

Note

The Case for Transitional Justice: Transparency, Undemocratic Institutions, and the Legitimacy Problem in American Prisons

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I. INTRODUCTION

In July 2014, Ramon Fabian entered the Ulster Correction Facility in upstate New York as an inmate.¹ Less than a week later, Fabian had one of his testicles surgically removed because of damage resulting from a beating administered by a prison guard, Michael Bukowski.² Bukowski beat Fabian as punishment for talking during the morning head count.³ After the headcount ended, Bukowski took Fabian to an isolated part of the prison.⁴ There were no cameras and no fellow inmates.⁵ There, he ordered Fabian to face the wall, stretch out his arms, and spread his legs, which is commonly known as a frisk position.⁶ Bukowski then kicked Fabian between the legs, with such force that his testicle ruptured, and he had to crawl back to his cell.⁷ Bukowski then left Fabian in his cell.⁸ It was not until later, when Fabian reported to the mess hall, that a different prison guard sent him to the medical unit, and eventually to the

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1. Fabian v. Bukowski, No. 9:16-CV-878 (LEK/DEP), 2017 WL 4876296, at *1 (N.D.N.Y. Oct. 30, 2017).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

hospital for surgery.⁹

American prisons have long been an overlooked site of some of America's most egregious human-rights abuses.¹⁰ Journalists' limited access to both inmates and facilities shroud the exact conditions in mystery.¹¹ But with numerous activists and NGO reports, the abuses of the American prison system are more of an open secret.¹² Because these atrocities are occurring at the hands of the politically wealthy,¹³ the international and domestic community seems content to continue the tradition of inaction and silence.

It is no secret that the American prison system is a source of tension and controversy. Beginning in the 1980s, with Ronald Regan's war on drugs, prison overcrowding became a major issue.¹⁴ In response to this problem, American began relying on private prisons to house and care for inmates.¹⁵ The for-profit model of private prisons has led to corruption and an increase in people sent to prison. Reports indicate significant human rights abuses occur within both private and public prisons,¹⁶ including withholding medical treatment for inmates with treatable

9. *Id.*

10. See generally AMNESTY INT'L, USA: RIGHTS FOR ALL: "NOT PART OF MY SENTENCE" VIOLATIONS OF THE HUMAN RIGHTS OF WOMAN IN CUSTODY (Mar. 1, 1999), <https://www.amnesty.org/download/Documents/144000/amr510011999en.pdf>; HUMAN RIGHTS WATCH, WORLD REPORT: 2016 (2016), https://www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf [hereinafter HRW, WORLD REPORT: 2016] (presenting background material on the inhumane conditions inside American prisons); *Fresh Air: Investigation into Private Prisons Reveals Crowding, Under-Staffing and Inmate Deaths*, NPR (Aug. 25, 2016, 3:03 PM ET), <https://www.npr.org/2016/08/25/491340335/investigation-into-private-prisons-reveals-crowding-under-staffing-and-inmate-de>.

11. Shane Bauer, *My Four Months as a Private Prison Guard*, MOTHER JONES, July/Aug., 2016, at 20.

12. AMNESTY INT'L, *supra* note 10; HUMAN RIGHTS WATCH, *supra* note 10; NPR, *supra* note 10.

13. See AMNESTY INT'L, *supra* note 10, at 38; HRW, WORLD REPORT: 2016, *supra* note 10, at 172.

14. Kathleen Miles, *Just How Much the War on Drugs Impacts Our Overcrowded Prisons, In One Chart*, HUFFPOST (Dec. 6, 2017, 7:30 AM ET), https://www.huffingtonpost.com/2014/03/10/war-on-drugs-prisons-infographic_n_4914884.html.

15. See Madison Pauly, *A Brief History of America's Private Prison Industry*, MOTHER JONES (July/Aug., 2016), <http://www.motherjones.com/politics/2016/06/history-of-americas-private-prison-industry-timeline>.

16. AMNESTY INT'L, *supra* note 10; HRW, WORLD REPORT: 2016, *supra* note 10; NPR, *supra* note 10.

diseases.¹⁷

In 2016, Human Rights Watch reported that prisons held an estimated 100,000 federal and state inmates in solitary confinement.¹⁸ Solitary confinement is a practice where inmates must stay in an eighty-square-foot room for twenty-three hours a day.¹⁹ They have no one to talk to, nothing to read, and often lights are left on, leading to sleep deprivation.²⁰ Solitary confinement has a profound effect on the human psyche.²¹ It causes inmates to experience hallucinations, panic attacks, paranoia, diminished impulse control, hypersensitivity to external stimuli, difficulties with thinking, concentration, and memory, inability to maintain alertness, and crippling obsession.²² With increased incarceration and reliance on private prisons, the length of time an inmate spends in solitary confinement has increased from a couple days or weeks to years.²³ The overuse of solitary confinement has detrimental effects on those with mental illnesses, and can even create mental illness in healthy individuals.²⁴

Physical and sexual violence are also prevalent in prison.²⁵ While reports indicate widespread violence occurs at the hands of prison staff,²⁶ inter-inmate physical and sexual violence, both physical and sexual,²⁷ exacerbate the problem. Prison guards do not adequately prevent this violence.²⁸ Sexual violence against men in prison is accompanied by degrading treatment, emotional or psychological abuse, and controlling behavior.²⁹

Shane Bauer, in his exposé on private prisons, indicates that while guards will interfere with “overt” rape, they are both

17. NPR, *supra* note 10, at 5.

18. HRW, WORLD REPORT: 2016, *supra* note 10, at 613.

19. Jason M. Breslow, *What Does Solitary Confinement Do to Your Mind?*, PBS: FRONTLINE (Apr. 22, 2014), <https://www.pbs.org/wgbh/frontline/article/what-does-solitary-confinement-do-to-your-mind>.

20. *Id.*

21. *Id.*

22. *Id.*

23. *See id.*

24. *Id.*

25. Bauer, *supra* note 11, at 44–48.

26. HRW, WORLD REPORT: 2016, *supra* note 10, at 613 (“Jail and prison staff throughout the US use unnecessary, excessive, and even malicious force against prisoners with mental disabilities.”).

27. Bauer, *supra* note 11, at 44–48.

28. *Id.*

29. *Id.* at 44.

encouraged and trained to turn a blind eye to more subtle forms of sexual violence and abuse, like coerced sexual relationships.³⁰ The prevention of rape in Winn, the private prison Bauer infiltrated in his exposé, was doused with homophobia and wrapped up with the “prevention of homosexuality.”³¹ Thus, consensual homosexual sex is also villainized, while at the same time instances of coerced sexual relationships are not prevented.³² By emphasizing homosexuality, rather than consent, private prisons abuse the human rights of sexual abuse victims and homosexual inmates alike.

Since American prisons lack transparency,³³ and because America is a political powerhouse on the international stage, there has been no international call to action to stop human rights abuses which occur in prisons. Since the American government is unwilling to take the steps required to stop these systematic human rights abuses,³⁴ the implementation of an alternative system of justice and prevention is needed.

