

HUMAN RIGHTS IN OUR BACKYARD: UTILIZING A TRUTH COMMISSION AND PRINCIPLES OF TRANSITIONAL JUSTICE TO ADDRESS ATROCITIES COMMITTED AGAINST ASYLUM SEEKERS IN THE UNITED STATES

KATIE WIESE*

ABSTRACT

For the past several decades, asylum seekers at the U.S. border and in detention facilities throughout the country have endured pervasive human rights violations, including family separation, removal to Mexico, inhumane detention conditions, neglectful medical care, sexual violence and physical abuse, forced deportation in violation of non-refoulement principles, reproductive injustice, and numerous other egregious abuses. When President Biden assumed office in January 2021, he committed to restoring human rights conditions and addressing many abuses perpetrated against asylum seekers. This Note examines why the Biden administration should establish a truth commission to rigorously investigate, document, and acknowledge the range of human rights abuses committed against immigrants seeking asylum in the United States, and will discuss how a truth commission could serve a vital role in seeking truth, justice, reparations, and institutional reforms. Drawing on both theory and practical examples from international truth commissions, this Note argues that the Biden administration should adopt a truth commission in order to investigate and establish the full scope of these pervasive abuses; formally acknowledge immigrant survivors' experiences and support survivor empowerment; recommend reparations for survivors; and propose institutional reforms to prevent future abuses against those seeking asylum.

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* Katie Wiese, J.D. Candidate and Blume Public Interest Scholar, Georgetown University Law Center, 2022; Bachelor of Arts, *summa cum laude*, Diplomacy and World Affairs, Occidental College, 2015. I would like to thank Professor Jane Stromseth for her invaluable feedback and guidance on this Note, as well as the Center for Applied Legal Studies (CALS) clinic for shaping my lawyering skills and passion for immigration advocacy. © 2021, Katie Wiese.

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INTRODUCTION

The last time Ever, an asylum seeker from Honduras, saw his three-year-old son Sammy was when they were sleeping on the ground under a foil blanket at an immigration detention center in Texas.¹ An Immigration and Customs Enforcement (ICE) official told Ever that he needed to sign some paperwork for his asylum case and could return to Sammy shortly, yet the father and son were abruptly torn apart, and ICE sent three-year-old Sammy

1. Abril Valdes & Imelda Mejia, 'My Son is Traumatized': One Separated Family's Reunion, ACLU (Aug. 24, 2018, 5:30PM), <https://perma.cc/PRJ3-YCQF>.

thousands of miles away to a facility in Michigan.² For three and a half months, Sammy remained separated from his parents, too traumatized to even speak with his father on the phone.³ Sammy's mother recounted, "I felt like I could no longer take [it] anymore. My soul was destroyed. I didn't know where he had gone or know if my son was alone in a cage without his father."⁴ When Sammy was finally reunited with his parents at the Houston airport, he refused to look his mother in the eyes and crawled aimlessly away from her.⁵ Sammy's mother desperately tried to soothe the traumatized toddler, reminding him, "I'm your mother, I'm your mother."⁶

Across the country at a detention center in Georgia, Pauline started experiencing irregular menstrual bleeding.⁷ Medical staff told her they could treat this condition with a routine, minor procedure known as dilation and curettage to remove excess tissue from her uterus.⁸ However, when Pauline awoke from surgery, the doctor informed her that he also removed her fallopian tube during surgery—an invasive procedure that Pauline did not consent to and that could likely prevent her from conceiving a child in the future.⁹ At the same detention center, another asylum seeker had a hysterectomy after the doctor declared she had stage four cervical cancer and thus needed a hysterectomy and intensive chemotherapy.¹⁰ But after surgery, an oncologist told the woman she did not have cancer.¹¹

Meanwhile at a detention center in Louisiana, B was working in the kitchen when ICE officers called him into a room to sign a piece of paper—a deportation document abandoning his asylum claim.¹² B vehemently refused to sign the removal papers, pleading that he would be killed if deported to Cameroon.¹³ When he refused to sign, the ICE officers handcuffed him, pepper sprayed him in the eyes, and strangled him to the point where he almost lost consciousness.¹⁴ B kept screaming "I can't breathe," but the officers

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. ACLU, 'My Son is Traumatized': One Separated Family's Reunion, YOUTUBE (Aug. 24, 2018), <https://perma.cc/CS2M-2T62>.

7. Nicole Narea, *A Woman in ICE Detention Says Her Fallopian Tube Was Removed without Her Consent*, VOX (Sept. 17, 2020, 12:40PM), <https://perma.cc/LA9A-KRM9>; Joel Rose, *ICE Almost Deported Immigrant Woman Who Says She Got Unwanted Surgery While Detained*, NPR (Sept. 16, 2020, 9:06PM), <https://perma.cc/J84P-A4HH>.

8. Narea, *supra* note 7.

9. *Id.*

10. Debra Cassens Weiss, *Lawyers, Nurse Raise Concerns about Hysterectomies Performed at ICE Detention Center*, ABA J. (Sept. 16, 2020, 11:59AM), <https://perma.cc/YE9X-M9L6>.

