

Truth, Justice, and the War on Terror

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## DEDICATION

This is dedicated to those who strive for human rights, justice, and dignity for all.

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## ABSTRACT

### TRUTH, JUSTICE, AND THE WAR ON TERROR

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This thesis examines whether a truth commission could be an effective means for establishing truth and serving justice for the abuses committed in the war on terror. Although truth commissions have generally been implemented in contexts that fall within the realm of transitional justice, this study applies the work of previous truth commissions to the non-transitional context in the United States. As such, this thesis includes research focusing on methods that previous truth commissions have employed in their pursuit of truth and justice, and evaluates whether and how such methods could be applied to the war on terror. Among other things, previous truth commissions' efforts to express the complex origins and consequences underlying widespread human rights violations could be applied to establish a comprehensive understanding of the genesis and fallout for the abuses committed in the war on terror. In a similar respect, the victim-centered approach employed in previous truth commissions could serve restorative justice, which promotes concepts such as reform and reconciliation in a manner that

augments traditional tenets of justice that tend to focus on wrongdoer accountability.

While the relative effectiveness of a truth commission for the war on terror remains theoretical because there is no specific precedent for non-transitional governments, this thesis concludes that a truth commission could be uniquely tailored to suit the needs of the United States in order to establish the truth and serve justice for the abuses committed in the war on terror.

## 1. INTRODUCTION

On June 5, 2008, Richard Clarke, former counter-terrorism advisor to the Clinton and Bush Administrations, appeared on Countdown with Keith Olbermann to discuss the latest revelations contained in a Senate Intelligence Committee report on pre-war Iraq intelligence. The report confirmed that the Bush Administration's reasons for going to war with Iraq, including claims linking Iraq to the so-called "war on terror," were based on "unsubstantiated, contradicted, or even non-existent" intelligence (Senate Intelligence Committee). When asked what remedy, other than impeachment, could be implemented to redress the Bush Administration's unsubstantiated claims in the lead up to the Iraq war, Clarke responded:

There may be some other kind of remedy. There may be some sort of truth and reconciliation commission process that's been tried in other countries, like South Africa, El Salvador, and what not, where if you come forward and admit that you were in error, admit that you lied, admit that you did something, then you're forgiven. Otherwise, you are censured in some way. I just don't think we can let these people back into polite society and give them jobs on university boards and corporate boards and just let – pretend that nothing ever happened when there are 4,000 American dead and 25,000 Americans grievously wounded. And they will



carry those wounds and suffer all the rest of their lives. Someone should have to pay in some way for the decisions that they made to mislead the American people.

Clarke's call for accountability suggests a need for truth and justice in relation to the Bush Administration's misleading the American people at least with respect to the Iraq war, which resulted in thousands of dead and wounded Americans. In addition, Clarke's suggestion that some sort of truth commission could provide a means for dealing with these issues further signals the need to uncover the truth regarding the Bush Administration's unsupported assertions about Iraq, just one component of the controversial and often concealed practices in the greater war on terror. Similarly, when commenting on the United States government's potential war crimes such as the torture of detainees, New York Times columnist Nicholas Kristof has also called for a truth commission with the power to investigate such abuses and hold the responsible parties accountable. Nonetheless, although previous truth commissions have been able to provide many with truth as well as justice regarding past abuses, it is worth noting that truth commissions have tended to operate in transitional countries recovering from massive human rights abuses and violent internal conflicts (Hayner 17). Thus, because the United States is generally considered to have established institutions and legal traditions, this thesis addresses whether a truth commission would be an effective and appropriate means for establishing truth and serving justice for the abuses committed in the war on terror.

The phrase “war on terror” first arose in response to al Qaeda’s terrorist attacks on September 11, 2001. In a speech to a joint session of Congress on September 20, 2001, then-President Bush said, “Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.” Following this speech, the Bush administration, the media, and ultimately the American public adopted the phrase “war on terror” to refer to the Bush administration’s counter-terrorism policies and the military and intelligence operations that accompanied new anti-terror legislation in the United States (Wilson 1). Although the phrase “war on terror” has been invoked colloquially in a manner that ostensibly captures a broad range of policies, practices, and objectives, what has actually occurred under the rubric of the war on terror can hardly be stripped down to a mere phrasing. Though the war on terror certainly encompasses various legitimate counter-terrorism efforts, after the better part of a decade, controversial and secretive practices that defy claims of legality and challenge basic tenets of morality have become the enduring hallmark of this paradigm. As information regarding torture and other abuses committed in the war on terror has slowly trickled into the public domain, the demand for an authoritative accounting has quickly grown beyond the point where it can continue to be ignored.

Truth commissions are best defined and understood in the following ways. Truth commissions are authoritative bodies implemented to deal with past human rights abuses, and typically established by presidential decree (Hayner 5). They are most often recognized as mechanisms for establishing the “truth about past injustices,” and have

several important aims that operate in relation to their primary function (Kiss 71).

According to truth commission expert Priscilla B. Hayner, truth commissions have five overarching goals: to discover and officially acknowledge past abuses; to assist in achieving accountability and justice for such abuses; to address the needs of abuse victims; to chart out institutional accountability and recommend reforms to prevent recurrences of abuse; and to encourage reconciliation and limit differences over what happened in the past (24). Additionally, truth commissions are generally considered independent bodies that operate outside of a nation's justice system. Thus, truth commissions do not issue final judgments on legal criminality or sentence perpetrators to punishment. Instead, truth commissions focus more on the form of justice known as restorative justice, which centers on the needs of victims and disruptions to societal equilibrium.

The shroud of secrecy surrounding controversial practices such as military commissions and secret deportation hearings suggests a need for truth and justice regarding these and other policies associated with the war on terror. Considering the range and severity of the abuses alleged to have been committed, no mechanism that has the potential to bring about truth and justice should be ignored. In order to determine whether a truth commission would be effective in addressing these concerns, further investigation of the complexity and characteristics of the issues is needed. In particular, the ideologies, policies, and abuses associated with the war on terror have widespread ramifications that may stretch beyond damage done to any individual person, implicating legal and moral concerns that lie at the heart of freedom and democracy. As such, in

view of the compelling and urgent nature of the questions that these controversial practices raise, this study will consider whether a truth commission for the war on terror would be an effective mechanism for uncovering the truth and serving justice, thereby restoring balance to our legal and moral framework.

## 2. LITERATURE REVIEW

Literature addressing the potential abuses committed in the name of the war on terror often focuses on two main issues: violations of international law and human rights violations. While these approaches are not mutually exclusive, for international law frequently deals with protection of human rights, the latter approach sometimes emphasizes principles of morality while the former tends to focus more on legality. In addition, literature that deals with bending or breaking the law tends to concentrate more on the perpetrators, while works dealing with human rights concentrate more on the victims. These issues of morality, human rights, and justice centered on victims versus punishment often appear in literature related to truth commissions and the subject of justice. Together, these sources offer valuable information pertaining to the effectiveness of a truth commission in terms of establishing truth and justice in the war on terror.

In his article, “The Tension between Combating Terrorism and Protecting Civil Liberties,” Richard Goldstone takes a historical approach to the Bush Administration’s war on terror, placing it within the context of human rights law and democracies struggling to protect human and civil rights while also fighting terrorism. Goldstone argues the necessity of addressing the “ambiguity in the policy and practice” of the United States’ government in its failure to protect civil and human rights in the war on terror (163). He further asserts that the United States’ war on terror is nothing new, and

that the Bush Administration should therefore not claim extraordinary or exigent circumstances to justify evasions of human rights law (157, 163).

Goldstone uses both legal reasoning and an appeal to readers' principles and morals in making his case against what he perceives to be the Bush Administration's violation of human rights in the war on terror (163). He argues, for instance, that the military tribunals that the Bush Administration established for reviewing the status of detainees are inconsistent with the Supreme Court decisions holding that all detainees have the right to challenge the basis for their detention before a "competent court" (164). Goldstone also notes that the indefinite detention of prisoners at Guantánamo Bay violates the presumed innocence principle of the Rule of Law (162). In terms of principles and morals, Goldstone states that "[t]hose who value the protection of human rights and the dignity of all people should remain vigilant in these difficult and worrisome times" (167). This direct reference to values and dignity demonstrates the extensive use of morality in his argument.

Goldstone's dual moral and legal approach addresses those who are responsible for criminal violations as well as the victims of these violations. This approach is similar to that taken in truth commissions, which provide space for both victims and oppressors to share their experiences and actions (Kiss 72). Goldstone speculates, moreover, that historians will view the post-9/11 impediments on human rights as "an unfortunate detour and not a roadblock" (167). However, for historians to make an informed judgment on this chapter of history, the truth about practices in the war on terror, such as secret

deportation hearings, should be known: a truth commission could also assist in this endeavor.

In “Military Necessity and Due Process: The Place of Human Rights in the War on Terror,” Anthony Dworkin challenges the American government’s application of international law to the armed conflict known as the war on terror and the justifications for the “most controversial policies” related to this conflict (53). He asserts that the government of the United States has improperly relied on the international laws of war to validate practices such as the detention of enemy combatants, because this armed conflict differs from the type that would fall under the laws of war. Instead, Dworkin argues that the war on terror falls under the category of “armed conflict that is not between states,” and as such, international law does not sanction any military action (54). Thus, he proposes that the best way of regulating this form of armed conflict would be through domestic laws, specifically human rights law (55).

Dworkin focuses on international law in his approach to the abuses committed in the war on terror. Accordingly, the evidence he uses to support his argument, while sufficient, is based primarily on legal analysis. Dworkin offers exemplary characteristics of the war on terror that do not fall under the legal category of traditional war to argue that it should not be considered a traditional war in terms of the application of international law (58-59). For example, despite the Bush Administration basing its authorization to use military force against al Qaeda suspects on the laws of war, he notes that these laws do not support the Bush Administration’s notion that one side of the conflict is permitted to use force while the other side is not (62). Thus, in thoroughly

explaining how elements of international laws that apply to wars are incongruous with the characteristics and practices of the war on terror, Dworkin uses legal analysis to refute the Bush Administration's legal interpretations and question its most controversial practices.

Dworkin's assertion that the controversial policies in the war on terror are the result of the Bush Administration's novel interpretations of the international laws of war seems to suggest the need for accountability for these practices. Yet for the most part, he only proposes human rights law as a viable remedy. While his suggestion may be useful in informing how the American government can correct prior legal failures in the war on terror, Dworkin primarily focuses on establishing the laws that do and do not apply to the conflict. Thus, he only briefly addresses the issue of legal accountability in terms of scrutinizing the Bush Administration's management of this armed conflict (73). Nonetheless, Dworkin's assertion that a proper understanding of the laws that apply to the war on terror leaves room for future steps towards truth and justice, possibly in the form of a truth commission.

David Luban also addresses the Bush Administration's legal reasoning underlying the management of the war on terror in "The War on Terrorism and the End of Human Rights." He draws sharp distinctions between the rules of law and the rules of war in discussing the war on terror. Luban argues that in "selectively combining" aspects of the rules of law and the rules of war, the Bush Administration utilized a "hybrid war-law" approach in the war on terror, widening the scope of action and potentially threatening the rights of innocents (414). To support his argument, Luban systematically lays out the



ways in which the rules of war allow freer rein than the rules of law, and how selected rules of law can replace some of the more restrictive rules of war (413-14). Furthermore, Luban provides specific examples of how the hybrid war-law approach works in the war on terror, such as the legally questionable detainment of suspected enemy combatants at the Guantánamo Bay Naval Base (416-17).

In addition to discussing legal issues with the hybrid war-law approach, Luban asserts that this approach to the war on terror threatens international human rights (418). To support his argument, Luban provides examples of human rights abuses with a focus on the victims. For instance, Luban refers to the government's tolerance of torture and indefinite detention of so-called "enemy combatants" (416, 419). In particular, he details the detention of two American citizens who were alleged to be al Qaeda operatives, held indefinitely without any criminal charges, and denied access to counsel or a hearing (416). Luban's focus on the victims' hardship, including indefinite confinement without due process, appears to be an effort to appeal to the reader's sense of morality. Rather than arguing against these practices in terms of their illegality, he makes his case according to principles and values that form the grounds and policies underlying the laws that prohibit these practices, such as the idea that one is innocent until proven guilty (418).

Todd Malinowski, Washington advocacy director for Human Rights Watch, also addresses morality and the war on terror in his article, "Restoring Moral Authority: Ending Torture, Secret Detention, and the Prison at Guantánamo Bay." Although Malinowski's discussion of human rights violations addresses issues of legality, the heart

of Malinowski's argument is based on morality and strategy. In fact, he asserts a strategic and moral need for the United States government to comply with legal norms, which would at least call into question (or outright prohibit) practices such as extraordinary rendition, indefinite detention without charges, and the use of military tribunals instead of criminal courts to prosecute terror suspects. On the basis of strategy and morality, Malinowski endorses an executive order prohibiting these practices, categorically banning torture, and shutting down the prison at Guantánamo Bay (148). He further points out the need to recognize past wrongdoings officially in the form of a non-partisan truth commission in order to demonstrate a willingness to deal truthfully with the government's mistakes (157).

Malinowski's proposal for a truth commission stems from his discussion of whether anyone should be punished for abuses committed in the course of the war on terror. He asserts that fairness would dictate that everyone should be punished, from the president to CIA interrogators, or else that no one should be punished. Malinowski further speculates that pursuing such a divisive past may divide the country, causing difficulties. While it is true that previous presidents have thwarted the possibility of prosecutions through exercise of the pardon power, such as George H.W. Bush's pardoning several Iran-Contra co-conspirators, his argument for a truth commission in lieu of prosecutions is based primarily on speculation and assumption. Nonetheless, he believes that a truth commission would be an effective alternative to prosecutions because it could make informed recommendations on how to move the country forward (157).

While Malinowski's consideration of the relative feasibility of prosecutions or a truth commission offers a pragmatic approach to establishing the appropriate remedy, he fails to address the question of punishment adequately. In view of the legal and moral offenses that may have been committed in the war on terror, the question of whether anyone should be punished for offenses committed in the war on terror underlie issues relating to accountability and justice. In particular, the method that could best serve justice and achieve accountability has yet to be ascertained, whether it be prosecutions, a truth commission, or some other process. Moreover, consensus regarding what is encompassed in the concepts of justice and accountability should be established in order to determine how to best go about achieving justice and accountability for abuses committed in the war on terror.