This Note will consider the applicability of transitional justice mechanisms to human rights abuses within the American prison system. Part One will explore the role of “transitions” within transitional justice. It will reflect on the traditional role of transitions as a precursor to transitional justice mechanisms and will consider an alternative use where transitional justice mechanisms are tools required to create transitions within liberal democracies. Part Two will contemplate how the robust mechanisms of the American legal system have failed to bring justice and prevention to prison-related human rights abuses. It will dissect individual transitional justice mechanisms and speculate on the efficiency of their application to the American prison system. Part Three ponders the role that leadership plays within transitional justice outcomes and considers what that means for American prisons. It will contextualize this discussion with examples of transitional justice used in liberal democracies and will argue

30. *See id.* at 44–48.

31. *See id.* at 45 (“It was never fully clear whether the goal was to eliminate rape or to suppress homosexuality in the prison. Even consensual sex could lead to time in seg.”).

32. *See id.*

33. *See generally id.* at 44–55.

34. *See, e.g.,* James Surowiecki, *Trump Sets Private Prisons Free*, NEW YORKER (Dec. 5, 2016), <https://www.newyorker.com/magazine/2016/12/05/trump-sets-private-prisons-free>.

for a democratically-led use of transitional justice.

II. BACKGROUND

With the onset of the Nuremberg Trials in 1945, the international community began to embrace systematic responses to state-sponsored violence.³⁵ Scholars often cite the Nuremberg Trials as the start of transitional justice as a form of international law.³⁶ Following the Cold War, the field of transitional justice rapidly emerged as the preferred method for dealing with such violence.³⁷

Transitional justice as an academic field occupies a medley of disciplines, relying on a variety of expertise. It combines the work of lawyers, sociologists, theologians, historians, anthropologists, and philosophers.³⁸ In the traditional sense, transitional justice can be said to be the “extralegal responses to past abuses, along with an expansive conception of ‘transition’ that includes many forms of political change and conflict resolution.”³⁹

This definition includes two important concepts. First, that transitional justice is a “response to . . . ‘past abuses.’”⁴⁰ But this definition does not include just any banal past abuse or wrong; rather, transitional justice is usually used to deal with widespread human rights abuses or state-sponsored abuses specifically.⁴¹ Second, transitional justice includes an “expansive conception of ‘transition.’”⁴² Transitional justice almost always involves some form of transition. Most commonly, this represents the transition from a repressive regime to a less-repressive regime.⁴³ However, such transitions are not easy to

35. See Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 72–74 (2003).

36. *Id.* at 70.

37. See *id.* at 89–92.

38. Cheryl Lawther & Luke Moffett, *Introduction: Researching Transitional Justice: The Highs, the Lows, and the Expansion of the Field*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 1, 1 (Cheryl Lawther et al. eds., 2017).

39. BRONWYN LEEBAW, JUDGING STATE-SPONSORED VIOLENCE, IMAGINING POLITICAL CHANGE 2 (2011).

40. *Id.*

41. See Lawther & Moffett, *supra* note 38, at 1.

42. LEEBAW, *supra* note 39, at 2.

43. See RUTI G. TEITEL, TRANSITIONAL JUSTICE 5 (2000).

define. Scholars disagree about how long a “transition” lasts,⁴⁴ as it is unclear what marks the end of a transition. For example, Rwanda is perhaps one of the most well-known instances of transitional justice. After the 1994 genocide, Rwanda dealt with the atrocity through tribunals, gacaca courts, and international accountability. However, the country still suffers as a result of the mass destruction of 1994.⁴⁵ Some may argue the transition ended when the genocide ended, when the tribunal ended, or that the transition is still ongoing.⁴⁶ Thus, for some scholars, the concept of transition has become less important for modern transitional justice. For example, Leebaw claims, “[w]hat sets transitional justice apart from ‘ordinary’ justice has less to do with the context of *transition* than with the political nature of the wrongs that these institutions seek to address . . . [w]hat they have in common is their *systematic* character.”⁴⁷ This emphasis on systematic wrongs creates a field that is exceptionally broad.

Despite this, transitional justice is still most commonly used in situations where authoritarian regimes previously committed mass human rights violations before transitioning to a more liberal form of government.⁴⁸ Some well-known uses of transitional justice that reflect this pattern have occurred in Rwanda and the former Yugoslavia. Modern analysis has stretched the discussion to include “conflicted democracies.”⁴⁹ But few examples contemplate transitional justice within liberal democracies, like the United States. And very few examples contemplate transitional justice in liberal democracies as a means to deal with ongoing abuses.

44. Thomas Obel Hansen, *The Time and Space of Transitional Justice*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE, *supra* note 38, at 37.

45. See generally HUMAN RIGHTS WATCH, WORLD REPORT: 2017 504–09 (2017), https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf.

46. Hansen, *supra* note 44, at 44.

47. Leebaw, *supra* note 39, at 2–3.

48. *Id.*

49. See generally Fionnuala Ní Aoláin & Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 27 HUM. RTS. Q. 172 (2005) (discussing the modern application of transitional justice to conflicted democracies).

III. ANALYSIS

A. THE “TRANSITION” IN TRANSITIONAL JUSTICE

Despite some scholars’ argument that “transition” is no longer central to the issue of transitional justice,⁵⁰ the concept is still deeply intertwined with transitional justice analysis. One way to conceptualize how transitions inform transitional justice is to analyze transitional justice as the whole of four parts. This analytical framework consists of transition, the legitimacy problem, the use of transitional justice mechanisms, and resolution of the legitimacy problem or justice.

Fionnuala Ní Aoláin and Colm Campbell comment extensively on the role that transitions play within transitional justice.⁵¹ In their article, *The Paradox of Transition in Conflicted Democracies*, Ní Aoláin and Campbell define two types of transitions and consider how each interacts with the field of transitional justice. They use the term “paradigmatic transition” when discussing transitional justice in the context of authoritarian and frequently violent regimes which are transitioning to more peaceful and more democratic forms of government.⁵² They use the term “conflicted democracy” when discussing transitional justice in the context of states that have experienced prolonged, structured, communal, or political violence, despite the existence of structures that would be broadly considered “democratic.”⁵³ Their analysis of these two contexts is informative when evaluating the relationship between the four parts of transitional justice. Part A of this section explores Paradigmatic Transitions. Part B of this section explores transitions in conflicted democracies. Part C explores why the United States does not represent a clear example of either form of transition, thus presenting complications.

1. Paradigmatic Transitions

Paradigmatic transitions represent the traditional context for transitional justice. Transition justice originally emerged as

50. See, e.g., LEEBAW, *supra* note 39, at 2–3.

51. See generally Ní Aoláin & Campbell, *supra* note 49 (exploring transitional justice as it applies to different governmental frameworks).

52. *Id.* at 179.

