christian prayer and belief.

Forced family separation also served to rupture traditional Aboriginal methods for traditional and experiential education, which are directly linked to intergenerational learning in Aboriginal communities.[59] Experiential education often occurred through children learning and watching from their Elders, an experience that was taken away by residential schools.[60] Disturbingly, residential school indoctrination was often extremely effective. Survivors describe being told to hate their ancestors and be ashamed of their parents, both because the parents were allegedly "drunkards" and simply because they were Aboriginal.[61] Such indoctrination often resulted in reactions from children not dissimilar from Stockholm syndrome, in which they

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Dorothy Hart, detailed coming back to her mother's house, only to find a man she didn't know at the door who said that Dorothy could not come in. *Id.*

[58] *Id.* (quoting survivor Florence Horassi, who attended residential school in the Northwest Territories).

[59] Beverly Jacobs & Andrea J. Williams, *Legacy of Residential Schools: Missing and Murdered Aboriginal Women*, *in* FROM TRUTH TO RECONCILIATION: TRANSFORMING THE LEGACY OF RESIDENTIAL SCHOOLS, *supra* note 40, at 127.

[60] *Id.* ("For example, in teaching the young, Elders and parents were responsible for teaching the children their way of life.").

[61] *See* THE SURVIVORS SPEAK, *supra* note 43, at 105 (Survivor Mary Courchene recalls, "[I was taught] my people were no good. This is what we were told every day: 'You savage. Your ancestors are no good. What did they do when they, your, your, your people, your ancestors you know what they used to do? They used to go and they, they would worship trees and they would, they would worship the animals.' . . . I looked at my mom, I looked at my dad again. You know what? I hated them. I just absolutely hated my own parents. Not because I thought they abandon[ed] me; I hated their brown faces. I hated them because they were Indians; they were Indian. And here I was, you know coming from [them].").

would go home after years in residential schools and reflect only on how "uncivilized" their parents were.[62]

B. Procedural Components of Cultural Loss

Cultural loss would be an intentional tort that would, functionally under the respondeat superior theory of liability, allow the Canadian government and church institutions to be held liable for the actions of their agents.[63] The tort would need to be mutually insulative from compensation diminution—meaning that if it is raised and proved as a cause of action, it could neither be reduced by, nor reduce other, claims such as sexual or physical abuse. From a theoretical perspective, this insulative property of the tort would serve as a recognition for the depth of communal loss and balance the logic of "but for" causation. By disallowing the tort to be reduced by, or reduce another, co-occurring claim, the scheme would effectively recognize that cultural loss is its own unique type of injury.

Functionally speaking, claims for cultural loss would include the following five elements:

1. The defendant must act intentionally or recklessly towards, or in accordance with state-sponsored policy that focuses on the oppression, assimilation, or structured prejudicial treatment, of
2. A particular social group whose membership is based on ethnic, racial, religious, gender, or sexual identity;
3. The defendant's conduct must be extreme and outrageous; and
4. The conduct must be the cause of
5. Profound cultural loss, including, but not limited to, linguistic norms, spiritual traditions, and ancestral connections.

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[62] *See id.* (Survivor Mary Courchene states, "So I, I looked at my dad and I challenged him and he, and I said, 'From now on we speak only English in this house,' I said to my dad. And you know when we, when, in a traditional home where I was raised, the first thing that we all were always taught was to respect your elders and never to, you know, to challenge them. And here I was eleven years old, and I challenged."); *see also* Embe, *Stiya: Or, A Carlisle Indian Girl at Home*, *in* CHILDREN OF THE DRAGONFLY: NATIVE AMERICAN VOICES ON CHILD CUSTODY AND EDUCATION, *supra* note 52, at 50–55 (a fictional portrayal of an Aboriginal girl returning to her parents after years in residential school who, in addition to critiquing her parents parochial ways, most notably refers to her own people as "the Indians," showing the depth of residential school deculturation). For a discussion on Stockholm syndrome, see Michael Adorjan, Tony Christensen, Benjamin Kelly & Dorothy Pawluch, *Stockholm Syndrome as Vernacular Resource*, 53 SOCIO. Q. 454, 454–55 (2012).