In "Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice," Elizabeth Kiss, Associate Professor of the Practice of Political Science and Philosophy at Duke University, explores the relationships among truth, justice, accountability, and morality in the specific context of truth commissions. In particular, Kiss references the successes and failures of the South African Truth and Reconciliation Commission (TRC) to address conceptual issues such as victim-centered restorative justice. In response to debates regarding the effectiveness of restorative justice, Kiss defends this methodology as a legitimate and coherent framework that offers an alternative to retributive justice (70-71). She makes a point not to reject retributive justice, however, instead noting the ways in which restorative and retributive justice overlap in the shared pursuit of accountability (78, 83). For example, Kiss proposes that

justice requires truth because there would be no way to differentiate between the innocent and the guilty without knowing the truth (71). This point is particularly astute in relation to the war on terror and the indefinite detention of suspected terrorists, which Goldstone and Luban note. Detaining prisoners without trial or a hearing before a neutral decision-maker prevents the administration of justice because no mechanisms exist to distinguish the innocent from the guilty. Further, the truth regarding who is responsible for ordering and implementing these and other controversial practices also needs to be revealed for meaningful accountability to be achieved. For according to Kiss, “[j]ustice, whether retributive or restorative, demands full and fair accountability” (78).

Kiss emphasizes that the principles of restorative justice, especially restoring dignity to the victims of abuses, were among the core the goals of the TRC (71). In this regard, the TRC’s truth-telling and restorative justice “practices of a victim-centered justice seek to recognize the dignity and voice of those who have suffered” (73). This relates to Luban’s appeal to morality and the victims of abuse in the war on terror. Advocates of restorative justice assert that it is morally important to not only reveal the nature of abuses, but also to return dignity to the victims of these abuses (Kiss 70; Ntsebeza 60). Conversely, retributive justice often focuses more on the punishment of those responsible for the abuses, rather than the victims (Kiss 79). However, this does not mean that truth commissions necessarily offer a perfect substitute for punishment. Depending on the goals of those responsible for determining how to administer justice, and what form of justice should be sought, prosecutions may also present a valid means for obtaining accountability. Thus, this study explores the values and principles of

restorative and retributive justice to establish the suitability and value of a truth commission in the context of the war on terror.

Because values of restorative justice have emerged as significant components in a number of truth commissions, the concepts of restorative justice inform whether a truth commission could serve justice in the war on terror. According to Howard Zehr, one of the founders of the restorative justice movement, restorative justice is “a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, or order to heal and put things as right as possible” (37). Standing alone, Zehr’s definition lacks the specifics necessary to comprehensively understand restorative justice in practice. However, in The Little Book of Restorative Justice, Zehr expands upon his definition and offers detailed explanations of the goals, values, questions, and practices associated with restorative justice. Among other things, he distinguishes restorative justice from criminal justice, providing a comparative approach that explains the specifics of restorative justice in clear and concise terms. For instance, in a point-to-point comparison, Zehr explains that criminal justice views crime as an infringement of laws and the state, whereas restorative justice characterizes crime as a violation of people and communities. In addition, he points out that the central focus of criminal law is on the offenders and the broken laws, while restorative justice focuses on the victim’s needs and the offender’s responsibility to the victim (21). Zehr also asserts that criminal justice involves the state establishing blame or guilt and imposing punishment, whereas restorative justice aims to address both

harms and causes in order to “put things right” and encourage responsibility and healing for all (21, 32).

Although Zehr’s book is generally limited to restorative justice practices at the level of communities, such as prison programs for offenders, Zehr asserts that no one model for restorative justice exists in practice, and that all models of restorative justice provide flexibility to accommodate culturally specific variations (10). Thus, his discussion of restorative justice’s aims, values, questions, and practices provides valuable background information demonstrating that restorative justice principles could be particularly viable in the pursuit of truth and justice in the war on terror. For instance, Zehr’s comparison of criminal justice and restorative justice correlates with the issues that the aforementioned authors address, including violations of international law, human rights abuses, questions about punishment, and the best way to go about achieving accountability for abuses committed in the war on terror. Nonetheless, Zehr emphasizes that restorative justice is “neither a panacea nor necessarily a replacement for the legal system,” signaling how methods for achieving justice vary in different scenarios (12).

Charles Villa-Vicencio, Executive Director of the Institute for Justice and Reconciliation and former National Director of Research in the South African TRC, also examines modes of justice, contextualizing it in a historical account of religious and philosophical origins of justice and revenge (167-75). In “The Reek of Cruelty and the Quest for Healing: Where Retributive and Restorative Justice Meet,” Villa-Vicencio argues that retributive and restorative justice are interrelated in the greater moral pursuit of human rights and peaceful coexistence (166-67). Using truth commissions as an

embodiment of his argument, with personal bias for the TRC, Villa-Vicencio asserts that models of retributive and restorative justice each have value because they act as mutually reinforcing correctives (179). For instance, he contends that truth commissions explore methods of restorative justice that are generally not considered in retributive justice, yet states that the success of truth commissions may rely on the threat of retributive justice methods, such as prosecutions (177, 179). Thus, Villa-Vicencio concludes that restorative and retributive justice mechanisms, such as truth commissions and the International Criminal Court respectively, should not be viewed as mutually exclusive, provided that there is agreement regarding the ultimate goal of justice (181).

Villa-Vicencio's emphasis on the importance of agreement regarding the goal of justice is significant and relevant to the question of whether a truth commission could be an effective mechanism for establishing justice for the abuses of the war on terror. Whereas authors such as Dworkin focus on law breaking and legality in the controversial practices of the war on terror, others such as Malinowski address the related moral infringements. While concern for the law and restoring moral order are not mutually exclusive, these matters play a role in establishing the predominant view of justice. For instance, healing, protecting life, and encouraging peaceful co-existence lie at the heart of Villa-Vicencio's goal of justice, whereby he argues that these priorities should take precedence over legal and even moral notions of justice (167, 186). Thus, Villa-Vicencio evaluates the effectiveness and value of restorative and retributive justice mechanisms based on whether they best serve his conception of justice. Similarly, to ascertain whether a truth commission can best serve justice for the abuses associated with the war

on terror, consensus regarding the goals and type of justice required must be achieved.

Thus, this study addresses the possibility and potential value of collaborative methods of restorative and retributive justice, such as the interplay between truth commissions and criminal prosecutions.

Priscilla B. Hayner addresses both truth commissions and prosecutions in her comprehensive book, Unspeakable Truths: Facing the Challenge of Truth Commissions. Considered by many experts to be the definitive book on truth commissions, Hayner's book aims to better comprehend how individuals and states can deal with atrocities and abuses of the past (back cover). Accordingly, Hayner examines truth commissions, which she defines as "official bodies set up to investigate and report on a pattern of past human rights abuses," and their role in these efforts (5). Having gained considerable information from interviews with persons involved in different truth commissions, Hayner utilizes a comparative approach to analyze more than twenty truth commissions from around the world, some of which involved or led to prosecutions (17, 337-44). She argues that truth commissions should not be viewed as replacements for prosecutions, but instead that truth commissions "can, and probably increasingly will, positively contribute to justice and prosecutions, sometimes in the least expected ways" (88). Hayner further states that there are some situations in which a truth commission may not be appropriate, and thus concludes that the effectiveness of a truth commission depends on the unique values and circumstances of a given country, with the truth commission being shaped according to the specific needs of each particular situation (184, 258).



Whether a truth commission can bring about truth, let alone justice, also depends on each distinct set of circumstances. Nonetheless, Hayner's comparative approach enabled her to reach several conclusions about potential ways that the revelations of a truth commission can serve justice. For instance, a truth commission's mandate often confers the authority to go to great lengths to uncover truths regarding past abuses. Thus, some truth commissions have assisted with unsolved crimes, even to the point of cracking key cases (25). In some circumstances, a judicial system may even be implicated as being complicit in past abuses. As such, a truth commission may uncover the role of the judicial system and provide recommendations for reforming the criminal justice system. In these ways, the work of a truth commission may result in exposing the truth, thus leading to the administration of justice. Regarding the war on terror, the military tribunals set up at Guantánamo Bay and the secret rendering of suspected terrorists may present opportunities for serving this form of truth and justice. As for truth serving justice in and of itself, Hayner explains that some victims and members of their family simply express hope that the truth commission's official account "can provide some sense of justice" (106). As applied to the war on terror, for victims tortured under the aegis of a government that ostensibly admonishes such abuse, mere acknowledgment of the torture may serve as a form of justice. Nonetheless, to avoid mere speculation, this study investigates further the specific relevance of Hayner's observations and conclusions to the abuses in the war on terror.

Hayner states that her analysis of the strengths and weakness of truth commissions serves to "bridge the gap between theory and practice" (9). This may be

true in some cases, and may assist with determining whether a truth commission would be an appropriate and effective means of redress in regard to the war on terror. By pointing out specific obstacles to the creation, implementation, and success of a truth commission, Hayner identifies potential impediments to those considering a truth commission as a means of establishing truth and serving justice. As Hayner warns, however, each set of circumstances is unique and requires an equally unique and customized approach to dealing with past abuses. Thus, while Hayner's book offers an informative basis for the initial consideration into the formation of a truth commission, it should not necessarily be used as a blueprint for how to go about doing so.

While there is useful literature dealing with the war on terror, justice, truth commissions, and human rights individually, much of the literature does not fully address the interconnections of these important issues and the abuses committed in the war on terror. Additionally, sources that do suggest a truth commission as a means for attaining accountability lack the specificity necessary to determine whether these suggestions hold any weight in reality. Also, as Hayner and Kiss note, part of what defines a truth commission is its nature as a method of transitional justice in countries moving from times of oppression and conflict to a potentially peaceful democracy. Thus, whether a truth commission would be a suitable mechanism for establishing truth and justice for widespread abuse in a country not facing such extreme transitions is a unique circumstance in itself. To that end, a truth commission may indeed be a valid option, as Kiss suggests that the "institutional repertoire of truth commissions may be helpful in developing innovative approaches to a variety of moral and political challenges within

stable liberal democratic regimes such as the United States” (92). Furthermore, the atrocious character of the abuses committed in the name of the United States raises moral, if not legal imperatives to explore any options that offer the possibility of healing and justice for all involved.

### 3. THE NEED FOR TRUTH IN THE WAR ON TERROR

Since the onset of the war on terror, instances of secrecy and misinformation that beg the need for truth have been nearly ubiquitous. In fact, numerous experts, such as law professor and nominee to head the Office of Legal Counsel Dawn E. Johnsen, human rights lawyer Scott Horton, and Timothy Lynch of the libertarian CATO Institute have protested the Bush Administration's excessive secrecy surrounding the war on terror and the curtailment of the public's right to know how the government is acting in its name (Croft 53; Horton "Torture;" Johnsen "What's" 417). Lynch even went so far as to declare the Bush Administration's support of secretive deportations, arrests, and trials as "antithetical to freedom" (qtd. in Croft 53). Indeed, widespread secrecy on the part of the CIA, the Bush Administration, and the Justice Department regarding controversial, morally reprehensible, and likely illegal aspects of the war on terror indicate the need to uncover the truth about these practices if there is any hope to see justice served.

For instance, in December 2007, media reports revealed that two years earlier "the CIA had destroyed at least two video tapes documenting the 2002 interrogation of two senior al Qaeda operatives in the agency's custody" (House Committee on the Judiciary Majority Staff 127). The destruction of these tapes occurred during an ongoing judicial inquiry, which suggests that there was an active attempt to conceal what is now known to have been severe and potentially illegal interrogation methods. The destruction

of evidence during ongoing judicial proceedings alone likely qualifies as criminal obstruction of justice. Furthermore, the underlying interrogations relate to just one aspect of the CIA's interrogation program, the full scope and legal standing of which remains largely concealed (House Committee on the Judiciary Majority Staff 114). Without an official and public understanding of what potentially illegal practices were documented on these tapes, or the remainder of the CIA's arguably illegal methods of interrogation, rendition, and indefinitely detaining terrorism suspects, the truth will remain unknown and justice will not be served.

As noted above, the CIA's practices are just one aspect of numerous controversial and potentially illegal practices that have occurred in the war on terror. In fact, information regarding the controversial practices of the war on terror has been shrouded in so much secrecy that leaks and lawsuits have been the primary means for revealing any information about them. For instance, the mere existence of the Bush Administration Justice Department's controversial legal policies and opinions establishing a legal framework for torture, secret rendition, and warrantless domestic wiretapping only became public knowledge after government leaks (Human Rights Watch 24; Johnsen "Faithfully" 1563). In addition, specific details about the mistreatment of detainees in the prison at Guantánamo Bay only came to light when the damning report of the International Committee of the Red Cross was leaked to reporter Mark Danner in March 2009 (Ambinder "Bush"). Similarly, details underlying the Bush Administration's policies of coercive "enhanced interrogation" have only become public as a result of successful Freedom of Information Act lawsuits against the government (Leopold

“Obama”). Indeed, even Congress has faced steadfast stonewalling and obstruction in their fight for information about the policies and practices associated with the war on terror. In one instance, the Bush Administration refused even to brief Congress on the manner in which anti-terror legislation such as the USA PATRIOT Act was being implemented (Godoy 542). Moreover, as recently as April 2009, government officials newly revealed that the National Security Agency eavesdropped on American citizens’ phone calls and e-mails in a manner that “went beyond the broad legal limits established by Congress last year” (Lichtblau and Risen).

Nonetheless, some may argue that the work of journalists and government watchdogs is sufficient to uncover the truth. In view of the fact that the controversial practices in the war on terror have been disclosed in such an incremental manner, however, with the former Bush Administration and current Obama Administration continuing to fight against new disclosures, it is apparent that the full truth about these controversial practices still remains hidden from public view. For example, on April 16, 2009, the Department of Justice under the Obama Administration released four previously secret Office of Legal Counsel memos that provided questionable legal rationales used to justify a torture regime under the Bush Administration (“Released”). Nonetheless, despite these recent revelations clarifying the chain of decisions that led to widespread abuse, major gaps remain in the public understanding of how these controversial practices came to pass. Indeed, many questions remain over these practices, including the number of people that have been detained in the war on terror, whether suitable procedures were in place to ensure that people were properly detained,

and the number and extent to which detainees were mistreated (Froomkin “So Much”). Furthermore, the ACLU continues to assert that a number of additional memos still remain secret, including memos relating to the NSA’s highly questionable warrantless wiretapping program (“Released”). Jameel Jaffer, a top national security lawyer for the ACLU, states that the “information in these memos is vital to the historical record and to informing the public about what actions were carried out in its name,” and is further necessary to hold “officials accountable for authorizing torture” (qtd. in Ambinder “Bush”). Therefore, in order to fully comprehend the degree to which official government policy permitted the potential torture of detainees, “a complete timeline of the official documents authorizing torture needs to be established,” which is something that a truth commission could provide (Hunsinger).

In addition to the right, if not the responsibility, that the public has to learn the truth about potentially illegal practices in the war on terror, there are also compelling moral reasons for establishing an official truth. In particular, the victims of abuse in the war on terror deserve to have the full truth known and officially acknowledged, especially in the face of pervasive denial. For instance, although Vice President Cheney has publicly acknowledged that he was “directly involved in approving severe interrogation methods used by the CIA,” the Bush Administration has yet to acknowledge officially that torture occurred, while some deny that waterboarding is correctly characterized as torture (Miller). Furthermore, due to the “clandestine nature of torture and other abuses,” it is possible for the American people to disbelieve or for the government to deny the existence of a torture program (Minow “Hope” 244).