53. *Id.* at 174.

a discourse to deal with the legacy of previous (authoritarian) regimes' massive violations of citizen's rights.⁵⁴ In this setting, transitions commonly began with a "deal" that led to changes in both constitutions and institutions.⁵⁵ Then, after a "reconciliation," the transition was considered complete.⁵⁶ Therefore, in a paradigmatic transition, one singular transitional moment is often identifiable.⁵⁷ Additionally, after the onset of this transitional moment, there is a marked lack of resistance.⁵⁸

Legitimacy is a central concern in paradigmatic transitions.⁵⁹ Only a regime change can solve these legitimacy problems⁶⁰ because the makeup of the regime itself is the legitimacy problem.⁶¹ An example of this is the South African apartheid government, where a racist white minority ruled a majority black country.⁶² The legitimacy problem at play in this example was the unrepresentative government, and the government could not resolve this problem without the replacement of at least some white members of government with new black members of government.⁶³

After such a regime change or transition, there is a need to establish the new regime as more legitimate than the previous regime.⁶⁴ This encompasses both stripping legitimacy from the previous regime and establishing legitimacy for the new regime.⁶⁵ Legitimacy is accomplished through transitional justice mechanisms, which hold previous regimes accountable

54. *Id.*

55. *Id.* at 182.

56. *Id.* As time continues to separate the present from the onset of transitional justice, many scholars debate whether these easily defined parameters of "transition" accurately reflect the ways in which countries engage with past mass violence. While direct engagement with this question is outside the scope of this paper, knowledge of this debate can help illuminate the racial tensions of the United States, which are linked to American slavery and the transition that occurred after the Civil War. *See generally* 13TH (Netflix 2016) (explaining the connection between American slavery and current racial tensions).

57. Ní Aoláin & Campbell, *supra* note 49, at 181.

58. *Id.* at 180.

59. *Id.*

60. *Id.*

61. *See id.*

62. *Id.*

63. *See id.*

64. *See* Lawther & Moffett, *supra* note 38, at 31.

65. *See* Ní Aoláin & Campbell, *supra* note 49, at 180.

for their past abuses.⁶⁶ Paradigmatic transitional justice is, thus, marked by a legitimacy problem that leads to a transition. After the transition, transitional justice mechanisms are used to solidify the transition, reestablish legitimacy, and create justice.

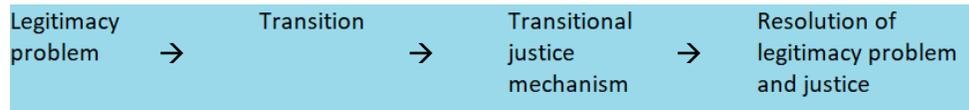


Fig. 1 Parts of a Paradigmatic Transition

2. Conflicted Democracies

Conflicted democracies face a different kind of legitimacy issue, based specifically on application.⁶⁷ When the unequal application of democratic principles affects a large percentage of the population, that country's democratic legitimacy is called into question.⁶⁸ This can lead to the type of widespread violence that is definitionally important to a country being labeled a "conflicted democracy."

Ní Aoláin and Campbell use a two-part test to define the confines of a "conflicted democracy."⁶⁹ First, there must be a "deep-seated and sharp divide in the body politic."⁷⁰ The depths of this divide is measured by the language and tenor of the interactions between the two groups.⁷¹ Second, the political division in the country must be severe enough to create or threaten to create significant political violence.⁷² While the nuance of which types of violence will count as significant can never be fully fleshed out,⁷³ it is clear that a certain level of intensity is required.⁷⁴

There are two interrelated standards for measuring the

66. See Lawther & Moffett, *supra* note 38, at 31.

67. See Ní Aoláin & Campbell, *supra* note 49, at 211.

68. *Id.*

69. *Id.* at 176.

70. *Id.*

71. *Id.*

72. *Id.*

73. See *id.* at 178–79 (acknowledging that some examples will always linger at the borders of these definitions and some of those examples may still constitute conflicted democracies).

74. *Id.* at 176.

required level of intensity.⁷⁵ First, violence intense enough to meet derogation standards will invoke the definition of “conflicted democracy.”⁷⁶ According to the European Convention on Human Rights, derogation of rights requires a “public emergency” that “threaten[s] the life of the nation.”⁷⁷ Examples of states using derogation powers occur most commonly in situations where the state itself is the victim of the violence.⁷⁸ Recently, this has been seen playing out in the counterterrorism framework.⁷⁹ The second measure of violence being sufficiently “significant” is the applicability of Common Article 3 of the Geneva Conventions.⁸⁰ Common Article 3 requires there to be an “armed conflict” to be applicable.⁸¹ Unlike a paradigmatic transition, in a conflicted democracy there is, by definition, resistance to the transition, thus creating a long and ongoing series of transitions.⁸²

Because of prolonged and massive violence, conflicted democracies must transition the application of their institutions to maintain control of their countries. Thus, transitional justice is used amid a transition to reestablish democratic legitimacy and avoid a complete regime change.

3. Transition in the United States

America is not a good example of either a paradigmatic transition or a conflicted democracy. Democracy is alive and well in America. America has regular mostly-democratic elections, and accountability mechanisms control most government action.⁸³ However, while America, as a whole, is a liberal

75. *Id.* at 177.

76. *Id.*

77. Convention for Protection of Human Rights and Fundamental Freedoms art. 15(1), Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222.

78. Ní Aoláin & Campbell, *supra* note 49, at 177.

79. Liora Lararus, *Human Rights and Counterterrorism*, OXFORD HUM. RTS. HUB (June 19, 2017), <http://ohrh.law.ox.ac.uk/human-rights-and-counterterrorism>.

80. Ní Aoláin & Campbell, *supra* note 49, at 178.

81. *E.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

82. Ní Aoláin & Campbell, *supra* note 49, at 194.

83. *See, e.g.*, Dylan Matthews, *Trump Has Eroded Important Democratic Institutions. Will Democratic Wins Change That?*, VOX (Nov. 8, 2018, 11:00 AM), <https://www.vox.com/future-perfect/2018/11/8/18072918/midterm-elections-2018-democracy-america>; Dan Slater & Lucan Ahmad Way, *Was the 2016 U.S. Election Democratic? Here Are 7 Serious Shortfalls*, WASH. POST (Jan. 12, 2017),

democracy, the prison system is an undemocratic institution in several significant ways. First, prisoners have no vote and no control over their lives.⁸⁴ The prison administration controls everything. It controls what and when the prisoners eat, what they do for work, when they get visitors, and who can visit.⁸⁵

On top of this, there are grave due process concerns within prisons. Prisons send inmates who break the rules to inmate “court.”⁸⁶ Inmate court is not a court of law, and the “judges” are often just staff at the prison.⁸⁷ The consequences of “inmate court” are high-stakes.⁸⁸ Inmates can be transferred to higher-security prisons, or given stints in solitary confinement as a result.⁸⁹ While inmate court cannot technically add time to an inmate’s sentence, “judges” can dole out punishments which effectively work to keep inmates in prison for longer.⁹⁰ For example, inmates can lose their right to early release for good behavior.⁹¹ These problems are especially concerning because “judges” often do not follow basic due process principles, such as “innocent until proven guilty.”⁹² In fact, according to the Department of Corrections (“DOC”), in some prisons, the inmates are found “guilty” more than 96 percent of the time.⁹³

Even after being released from prison, inmates are not incorporated back into the democratic norms of society.⁹⁴ Felons may lose their right to vote forever and have restrictions on the jobs they can get and places they can live.⁹⁵ As a result, a felony conviction is effectively the loss of the right to participate in democratic life.