[63] *See, e.g.*, Julie A. Dabrusin, *A Framework for Assessing Vicarious Liability: Guidelines Set Out in Two Supreme Court of Canada Decisions*, ROGERS PARTNERS LLP (2000), https://www.rogerspartners.com/wp-content/uploads/2016/06/A-Framework-for-Assessing-Vicarious-Liability.pdf (discussing the Supreme Court of Canada's consideration of respondeat superior "in the context of two sexual abuse cases involving employees").

These elements look somewhat similar to those for the tort of intentional infliction of emotional distress (IIED) in the U.S. legal system, which "limits recovery to 'severe emotional distress' caused by 'extreme and outrageous conduct.'"[64] This is because, like IIED, there is no physical action (or at least no *singular* physical action) that causes the loss of cultural harm. However, there are several additions to this proposed draft tort that differentiate it from IIED. First, the addition of "or in accordance with state-sponsored policy that focuses on the oppression, assimilation, or structured prejudicial treatment, of" to the "intentionally or recklessly" language of the traditional IIED tort is meant to account for actors who may act involuntarily but still inflict harm. Without this addition, an individual, or even an institutional actor could argue that because they were acting in accordance with state policy (to, for example, cut off the braids of all incoming Aboriginal children at a given residential school) they acted neither intentionally nor recklessly. This addition addresses such a potential loophole in the case of state-sponsored cultural pogroms.

Additionally, the second element would account for specific identity groups that may be targeted for cultural loss, recognizing that vulnerable or historically marginalized groups are more likely to experience cultural loss than other groups. Requiring membership to an identity group also ensures that communal loss is fundamental to the tort, even if it is brought by an individual claimant. Finally, the fifth element accounts for the taxonomy of cultural loss outlined in this Comment. Again, it should be highlighted that the sub-elements discussed here—linguistic, spiritual, and familial–ancestral losses—are not exhaustive and are tailored for the residential school context.

In practice, a hypothetical plaintiff who is a survivor of an Indian residential school would first provide some type of minimally adequate evidence or testimony that they are a member of a particular social group. This requirement should not be overly restrictive, such as demanding official documentation of tribe membership, to prevent further privacy invasion or hegemonic gatekeeping than has already likely occurred. Next, the plaintiff would cite the defendant's act and specify whether the act was reckless, intentional, or mandated by a state policy. In the case of the hypothetical residential school survivor, they would cite the Canadian government's national policy that sent children to residential schools and could cite specific examples of individuals committing tortious acts on account of this policy.[65] The plaintiff would concurrently show that the defendant's conduct was extreme and outrageous,

[64] Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-CIV. LIBERTIES L. REV. 133 (1982), *reprinted in* A TORTS ANTHOLOGY 30 (Julie A. Davies, Lawrence C. Levine & Edward J. Kionka eds., 2d ed. 1999) (quoting RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965)). The elements of IIED in the Canadian legal system differ slightly, but for purposes of this Comment, I have focused on the tort of IIED in American law.

[65] Tortious acts might include cutting off childrens' braids upon entering the school, forcing them to learn English, and denying them the ability to practice their native religion.

as with an IIED claim. This would be theoretically easier to prove in this context because the state policy of assimilation is, in itself, an extreme and outrageous measure. Recovery would also be available for the perceived feelings and experience of the plaintiff, such as humiliation, fear, shame, and sadness.[66] The tort would need to be distinct from IIED, however, because the type of injury suffered in these cases (and by hypothetical future plaintiffs) is beyond mere emotional distress by an individual. The type of harm inflicted by a cultural attack is, in many ways, unique.[67] Finally, the plaintiff would show that, on account of the specific tortious acts experienced in residential school, they suffered profound cultural loss. Without question, the initial claimants would bear a heavy burden of illustrating cultural loss—that, but for their forced attendance at a residential school, they would have enjoyed the benefits of their native culture. However, this could be proved by a comparison to a population of Aboriginal children who evaded residential school attendance, and the strength of their linguistic, spiritual, and familial connections in comparison to the plaintiff who did attend a residential school.