Understandably, the American public may be reluctant to believe that their government bears responsibility for such horrendous abuse of their fellow human beings. Nonetheless, regardless of whether these harsh treatments are legally categorized as torture, on an individual, human level, it is morally wrong to deny a victim's personal experience of abuse. Otherwise, in addition to the physical abuse, victims are further forced to deal with the psychological pain of having their traumatic experience go unacknowledged (Minow Between 67). Addressing this issue after a monumental project in which journalists interviewed sixty-six detainees released from prisons in Afghanistan and Guantánamo Bay, the project editor Roy Gutman asserts that "getting the full picture of the Bush Administration's treatment of detainees [in the war on terror] has to start with a reckoning of exactly what happened to each and every one" (Froomkin "How Many"). To that end, Gutman believes that a genuine understanding of the scope of the Bush Administration's detainee program should include making amends to individuals who were wrongly detained and mistreated, an impossibility without comprehensive truth. Indeed, basic morality demands revealing a complete truth about the controversial practices in the war on terror in order to serve justice for both the victims and the perpetrators.

Although there are certainly valid instances in which secrecy is a vital component of national security operations, government secrecy regarding matters that may be illegal should be taken seriously. This is especially true when the individuals invoking secrecy may have committed criminal acts. In fact, Frederick Schwarz, chief counsel of the Church Committee that investigated previous intelligence abuses within the United States



government, criticized the Bush Administration's excessive claims of secrecy on the grounds that a lack of transparency increases the likelihood of bad decisions (Froomkin "Is There a Price"). In addition, given the gravity of allegations of torture and other abusive treatment of detainees, the American public has the right to know the official truth regarding the potentially illegal actions of their government. That is, in order to determine an appropriate remedy for the abuses committed in the war on terror, it is necessary to have a shared understanding of the underlying truth. Without a comprehensive account of the truth, valuable lessons may go unlearned and similar legally and morally controversial practices will be more likely to recur (Grandin and Klubock 3; Villa-Vicencio and Verwoerd 288). Thus, because "the events of 2001 to 2008 represent such a consequential departure from [American] moral and legal traditions that they require an authoritative history," there is a clear need to uncover the truth to decrease the likelihood of similar abuses recurring in the future (Froomkin "So Much").

#### 4. HOW A TRUTH COMMISSION CAN ESTABLISH THE TRUTH

Uncovering the truth and publicly acknowledging past abuses are among the primary functions of truth commissions (Minow “Hope” 238). Although these functions are not the exclusive province of truth commissions, for prosecutions often serve similar aims, truth commissions offer a unique opportunity to explore, analyze, and memorialize a more nuanced and comprehensive understanding of the truth underlying past abuses. To that end, various prior truth commissions have focused on the origins, circumstances, and consequences of violence in order to document a descriptive account of past abuses. Guatemala’s Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan People to Suffer established research teams specifically tasked to “address causes and origins of the armed conflict, strategies and mechanisms of the violence, and consequences and effects of the violence” (Hayner 83). In doing so, the focus of the Guatemalan truth commission had an expansive scope, resulting in a comprehensive account spanning many factors beyond the mere culpability of individual perpetrators (Kiss 73-74).

In particular, criminal prosecutions are inherently limited to the presentation of trial evidence and testimony to establish the truth vis-à-vis the guilt of individual perpetrators (Hayner 100). Given the nature of the abuses alleged to have been committed in the war on terror, a truth commission could extend investigation, analysis,

and reporting to reach a broad array of factors, thereby providing a more comprehensive understanding of the relevant facts. Among other things, this extended approach could include analyzing social and cultural factors that may have played a role in enabling the abuses, including the construct of the “war on terror” itself. For example, Professors David Holloway and Stuart Croft assert that the United States’ reaction to the terrorist attacks on September 11, 2001 directly impacted the “discursive shift of contemporary international security,” known as the war on terror, and “led to new patterns of behavior” (Croft 53). According to Croft:

The attacks were to be seen in terms of “the day that changed America”; as a pivotal moment in history. It is this reaction from political leaders and media commentators, from the political left and right, that was to be so well embedded in popular culture that it constructed the context for the decisive political intervention in the development of the institutions that came to comprise the “war on terror.” (86)

In other words, the widespread interpretation of September 11, 2001 as a decisive event that changed the way Americans should view the world and their role in the world directly influenced policy decisions and actions related to the war on terror. This view then paved the way for the Bush Administration to approach the war on terror in a new, highly aggressive manner, which may have been a significant contributing factor leading to the abuses committed in the war on terror.

Thus, a truth commission could follow the lead of the South African TRC and examine whether an “official discourse” about September 11, 2001 emerged in the media

and government. Through analyzing the media, government, and other socio-cultural factors, a truth commission could explore different theories about the causal factors leading to the abuses in the war on terror, which would contribute to a clearer picture of the truth. In “A Guide to Citizen Preparedness,” for instance, former FEMA director Joe M. Allbaugh wrote, “[w]e live in a different world than we did before September 11, 2001” (qtd. in Croft 127). This sentiment was echoed in a Washington Post article quoting Cofer Black, former head of the counter-terrorist division within the CIA, who testified before a joint session of Congress, “All you need to know: there was a before 9/11, and there was an after 9/11. After 9/11, the gloves came off” (qtd. in Godoy 540). In addition to corroborating Allbaugh’s assertion, Black’s statement hints at a dangerous consequence of this widespread belief that the attacks on September 11, 2001 somehow changed the rules of the proverbial game. With the media simply reiterating the statements of government officials, their beliefs were quickly embedded within the public discourse. This may have then opened the door to policies and actions underlying the abuses in the war on terror. Thus, a truth commission could examine these and other statements relating to September 11, 2001 and the war on terror to gain understanding into the origins of the abuses committed in the war on terror.

To address another important aspect of the truth, a truth commission can also work to establish an understanding of the ideology behind past abuses. This may be particularly significant with regard to the war on terror. According to Holloway, the Bush Administration’s interpretation of September 11, 2001 as the day when “everything changed” provided an ideological lynchpin to justify radical policy changes and actions

in the war on terror (4). In doing so, the war on terror was conceptualized as “a new kind of war,” which required a new, “more aggressive response” (Heymann and Kayyem 2). For example, White House lawyers claimed that this new paradigm of war required a superior “ability to quickly obtain information from captured terrorists . . . [and] renders obsolete Geneva’s strict limitations on questioning of enemy prisoners” (qtd. in Horton “Justice” 50). With the unilateral suspension of the Geneva Conventions for war on terror detainees, the Bush Administration’s construction of terrorism as “an exceptional crime” requiring “exceptional measures” seems causally related to the detainee abuse committed in the war on terror (Croft 53). Considering the complex relationship between the September 11 attacks, the resulting discourse, and the policies, actions, and abuses associated with the war on terror, it is hardly surprising that there is not widespread agreement regarding the war on terror. However, a truth commission’s thorough investigation and analysis could explicate the relationship among these issues, thereby establishing a foundational framework for the comprehensive truth about the abuses in the war on terror.

By addressing the overall circumstances leading to the alleged abuses, “truth commissions can promote resolution by allowing members of a society to learn as much as possible about all that happened in the past” (Weston 1022). In addition, truth commissions assemble and publicize a holistic and authoritative account of past abuses, which can facilitate widespread understanding and put past myth-making and continuing denial to rest (Weston 1051). As applied to the war on terror, a truth commission could examine the social, cultural, and political impact of the myths that emerged in response to

the attacks on September 11, 2001. For example, Croft asserts that the September 11 attacks “were socially constructed to give particular meaning, and those events were spoken of in terms that created a foundational myth” consisting of selective interpretations about the attacks (85). This foundational myth then became integrated into the national discourse, whereby any alternatives to the powerful myth were dismissed (Gusterson 82).

For instance, because the myth was premised on the attacks coming out of nowhere, any narratives that considered whether the attacks were actually a consequence of the behavior or policies of the United States government were preempted (Croft 86). What is more, any suggestion that United States policies even minimally motivated the September 11 attacks triggered fierce backlash in the myth-made national discourse. Consequently, alternative interpretations that may have inspired a more measured response were largely rebuffed or ignored, if not ridiculed (Dionne). A truth commission could therefore examine and report on the different theories and myths involved in the war on terror to encourage a fresh national discourse regarding the appropriate response to terrorist attacks against the United States. In other words, a truth commission would have value beyond merely seeking to bring about widespread understanding of the abuses committed in the war on terror; a truth commission could also offer a significant opportunity to publicly debate the findings and constructively influence future events.

To further the objective of investigating a range of factors contributing to past abuses, a truth commission should consider the interrelated roles of governmental and private institutions that may have indirectly contributed to the abuse. For example, in

order to “establish as complete a picture as possible of the causes, nature and extent of the gross violations of human rights” and the “antecedents, circumstances, factors and context of such violations,” South Africa’s TRC arranged hearings addressing the roles of political parties, the media, churches, the medical profession, and the judicial system, among others. While these hearings achieved mixed results, for some judges refused to give testimony before the commission, they nonetheless triggered a national discourse involving a multitude of factors (Kiss 78). Similarly, because various established institutions are implicated in the abuses committed in the war on terror, a truth commission could address the interrelated roles of these institutions and unearth holes in the framework.

For instance, Frederick Schwarz asserts that the role Congress played in the Bush Administration’s “anti-terror policies – or lack of a role – needs to be more fully documented and discussed” (Froomkin “Is There a Price”). Indeed, whether Congress abdicated its constitutional role as a check and balance on the executive branch raises serious concerns that knowledge of the abuses may have been systemic. For instance, to this day, the debate continues over whether or when members of Congress received briefings informing them that certain detainees were being subject to so-called “enhanced interrogation techniques,” including waterboarding. Indeed, recently released intelligence documents indicate that the CIA briefed House Speaker Nancy Pelosi on the enhanced interrogation techniques in 2002, yet the definitive truth for even this one briefing remains in doubt (Kane and Warrick). Thus, operating as an independent body ideally separated from the influence of Congress, a truth commission could provide a

viable option to investigate claims of Congress' complaisance impartially, or even outright complicity, in the abuses committed in the war on terror.

Determining the role that medical professionals played in past abuses is another important factor that a truth commission should examine to establish the comprehensive truth. For example, questions remain regarding the role of the American Psychologists Association (APA) in the conduct of harsh interrogations, particularly in view of internal APA documents newly released in May 2009. Among other things, these documents indicate that in the context of national security interrogations, the APA ethics task force "developed its ethics policy to conform with Pentagon guidelines governing psychologist participation in interrogations" (Physicians for Human Rights). Moreover, a Senate Armed Services Committee report included findings that psychologists designed, supervised, rationalized, and implemented various elements of the Bush Administration's "torture program." Nathaniel Raymond, Director of the Campaign Against Torture for Physicians for Human Rights (PHR), has thus asserted, "the American public needs to know why a supposedly independent ethics policy was written by some of the very personnel allegedly implicated in detainee abuse" (Physicians for Human Rights). As such, whether APA psychologists ultimately bear responsibility for likely illegal interrogations should be investigated to determine the truth about how these practices came about. Thus, similar to the South African TRC special hearings on the role of the health sector in abusive practices, a truth commission for the abuses committed in the war on terror could delve into the role of psychologists and other medical professionals to contribute to a more holistic account of the truth.



There are many powerful reasons for exposing the truth: the public may learn what happened, an official acknowledgement of wrongs may be provided, and at least a minimal degree of accountability is offered (Greenawalt 189). When considering the relative merits that different mechanisms may have in their ability to establish the facts underlying past abuses comprehensively, truth commissions provide significant advantages over prosecutions. Whereas criminal prosecutions typically focus on individual acts of wrongdoing, truth commissions consider the entire context that enabled the abuses to occur, including the systemic reasons and characteristics of widespread abuse. Applied to the war on terror, there is clear evidence to indicate that the incidents of abuses were far from isolated, but were the reflection of a pattern rooted in a specific ideology and set of policies. Accordingly, if there is any hope to truly discourage similar crimes from occurring in the future, the ability of a truth commission to “contribute to a ‘common memory’ on which the whole society may build” provides an invaluable opportunity to address the past in a manner that can have a lasting impact on the future (Greenawalt 189).

## 5. MECHANISMS FOR A TRUTH COMMISSION TO ESTABLISH THE TRUTH

To establish the truth about a country's abusive past, a truth commission is typically given a mandate that confers the authority and power to collect any information necessary to establish the relevant facts (Amnesty International "Checklist"). Once the mandate is established, the members and staff for the commission selected, the commission's investigators then engage in a process of investigation and corroboration, which may include issuing subpoenas to obtain documents or compel witness testimony (Castillejo-Cuellar 19). Truth commissions generally rely upon a substantial amount of victim testimony to establish the truth about past events, with the testimonial accounts being placed in a database to analyze potential patterns of abuse (Hayner 16). Importantly, in addition to analyzing the overarching patterns of abuse, truth commissions further address the overall circumstances, social dynamics, and governmental policies that contributed to creating the framework that enabled the abuses to occur (Weston 1022). The findings of the commission are then made public, typically through a combination of public testimony and the publication of an official report, whereby the truth commission presents its conclusions about the past abuses and offers recommendations for institutional reform and other actions that a nation should undertake to redress the abuses (Amnesty International "Checklist"; Hayner 167).

As noted above, truth commissions are typically implemented to establish a holistic account of past abuses, with a focus on “describing the broad pattern of events over many years, and the specific policies and practices that caused them” (Hayner 88). Even so, a truth commission could only establish the truth about the abuses committed in the war on terror to the extent of having enforceable mechanisms to collect, analyze, and report on secret government documents, practices, and other relevant information. In fact, citing his experience on the Church Committee, Frederick Schwarz asserts that the “single most important thing [for an investigative commission] is to get the documents,” which would require the commission to have subpoena power (Froomkin “Is There a Price”). Indeed, to facilitate obtaining the truth about past abuses, the South African TRC was granted the power to subpoena witnesses, search premises, and seize evidence (Hayner 41). Nonetheless, rights organizations criticized the TRC not for invoking the subpoena power, but for failing to compel testimony from the President of the Inkatha Freedom Party and the Minister of Home Affairs, out of fear over a possible violent reaction (Hayner 42).

Thus, for a truth commission to be effective, a key factor would be its authority and willingness to compel the disclosure of evidence. That is, although governments generally establish and fund the operation of truth commissions pursuant to a legislative act or executive decree, a lack of subpoena power has mitigated the effectiveness of many truth commissions. If truth commissions do not have complete access to official documents despite ostensibly having the right to access such documents, the ability to create a comprehensive account necessarily suffers. For example, the mandate for the

truth commission in El Salvador spelled out the right of the commission to enter any compound or office to search for any information considered relevant, with or without prior notice, and further included an official commitment to cooperate with the commission's requests for records, documents, or reports. Nevertheless, relatively little government documentation was made available to the commission, as requests for documentation "tended more often than not to be answered with explanations that the files had been destroyed, could not be found, or were incomplete" (qtd. in Hayner 239).