Thus, the role of “transition” within transitional justice is

<https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/12/was-the-2016-u-s-election-democratic-we-see-7-serious-shortfalls>; *About GAO*, U.S. GOV'T ACCOUNTABILITY OFF. (Jan. 2019), https://www.gao.gov/pdfs/about/gao_at_a_glance_2019_english.pdf.
84. *Felony Disenfranchisement Laws (Map)*, ACLU, <https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map> (last visited Apr. 21, 2019).

85. Bauer, *supra* note 11, at 24–26, 30.

86. *Id.* at 30.

87. *Id.*

88. *See id.*

89. *Id.*

90. *See id.* at 30–31.

91. *Id.*

92. *Id.* at 30.

93. *Id.*

94. 13TH, *supra* note 56.

95. *Id.*

markedly different in the context of the American prison system. In both paradigmatic transitions and conflicted democracies, transitional justice is a tool used to address the legitimacy concerns that sparked the transition. However, the American prison system is neither post-transition nor mid-transition. In fact, the average American probably does not view the prison system as having a legitimacy problem, despite widespread mistreatment. The reason for this is in part because of the lack of transparency, and in part because of the victims' status as "criminal." In this context, the transition is not the problem to be solved by transitional justice, but the goal to be achieved by it. In other words, transitional justice can be effective in a liberal democracy when a legitimacy problem exists, but the population does not perceive it. Here, transitional justice mechanisms are used to "create" the legitimacy problem in the eyes of the public, thus creating the political will required to generate a transition, which in turn resolves the legitimacy problem.

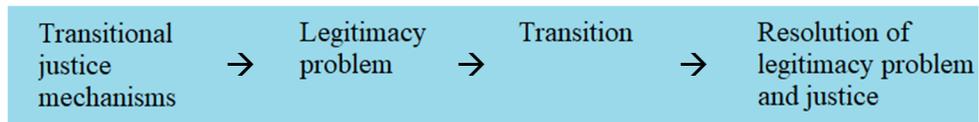


Fig. 2 Parts of Liberal Democratic Transitions

B. REMEDIES FOR PRISONERS.

To understand how transitional justice can illuminate a legitimacy problem, it is important to understand both the scope of the legitimacy problem as well as the scope of remedy offered by transitional justice mechanisms. In both paradigmatic transitions and conflicted democracies, transitional justice takes the place of the legal system because the system is non-existent or completely ineffective. However, in a liberal democracy, like America, the legal system is effective for most of the population. The question, then, becomes, "why isn't the American legal system working for prisoners?"

1. Limited American Legal Remedies

America has a robust legal system with a variety of protections. These numerous mechanisms work together to right

wrongs and prevent future harms. The American legal system includes civil lawsuits, criminal prosecutions, mediations, arbitrations, and several equitable remedies.⁹⁶ In most cases, these protections adequately address the legal needs of victims and prevent future abuse.⁹⁷ However, this is not true for prison inmates. Several factors limit a prisoner's access to justice and put them in danger of future abuse.

a. Prison Litigation Reform Act

The Prison Litigation Reform Act ("PLRA") was passed in 1996.⁹⁸ The official purpose of the PLRA was to prevent frivolous lawsuits.⁹⁹ However, in reality, the PLRA prevents meritorious lawsuits by creating barriers for prisoners looking to enforce their constitutional rights. These barriers are applied broadly, and not only to convicted prisoners but also children and pre-trial detainees, who have not been tried or convicted.¹⁰⁰ Pre-trial detainees supposedly enjoy a presumption of innocence.¹⁰¹ Prisoners are the only group to whom these barriers apply.¹⁰²

There are many ways that the PLRA limits a prisoner's right to justice. Among other things, the legislation limits the shifting of attorney's fees¹⁰³ and requires physical harm before bringing a claim for mental or emotional damages.¹⁰⁴ Effectively, this means that most of the abuses endured at Abu Ghraib would

96. ELLEN S. PODGOR & JOHN F. COOPER, OVERVIEW OF U.S. LAW 3–7, 36–38 (2009).

97. *See id.* at 35–38, 111–12, 138–39.

98. CTR. FOR CONST. RIGHTS & NAT'L LAWYERS GUILD, JAILHOUSE LAWYER'S HANDBOOK: HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON 15 (Rachel Meeropol & Ian Head eds., 5th ed. 2010), https://ccrjustice.org/sites/default/files/assets/files/Report_JailHouseLawyersHandbook.pdf.

99. *Id.* at 16.

100. 42 U.S.C. § 1997e(a) (stating that the provision applies to "a prisoner confined in any jail, prison, or other correctional facility").

101. HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 1 (2009), <https://www.hrw.org/sites/default/files/reports/us0609web.pdf> [hereinafter HRW, NO EQUAL JUSTICE].

102. *Id.* at 1–2, 11–12.

103. 42 U.S.C. §§ 1997e(d)(2)–(3) (limiting the allowable hourly rate a plaintiff's lawyer can earn and requiring a portion of the plaintiff's damages to go to lawyer's fees, shifting only what is left over).

104. 42 U.S.C. § 1997e(e) (2013).

not be actionable under the PLRA.¹⁰⁵

Describing all these mechanisms in detail is beyond the scope of this Note. Instead, one illustrative example will be provided to demonstrate the barriers to justice. The PLRA limits access to justice through its requirement for administrative exhaustion. The PLRA states that “No action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted.”¹⁰⁶ Other American statutes also contain this style of administrative exhaustion. However, the enforcement bodies in these other statutes are significantly different. For example, under Title VII of the Civil Rights Act, plaintiffs must exhaust the administrative procedures before suing for employment discrimination. The Equal Employment Opportunity Commission (“EEOC”) creates these administrative procedures and plaintiffs must file their complaints with the EEOC before filing with the court. However, in employment discrimination cases, the defendant is the plaintiff’s employer, not the EEOC.

This is not the case in prison cases. Under the PLRA, a prisoner must exhaust their administrative remedies before filing a complaint concerning their mistreatment in prison.¹⁰⁷ Here, the prison is the defendant, but also the entity in charge of creating and enforcing the administrative procedures.¹⁰⁸ Prisons, thus, have an express incentive for creating hard-to-follow procedures.¹⁰⁹ As a result, prison procedures are confusing and disjointed.¹¹⁰ Administrative procedures also have very short filing deadlines, sometimes as brief as a couple of days.¹¹¹ This process effectively shortens the statute of limitations, because prisoners who miss this deadline, lose their right to sue forever.¹¹² A non-prisoner plaintiff would normally have somewhere between one and three years to file a lawsuit.¹¹³ A shortened statute of limitations is problematic because a few days is often not enough time to process and recover from an incident of abuse and brutality, and victims often need distance

105. HRW, NO EQUAL JUSTICE, *supra* note 101, at 38.

106. 42 U.S.C. § 1997e(a) (2013).

107. *Id.*

108. HRW, NO EQUAL JUSTICE, *supra* note 101, at 12.

109. *Id.*

110. *See id.* at 14–15.

111. *Id.* at 13.

112. *Id.*

113. *Id.*

to effectively evaluate the best path towards recovery.