Several complications would arise in the filing of the cultural loss claim, including liable parties and statutes of limitation. In terms of liability, most of these claims—again, in the context of residential school litigation—would likely be joint claims, attaching a suit against the Canadian government, for example, to a suit against specific clergy that carried out the physical harm. Statutes of limitation would present a particularly difficult issue, since lawmakers would likely prefer to limit liability as much as possible for the government. This is because the effects of cultural loss—like the effects of emotional distress, or sexual and physical abuse—could theoretically last a lifetime or even be intergenerational.[68] While limitations of the tort and the need for further scholarship will be discussed in more detail later in the Comment, a liberal statute of limitations would be highly preferred for survivors, who may not have the opportunity to reckon with their trauma until decades later.

C. Transformative Reparations

While traditional tort claims result in individual, or even sometimes mass, payouts, the cultural loss claim proposed in this Comment should be grounded in the concept of transformative reparations. Because the tort itself is a social justice mechanism meant to address structural oppression, the benefits of the tort would be

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[66] *See* Delgado, *supra* note 64, at 28, 30.

[67] *Id.* at 32; *see also* Andrew M. Subica & Bruce G. Link, *Cultural Trauma as a Fundamental Cause of Health Disparities*, SOC. SCI. & MED., Jan. 2022, at 1, 1–2.

[68] *See* Kimberly Matheson, Ann Seymour, Jyllenna Landry, Katelyn Ventura, Emily Arsenault & Hymie Anisman, *Canada's Colonial Genocide of Indigenous Peoples: A Review of the Psychosocial and Neurobiological Processes Linking Trauma and Intergenerational Outcomes*, INT'L J. ENV'T RSCH. & PUB. HEALTH, June 2022, at 1–28; *see also* Subica & Link, *supra* note 67, at 2, 5.

aimed at dismantling the underlying causes that created the tortious action in the first place.[69] In this way, the effect of successful cultural loss claims would be "not only of restitution, but also of rectification."[70] This would depart from the traditional tort notion of restitution as a mechanism to place the person in the position they would have been prior, or back to the status quo.[71] Rather, a tort of cultural loss grounded in a transformative reparations approach would seek to, in some way, dismantle the "structural context of violence and discrimination" that caused the harm in the first place.[72] This approach would also address the intergenerational harm created by residential schools. National-level data from the First Nations Regional Longitudinal Health Survey and the Aboriginal Peoples Survey showed that "having a familial history of [residential school] attendance interacts with current stressors to influence well-being" and that trauma responses may accumulate across generations.[73] Beneficiaries of cultural loss claims would thus need to be expanded to include descendants of those who attended residential schools, rather than solely the survivors themselves.

In practice, cultural loss claims as a vehicle for transformative reparations could include the following types of benefits for successful claimants:

1. Allocating a percentage of all successful claims to a national fund for survivor support;
2. Guaranteeing mental health treatment upon the claimant's request;
3. Allocating any attorney's or contingency fees to be paid into a re-culturation trust aimed at restoring Aboriginal traditions and practices.

A successful cultural loss claim would thus not be a merely monetary payout, but serve as a vehicle for communal restitution, seeking to address the depth of communal harm caused by residential schools. A veritable suite of restitution, including payouts to national funds or trusts run by Aboriginal leaders and organizations, would make the tort more meaningful as a tool for transformative reparations. This aspect, in particular, would need to be fully informed by survivors and Aboriginal leaders so that restitution itself does not reaffirm existing top-down power structures that inhibit Aboriginal voices. Such a unique approach to restitution would

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[69] *See* FRANCESCA CAPONE, REPARATIONS FOR CHILD VICTIMS OF ARMED CONFLICT: STATE OF THE FIELD AND CURRENT CHALLENGES 132 (2017).

[70] *Id.* at 133 (quoting González v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 450 (Nov. 16, 2009)).

[71] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 903 (AM. L. INST. 1965).

[72] CAPONE, *supra* note 69, at 133 (quoting *González*, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 450).