Accordingly, a truth commission for the war on terror would have to deal with problems relating to the destruction of documents and other evidence. In fact, as noted above, it is already known that the CIA has destroyed evidence such as videotapes documenting harsh interrogations. However, established legal and governmental mechanisms may uniquely position the United States to avoid pitfalls that previous commissions operating in less stable governments have encountered. Even though granting subpoena power to an independent commission may be a "complex legal matter" that may involve withheld documents, theories of privilege, and other forms of obstruction, these obstacles are not insurmountable because various avenues are available to enforce subpoenas in cases of non-compliance (Horton "Justice" 59). Moreover, the U.S. Freedom of Information Act (FOIA) would make it easier for the commission to request and obtain the declassification of official information relative to many other countries that lack analogous mechanisms. Moreover, the independent National Security Archive has extensive expertise in applying for declassification of government documents, even assisting the Guatemalan and Salvadoran truth commissions with FOIA

applications (Hayner 241). Thus, while any truth commission would likely have difficulty obtaining incriminating or classified evidence, a truth commission in the United States would have various institutional mechanisms at its disposal to support efforts at enforcement.

When truth commissions have attempted to gain access to confidential information in the past, Hayner notes that national security claims have been asserted to conceal foreign policy decisions from meaningful review (Hayner 205). Notably, this scenario is perfectly exemplified in the Bush Administration's "citing exotic theories of privilege" to block the release of government information (Horton "Justice" 59).

However, a truth commission could hold closed proceedings in certain circumstances to deal specifically with evidence falling under valid claims of national security and then publish a summarized or redacted form of the information (Balkin). While this is not ideal, for a truth commission seeks to establish as whole a truth as possible, limiting the disclosure of information vital to national security would not necessarily preclude a comprehensive understanding of the truth, while also addressing certain objections that opponents may raise. Even if certain aspects of a truth commission's report are not initially made public, the information may eventually be released in a similar manner to the truth commission reports in Burundi and Nepal, which were each made public at a later date (Hayner 57, 68). Moreover, although the 9/11 Commission should not be equated with a truth commission, for it lacked many aims and characteristics that are common to genuine truth commissions, it had a "remarkable degree of access" to confidential information. Indeed, the 9/11 Commission reportedly had access to

intelligence well beyond what prior commissions or high-ranking members of Congress have had access to, including information that would usually be withheld from the historical record for years (Simon 1444). Thus, the 9/11 Commission may provide a model for granting similar access to a truth commission on the war on terror.

A truth commission could also benefit from cooperating with non-governmental organizations (NGOs) to leverage the access and resources of such organizations in an effort to establish a fuller truth. For instance, NGOs greatly helped the efforts of the National Commission on Truth and Reconciliation in Chile by providing detailed reports for thousands of cases (Hayner 36). Similarly, NGOs such as the Human Rights Center, Amnesty International, and the International Committee of the Red Cross (ICRC) have already published reports on detainee abuse detailing incidents of torture, extraordinary rendition, and secret detention that implicate both the government and private companies. Thus, a truth commission could cooperate with these NGOs and other non-partisan organizations to obtain reports and personal accounts that can considerably contribute to the efforts of a truth commission to gather a comprehensive collection of testimony regarding abuses in the war on terror.

In addition, a truth commission should have the ability to collect testimony independently and expert accounts to establish truth about the abuses in the war on terror. For instance, Roy Gutman, a journalist with experience reporting on war crimes, has indicated that the full scope of detainee abuse cannot be understood without documenting each detainee's experience (Froomkin "So Much"). In fact, documenting the experiences of abuse victims is one of the primary methods that a typical truth commission employs

in efforts seeking out the truth. The Commission on Truth in El Salvador heard testimony from approximately two thousand witnesses and victims and reported on more than seven thousand cases involving disappearance, torture, massacre, rape, killing, and other abuse (Hayner 39). The extensive collection of testimony informed the conclusions of the El Salvador commission regarding patterns of abuse, which ultimately contributed to a more complete picture of the truth. Victim testimony would be especially important with regard to alleged detainee abuse and torture in the war on terror, as many detainees continue to be held indefinitely with having their stories heard. In addition, testimony from experts or witnesses with first-hand knowledge could provide a broader, more nuanced understanding of inner governmental workings to shed light on how these abuses came to pass.

Ultimately, whether a truth commission holds public hearings or collects testimony behind closed doors should be evaluated on a case-by-case basis, for public hearings can be extremely resource and time intensive. Moreover, certain witnesses may be unwilling to testify without some measure of confidentiality. Even so, a public report and some degree of public hearings would be invaluable, if not indispensable, to establish the truth about the abuses committed in the war on terror. For instance, the South African TRC held hundreds of public hearings, many of which were broadcast on television, to “provide a platform on which victims could speak publicly, to offer formal and public acknowledgment of events reported, and to bring the victims’ stories to the public” (Hayner 225-26). This is especially important considering the lack of official consensus

regarding these critical issues and the fact that the public remains uninformed of the full extent and details of the abuses.

Publicly acknowledging personal abuses and providing an official, authoritative, public account of the truth would offer citizens and the government a chance to finally confront the painful truth and settle factual quarrels about the past. As the public begins to comprehend the true scope of the facts, any denial of past abuses may either be vindicated or quashed once and for all. For instance, despite mounting evidence that Bush Administration officials authorized detainee abuse amounting to torture, prominent officials such as former Vice President Cheney have continued to engage in public relations efforts defending the practices (Cheney). Contradictory allegations, denials, and general misinformation regarding torture are extremely serious, as they send mixed messages that inhibit the public from truly understanding the issues. Thus, in addition to educating the public and resolving denial, the public aspects of a truth commission could encourage discourse promoting the shared understanding needed to settle debates about the past and allow the nation to move forward.

Of course, “[d]igging up the truth about past abuses is always inherently messy and complex, whether in the national arena or at the community level” (Magarrell and Wesley 238). Consequently, a truth commission can further serve to establish the truth about abuses committed in the war on terror through its attention to expressing the complexity of past abuses. For instance, to understand the complex truth about Ku Klux Klan members fatally shooting five members of the Communist Workers Party in 1979, the Greensboro Truth and Reconciliation Commission examined various perspectives on



the event. These perspectives differed beyond obvious divisions between race, class, gender, and worldview, revealing the inherent complexity of the truth (Magarrell and Wesley 3, 94; “About”). Similarly, with respect to detainees subjected to abuse and the perpetrators, a truth commission for the war on terror could be invaluable in considering the complexity behind the possible dual identities of perpetrator and victim. That is, to the extent that certain war on terror detainees are guilty of some offense, this potential guilt should not overshadow, or be overshadowed by the fact that they may also be victims of abuse. Moreover, individuals responsible for abuse may be considered perpetrators based on their engagement in the abuse, but they may also be seen as victims of higher-level officials that ordered the abuse. Without a nuanced view of the truth about responsibility and accountability, issues pertaining to abused detainees could easily be reduced to their relative guilt as enemies in the war on terror and the duty of American officials to protect their country. This whitewashing and demonizing the “other” could inhibit efforts to produce a full account that addresses these complex elements (Crocker 103). Fortunately, a truth commission has the freedom to shed limited dichotomies such as guilty versus innocent or perpetrator versus victim, expressing past abuse in terms of complex factors that provide a more complete telling of the truth.

Consequently, in addition to having various mechanisms at their disposal to discover the relevant truth, truth commissions can provide substantial societal benefits through their efforts to reconcile different accounts and promote shared understanding of past events. Whereas criminal trials are typically framed in terms of simplistic questions of guilt or innocence, truth commissions express the complexity of events in a manner

that can capture multiple sources of mass violence. That is, truth commissions do more than merely recite facts and conclude whether a particular individual is guilty or not guilty of committing a particular crime. Rather, truth commissions are designed “to tell a story that is well-supported and that reflects the complexity of human interaction, identifying and attempting to answer the questions foremost in people’s minds concerning the events, their causes, sequence, consequences, and the surrounding context” (Magarrell and Wesley 118). In short, despite sharing many of the mechanisms of other fact-finding institutions, truth commissions are notably distinct for the particular manner in which those mechanisms are wielded to establish a holistic account that considers the relevant facts from various perspectives.

## 6. THE NEED FOR JUSTICE IN THE WAR ON TERROR

Shortly after the attacks on September 11, 2001, the Bush Administration began to wage a war on terror consisting of controversial practices that morally, if not legally, compel the need for justice. In early 2004, for instance, the abusive treatment of detainees in the war on terror first sprang to public attention with the leaking of disturbing photographs of prisoner abuse in the Abu Ghraib prison in Iraq (Walsh). Despite several soldiers asserting that the abuse was authorized from higher in the chain of command, initial investigations by the Bush Administration concluded that the abuse documented in these photos was just the case of a few “bad apples” (Boraine 152; Holloway 47). As information came to light over the subsequent years, it has become clear that senior Bush Administration officials, including Vice President Richard Cheney and Defense Secretary Donald Rumsfeld, were indeed responsible for authorizing these techniques (House Committee on the Judiciary Majority Staff 122). However, despite the arguable illegality of these techniques, the Justice Department has not indicted even a single senior Bush Administration official, indicating a considerable deficit in accountability and justice. As Major General Antonio Taguba stated after completing his 2004 report about the detainee abuse in Abu Ghraib, “there is no longer any doubt as to whether the [Bush] administration has committed war crimes. The only question that

remains to be answered is whether those who ordered the use of torture will be held to account” (Leopold “Cheney”).

Since the prisoner abuse scandal at Abu Ghraib initially broke, a legal and moral controversy has erupted over the “enhanced interrogations” of suspected terrorists in the war on terror. A particular technique known as waterboarding has been the subject of much debate, for the United States has historically considered the practice to be a crime, prosecuting both foreign and domestic soldiers for waterboarding throughout the twentieth century (Brayton; Greenwald “Establishment”). In fact, memos written by lawyers in the Office of Legal Counsel under the Bush Administration even acknowledged “that the use of the waterboard constitutes a threat of imminent death,” while simultaneously authorizing the technique on the specious basis that “no prolonged mental harm” would result (Bybee 15). In light of the historic evidence suggesting that waterboarding is indeed torture, it follows that some manner of justice should be carried out if there are reasonable grounds indicating that the crime has occurred. Yet despite the Bush Administration admitting to authorizing waterboarding for several detainees suspected of being members of al Qaeda, no indictments have ensued, with public debate instead centering on whether torture “worked” (Cheney).

While the absence of indictments for potential crimes is a major indicator of the lack of justice for abuses committed in the war on terror, there are other issues that point to the need for justice. For instance, the few soldiers convicted for the detainee abuse at Abu Ghraib were wrongly accused of being solely responsible for the abuse, “as there is an ever-growing body of evidence definitively linking decisions made by Bush and

Cheney . . . to the pervasive, inhumane treatment of detainees” (Froomkin “Establishing”). While this certainly does not excuse those soldiers for their active participation in the abuse, they nonetheless deserve to have the individuals ultimately responsible for authorizing the abuse held accountable. In addition, the detainee abuse scandals and the controversy over waterboarding and other coercive interrogation techniques suggest humanitarian and moral needs for justice on behalf of the abused victims. Considering the severity of alleged specific abuses, moral impulses raise questions relating to whether anyone should be subject to such treatment and how to achieve justice for the victims. In a 2007 report on the treatment of fourteen “high value detainees,” the ICRC found that the CIA subjected these detainees to “incommunicado detention, constant solitary confinement,” suffocation by water, prolonged stress positions, “beating by use of a collar,” kicking and beating, “confinement in a box” extended periods of nudity, deprivation of sleep, and “deprivation/restricted provision of solid food,” among other abuse (2). The ICRC concluded that these efforts were “clearly designed to undermine human dignity” of the detainees, resulting in their dehumanization (26). Not surprisingly, Red Cross officials concluded, “quite unequivocally,” that the horrific accounts of detainee abuse “constituted torture” (Danner “What it Means”).

While detainee abuse has dominated the public discourse on the need for justice relating to the war on terror, the abuses requiring justice extend beyond this important issue. For instance, once the war on terror was initiated, the Bush Administration began a program of indefinite detention for so-called “enemy combatants,” even though many of these individuals were not captured on what would qualify as a traditional battlefield

(Roth). Rather than submitting their cases to local law enforcement for prosecution, the Bush administration held them in detention facilities, where many of the detainees continue to languish without formal charges. In fact, the Bush administration even claimed the authority to detain suspected terrorists indefinitely that were American citizens or arrested in the United States (Human Rights Watch 10). Although a series of Supreme Court decisions invalidated the legality of these indefinite detention efforts, no one has been held accountable for this regime in which many prisoners have been held for years with “no crimes charged, no opportunity to consult counsel, and no hearing” (Luban 416).

On a related front, further impropriety with regard to the handling of detainees likely exists in the context of extraordinary rendition and military commissions. In the former case, Human Rights Watch reports that the CIA “disappeared” at least one-hundred prisoners, holding them in secret “black sites” or delivering them to countries notorious for torturing and abusing detainees (16). In fact, then-President Bush issued a classified order less than a week after 9/11 authorizing the rendition of terrorism suspects “without any official record of doing so, thus avoiding any accountability” (House Committee on the Judiciary Majority Staff 138-39). Although the practice of rendition predates the Bush administration, the application to suspected terrorists in the war on terror raises serious questions that suggest a need for justice. In early 2002, for example, the CIA arrested Muhammad Saad Iqbal in Indonesia and rendered him to Egypt, where he was detained for several months and allegedly tortured. Ultimately, the CIA transferred Iqbal to several United States military bases until he was eventually released

after being held for more than six years in American custody without ever being charged. The way in which the rendition program robbed potentially innocent individuals of their freedom and deprived them of their family and friends is morally questionable, at best. People should be able to live their lives without having to worry about the United States, ostensibly a beacon of justice and democracy, kidnapping them and subjecting them to harsh treatment alleged to be torture. From a legalistic view of justice, transferring individuals to countries where “torture is foreseeable violates U.S. and international law” (House Committee on the Judiciary Majority Staff 138-41). Moreover, extraordinary rendition is particularly troubling because it bypasses the requirements of due process that are designed to ensure that innocent people, such as Iqbal, are not unfairly punished.

Even in the rare cases where certain detainees were lucky enough to receive a hearing to challenge the basis for their detention, the military commissions established for that purpose failed to meet the standards of due process, leading them to be dubbed “kangaroo courts” (Glazier 2005). In fact, several prosecutors resigned from the military commissions system to protest the unfairness of the process, while the Supreme Court invalidated the military commissions altogether as an unconstitutional suspension of the centuries-old writ of *habeas corpus* (Boumediene v. Bush; Human Rights Watch 5). Nonetheless, despite the handling of detainee cases being replete with dubious and illegal practices, the Obama administration is engaging in new efforts to resurrect the military commissions and establish a system of “prolonged detention” (Finn). However, changing the branding for an unjust system does not remedy the core injustice; the fact remains that suspected terrorists in the war on terror have been thrown into one legal black hole after

another. As such, there is a clear need for justice in view of the rampant violations of the fundamental right to answer charges of wrongdoing in court, a principle that is embodied in the writ of *habeas corpus* and the United States Constitution.