Additionally, some procedures are designed to discourage prisoners from filing complaints by requiring the prisoner to partake in traumatizing behaviors.¹¹⁴ For example, some prisons require a prisoner to confront the offending prison guard before beginning the administrative grievance process.¹¹⁵ In this situation, a traumatized prisoner, who may have been sexually abused or physically brutalized, may decide that the price of enforcing their rights is too high.¹¹⁶

In practice, the administrative exhaustion requirement bars meritorious plaintiffs from accessing the courts in a meaningful way. For example, in *Amador v. Andrew*, female prisoners from New York state prisons brought a class action lawsuit based on the widespread and systematic sexual abuse they faced at the hands of prison guards.¹¹⁷ After spending over three pages describing the complex grievance procedures of the prisoners,¹¹⁸ the court concluded that ten of the thirteen women had failed to exhaust their administrative remedies.¹¹⁹ Nine of these women made internal complaints.¹²⁰ However, these complaints did not exhaust their administrative remedies because the women's complaints asked for redress for their harms but not for a policy change.¹²¹ Since asking for a policy change was one of the things prisoners could ask for, under the grievance procedures, the administrative remedies were not exhausted.¹²² These women lost their right to use the court system to redress their harms.¹²³ Thus, the PLRA limits the ability of prisoners to enact meaningful change, access justice, and ensure their bodily safety by handing over the power to establish jurisdiction to the defendants.

b. Arbitration Agreements

In addition to limited court access, American prisoners are

114. *Id.* at 12.

115. *Id.*

116. *See id.* at 20.

117. *Amador v. Andrews*, 655 F.3d 89, 92 (2d Cir. 2011).

118. *Id.* at 96–99.

119. *Id.* at 103–04.

120. *Id.* at 101–02.

121. *See id.*

122. *Id.*

123. *Id.* at 105.

not adequately protected from future abuse. Prison guards are members of very strong unions.¹²⁴ The employment contracts negotiated by these unions require binding arbitration for all employment disputes.¹²⁵ Therefore, even when a prison wants to fire an abusive guard, the guard is entitled to appeal this decision through arbitration.¹²⁶ Parties pick arbitrators by ranking their top choices.¹²⁷ Therefore, arbitrators have an incentive to make “split the baby”-style rulings.¹²⁸ Because these decisions are binding, they are not easy to overturn.¹²⁹ To overturn binding arbitration a court must find the decision to be irrational or against public policy.¹³⁰ Even a mistake of law is not enough to overturn binding arbitration.¹³¹

Because of these arbitrations, prisons are almost never successful in firing prison guards.¹³² Often guards return to the same prisons and oversee the same prisoners who they had previously abused.¹³³ This is what happened in Ramon Fabian’s case.¹³⁴ After Fabian had one of his testicles removed, the Ulster Correctional Facility attempted to fire Michael Bukowski for the abuse.¹³⁵ After filing a grievance, the case went to arbitration.¹³⁶ The arbitrator’s finding of facts stated that Bukowski abused Fabian, resulting in permanent physical injury.¹³⁷ Bukowski had done this in an isolated part of the prison with no cameras.¹³⁸ Bukowski then lied to investigators about the

124. Tom Robbins, *Why It’s So Hard to Fire an Abusive Prison Guard*, MARSHALL PROJECT (Sept. 27, 2015), <https://www.themarshallproject.org/2015/09/27/why-it-s-so-hard-to-fire-an-abusive-prison-guard>.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *See id.*

130. *Id.*

131. *Id.*

132. *See id.*

133. *Id.*

134. *Id.*

135. N.Y. Dep’t. of Corr. Serv. v. NYS Corr. Officers & Police Benevolent Ass’n, Inc., No. DX2014-036 (N.Y. Pub. Emp. Relations Bd. Nov. 13, 2014) (Dais, Arb.) (on file with The Marshall Project, <https://www.themarshallproject.org/documents/2430193-arbitration-award-11-13-14-2#document/p5/a245105>) [hereinafter Bukowski Arbitration].

136. Robbins, *supra* note 124.

137. Bukowski Arbitration, *supra* note 135.

138. Robbins, *supra* note 124.

incident.¹³⁹ Despite these findings, the arbitrator concluded that, because this was Bukowski's first offense, firing him was unreasonable.¹⁴⁰ The arbitrator reduced his punishment to a 120-day suspension, after which he could return to the Ulster Correctional Facility.¹⁴¹ Thus, like the PLRA, arbitration agreements limit prisoner's access to both safety and justice.

2. Transitional Justice Mechanisms.

Because the American legal system is not providing adequate remedies or protections for prisoners, alternative mechanisms must be used. Transitional justice mechanisms include things like prosecutions, reparations, lustrations, and truth commissions.¹⁴² Most of these mechanisms are substantially similar to the mechanisms offered by the American legal system. Therefore, they are unlikely to adequately replace the ineffective legal mechanisms. For example, if prosecutors are not bringing criminal charges against prison guards, prosecutions brought in a transitional justice context is unlikely to produce better results. Additionally, if employment procedures within the legal system are unable to secure lustrations, then it is unlikely that lustrations will be more effective in a transitional justice context. However, recalling that the aim of transitional justice in this context is to "create" the legitimacy problem that brings transition, it seems that some transitional mechanisms could be exceptionally effective.

c. Truth Commissions

In a truth commission, testimonies are gathered from witnesses, victims, and perpetrators.¹⁴³ These testimonies are then standardized into a final report, revealing trends that would otherwise remain unknown.¹⁴⁴ Truth commissions, like

139. Bukowski Arbitration, *supra* note 135.

140. *Id.*

141. *Id.*

142. Joanna R. Quinn, *The Development of Transitional Justice*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE, *supra* note 38, at 16–22. For a discussion on lustrations, see Lavinia Stan, *Lustration and Vetting*, in AN INTRODUCTION TO TRANSITIONAL JUSTICE 137–55 (Olivera Simić ed., 2017).

143. Agata Fijalkowski, *Truth and Reconciliation Commissions*, in AN INTRODUCTION TO TRANSITIONAL JUSTICE, *supra* note 142, at 91, 97.

144. *Id.*

transitional justice generally, can work towards a wide range of goals.¹⁴⁵ For example, the goal may be to outline institutional responsibility, establish a record of the past, address the needs of the victims, all of these, or none of these.¹⁴⁶ Truth commissions attempt to challenge secrecy, counteract denial, and examine institutional responsibility.¹⁴⁷ Scholars consider truth commissions to be more victim-centric than traditional judicially-based mechanisms because they acknowledge the victim's claims as credible and confirm that the harms committed were wrong.¹⁴⁸

Truth commissions also acknowledge new histories.¹⁴⁹ A large number of interviews conducted by truth commissions detail patterns of abuse across time and place, uncovering trends that are often hidden on the micro level.¹⁵⁰ Truth commissions are sometimes asked to encourage reconciliation.¹⁵¹ The theory is that directly confronting past conflicts will prevent tensions from boiling over into violence or political strife.¹⁵² While truth commissions can have positive impacts, not all victims respond to truth commissions in the same way. For many, the process could be retraumatizing¹⁵³ and yet required for victims to receive much-needed remedies.¹⁵⁴

Additionally, truth commissions do not consider all victims equally. Every conflict has different versions of the truth, and every truth commission must decide whose truth it is going to tell.¹⁵⁵ Truth commissions do not tell everyone's truth, and therefore, in some ways, may act to strictly enforce the borders

145. See PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* 20 (2d ed. 2011), https://www.mcgill.ca/isisd/files/isisd/priscilla_b_hayner_unspeakable_truths_transitibookzz.org_.pdf.