[73] Bombay et al., *supra* note 25, at 323–24 ("37.2% of adults who had at least one parent who attended [Indian residential schools] thought about committing suicide in their lifetime, compared to 25.7% of those whose parents did not attend. . . . 26.3% of First Nations youth with a parent who attended IRS had thought about suicide, whereas 18.0% of non-IRS youth reported such suicidal ideation (citation omitted).").

attempt to address the way past injustices affect current opportunities, such as the ability to obtain jobs or maintain ties with family members.[74]

While certainly not without its limitations, situating this process within the judiciary would in many ways legitimize reparations through the use of the courts, particularly to those who would criticize blanket payments, as the IRSSA allowed for a short period.[75] Ideally, using the tort of cultural loss as a reparations mechanism for survivors would also have a more minimal chance of re-traumatization. Truth and reconciliation committees and public forums, while certainly each having their own roles in the wake of mass violence or cultural genocide, can serve to further traumatize survivors, who may tell their story in public for the purpose of "reconciliation," without any meaningful closure or consequence afterward.[76]

Recognition of the tort of cultural loss may thus serve a role in dismantling the political mythology of Canadian-Aboriginal relations. Recognition that residential schools were not a good idea gone bad, but an intentional program that was meant to result in profound cultural loss would legitimize the entitlement survivors are due. The role of a cultural loss claim as a mode of reparations serves to foment "public recognition of the severity, and (crucially) the contemporary relevance of [the wrong that] transpired."[77] This can establish what has been called a "common baseline of historical memory," which is integral for the significance of the past injury to become part of current policy discourse.[78] Compensation via a cultural loss tort thus serves a reparative function both to paying survivors while also forcing the injuring party (i.e. church institutions and the Canadian government) to admit, even in small part, that it is accountable for its injurious actions.

D. Limitations of the New Tort

While creating a new tort of cultural loss may be useful for survivors of Indian residential schools in Canada, it is not without its limitations and would certainly

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[74] *See* Rebecca Tsosie, *Acknowledging the Past to the Heal the Future: The Role of Reparations for Native Nations*, *in* REPARATIONS: INTERDISCIPLINARY INQUIRIES 43, 47–50 (Jon Miller & Rahul Kumar eds., 2007).

[75] *IRSSA*, *supra* note 12.

[76] *See* Anne-Marie Reynaud, *Dealing with Difficult Emotions: Anger at the Truth and Reconciliation Commission of Canada*, 56 ANTHROPOLOGICA 369, 376 (2014); *see also* JACOBUS CILLIERS, OEINDRILA DUBE & BILAL SIDDIQI, INNOVATIONS FOR POVERTY ACTION, SIERRA LEONE: DOES RECONCILIATION HEAL THE WOUNDS OF WAR? 3 (2016), https://poverty-action.org/reconciliation-conflict-and-development-field-experiment-sierra-leone (showing that, for some survivors of "devastating" Sierra Leone civil war, speaking publicly about their experience increased levels of PTSD).

[77] Glenn C. Loury, *Transgenerational Justice—Compensatory Versus Interpretive Approaches*, *in* REPARATIONS: INTERDISCIPLINARY INQUIRIES, *supra* note 74, at 104.

[78] *Id.*

require further scholarship. The two broad categories of limitations that arose during literature review and analysis were (1) the limitations of compensation; and (2) the evidentiary burden on survivors.

1. The Issue with Compensation

The two main issues with compensation for a cultural loss tort would be the difficulty of calculation and limitations of corrective justice. Compensatory restitution in cases such as the Indian residential schools litigation can be characterized as a limited form of corrective justice, in which the harm can never truly be rectified regardless of the amount paid out.[79] As well, the type of harm that the proposed cultural loss tort would attempt to mitigate is extremely amorphous, arguably even more so than harms based on sexual or physical abuse. While the additional types of restitution outlined in Section IV.C attempt to rectify this issue, individual claimants would likely still be looking to address individual harms.