The foregoing discussion of some of the abuses committed in the war on terror that demand justice only begins to scratch the surface. In addition to detainees being tortured, abused, and denied due process, there is substantial evidence to suggest that the Bush administration “waged war against the law itself.” For example, there are several domestic activities that also appear to be violations of the law or abuses of power, including the warrantless surveillance program of such questionable legality that it nearly resulted in a mutiny within the Justice Department (Horton “Justice” 49). Consequently, the abuses implicate issues that extend beyond any one matter, encompassing violations of international and domestic laws, targeting American citizens and foreign nationals, and involving secrecy, acquiescence, and conflict in all three branches of government. The need to address this systemic injustice is self-evident, particularly in light of the fact that the war on terror is unlike a traditional war in that there will never be a formal cease-fire. That is, in all probability the United States will have to continue to deal with the threat of terrorism for years – if not decades – to come. In a speech during his presidential campaign, President Obama cited Martin Luther King, who said: “The arc of history is long, but it bends towards justice” (Dickerson). If the people and the government of the United States are to uphold this ideal, serving justice for the abuses that have been committed in the war on terror could be a good place to start.



## 7. HOW A TRUTH COMMISSION SERVES TRADITIONAL JUSTICE CONCEPTS

Whether a truth commission can serve justice for the past abuses committed in the war on terror has been subject to substantial debate. Some critics suggest that the incentives offered in exchange for truthful testimony inherently eliminate the chance for justice because perpetrators may receive immunity from prosecution. Others point to truth commissions lacking the power to independently prosecute or punish perpetrators as evidence that they cannot provide justice (Horton “Justice” 56). In fact, some human rights advocates even suspect that truth commissions “are sometimes intentionally employed as a way to avoid holding perpetrators responsible for their crimes” (Hayner 86). However, there are no inherent reasons why a truth commission could not contribute to subsequent trials. That is, these critiques fail to address the fact that the “stated intention of most truth commissions has been to strengthen or contribute to justice in the courts” (Hayner 90). In Argentina, for example, the National Commission on the Disappeared played a crucial role in contributing to the prosecution of former military junta members. The Argentinian truth commission delivered case files directly to prosecutors and provided access to witnesses, providing the catalyst for quickly developing cases against senior junta members. Indeed, the deputy prosecutor in the trial of these senior leaders noted that “the timing and nature of that trial would have been ‘impossible’ without the information from the commission” (Hayner 93-94).

Consequently, a truth commission could forward information to law enforcement officers to assist the future prosecution of the individuals ultimately responsible for the abuses in the war on terror. In fact, Senator Leahy, the leading advocate for establishing a truth commission, explained that evidence gathered in a truth commission could also be used in prosecutions (Interview). Correlatively, Scott Horton, proposed a version of a truth commission that he calls “commission plus special prosecutor,” which would officially recommend appointing a special prosecutor after investigating the facts surrounding the alleged torture and identifying areas that require further criminal investigation (“Justice” 56). This approach is not without precedent, as the Commission of Inquiry into the Disappearance of People in Uganda forwarded approximately two hundred cases to police for further investigation and prosecution (Hayner 94). Thus, a truth commission for the war on terror could provide prosecutors recommendations for further criminal inquiries and access to witnesses and official findings, thereby promoting justice in the form of accountability for wrongdoers.

Another way a truth commission can serve justice is through strengthening the rule of law after periods of lawlessness, especially with regard to massive human rights abuses. According to principles of international law, countries have an obligation to act when massive rights abuses occur, including the duty to submit any cases of alleged torture to “competent authorities for the purpose of prosecution” (Hayner 105; Office of High Commissioner for Human Rights). Even so, cases that involve widespread abuses may confront a nation with the practically impossible task of prosecuting large numbers of perpetrators. Thus, rights advocates have argued that nations may fulfill obligations

under international human rights treaties when their governments “investigate and make known to victims or to their families all that can be established about crimes against humanity” (Hayner 106). Thus, when a truth commission investigates and makes the truth about past abuses publicly known, justice is served in the sense that a nation can fulfill its obligations under international law, thereby strengthening the rule of law.

Nonetheless, constitutional law professor Jonathan Turley questions whether a truth commission for the war on terror would satisfy the obligation to investigate allegations of torture. In particular, Turley asserts that implementing an investigatory commission “is basically saying that we are not going to comply with the promise we made not to ourselves but to the world.” However, this critique fails to account for the need to gather the relevant facts and evidence before any prosecutions could proceed in the first place. Moreover, it also minimizes the fact that “so many high-level figures at [the Justice Department] were involved in creating the legal mechanism for torture that the Justice Department has effectively disqualified itself as an investigatory vehicle, even under a new administration” (Horton “Justice” 55). Accordingly, in addition to fulfilling the legal obligation to investigate past abuses and contributing to justice for human rights abuses, a truth commission may even provide strategic advantages over the types of investigations that typically precede prosecutions (de la Vega “Black Holes”).

While contributing to criminal investigations and prosecutions and supporting the rule of law are among the ways that a truth commission can promote justice for past abuses, some critics of a truth commission for the war on terror suggest that truth commissions cannot provide justice autonomously. However, these critiques seem to rest

on the false assumption that the only way to serve justice is through prosecuting and punishing perpetrators, a form of retributive justice. Retributive justice generally consists of the proportionate punishment of perpetrators, which is justified on the grounds of giving perpetrators their just desserts (Minow Between 12; Philpott 22). In the United States' criminal justice system, this version of justice is carried out in the investigation, prosecution, and punishment of perpetrators, a legal process that "focuses largely on the offender" (Hadley 7). Alternatively, truth commissions practice a more victim-centered form of justice, known to many as restorative justice, which emphasizes justice for the victims over the perpetrators (Hayner 28; Kiss 73). Thus, further examination of these different modes of justice will demonstrate that, although truth commissions may not fit neatly within retributive conceptions of justice, they do offer a powerful alternate conception of justice.

## 8. HOW A TRUTH COMMISSION SERVES RESTORATIVE JUSTICE

Justice is a vague concept, the meaning of which is open to many different interpretations (Steele 28). For example, the Bible is often referenced as the basis for how justice is carried out in the United States (Zehr “Retribution”). In fact, the Jewish and Christian myths have profoundly impacted the formation of legal institutions and philosophy in the West, and continue to influence contemporary society (Villa-Vicencio 168). Indeed, the Biblical principle of “an eye for an eye, a tooth for a tooth,” which constrains the degree of permissible punishment and vengeance according to the degree of the corresponding offense, is reflected in precepts of Western retributive justice (Solomon and Murphy 11, 205). In particular, retributive justice generally holds that punishment must be directly proportional to the harm that the wrong inflicted. In the retributive theory of justice, the primary mechanism for carrying out justice is punishment for the perpetrator, which remains the cornerstone of justice throughout the world. There are other forms of justice that do not involve punishment, however. Among some aboriginal cultures in North America, Africa, and Australia accountability and justice are achieved through a community-based process that does “not involve the imposition of ‘punishment’ in the modern, legal sense of the term” (Brunk 32). This process, referred to as restorative justice, suggests how justice in a truth commission differs from traditional retributive forms of justice. That is, although the retributive

concept limiting punishment to the severity of the wrongdoing inherently includes some consideration of the victim, the primary focus of retributive justice falls on the perpetrator. Truth commissions, in contrast, practice a victim-centered approach to justice, which involves principles, values, and practices that have particular relevance to restoring the disruption to societal equilibrium resulting from widespread abuse.

In explaining the prominence of this victim-centered approach to justice in the context of the South African TRC, Archbishop Desmond Tutu emphasized culturally different interpretations and methodologies employed in the administration of justice. Contrasting the practice of retributive justice in Western societies, the Archbishop and chair of the TRC pointed out how the “African understanding is far more restorative – not so much to punish as to redress or restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of the people” (qtd. in Minow Between 81). Without calling it such, Archbishop Tutu is referring to the victim-centered method of restorative justice. To achieve this objective, restorative justice holds “perpetrators accountable, emphasizing the harm that they have done to individual human beings” (Kiss 79). Accordingly, rather than placing the main focus of justice on broken laws, criminals, and punishments, restorative justice promotes reconciliation and fosters the development of social conditions where respect for human rights can thrive. To that end, restorative justice has a primary focus on the victims who have been harmed, their needs, and the obligations of responsibilities that offenders should fulfill to restore balance for the harm inflicted upon the victims and the community as a whole (Zehr Little Book 21, 23).

There are a number of ways that truth commissions promote restorative justice. The South African TRC provided some victims with an opportunity to confront their offenders, emphasizing a key idea of restorative justice “that crimes and offenses are injuries done to another person” (Kiss 76). Instead of making the abuse about a broken law, this effort personalized the violence and empowered victims, which is a principle of restorative justice that involves victims in the search for justice in their own cases (Zehr Little Book 14-15). In addition, the TRC encouraged perpetrators to face their victims and answer for their abuses, thereby promoting important restorative justice principles relating to perpetrator responsibility and restoring relationships damaged by past abuses (Rotberg 15). In this sense, although individual victims and perpetrators are unlikely to have personal relationships with one another, restorative justice assumes communal and social interconnectedness. Thus, not only does the victim-centered approach employed in restorative justice systems serve the needs of victims, it further aims at reconciling differences and repairing damage that past abuses inflicted upon relationships. As a result, restorative justice includes efforts to “put things right” and restore respect for human rights throughout the whole community (Zehr Little Book 20, 29). In sum, truth commissions provide restorative justice through the victim-centered functions and aims that they typically employ, which implicitly further the central aims and values of restorative justice.

### *Needs of Victims*

Restorative justice advocates assert that because crime is defined as against the state, criminal (or retributive) justice systems put the state in the place of the victim, thereby minimizing the needs of victims. The needs of victims are therefore of special concern in restorative justice systems. For example, restorative justice systems often focus on a victim's need to obtain information about why an offense occurred, share personal accounts of trauma, and experience empowerment and vindication in the process (Zehr Little Book 14-15). In line with this approach, truth commissions offer a particular victim-centered approach to truth and justice referred to as "truth as acknowledgment" and "justice as recognition," which address victims' needs to share their account of abuse, have that account acknowledged, and receive recognition as "equal sources of truth and bearers of rights" (du Toit 123, 136). Through listening to personal accounts of abuse from the victims, truth commissions can fulfill the need of victims to have their personal perspective recognized. That is, enabling victims to "tell their own stories" transcends specific factual statements, extending victims the right to frame the issues from their own perspective and receive recognition as "legitimate sources of truth with claims to rights and justice" (du Toit 136).

In a related effort, truth as acknowledgment aims to address the victims' need to have the truth about their abuse officially acknowledged. For many victims of past abuses, the victim-centered approach in which truth commissions collect victim testimony and publish findings in an official and public report represents "the first sign of acknowledgment by any state body that their claims are credible and that the atrocities



are wrong” (Hayner 16). Especially in cases where the government has officially denied the abuses for many years, publicly acknowledging past abuses can serve as a form of justice in and of itself for victims who were consistently denied recognition of their suffering. As TRC commissioner Pumla Gobodo-Madikizela explains, victims have the right to hear, “You are right, you were damaged, and *it was wrong*” (qtd. in Kiss 73). Thus, in officially acknowledging victims’ personal stories of abuse in the overall truth, truth commissions address the critical aspect of restorative justice relating to the needs of victims.

Another way that truth commissions contribute to restorative justice with attention to victim needs is through affirming and restoring “the dignity of those whose human rights have been violated” (Kiss 79). Indeed, according to the official report of the TRC, affirming and restoring the civil and human dignity of victims is an essential commitment of restorative justice (Kiss 71). That is, abuse victims may experience a loss of dignity when their personal accounts of abuse are ignored or denied, thus requiring restoration of dignity. Loss of dignity often arises for the relatives of the victims, as Nohle Mohapi explained in her testimony before the South African TRC. For nearly two decades, Nohle Mohapi had claimed that the state had actually murdered her husband, who was arrested under the Terrorism Act of 1967, detained indefinitely, and eventually found dead with an apparent suicide note. Despite her steadfast attempts to establish the truth about her husband’s death through traditional legal processes, Mrs. Mohapi felt that the truth about her husband’s case would never be genuinely investigated until the TRC took up her case and invited her to testify. After many years of feeling as though her account of her

husband's death did not matter, Mrs. Mohapi experienced restored dignity knowing that the TRC respected her account and would make a genuine effort to uncover the truth (Ntsebeza 160-61). Thus, not only can truth commissions restore a victim's civic dignity as a citizen equally protected under the law, they can further restore human dignity when victims are provided with a platform where their stories can be told and acknowledged. These practices collectively demonstrate how a truth commission can address the needs of victims and restore their dignity, thereby contributing to the goals of restorative justice.

In the context of a truth commission for the war on terror, addressing the needs of victims would be an important element of the effort to achieve restorative justice. Indeed, therapists experienced in working with victims of collective violence often stress that victims need to have societal acknowledgement of the abuses they experienced. Moreover, bystanders also need societal acknowledgment to address their potential guilt for ignoring, denying, or participating in the collective violence that their regimes have inflicted (Minow Between 74). For instance, victims of indefinite detention, extraordinary rendition, and other mistreatment generally remain anonymous, forgotten, or ignored, and therefore deserve to have their accounts heard and acknowledged. Moreover, the fact that many individuals detained in the war on terror have still not been officially charged with any crimes emphasizes the pressing need for truth and acknowledgment. For example, among the sixty-two former Guantánamo Bay detainees who responded to a study on "U.S. Detention and Interrogation Practices and their Impact on Former Detainees," none have received any "official acknowledgement of their

innocence,” and several expressed a desire for the United States to “publicly acknowledge their innocence.” Without official exoneration, some former detainees have been socially stigmatized in their communities, being regarded as suspect or potential threats to public safety (Fletcher et al. 63). Thus, a truth commission’s including victims’ accounts within its efforts to establish and acknowledge the truth about past abuses may fulfill important needs for the victims of indefinite detention, extraordinary rendition, and mistreatment.