146. *Id.*

147. Cheryl Lawther, *Transitional Justice and Truth Commissions*, in *RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE*, *supra* note 38, at 343.

148. *Id.*

149. See HAYNER, *supra* note 145.

150. *Id.*

151. *Id.* at 23.

152. *Id.*

153. Lawther, *supra* note 147.

154. See Luke Moffett, *Transitional Justice and Reparations: Remedying the Past?*, in *RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE*, *supra* note 38, at 384–85 (explaining how reparations in South Africa were limited in scope to those who appeared before the commission).

155. See HAYNER, *supra* note 145, at 80–84.

of victimhood regarding time, place, or harm.¹⁵⁶ The mandates that create truth commissions often limit their scope, meaning that not all victims are equally heard.¹⁵⁷

The hard lines drawn by truth commissions between whose truth it tells and whose it does not creates a story with easily defined groups of victims and perpetrators. However, in conflicts marked by wide-spread violence, these groups do not reflect reality.¹⁵⁸ This is especially true in American prisons, where the line between perpetrator and victim does not fall neatly in lines with the distinction between guard and inmate. Heightened tensions between guard and prisoner boil into violence on all sides.¹⁵⁹ This puts all parties on heightened alert and thus heightens the tensions that boil into further violence. This is unique because guards have complete power over the inmates, however, inmates still commit wide-spread violence.¹⁶⁰

Additionally, both sides of guard-inmate tensions are exposed to intra-community violence. Thus, an inmate may experience violence at the hands of guards and other inmates simultaneously.¹⁶¹ Nonetheless, an inmate may experience violence at the hands of guards and concurrently commit

156. *Id.* at 75–77.

157. *See id.* at 75.

158. *See* Kieran McEvoy & Kirsten McConnachie, *Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy*, 9 EUR. J. CRIMINOLOGY 527, 533 (2012).

159. *See, e.g.*, Demetrius Buckley, *Prisoner to Violence*, MARSHALL PROJECT (Nov. 16, 2017), <https://www.themarshallproject.org/2017/11/16/prisoner-to-violence>; Brian Mann, *Reports of Prison Guard Brutality in New York Draw a Harsh Spotlight*, NPR (Oct. 20, 2016), <https://www.npr.org/2016/10/20/498688702/reports-of-prison-guard-brutality-in-new-york-draw-a-harsh-spotlight>; Mira Ptacin, *Guards vs. Inmates: Mistreatment and Abuse in the US Prison System*, VICE, <https://partners.vice.com/starz/starzpowers4/news/guards-vs-inmates-mistreatment-and-abuse-in-the-us-prison-system> (last visited Apr. 21, 2019).

160. *See, e.g.*, Desmond Ellis et al., *Violence in Prisons: A Sociological Analysis*, 80 AM. J. SOC. 16, 16 (1974); *see also* Phaedra Haywood, *Inmate Violence in New Mexico Prisons Hits 10-Year High*, SANTA FE NEW MEXICAN (Oct. 13, 2018), https://www.santafenewmexican.com/news/local_news/inmate-violence-in-new-mexico-prisons-hits--year-high/article_02efcf47-b74c-5ef3-81c9-9064e135a5da.html.

161. *See* Melissa Brown, *Inmate Deaths Highlight ‘Constant Threat of Violence’ in Alabama Prisons, Reform Advocates Say*, MONTGOMERY ADVERTISER (Dec. 7, 2018, 5:38 PM), <https://www.montgomeryadvertiser.com/story/news/2018/12/07/alabama-prison-violence-murder-assaults-danger-inmates-and-correctional-officers/2231301002/>.

violence against other inmates.¹⁶² The same is true for guards, who are exposed to a hyper-masculine police culture. This issue especially affects female guards who often experience sexual harassment and assault at the hands of both fellow guards and inmates.¹⁶³

Because both guards and inmates are targets of abuse,¹⁶⁴ and both guards and inmates are also perpetrators of violence,¹⁶⁵ neat lines between perpetrator and victim, necessarily drawn by truth commissions may obscure as much justice as it creates if not done carefully.

Still, a truth commission could be an exceptionally effective means for creating public knowledge of the legitimacy problem within American prisons. Guards and inmates must be able to tell their stories side by side because in the current American narrative the stories of guards are revered while the stories of prisoners are ignored or pushed off with a simple, “jail isn’t supposed to be fun.”¹⁶⁶ By bringing the extent and severity of prison abuse, on both sides, into public view, a truth commission could change the national debate. Additionally, by including information concerning the lack of legal remedy available to prisoners, American citizens would begin to understand the extent to which America’s legitimacy problem has shut down the constitutional rights of an entire population.

d. Reparations

Reparations include a variety of remedies focused on repairing the harm done to victims.¹⁶⁷ This includes “restitution, compensation, rehabilitation, satisfaction and guarantees of non-occurrence.”¹⁶⁸ Restitution and compensation both refer to

162. *E.g.*, Buckley, *supra* note 159.

163. Caitlin Dickerson, *Hazing, Humiliation, Terror: Working While Female in Federal Prison*, N.Y. TIMES (Nov. 17, 2018), <https://www.nytimes.com/2018/11/17/us/prison-sexual-harassment-women.html>.

164. Ptacin, *supra* note 159.

165. *Id.*

166. See Tyler Cowen, *Why America’s Prisons Are an Unconstitutional Moral Horror*, MORNING CALL (Jan. 2, 2019, 7:00 AM), <https://www.mcall.com/opinion/mc-opi-prison-reform-morality-unconstitutional-20190101-story.html>.

167. Jemima García-Godos, *Reparations*, in AN INTRODUCTION TO TRANSITIONAL JUSTICE, *supra* note 142, at 177–79.

168. *Id.* at 179.

providing a monetary payment to the victim.¹⁶⁹ This is unlikely to go over well in America. Taxes already are a controversial subject in the American public discourse.¹⁷⁰ Dolling out those tax dollars to convicted criminals will almost certainly be met with widespread criticism. Guarantees of non-occurrence are also unlikely to be effective, given the political power of prison guard unions. That leaves American prisoners with rehabilitation. Rehabilitation includes things like providing medical and psychological care.¹⁷¹ This is a fitting solution, as the American public will likely be more accepting of providing services as opposed to cash.¹⁷²

Reparations can help victims recover and move on with their lives after situations of widespread abuse. However, they also bring a resource problem. Because of the widespread nature of the abuses, reparations programs cannot cover all victims. This creates a problem of victim classification. Some deserving victims are always left out. Reparations are often connected to truth commissions.¹⁷³ Functionally, this means that victims who provide testimony to the truth commission receive reparations.¹⁷⁴ This, however, creates two problems. First, victims who do not want to share their story are barred from receiving any remedies. Second, prisoners who were not victims of abuse may be inclined to fabricate stories to receive recovery resources. Fabricated stories would almost certainly be more common if cash payments were being made to victims. However, because prisoners are often disenfranchised, and may have entered prison already traumatized, the lure of recovery resources may still be present. Ultimately, providing recovery resources to a small number of “undeserving” prisoners, who will be able to better their lives, as a result, is probably outweighed by the social benefit of increasing public knowledge of prison abuse. Additionally, linking reparations to truth commission testimony will benefit the end goal of transitional justice here,

169. *Id.* at 180.