Despite the theory of communal loss and reparations imbued in the proposed tort, individual cultural loss claims would still be based on corrective justice, seeking to mitigate an individual harm. Torts scholar John Goldberg offered five main theories of tort for the 20th century: (1) compensation deterrence theory; (2) enterprise liability theory; (3) economic deterrence theory; (4) social justice theory; and (5) individual justice theories, including corrective justice theory.[80] Individual tort claims typically fall into the corrective justice theory, in which there is some type of "interference" or friction between the perpetrator and the victim, effectually denying the rights of the victim in some way.[81] The remedy, per corrective justice theory, is that some type of material transfer from perpetrator to victim will remedy the inflicted harm.[82] The inherent limitation of this method, though, is its inability to genuinely account for intangible harms. In the case of cultural loss, nearly all the harms are intangible. It would be extremely difficult, for example, to calculate the effect of losing one's native language in dollars and cents. However, there is also an argument that any type of payment from the wrongdoer—even if its calculation was an approximation—is itself a type of recognition. The input of torts scholars on the financial calculations of other intangible harms, such as IIED, would be extremely helpful in ironing out this limitation of compensation.

[79] *See* Jacob Bronsther, *The Corrective Justice Theory of Punishment*, 107 VA. L. REV. 227, 255, 274 (2021).

[80] John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 514, 570 (2003).

[81] Llewellyn, *supra* note 10, at 274.

[82] *Id.* at 275.

2. The Issue of Proof

The second large category of limitation for a new tort of cultural loss in the context of Indian residential schools would be the evidentiary burden on the plaintiff. The threat of re-traumatization and the threshold of evidence required to prove a claim are the primary issues surrounding proof for cultural loss claims.

Survivors of Indian residential schools have already been through complex trauma, the extent of which is likely not limited to cultural loss alone.[83] Proving one's cultural loss may serve to re-traumatize survivors by reviewing the details of their experiences, some of which may have occurred decades ago. It is also likely that a survivor would not be filing a cultural loss claim alone but jointly with other claims (such as sexual or physical abuse).[84] While this serves an efficiency purpose for the judiciary and for the claimant, it would expand the type of harm the plaintiff would have to revisit psychologically during litigation.

There may also be an issue with the threshold of evidence required to prove a claim of cultural loss. As outlined in the elements of the claim, the claimant would be required to make a showing of cultural loss, which may be difficult. If possible, it would be helpful to have data on the counterfactual experience of Aboriginal youth who somehow evaded residential schools. While such research could not be found in the literature review for this Comment, scholars on this issue should be sought out. Without this control group, the harm itself will be difficult to quantify. The claimant would likely have to make testimony on the depth of their loss and have this be qualitatively corroborated by family members or peers in their community. While certainly not impossible, the initial claims may be extremely arduous to litigate.

CONCLUSION

Indian residential schools in Canada were part of an assimilationist program that sought to disappear Aboriginal identity. The schools attempted to disenfranchise thousands of youth from their native spiritual traditions, family connections, and languages. While the physical and sexual abuse that occurred at residential schools has received major attention from the public and from litigation efforts, the more nuanced harm of cultural loss remains an open question. The Indian Residential School Settlement Agreement sought, in its own way, to address cultural loss through Common Experience Payments, but this scheme had several limitations and sidestepped the role of a cultural loss tort claim in ongoing and future related litigation.

This Comment has proposed a new tort of cultural loss to give survivors of residential schools another recourse for healing and justice. A taxonomy of cultural

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[83] *See, e.g.*, THE SURVIVORS SPEAK, *supra* note 43, at 36, 59, 121.

[84] *See id.* at 153–64.

loss further elucidated what such a claim could look like if it truly addressed the myriad harms of the residential school system. While spiritual, linguistic, and familial–ancestral loss are the main tenets of cultural loss proposed in this Comment, these losses should only serve as the start of a more nuanced conversation including Aboriginal advocacy, scholarship, survivors, and attorneys. While cultural loss would serve as a compensatory scheme in itself, its use as a tool for transformative reparations should be capitalized on to further entrench Aboriginal sovereignty. It can also be used to continually hold the Canadian government accountable for the cultural violence it has inflicted on Aboriginal communities.

The residential schools inflicted immense harm on thousands of children for decades. In some ways, survivors may feel like they are still caged by the institutions where they were sent. Adequate creation of reparations mechanisms and enforcement should be similarly nuanced and profound. While the tort of cultural loss should only be one small part of a larger reparative framework for residential school survivors, it is a start. The children who have been so profoundly harmed, and the adults they have become today, deserve at least that much.