Officially establishing and acknowledging the truth about the abuses committed in the war on terror may also restore dignity to the victims, for proper remembrance in and of itself has the potential to restore self-respect and dignity to victims (Bhargava 53). This is particularly important for detainees in the war on terror, who were subject to brutal and dehumanizing mistreatment that likely amounted to torture. Additionally, even in less severe instances of detainee treatment, some detainees still experienced damage to their dignity. For instance, a former Afghani detainee, Wali Mohammad, described an incident in which approximately twenty American soldiers laughed, mocked, and snapped photos during a strip search. According to Mohammad, “They disrespected us and undermined our dignity. They brought shame on us before the whole world” (qtd. in Amnesty International “Human Dignity” 24). Reported instances of detainee dehumanization at the Guantánamo Bay prison have been widespread, with nearly every respondent in the report on “U.S. Detention and Interrogation Practices and their Impact on Former Detainees” saying that the regime at Guantánamo brought them feelings of humiliation and diminishment. In the words of one respondent, “[t]hey tried

to do everything to push our human dignity down, to really push it down” (qtd. in Fletcher et al. 35).

These disturbing accounts of dehumanization, not to mention accounts that possibly remain unknown, morally, if not legally, oblige the United States to address the loss of dignity inflicted upon victims in the war on terror. A truth commission’s unique victim-centered approach to truth and justice offers an ideal mechanism for fulfilling such an obligation. Specifically, providing victims an opportunity to tell their stories to an official and authoritative body “can help them regain their dignity and begin to recover” (Hayner 134). Moreover, in accordance with the victim-centered approach to justice, a truth commission would offer a safe space where the victims could share their stories without facing counter-arguments, objections, or immediate scrutiny. As South African psychologist Brandon Hamber explains, “Psychological restoration and healing can only occur through providing the space for survivors to feel heard and for every detail of the traumatic event to be re-experienced in a safe environment” (qtd. in Hayner 134). Thus, putting victim and witness testimony on the record in a truth commission charged with investigating the treatment of detainees in the war on terror would be “the first step toward restoring the dignity and humanity of the victims” (Horton “Justice” 59).

Recommending reparations for victims is another way that a truth commission can address the needs of victims and serve restorative justice. In fact, some victims have argued that establishing the truth and apologizing for past abuses comprise an aspect of reparation, whereby “the work of a truth commission can be an important piece of a full reparations package.” Even so, the truth is only one piece of the puzzle, for many abuse

victims have to deal with physical and psychological trauma. As such, the full measure of reparations would have to account for the fact that many victims may suffer enduring trauma that interferes with their ability to work or requires ongoing medical expenses. In this context, truth commission staff members have often heard pleas for financial reparations from victims who offer testimony (Hayner 171-72).

While no sum of money can make up for years of wrongful imprisonment, the disappearance of a loved one, or physical and psychological pain and abuse, “even a relatively modest payment can be critical to those living in poverty and can serve an important psychological role of acknowledging wrongs and providing an official, symbolic apology” (Hayner 170). Thus, recommending a financial reparations program may play an important role in a truth commission’s effort to address the needs of victims. For example, a reparations program in place in Chile directly resulted from the National Commission on Truth and Reconciliation officially recommending both financial and symbolic reparations. According to Carla Pellegrin Friedman, who lost her brother to violence at the hands of the Chilean army, receiving monthly checks from the government demonstrated “recognition from the state of its own guilt” in her brother’s killing (qtd. in Hayner 173). Thus, even if reparations cannot fully redress past abuses, they can provide another way to satisfy a victim’s need for official acknowledgment of wrongdoing on the part of the state.

With regarding the abuses committed in the war on terror, a truth commission may recommend that the United State government institute a reparations program for victims of abuses to further the goal of restorative justice. Indeed, the cumulative effect

over years of imprisonment without an adequate hearing, let alone a trial, extracts a substantial physical and psychological toll on victims of torture and indefinite detention. Given the suffering inflicted upon these victims, morality demands instituting some form of reparations to address this grave injustice. George Hunsinger, the founder of the National Religious Campaign Against Torture, expresses this sentiment in asking, “[i]sn’t an official apology and significant monetary compensation the least that can be done for all who were tortured, especially those known to be innocent, and who will suffer unspeakable trauma for the rest of their lives?” To make matters worse, to the extent that some former detainees have sought monetary compensation “for what they saw as wrongful imprisonment, for their losses, and for their treatment in Guantánamo,” both the Bush and Obama administrations have thus far blocked the claims from proceeding in court (Fletcher et al. 69; Greenwald “ABC”). Consequently, whether or not a reparations program is established will ultimately depend on the American government’s commitment to repairing the wrongdoing and showing the political will to formally acknowledge and apologize for crimes that the state has committed.

### *Offender Accountability and Responsibility*

In the restorative approach to justice, crime is considered to be essentially about harm. Hence, consistent with their victim-centeredness, offender accountability and responsibility is another important restorative justice principle that can be achieved through the work of a truth commission. Specifically, accountability entails perpetrators understanding and taking responsibility for the fact that the harm inflicted upon victims

was a consequence of their actions. This means that action must be taken to make things right “as much as possible,” both symbolically and concretely (Zehr Little Book 23). For instance, a perpetrator could acknowledge the wrongness of an offense to demonstrate accountability and responsibility for that wrongdoing, for a critical component of restorative justice is “amelioration of the victims’ sense that they have been *wronged*” (Brunk 52). As applied to truth commissions, the fact that a government establishes a truth commission to investigate and officially acknowledge past wrongdoing can be an act of accountability in and of itself, signaling that the government is engaging in some effort to take responsibility for past abuses. With investigating and reporting about institutional and governmental responsibilities for past abuses being important aspects of a truth commission’s work, the government creates an opportunity to acknowledge culpability and accept responsibility. In fact, after reading the report of the Chilean truth commission, then-President Aylwin spoke publicly on behalf of the state to beg the victims for forgiveness, while also asking the armed forces to make gestures recognizing the pain they caused (Hayner 37). Thus, through publicizing victims’ personal accounts of abuse, truth commissions can encourage widespread public understanding of the harm that victims experienced, thereby promoting a restorative form of accountability.

At the least, establishing public understanding of the truth can contribute to restorative justice because victims may be given the opportunity to feel that the harm inflicted upon them is widely acknowledged. While restorative justice generally “assumes that those most affected by crime should have the opportunity to become actively involved in resolving the conflict,” truth commissions typically encourage

individual offenders to come forward and make amends for participating in past abuses (qtd. in Dressler 61). As a result, this public service may increase the likelihood that perpetrators will better appreciate the personal, human harm that their actions have caused, regardless of whether individual perpetrators acknowledge their wrongdoing. For example, on a more individual level, the South African TRC encouraged individual offenders to come forward, share their account, and accept personal responsibility for their role in perpetrating past abuses (Kiss 76). In a similar respect, military officials who were involved in past abuses provided firsthand confessions to the Chilean National Commission for Truth and Reconciliation (Hayner 113). Possibilities remain, however, that individual offenders may fail to come forward and that victims may feel that justice has not been served because some offenders may not choose to accept responsibility. Nonetheless, a truth commission can provide “at least a minimal step toward accountability, especially when the commission publicly names those responsible for abuses” (Hayner 17).

With regard to the war on terror, a truth commission’s official acknowledgment of past wrongdoing can, in fact, serve as an initial step towards establishing accountability (Greenwald “Exceptionalism”). Consistent with the restorative approach focusing on harm, accountability for past abuses should consist of “a direct, moral, and ethical response to victims on behalf of society that demonstrates that the state is validating their innocence and their lack of culpability in the deeds” (Fletcher and Weinstein 59). As such, on an individual level, a truth commission could promote accountability in providing individuals who were somehow involved in past abuses an opportunity to



acknowledge wrongdoing publicly, whether it be witnessing warrantless wiretapping, promoting false justifications for the Iraq war, or participating in detainee abuse. While voluntary testimony may be difficult to acquire from individuals who could face criminal liability, some form of immunity for truthful testimony could be arranged to moot the issue of prosecution and encourage perpetrators to accept accountability. However, drawing from his experience as Chief counsel for the Church Committee, Frederick Schwarz suggests that immunity may not be necessary for perpetrators to acknowledge their wrongdoing. Arguing in favor of a truth commission for the war on terror, Schwarz notes that of the hundreds of people that admitted wrongful and criminal conduct before the Church Committee, not a single one requested immunity (Froomkin “Is There a Price”). Thus, accountability for individual offenders may be achieved through the work of a truth commission, with immunity simply being an additional mechanism for coaxing reluctant witnesses.

On a societal level, the American people also have a responsibility to learn the truth about abuses that their own government has committed. That is to say, a key principle of the American governmental system is that the people govern themselves, wherein “ultimate accountability is and must remain in the hands of an informed citizenry” (Heymann and Kayyem 6). Knowledge of the abuse is not enough, however, for overt criminality is a cancer on a democratic society, implicating “all who know of the conduct and fail to act” (Horton “Justice” 51). Indeed, there is ample evidence to indicate that such is the case with regard to the war on terror. For example, it is public knowledge that the Bush Administration falsely linked Saddam Hussein’s Iraq to the

greater war on terror to justify an arguably illegal war. Moreover, recent revelations suggest that harsh interrogations may have even been authorized to generate intelligence supporting these false justifications for war (Smith). Despite this information being in the public domain, the American public has largely failed to demand official action addressing this grave injustice. Indeed, for the American people to claim responsibility for actions carried out in their name, true accountability would require recognizing the extent of responsibility for the Iraq war from upper echelons of government all the way down to the level of individual citizens (Horton “Justice” 51). For, as Frank Rich asserts:

Five years after the Abu Ghraib revelations, we must acknowledge that our government methodically authorized torture and lied about it. But we also must contemplate the possibility that it did so not just out of a sincere, if criminally misguided, desire to “protect” us but also to promote an unnecessary and catastrophic war. Instead of saving us from “another 9/11,” torture was a tool in the campaign to falsify and exploit 9/11 so that fearful Americans would be bamboozled into a mission that had nothing to do with Al Qaeda. The lying about Iraq remains the original sin from which flows much of the Bush White House’s illegality.

Although neither the American public nor government officials can be forced to accept responsibility, a truth commission for the abuses committed in the war on terror may implicitly represent the public and acknowledge harms on its behalf. In doing so, a truth commission can encourage, if not fulfill, the need for responsibility and accountability for the past abuses in the war on terror, thereby serving the greater goal of restorative justice.

Another way that a truth commission for the war on terror could offer accountability is through naming individuals responsible for past abuses. However, considerable controversy has stemmed from the question of whether it is appropriate for a truth commission to name the individuals it considers responsible for human rights abuses publicly. On the one hand, rights advocates argue that due process requires accused individuals to have the right to defend themselves in a court of law before being declared guilty. On the other hand, truth commissions are created as truth-telling mechanisms, where telling the full truth includes naming persons responsible when clear evidence of their culpability exists. Furthermore, when truth commissions name responsible individuals without necessarily indicating that they are legally guilty of committing a crime, the naming may be conceptualized as being similar to issuing an indictment that simply amounts to an accusation. Pragmatic issues may also come into play, as political pressures and security risks may be considered in determining whether or not to name specific perpetrators (Hayner 108). Nevertheless, the option of naming individuals found responsible for past abuses can clearly contribute to establishing accountability. For example, public exposure can offer a kind of public shaming serving as a social or moral sanction for the perpetrators (Philpott 21). In fact, Senator Graciela Fernandez Meijide, a senior director of the National Commission on the Disappeared in Argentina, specifically argued in favor of publishing the names of individuals responsible for past abuses to provide “at least some moral sanction against abusers” (Hayner 109). Individualizing guilt is an important principle of accountability, whereby naming

individuals responsible for past abuses is one way that truth commissions contribute to the greater effort of restorative justice.

With regard to the war on terror, a truth commission could officially establish the identities of individuals it finds responsible for abuses to foster accountability. However, truth commissioners ought to consider carefully the overall circumstances in determining whether to name particular perpetrators. On the one hand, identifying high-profile individuals who are responsible for abuse and publicizing evidence of their culpability may interfere with future prosecutions, thereby hindering the justice process (Hayner 118). In addition, identifying low-level individuals who committed abuses as a result of following orders, such as military personnel, could be controversial or create disincentives for coming forward and testifying. On the other hand, an argument can be made that justice demands holding individuals personally responsible for past abuses, which necessarily requires that the responsible individuals be identified. Moreover, publicly exposing the wrongdoing of certain individuals can function as a kind of public shaming, which itself may serve as a “form of accountability” (Philpott 21).

According to Hayner, an overarching purpose of truth commissions is to “focus attention on those who organized or authorized massive abuses, including those in senior political or military positions who knowingly allowed such acts to take place on their watch” (132). Thus, in terms of the war on terror, a truth commission may determine whether or not to name low-level perpetrators according to the specific circumstances of the case, while emphasizing ultimate accountability at the highest levels where abuses were authorized. Indeed, Majorie Cohn, president of the National Lawyers Guild, states

that the “command responsibility” doctrine imparts liability to top officials if they knew, or should have known, that subordinates would engage in torture and did not act to stop them (Lithwick). Moreover, identifying perpetrators would be superfluous if the Justice Department shows any inclination to take action and prosecute these individuals.

However, the inaction to date coupled with the Justice Department’s role in enabling the abuses suggests that to be an unlikely proposition. In other words, in the likely event that the Justice Department does not act, a truth commission may nonetheless serve principles of restorative justice through publicly naming the individuals it finds responsible for the abuse.

### *Prevention and Reform*

Addressing the needs of victims and holding individual offenders accountable may result in decreasing the likelihood of future abuses, another major goal common to restorative justice and truth commissions (Zehr Little Book 37). In fact, Hayner suggests that preventing abuses from recurring in the future might be the most important objective for any given truth commission (29). Similarly, Roy Gutman, who has extensive experience reporting on countries dealing with war crimes, asserts that exposing the truth “completely and thoroughly – and shaming those who did it – may be every bit as powerful a deterrent to future illegal action as criminal prosecution” (qtd. in Froomkin “How Many”). Indeed, public shaming in a truth commission can “express appropriate moral condemnation” on behalf of the state and citizenry, which may serve to deter future abuse (qtd. in Dressler 62). In addition, establishing an official truth about past

abuses encourages a collective remembering that is critically important to prevent similar abuses in the future (Bhargava 54). Without properly understanding how and why the past happened, it is axiomatic that the past is destined to repeat itself. Thus, because truth commissions can facilitate learning lessons from the past and condemning the individuals responsible for abuse, they serve an important function in preventing the recurrence of past abuses.

Congruent with learning lessons from the past to deter future abuses, truth commissions officially recommend reforms that are specifically aimed at preventing future abuses. After collecting, analyzing, and reporting the truth about past abuses, truth commissions are naturally “positioned to evaluate the institutional responsibilities for extensive abuses, and to outline the weaknesses in the institutional structures or existing laws that should be changed to prevent abuses from reoccurring in the future” (Hayner 29). Consequently, most truth commissions recommend specific reforms in the judiciary, military, legislature, and political system in an effort to curb future abuses and strengthen the institutions charged with responding to abuses if and when they occur (Hayner 154; Kiss 75). For instance, prior to the Commission on the Truth for El Salvador, whenever an individual was arrested in El Salvador, any confession offered by that individual could be used against him or her in court, even if the confession was obtained through torture. Following the truth commission’s investigation and report on past abuses, El Salvador followed the recommendations of the truth commission and invalidated the use of extra-judicial confessions in a constitutional amendment, establishing a mechanism specifically designed to prevent further abuse of a similar nature (Hayner 165). Fully reckoning with

past wrongdoing requires a society to “identify the causes of past abuses and take steps to reform the law and basic institutions to reduce the possibility that such violations will be repeated” (Crocker 10). Thus, the functions of identifying areas needing reform and presenting recommendations for such reform make truth commissions ideal mechanisms for preventing further abuses and contributing to the overarching purpose of restorative justice.