170. See Eduardo Porter, *The Great American Tax Debate*, N.Y. TIMES (Sept. 18, 2012), <https://www.nytimes.com/2012/09/19/business/the-great-american-tax-debate.html>.

171. García-Godos, *supra* note 167, at 179; see also Beth M. Huebner, *Rehabilitation*, OXFORD BIBLIOGRAPHIES: CRIMINOLOGY, <http://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0046.xml> (last updated Dec. 14, 2009).

172. Although some resistance is still almost guaranteed.

173. See Moffett, *supra* note 154, at 384–85.

174. See *id.*

which is to generate as much information as possible about the scale of prison abuse in America.

C. MODES OF TRANSITIONAL JUSTICE

The mode of transitional justice plays a significant role in the outcomes achieved. Eric Posner and Adrian Vermeule lay out four classes of transition, arguing that the level of transitional justice success is linked to the mode of transition.¹⁷⁵ The first class is an elite-led transition.¹⁷⁶ An example of this is the King of Spain initiating democratic reforms after Franco died.¹⁷⁷ When a transition is elite-led, transitional justice will be limited, because like under the PLRA, the potential defendants are in charge of the process.¹⁷⁸ Second is a bargain transition.¹⁷⁹ A bargain occurs when elite and opposition forces negotiate a transition.¹⁸⁰ In this case, transitional justice will be moderate.¹⁸¹ The third type of transition is opposition-led.¹⁸² An example of this is the defeat of Greek colonels by civil and military groups in the 1970s.¹⁸³ When a transition is opposition-led, transitional justice will be significant.¹⁸⁴ Finally is the foreign-imposed transition.¹⁸⁵ This is what occurred after WWII when the Allied forces ended the Nazi regime.¹⁸⁶ Foreign-imposed transition also creates significant transitional justice.¹⁸⁷

However, Posner and Vermeule fail to consider the effects of a democratically-led transition. This type of transition occurs when the people put political pressure on their government, through things like protests and petitions. It usually leads to changes in policy rather than full-on regime change. It is unclear whether democratically-led transitions would fall closer to elite-

175. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 770 (2004).

176. *Id.* at 769.

177. *Id.*

178. *Id.* at 770.

179. *Id.* at 769.

180. *See id.* at 769–70.

181. *Id.* at 770.

182. *Id.* at 769.

183. *Id.*

184. *Id.* at 770.

185. *Id.* at 769.

186. *Id.*

187. *Id.* at 770.

led or opposition-led, under Posner and Vermeule's continuum. It is likely somewhere in the middle, with the level of transitional justice depending on the amount of public outcry and governmental resistance. The more tension that builds up between government and citizen before the "transition" occurs, the closer it comes to opposition-led style results. This is the type of transition that occurs when transitional justice mechanisms are used to create a legitimacy problem and facilitate the transition. The dynamic between the mode of transitional justice and the success is illustrated when looking at examples of transitional justice being used in liberal democracies.

1. The Truth and Reconciliation Commission of Canada

From the mid-nineteenth to the late twentieth century, thousands of indigenous children in Canada were removed from their communities and forced into the Indian Residential Schools system.¹⁸⁸ These schools were poorly run and often bred psychological, physical, and sexual abuse.¹⁸⁹ In the mid-2000s, Canada implemented a truth commission to provide a complete history and spread awareness about the atrocities that occurred.¹⁹⁰ The Truth and Reconciliation Commission had several goals.¹⁹¹ Not only did it want to give former students the opportunity to tell their stories to the public, but also hoped to refute notions of assimilation and racism and build appreciation for Native culture.¹⁹²

The Truth and Reconciliation Commission of Canada was multifaceted.¹⁹³ It put on musical performances, created a research foundation, and circulated the history of the Indian Residential Schools.¹⁹⁴ Additionally, the Commission staged six national events in major Canadian cities.¹⁹⁵ These events sought to address the community as a whole, and engage with non-indigenous citizens, who did not know the history of the Indian

188. Ravi de Costa, *Discursive Institutions in Non-Transitional Societies: The Truth and Reconciliation Commission of Canada*, 38(2) INT'L POL. SC. REV. 185, 186 (2017).

189. *Id.* at 187.

190. *Id.* at 188.

191. *Id.*

192. *Id.*

193. *Id.* at 190.

194. *Id.*

195. *Id.* at 191.

Residential Schools system.¹⁹⁶ There were three major types of activities at these events.¹⁹⁷ First was statement-gathering, where the Commissioners would gather survivors statements through formal and informal hearings.¹⁹⁸ The second was demonstrations of cultural survival.¹⁹⁹ The third was public engagement, where sharing circles sought to include everyone.²⁰⁰

However, the Canadian Truth and Reconciliation Commission did not seem to achieve its goals of engagement and reconciliation.²⁰¹ At the sharing circles, contrary ideas were not discussed openly because of the well-founded fear of causing additional harm to the victims of the Indian Residential Schools.²⁰² The final report noted that there were almost no direct exchanges between former staff and former students.²⁰³ It interpreted this as an indication that the time for reconciliation had not yet come.²⁰⁴ Ultimately, “The [Canadian Truth and Reconciliation Commission] created a structure and atmosphere in which the possibilities of testimony were narrow: ‘the truth they are called upon to tell is centred on unconditional contrition, an unequivocal recognition of institutional wrong.’”²⁰⁵

Ravi de Costa points out that “[a]n extensive and complex literature now casts doubt on the idea that simply hearing testimony can ground ethical relations between listener and speaker.”²⁰⁶ She also observed that those who attended the national events were usually those who were already aware of the Truth Commission and the importance of its work.²⁰⁷

The Canadian Truth and Reconciliation Commission was elite-led and showed only limited benefit. In this way, it confirms the argument of Posner and Vermeule. The Canadian government created the commission as a way to avoid other mechanisms of accountability and quiet the debate on uncomfortable topics.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 191–95.

203. *Id.* at 192.

204. *Id.*

205. *Id.*

206. *Id.* at 193.

207. *Id.* at 194.

The Canadian Commission had additional considerations for those seeking to implement transitional justice in the American prison system. If the purpose of a truth commission on prisons is to shed light on the conditions of American prison so that citizen can more effectively pressure their government to end the mass atrocity and human rights violations occurring, then the Canadian Truth and Reconciliation Commission sends a dire warning. Merely having inmates tell their stories will not be enough. Those utilizing the truth commission will need to cultivate engagement between citizens and inmates, to foster the type of passion required to consistently advocate a government determined not to listen. This sort of engagement requires that people be allowed to introduce dissenting opinions. However, this runs the risk of retraumatizing victims, who may be confronted with victim-blaming. This concern is especially apparent when we consider inmates, who, by definition, have been convicted of a crime. The fact that criminal justice reform in American is already a controversial topic only heightens this concern. Two other truth commissions can shed light on the ways controversial topics are likely to play out in American.

2. Metropolitan Detroit Truth and Reconciliation Commission

On July 23, 1967, white police officers in Detroit raided African-American clubs, leading to citywide protests and several days of unrest, leaving much of the city destroyed.²⁰⁸ In response to these riots, President Lyndon Johnson appointed a commission,²⁰⁹ which was supposed to deal with the tensions and problems that led to the riots.²¹⁰ This Commission made several recommendations for dealing with race relations moving forward.²¹¹ It recommended the creation of two million new jobs and the expansion of the welfare system.²¹² It also observed that the welfare system in America was designed to save money, not

208. Joshua Inwood et al., *Addressing Structural Violence Through US Reconciliation Commissions: The Case Study of Greensboro, NC and Detroit, MI*, 52 *POL. GEOGRAPHY* 57, 57 (2016).

209. *Id.* at 62 (“The Detroit commission’s original mandate was to examine the roots and impacts of the riots of 1967 . . .”).

210. *Id.* at 60-61.

211. *See id.* at 61.

212. *Id.*

people.²¹³

However, these recommendations were not implemented, and, in the end, may actually have fueled inequality in Detroit.²¹⁴ The Commission's report was met with political opposition.²¹⁵ It was used to portray urban-dwelling blacks as dangerous and liberals as lawless.²¹⁶ Rather than focusing on ways to lift people out of poverty, contemporary Detroit seems to view those living in poverty as the problem.²¹⁷ Heightened security in the downtown area keeps these individuals out of view,²¹⁸ and vital services, like trash removal, have been cut back in areas deemed "unhealthy."²¹⁹

In November 2011 the Metropolitan Detroit Truth and Reconciliation Commission [MDTRC] began an operation to investigate segregation and the resulting 1967 Detroit Uprising.²²⁰ The MDTRC aimed to address segregation and the effects it had had on the city.²²¹ Problems plagued the MDTRC from the beginning.²²² The loss of three commissioners in the first year, Detroit declaring bankruptcy, its redevelopment plans for downtown, and the election of the first white mayor since the 1970s all overshadowed the commission.²²³

The MDTRC sought to address deep-seated societal issues and state action. Racial tensions in Urban America, the criminalization of poverty, and the violent responses of a primarily white police force are controversial topics. These issues, however, also feed into the atrocities of the American prison system and will need to be addressed by any transitional justice mechanisms seeking to take on this issue. Overall, the Detroit truth commission was considered a failure, thus confirming Posner and Vermeule's argument, since it was elite-

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 62.

219. *Id.* at 61; *see also* Scott Beyer, *Why Has Detroit Continued to Decline?*, FORBES (July 31, 2018, 11:58 PM), <https://www.forbes.com/sites/scottbeyer/2018/07/31/why-has-detroit-continued-to-decline/#2a8a38a93fbc> (listing one of Detroit's "internal problems" as "poor services" that "are quantifiably bad," such as "waste that is dumped and never cleaned up").

220. *Id.*

221. *Id.* at 57.

222. *Id.*

223. *Id.*

led, being established by the president. The last example of an American truth commission deals with these same contentious issues but lapses from the elite-led mode of transition usually seen in a liberal democracy.

3. The Greensboro Truth and Reconciliation Commission

In 1979, in Greensboro, North Carolina, the Ku Klux Klan murdered several labor and civil rights activists.²²⁴ Klan members showed up to a protest in the projects and shot activists, leaving five dead.²²⁵ Despite video evidence showing Klan members shooting into a crowd of fleeing protestors, no one was convicted of any crime.²²⁶ In 2000, the Greensboro Truth and Reconciliation Commission was formed to deal with the legacy of this event.²²⁷ Community activists formed the Commission²²⁸ and modeled it after the South African and Peru commissions.²²⁹ The Commission gathered “testimony from survivors, perpetrators of violence, and local citizens and officials.”²³⁰ After the gathering of testimony, the Greensboro Truth and Reconciliation Commission released its report.²³¹ The Commission was meant to focus on the long-lasting implications of the violence, including the unresolved issues of police accountability, poverty, low wages, and unemployment.²³²

Scholars argue that the Greensboro Truth and Reconciliation Commission was a success.²³³ It is often regarded as “a model for other communities wishing to engage with and in *truth work* in the United States.”²³⁴ The successful Greensboro Truth and Reconciliation Commission’s classification under the Posner and Vermeule thesis is unclear. It does not quite fit under elite-led or opposition-led. It is the

224. Inwood et al., *supra* note 208, at 57.

225. *Id.* at 60.

226. *Id.*

227. *Id.* at 57.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. Inwood et al., *supra* note 208, at 60; accord James Edward Beitler III, REMAKING TRANSITIONAL JUSTICE IN THE UNITED STATES: THE RHETORICAL AUTHORIZATION OF THE GREENSBORO TRUTH AND RECONCILIATION COMMISSION 96 (2013).

233. Inwood et al., *supra* note 208, at 57; accord Beitler, *supra* note 232.

234. Inwood et al., *supra* note 208, at 57.

closest to the kind of democratically-led transition suggested here. Therefore, its success has positive implications for the feasibility of the truth commission on the American Prison system. This is especially true when considering the overlap in underlying tensions. The current American prison system is a legacy of American slavery and racism. Questions of power and privilege are prevalent in both contexts. The stereotype that prison guards are white, and inmates are not, is connected to the lasting impacts of American racism.

A second factor to consider when applying this model to American prisons is the procedure used by the Greensboro Commission. The Commission did not operate as an open forum. Unlike the Canadian Truth and Reconciliation Commission, where people gathered and shared their stories in real time, the Greensboro Commission collected testimony from many sources and then compiled a report. Only then was the information distributed to the public. This system may be helpful in overcoming some of the concerns presented by the Canadian Truth and Reconciliation Commission. Specifically, it presents a compromise for those who want to avoid traumatization of survivors while also minimizing the desire to exclude dissenting opinions.

IV. CONCLUSION

Although transitional justice has been primarily implemented in post-authoritarian societies, it has also been applied to those democratic societies with significant political violence. The United States does not fit into either category, and human rights abuses within its prisons remain unaddressed. The current legal mechanisms available in the United States remain unavailable to victims of prison abuse, and strong guard unions protect guards' jobs while leaving prisoners vulnerable to future abuse.

Reimagining the relationship between transition, legitimacy, resolution, and transitional justice mechanism creates space for a beneficial application of transitional justice to American prisons. A narrowly tailored application of transitional justice mechanisms could illuminate the pre-existing legitimacy problems of the American prison system. The best way to achieve this is through a truth commission with recovery service reparations for victims who tell their stories. By collecting data and subsequently distributing the findings, multiple viewpoints

can be solicited without creating unnecessary risks of traumatization. Bringing this legitimacy problem to the foreground of the American political psyche is aimed at creating a transition as the means to resolving the legitimacy problem of unequal protection for the constitutional rights of American prisoners.