Successfully preventing future abuses can never be entirely guaranteed.

Nonetheless, elements of a truth commission could certainly decrease the likelihood that abuses like those committed in the war on terror will recur. For instance, investigating and acknowledging the faulty justifications for the Iraq war could serve to assert that similar “unilateral initiation of warfare” will not be tolerated in the future (Krieger). In fact, without such an assertion, other countries, if not the United States itself, could cite the Bush Administration’s rationale for war with Iraq as a standing precedent for engaging in similar action. Thus, a truth commission could act as a mechanism for the American government to disavow the preventive warfare doctrine and preempt others from invoking it in the future. Regarding public shaming and social condemnation as a form of deterrent, publicly denouncing the actions of current or former government officials could prevent them from acting in positions of power and authority. In this sense, a truth commission could end the cycle of influence these officials possess and delegitimize their support for abusive practices.

Indeed, many of the people implicated in the practices in question remain in government positions, while others such as former Vice President Cheney and former

Defense Secretary Rumsfeld have substantially influenced policymaking decisions over the course of multiple administrations (Froomkin “So Much”). Moreover, former Vice President Cheney continues to be welcomed in many different media outlets to argue that the abuses committed in the war on terror were legitimate. Without officially and publicly condemning the role of Vice President Cheney and other top Bush Administration officials in the abuses, Cheney could continue to have influence over the government. This could result in latent powers being vested in the government, which could then be reasserted in the future used to justify similar abuses. Thus, a truth commission’s condemnation of past abuses and those who authorized or even participated in the abuses could offer a unique opportunity to provide an official record about practices carried out in the name of the war on terror. In doing so, a truth commission may ultimately lead to the reform and oversight needed to create an effective “deterrent against disproportionate and inappropriate invasions of human rights” (Goldstone 166).

Accordingly, in establishing the truth about past abuses, a truth commission can provide the American public and the government valuable lessons to be learned. In doing so, a truth commission may encourage the implementation of important reforms, helping to prevent similar recurrences of abuse. Indeed, advocates of a truth commission for the war on terror, such as Senator Patrick Leahy, assert that the “best way to move forward is getting to the truth, finding out what happened, so that we make sure it does not happen again” (“Truth Commission”). One important lesson that may need to be learned relates to whether Frederick Schwarz and others are correct in believing that the



Bush Administration may have actually made the country “less safe” as a result of breaking the law and violating basic American values (Froomkin “Is There a Price”). For instance, it has been broadly alleged that enemies of the United States, and especially al Qaeda, have used the mistreatment of detainees in the war on terror as recruiting tools. Thus, a truth commission could inquire into these allegations and offer conclusions that may ultimately carry the critical lesson that there is a cost for departing from values such as upholding human rights. However, even if a truth commission were to find instead that Schwarz’s hypothesis is incorrect, the chance to examine American morals and values and consider the individual and collective consequences of violating those principles would arise as a consequence. From this perspective, a truth commission can offer various paths for the emergence of important lessons to ensure that similar abuses will not be tolerated in the future.

In addition to providing a shared understanding to prevent the repetition of failures that led to past abuse, a truth commission can offer recommendations to reform laws, policies, and tactics that the government employs in the war on terror. In doing so, a truth commission can serve the critical aspect of justice that aims at preventing future abuses. In particular, the overall manner in which the war on terror has been implemented is replete with abusive and controversial practices, causing profound problems in America’s counter-terrorism policy that a truth commission could address. Indeed, Eric Stover, Faculty Director of the Human Rights Center, suggests that the United States’ response to “a dangerous enemy that fights in unconventional ways” should be meticulously examined to propose reforms to correct past mistakes in national

security policy. As an example, Stover points to the bounty system that provided remuneration to Pakistanis and Afghans that handed over alleged terrorists, which resulted in a large number of innocent people being mistakenly detained (Froomkin “To Look Forward”). As such, a truth commission could examine this tactical approach to counter-terrorism, evaluate the consequences of the approach, and recommend areas requiring reform to avoid similar abuses in the future.

In the legal context, many experts suggest that the Bush Administration’s strategic decision to declare a “war” on terrorism allowed the administration tremendous flexibility and minimal restrictions within the law, ultimately resulting in the implementation of morally and legally questionable practices (Goldstone 165; Roth; Singh 17; Sullivan). Specifically, the Bush Administration selectively combined rules of law and rules of war in what Luban refers to as a “hybrid war-law approach” that significantly widened the scope of the battlefield in the war on terror and threatened the rights of innocent people (414). Considering the fact that the war on terror does not qualify under the traditional legal definition of warfare, there is an apparent “need to clarify certain legal principles that Bush intentionally muddled, most notably who is covered by what parts of the Geneva Conventions” (Froomkin “How Many”). Thus, a truth commission could examine questionable legal interpretations in the war on terror and evaluate the causal relationship to past abuses. Furthermore, a truth commission could draw upon domestic human rights law to point out the need to reform legal and policy loopholes that enabled torture and other abusive practices to occur.

### *Reconciliation*

Another important way in which truth commissions contribute to restorative justice is through their reconciliation efforts. According to the principles and values of restorative justice, everyone in a society is interconnected, such that crimes are viewed as violating the interconnected relationships (Zehr Little Book 19-10). In line with this view, restorative justice entails healing the damage done to relationships as a result of crime. Reconciliation is therefore a “fundamental principle of restorative justice,” for facilitating reconciliation between offenders, victims, and communities may promote healing these interconnected relationships (Cunneen 367). In truth commissions, reconciliation tends to refer to a broader form of societal healing that can occur when the truth about past abuses is widely known and understood (Hayner 133). In this sense, the truth itself can assist a society in overcoming the fear and distrust that plague societal relationships due to disputes and misinformation over past abuses. Consequently, truth commissions can create an opening to heal relationships that were damaged because a society lacked a shared understanding of the truth (Kiss 71).

Indeed, a distinction should be made between individual reconciliation and the broader concept of political or national reconciliation as truth commissions tend to focus more on the latter. In particular, truth commissions typically operate in nations attempting to deal with widespread violence or political conflict. In these cases, the relationships that need the most healing tend to be between different religious, regional, political, or ethnic groups, rather than those between particular individuals (Hayner 133, 155). Thus, when truth commissions expose the truth about past events, national

reconciliation may result from the resolution of disputes between all of the victims and former criminals in the polity (Dancy and Poe 5). In this sense, truth commissions can encourage groups embroiled in disputes over the past to reconcile their contradictory stories or facts. In other words, establishing an official and consistent account of the truth about past abuses may pave the way reconciling differences, which is a critical component often emphasized in restorative justice (Slye 179). As a result, in societies dealing with widespread rights abuses, “encouraging reconciliation between opposing groups who may feel they have much to hate or fear in the other” may help to break the cycle of contempt and revenge. Breaking this vicious cycle may contribute to restorative justice in itself through decreasing the likelihood of future abuses and clearing the path for further societal healing (Hayner 154).

Another way that truth commissions contribute to reconciliation and restorative justice is through moral reconstruction. As previously noted, restorative justice emphasizes the importance of “making things right” or “putting right” what has gone wrong (Zehr Little Book 20). In fact, this concept is considered a necessary obligation for offenders in terms of restorative justice. With regard to the manner in which truth commissions deal with massive rights abuses, moral reconstruction or restoring moral order is crucial to putting things right. According to Jose Zalaquett, a Chilean lawyer and truth commissioner, truth commissions aiming to systematically address past abuses involve restoring “a moral order that has broken down or has been severely undermined,” or alternatively establishing “a just political order if none existed in previous historical memory” (qtd. in Kiss 80). The moral order in a society generally requires that rules

governing social interaction are commonly understood and that disputes are adjudicated when these rules have been broken (Chinapen and Vernon 120). In cases of widespread rights abuses, the moral order that governs social interaction has necessarily been broken, blurring the line dividing socially acceptable and unacceptable behaviors.

To address this breakdown in the social moral fabric, and in line with the ability to grasp a number of complex factors underlying past abuses, a truth commission can clarify legal and moral conceptions of appropriate behavior. For example, truth commissions often provide the space for considering the complexity of the moral intent of certain laws versus the positive aspects of the laws themselves. Indeed, in determining whether certain behavior is morally appropriate, a truth commission can ensure that the particular purpose of a legal action or law is not overlooked (Villa-Vicencio 177). In this sense, a truth commission can, and perhaps should, highlight abusive practices regardless of whether or not they strictly comply with the law to bring attention to potential problems in the legal framework. In terms of the war on terror, much of the debate over harsh interrogation methods and the overall treatment of detainees centers on legal arguments over what does or does not qualify as torture. While clever legal arguments have been proposed to narrow the scope of laws prohibiting torture, these arguments are far from convincing when the moral intent of these laws is taken into account. Regardless of whether the detainee abuse known to have occurred legally qualifies as torture or otherwise merits prosecution, moral decency demands that the government and citizens of America contemplate whether this mistreatment violates fundamental moral values regarding the treatment of fellow human beings.

Accordingly, because truth commissions consider the impact on legal and moral conceptions of appropriate behavior in their efforts to establish the truth, their work serves restorative justice through reestablishing the boundaries defining morally appropriate behavior within a given society. To do so, truth commissions often render a moral verdict about past abuses to draw a “moral bottom line” (Maier 267). For instance, truth commissions seek to identify behaviors that morally, and possibly legally, encompass intolerable conduct. Although trials arguably also have the capacity to render moral verdicts, the origins and circumstances underlying widespread abuses require a more comprehensive understanding to render a proper moral verdict on the societal level. In particular, moral reconstruction does not merely deal with breaches to the moral order that occurred in the past. Rather, moral reconstruction further requires efforts to establish that moral order for the future and prevent subsequent breaches. For example, these forward-looking efforts may include repairing “the broken quality of human relationships through a society, including those between the former oppressor and the oppressed” (Kiss 80). With this goal in mind, truth commissions can foster the conditions for according dignity and respect to every citizen, creating the possibility for restoring moral order and contributing to restorative justice.

As applied to the war on terror, restorative justice demands addressing the tumultuous condition of societal relations within the United States, especially because the need for reconciliation may not be as obvious as in other countries dealing with civil unrest and violent conflicts. Nonetheless, there are compelling signs indicating the need for societal healing, reconciliation, and restoring moral order, the trademark objectives of

restorative justice. For instance, the Bush Administration violated the trust of the American public and allies in providing misleading reasons to rally support for the war. The office of President entails great power and responsibility, for it the holder of that position makes important decisions that greatly impact the lives of Americans and citizens around the world. Indeed, when the President asks the American public and international allies to sacrifice blood and treasure in support of a military effort, they should be able to trust that the reasons for this ultimate sacrifice are honorable and prudent. The Bush Administration violated this relationship of trust, however, when faulty justifications were espoused to justify preemptive and unnecessary military action. What is more, a majority of the American public now believes that the Bush Administration went so far as to *deliberately* mislead them into war, exacerbating the seriousness of this violation (Page). As such, the United States could benefit from domestic and international reconciliation efforts at least with regard to the Iraq war.

Furthermore, in requesting international support for the military endeavor in Iraq, the Bush Administration was also asking for trust in the integrity and legitimacy of the justifications for going to war. Indeed, the just war doctrine has ancient roots that are evident in the world's religions, embedded in principles of international law, and codified in the UN charter (Andreopoulos 197-200; Howard 2-8). Thus, in breaching this omnipresent contract of trust, the Bush Administration damaged relations with long-standing allies and the international community at large, the consequences of which may resonate for years to come. The next time an American president requests support for military action, there is a risk that the requisite backing of the public and international

allies may be withheld out of doubt that the reasons are legitimate. Therefore, to further the pursuit for restorative justice in the war on terror, the United States should seek to ameliorate damage and restore trust to the relationships among the government, the American people, and the international community, all of which could be achieved through the work of a truth commission. To that end, a truth commission could acknowledge that the Bush Administration provided wrongful and misleading rationales for military action in Iraq in public hearings or an official report. This could serve as the voice of apology and assurance that similar breaches in trust will not happen again. In this way, the rekindling of trust needed to bring about reconciliation and restorative justice could begin.

Similarly, there may be a further need for reconciliation in the sense of healing, or perhaps simply establishing, benevolent relations between the United States and the Muslim world. Indeed, conflicting interpretations, mutual misunderstanding, and general disrespect between these communities plague many of the abuses committed in the war on terror, indicating the need to reconcile relations and the truth. For instance, due to the Bush Administration's propaganda, many American troops believed and likely continue to believe that the war with Iraq was part of a broader effort to combat terrorism, protect their country, and bring democracy and freedom to the Iraqi people (Barstow). For many Iraqis, however, the war is likely perceived as an unwarranted invasion that resulted in many innocent people being mistreated, displaced, or even killed. One Iraqi from Fallujah summed up his feelings about the American military presence in Iraq with the following statement:



For Fallujans it is a *shame* to have foreigners break down their doors. It is a *shame* for them to have foreigners stop and search their women. It is a *shame* for the foreigners to put a bag over their heads, to make a man lie on the ground with your shoe on his neck. This is a great *shame*, you understand? This is a great *shame* for the whole tribe.

It is the *duty* of that man, and of that tribe, to get revenge on this soldier – to kill that man. Their duty is to attack them, to *wash the shame*. The shame is a *stain*, a dirty thing; they have to *wash* it. No sleep – we cannot sleep until we have revenge. They have to kill soldiers . . . The Americans . . . *provoke* the people. They don't *respect* the people. (qtd. in Danner Torture and Truth 1-2).

While the acts of the soldiers in this Iraqi's account may be offensive to any individual regardless of their culture or religion, the references to shame and the desire for revenge seem to indicate religious or cultural perspectives that the United States government and the American people may not fully understand. In this sense, the existence of serious cultural misunderstandings is apparent, which is something that a truth commission could address to further the reconciliation aspect of restorative justice.

Indeed, the people of Iraq have dealt with Western forces colonizing their lands and supporting oppressive heads of state in the past, which may exacerbate negative sentiments towards American troops in Iraq. For some members of the Muslim faith, the invasion of Iraq may be viewed as yet another example of the United States' history of dubious involvement in the Muslim world (Armstrong Battle 230-32). Moreover, it could

be the case that members of the United States government may not widely understand the ways in which some Iraqis may interpret Islamic principles of modesty and self-defense. This becomes a significant problem because those interpretations have the potential to cause feelings of shame or humiliation and acts of violence towards American troops (Kimball 176; Wadud 10). Furthermore, Americans may respond with frustration and confusion to these reactions based on the belief that they are simply trying to help the Iraqi people and defend America against terrorism. However, after adding extraordinary rendition, torture, indefinite detention, and inflammatory rhetoric such as “Islamofascism” to the mix, the need for reconciliation between the West and the Muslim world becomes undeniable (Reston “Iraq, Anyone”).

Achieving peace and reconciliation between the West and the Muslims around the world might remain a lofty goal that might not be attainable for generations, if at all. Nonetheless, a truth commission would at least signal an honorable effort to begin the journey towards reconciling misunderstandings and conflicting perspectives that have deep roots. Genuine efforts to address the abuses that have been committed in the war on terror could therefore serve as a microcosm of the greater cause to reconcile the relationship between the Islamic world and the West. In particular, as indicated above, a truth commission would focus on the needs, voices, and perspectives of the victims of abuse, while also affording offenders the opportunity to share their experiences and acknowledge wrongdoing. In this sense, the mere process through which a truth commission establishes the truth about past abuses could result in an empathetic and shared understanding that may ease relations between Americans, Iraqis, and Muslims,

among others involved in the abuses. In addition, a truth commission could draw from the testimony of experts on history, culture, and religion to establish a comprehensive and shared understanding that places the abuses in the war on terror in the larger context of conflict between Muslims and the West. The work of a truth commission could therefore begin to lay the foundation for encouraging or contributing to present and future reconciliation efforts between these great communities.

In view of the scope and severity of the abuses committed in the war on terror, the potential of a truth commission to restore moral order and promote political reconciliation would serve important principles of restorative justice. Indeed, disagreements over whether and to what extent detainee mistreatment is legally or morally acceptable continue to dominate discourse surrounding this issue in the United States (Krauthammer). While the American people are certainly free to assert their own opinions, the “discursive location of torture at the heart of public debate about war on terror policy sometimes [offers] visceral evidence of a profound political and moral crisis” (Holloway 53). Accordingly, a truth commission could provide an official and authoritative judgment on this issue to reconcile differing perspectives on the morality of mistreating detainees. In addition, this moral judgment may encourage or lead to changes in legislation and policy, further reaffirming this political reconciliation. Definitively highlighting the abuses, the harm done to victims, and recommendations for preventing similar abuses in the future, as a truth commission does, could officially settle differences and thereby promote political reconciliation. Moreover, in rendering an official judgment that condemns past abuses, a truth commission may set the stage for

restoring a moral order consistent with the fundamental values of human rights and the rule of law that the United States has long promoted.

## 9. A TRUTH COMMISSION AND JUSTICE FOR THE WAR ON TERROR

The touchstone of justice, whether it is retributive or restorative, is accountability (Kiss 78). How this accountability is ultimately achieved, however, depends upon the values and principles that are most important to those responsible for dealing with the offenses at hand. That is, different people may have different views on what the concept of justice entails. To some, justice may involve symbolic or actual reparations for victims; for others, it may require “eye-for-an-eye acts of revenge” or “societal or community development to make up for past deprivations and injury” (Hayner 282). Arguably, the American justice system has appropriate mechanisms in place to deal with lawbreaking that falls within traditional concepts of Western justice. In light of this, the restorative justice methodology typically employed in a truth commission may seem unnecessary. However, narrowing the definition of justice to purely judicial and legalistic terms runs the risk of overlooking other important factors relating to the offense, and may limit the breadth of justice that could be achieved. The concepts of restorative justice, as practiced in a truth commission, could address some of these gaps in the existing criminal justice framework.

It could be the case that comfort with the status quo forms the basis for some of the opposition to a full-fledged investigation into the abuses committed in the war on terror. That is, familiarity with punishment as the primary mode for carrying out justice

obfuscates the fact that state punishment is a social convention that has only been adopted in Western societies in recent centuries (Johnstone 10). Due to this familiarity with establishments, shifting to the restorative justice approach that would be practiced in a truth commission “requires a leap of faith, a belief in the possibility of moral transformation of both persons and institutions” (Kiss 83). Even so, the circumstances surrounding some of the abuses committed in the war on terror are so complex that a truth commission’s multifaceted approach may be best suited for truly serving the interests of justice. For example, the detainee abuse scandals have a character that is “peculiarly contemporary,” being less about the wrongdoing itself and more about how the government, the press, and the citizenry collectively failed to act after the wrongdoing was revealed (Danner Torture and Truth xiv). In line with this view, a truth commission adheres to the restorative justice concept that considers an entire community to be somehow involved in egregious offenses to one degree or another.

Whether that community is on a local or global scale, a broader perspective that considers the long-term can extend the reach of justice beyond narrow conceptions that are limited to individual perpetrators and victims. Indeed, the manner in which a truth commission combines a restorative justice methodology with the potential to cooperate in future criminal inquiries could offer benefits beyond what either mechanism provides alone. Thus, given the multitude of abuses committed in the war on terror that beg the need for justice, the range of ways in which a truth commission establishes a comprehensive understanding and promotes restorative justice could provide promising possibilities for addressing the past abuses and preventing their recurrence. After all,

only “the disclosure of truth and the search for justice can create the moral climate in which reconciliation and peace will flourish” (Boraine 151).

## 10. CONCLUSION

Truth and justice, which are intrinsically and instrumentally linked, may be considered the two predominant purposes that animate how societies respond to collective violence. It goes without saying that “without truth one cannot distinguish the innocent from the guilty,” whereby truth implicitly serves justice (Kiss 71). When the truth is publicly exposed, the resulting shared understanding can create the possibility of identifying the perpetrators who produced the harm and holding them accountable. Furthermore, when the truth is established holistically to encompass broadly the relevant facts and circumstances, the ensuing impact on justice has the potential to surpass the limits inherent in questions relating to accountability. For example, a comprehensive truth can cultivate a new culture of respect for human rights and promote reconciliation for damaged relationships. As such, in view of the widespread nature of the abuses committed in the war on terror and the institutional and societal complicity in the abuses, a truth commission could establish an extensive account with the potential to serve many different purposes embedded within the abstract concept of justice.

Consequently, a truth commission for the abuses committed in the war on terror would have the potential to grasp the complexity behind the abuses, which may ultimately further the aims of restorative justice. In this sense, the question of whether a truth commission could serve restorative justice can be answered in the affirmative.



However, because the definitions, goals, and practices associated with the pursuit of justice can vary, a common understanding regarding what is encompassed in the concepts of justice and accountability should be established to determine whether a truth commission could serve justice for the abuses committed in the war on terror. For example, a society may generally agree on the definition of justice as “an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs,” which “implies regard for the rights of the accused, for the interests of victims and for the wellbeing of society at large” (qtd. in Gierycz 6). However, translating this definition into a concrete system of justice is more ambiguous. Specifically, it is critical to acknowledge that different cultures and nations may perceive justice differently. Thus, agreement regarding what is encompassed in the American concept of justice should be established if there is to be societal acceptance that a truth commission is the best way to achieve justice for the abuses committed in the war on terror. Once this agreement is established, the restorative approach that would be employed in a truth commission could be tailored to promote justice in a manner that is acceptable in American society.

Indeed, those in favor of traditional methods that emphasize retributive justice may reject the emphasis truth commissions place on restorative justice. However, it should be noted that a truth commission for the war on terror ought not be implemented to displace the criminal justice system. Rather, a truth commission would offer the opportunity to engage in a comprehensive approach to justice that includes restorative, victim-centered aspects and robust fact-finding capabilities that can strengthen and

reinforce traditional Western methods such as prosecutions. Moreover, even though a truth commission would not have the authority to prosecute and punish perpetrators independently, it could serve retributive justice to some degree through its efforts to mitigate power that the perpetrators may hold (Maier 268). Finally, because the manner in which the past is remembered or forgotten can have a significant impact on the present and the future, a truth commission could offer valuable and unique insights that may broaden the scope of justice at the individual and societal level (Minow Between 119). Thus, although the tangible effectiveness of a truth commission can only be evaluated in view of its actual implementation, it has the potential to extend justice beyond the mere assignment of culpability and serve a more thorough form of justice for the abuses committed in the war on terror.

It should be acknowledged, however, that fully detailing the consequences and extent of widespread abuses carried out over a number of years would be difficult, if not impossible, for a short-term commission (Hayner 85). In addition, reliable knowledge may be elusive in many cases, which may present impediments to pronouncing conclusions beyond a reasonable doubt (du Toit 133). In light of these limitations, some may argue that investigatory journalism offers a valuable existing alternative to a truth commission's search for the truth. However, even though investigative journalism has been responsible for exposing some of the abuses committed in the war on terror, any coverage and truth-telling reports have tended to be sporadic and not without interference from the government.

In contrast, an officially sanctioned truth commission would undoubtedly receive a large amount of ongoing media attention and operate with governmental consent. This would increase the likelihood that the attention of the media and the public will be directed to a forum for presenting stories of abuses that may have otherwise gone unnoticed. Furthermore, a truth commission would present a single and definitive report to establish a narrative form of truth telling that cannot be summarily dismissed. Finally, the ability of a truth commission to dig deeply into the various factors that contributed to the abuses may present a thorough truth that, if properly used, could positively influence the United States' response to similar circumstances that may arise in the future. Indeed, the mere process of compiling the relevant information may be as important as the final report itself, for it would involve broad sectors of society in the cause of uncovering information about the abuses and listening to the stories of those involved.

Accordingly, a truth commission clearly has the potential to establish truth and serve justice for the abuses committed in the war on terror. However, the expectations surrounding what truth commissions will ultimately achieve almost always exceed the reasonable prospects for these bodies. Logistical issues such as funding, mandates, the composition of the commission, and incentives for participation may present obstacles interfering with the ability to realize ideals. Nonetheless, despite the possible shortcomings of a truth commission, the bottom line is that idealistic expectations may simply be unrealistic. In addition, even if a truth commission were to establish the truth to the full extent of its ability and bring justice for past abuses, some individuals may still assert that truth and justice have not been fully achieved. In any event, a truth

commission could at least provide an initial step towards truth and justice, which could then serve as the impetus for further pursuing these important goals. Indeed, even if a truth commission for the war on terror is unable to achieve its full potential, it should be noted that previous truth commissions have resulted in significant long-term benefits that were not entirely expected at the outset of their efforts (Hayner 8). Besides, questions that focus on the potential imperfections of a truth commission are misleading at best, for there have been no rigorous efforts to explore an alternate mechanism for establishing the truth and serving justice for the abuses committed in the war on terror. Inaction is unacceptable, and the American people should avoid the temptation to frame the issues in terms of the false choice between an imperfect truth commission and imperfect trials. Rather, in view of the sustained failure to act years after the existence of the abuse has been known, the choice appears to be “between a truth commission and silence, or worse than silence: between the commission and the often unbearable sight of seeing earlier abusers of power continue in office and enjoy the wealth they have accumulated” (Maier 269).

In addition, the abuses committed in the war on terror not only implicate the individuals directly involved in the abuses; to some degree, all American citizens are responsible for the actions of their government. In this sense, when everyone in society played some role in the abuse, a truth commission may be an ideal mechanism for attaining truth and justice. This is because a truth commission would consider a version of the truth that not only addresses who did what, but also considers what acts were carried out in the name of the United States. To that end, a truth commission draws

strength from its broad and flexible approach, for there is no silver bullet for establishing the truth and serving justice for widespread abuses that are rife with controversy. Indeed, the eventual success of a truth commission may require creative methods aimed at unearthing the truth while being sensitive to national needs (Hayner 252). Thus, in dealing with widespread complicity and other complex issues linked to the abuses committed in the war on terror, a truth commission can and should be developed in a way that specifically addresses the needs and context of the United States. In this sense, a truth commission may offer a uniquely tailored mechanism for establishing the truth and serving justice for the abuses committed in the war on terror.

In summary, not only would a truth commission certainly have the potential to establish the truth and serve justice for the abuses committed in the war on terror, it could help to “transform this history from a source of silent pain and conflict to a point of public understanding and acknowledgment, so that the future is not continually hampered by an unresolved past” (Hayner 254). Emphasizing the interconnectedness and shared responsibility for the abuses, a truth commission could involve all of society in its work, thereby raising the stakes and extending the reach of justice. In other words, broadcasting the truth about the harm resulting from the abuses and emphasizing the need for restorative justice on a societal scale may kindle widespread support for repairing the damage that the abuses have caused. The obvious victims of abuses are not the only ones having a stake in justice being served, for the abuses raise metaphysical issues of guilt that extend well beyond earthly pain (Reston “Responsible”). While the actual effectiveness of a truth commission cannot be predicted, its unique capacity to tell a

comprehensive truth provides a solid foundation for addressing the systemic breakdown that enabled the abuses. That is, considering the range of factors in the restorative justice framework that a truth commission would follow, the promising transformative value of a truth commission demands serious consideration for implementing one for the abuses committed in the war on terror.

Ultimately, the decision of whether or not to look into the details of a difficult past belongs to a country and its people, despite any possible lack of political will or other ostensibly urgent priorities. If executed effectively and provided sufficient resources and support, however, a truth commission could fundamentally shift how the United States understands its past and moves towards the future. For example, a truth commission could try to restore important morals and values that the United States has previously advocated. Indeed, a truth commission could draw inspiration from the South African TRC's emphasis on "the African concept of *ubuntu*, or humaneness," practicing and promoting traditional American values such as the defense of human rights (Kiss 81). In giving respect and acknowledgement to the human rights of dehumanized detainees, a truth commission could demonstrate a genuine commitment to the ideals of freedom and democracy that the United States has historically advocated. In this way, a truth commission may help to restore basic human decency and frame past events in a narrative that represents the acknowledgement, accountability, and civic values of the nation.

Finally, a truth commission may offer a unique opportunity to address truth and justice in terms that extend beyond the restrictive "us versus them" dichotomy that the

practices and discourse associated with the war on terror aggrandized. A truth commission's focus on the individual, human elements of these abuses may open the door to an empathetic approach to truth and justice that emphasizes an interconnected view of our common humanity. In this sense, the Golden Rule: "do not do to others what you would not have done to you," may represent a common religious conception reflecting this ideal of empathy and compassion (Armstrong Transformation xix). In the context of a secular truth commission this ideal may play out through the examination of victims' personal stories and individual and societal responsibility. Consequently, in addition to enabling widespread comprehension of the suffering inflicted on individuals, a truth commission may also create the space to consider how our government and we should or should not behave towards fellow human beings. That is, a truth commission may approach truth and justice with an emphasis on our interconnectedness and shared human experience, while still working to draw a clean line defining legally and morally appropriate behavior. In an age when technology and an expanding global economy are bringing international communities ever closer together, damaging conceptions of "the other" continue to persist. A truth commission for the abuses committed in the war on terror may present a small yet hopeful opportunity to take on these conceptions and assert that no one should be denied the ideals of truth, justice, and compassion.

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## CURRICULUM VITAE

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