11. *Id.*

12. Compl. to the Dep't of Homeland Security, Immigration and Customs Enforcement Officers' Use of Torture to Coerce Immigrants into Signing Immigration Documents at Adams County Correctional Facility (Oct. 7, 2020) by the Southern Poverty Law Center and Freedom for Immigrants [hereinafter Adams County Complaint], <https://perma.cc/43XT-75R9>.

13. *See id.*

14. *See id.*

continued inflicting physical violence until they forcibly obtained B's fingerprint on the deportation documents.¹⁵

Sammy, Pauline, and B's stories reflect some of the pervasive atrocities committed against asylum seekers at the border and in immigration detention centers throughout the United States. Under U.S. law, individuals who are currently physically present in the United States or who arrive at the border have the legal right to apply for asylum, a form of humanitarian immigration relief that protects an individual who has been subjected to past persecution or fears future persecution in their home country on account of their religion, political opinion, race, nationality, or membership in a particular social group.¹⁶ The Trump administration's heinous policies eviscerated the U.S. asylum system, but human rights violations against asylum seekers have been systemically occurring long before President Trump assumed office.¹⁷

This Note examines why the Biden administration should establish a truth commission to rigorously investigate, document, and acknowledge the range of atrocities committed against immigrants seeking asylum in the United States and will discuss how a truth commission could serve a vital role in seeking truth, justice, reparations, and institutional reforms. Part I will outline the range of known human rights abuses committed against asylum seekers over the past several decades at the border and in detention centers. This section will additionally discuss President Biden's proposals to address some of these violations and to reform humanitarian immigration policy more broadly. Part II will discuss what a truth commission is and will outline the history of truth commissions in the transitional justice field and in the United States. Part III will explore the benefits of utilizing a truth commission to address the atrocities committed against asylum seekers, drawing on both theory and practical examples from international truth commissions. Part IV will discuss some of the challenges in creating an asylum truth commission in the United States and will outline several recommendations to mitigate these distinct challenges.

I. HUMAN RIGHTS ABUSES COMMITTED AGAINST ASYLUM SEEKERS IN THE UNITED STATES

For the past several decades, asylum seekers at the U.S. border and in detention facilities have endured pervasive human rights violations, including family separation, removal to Mexico, inhumane detention conditions, neglectful medical care, sexual violence and physical abuse, forced

15. *Id.*

16. See 8 U.S.C. § 1158.

17. See *Chaos, Cruelty, & Illegality: The Trump Administration's Record on Asylum*, HUM. RTS. FIRST (Jan. 12, 2021), <https://perma.cc/AV98-CG6H>; see also *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Centers*, U.S. COMM'N ON CIV. RTS. (Sept. 2015), <https://perma.cc/L3RG-VHQM> (discussing numerous civil rights violations occurring prior to 2015 in immigration detention centers throughout the United States).

deportation in violation of *non-refoulement* principles, reproductive injustice, and numerous other egregious abuses. This section discusses these human rights abuses and additionally outlines the Biden administration's recent proposals to address the violations.

A. *Abuses at the Border and in Detention Centers*

During the Trump administration, the Department of Homeland Security (DHS) forcibly separated at least 5,400 children from their parents at the border, including children as young as a few months old.¹⁸ In April 2018, the Trump administration announced its official “Zero Tolerance Policy” to prosecute all immigrants entering the United States without inspection, including asylum seekers.¹⁹ As a result, immigration authorities forcibly separated families seeking asylum, detaining children in separate jails for “unaccompanied minors” and detaining or deporting their parents.²⁰ Children were imprisoned in cages, sobbing for their parents while sleeping on concrete floors; and parents had no idea where to find their children.²¹ As public condemnation intensified over this horrific practice, President Trump signed an Executive Order in June 2018 to end family separations and a federal judge in San Diego then ordered the government to reunite families.²² Despite the June 2018 Executive Order and court injunction, immigration officials continued separating children at the border for several years by making unsubstantiated claims that parents were unfit or dangerous.²³ Furthermore, investigations revealed that the administration actually started separating children as early as mid-2017 under a pilot program in El Paso.²⁴ Physicians have documented the extensive physical and mental trauma of the family separation policy²⁵

18. See Associated Press, *More than 5,400 Children Split at Border, According to New Count*, NBC NEWS (Oct. 25, 2019), <https://perma.cc/8492-KNSU>.

19. See Mem. from Jeff Sessions, Att’y Gen., to Federal Prosecutors Along the Southwest Border, Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (April 6, 2018), <https://perma.cc/M6CQ-C9S4>.

20. See *Family Separation under the Trump Administration – A Timeline*, S. POVERTY L. CTR. (June 17, 2020), <https://perma.cc/UT2C-M9QF>.

21. See *id.*; see also Sam Levin, ‘We Tortured Families’: The Lingering Damage of Trump’s Separation Policy, GUARDIAN (Jan. 4, 2021), <https://perma.cc/V786-T5BQ>.

22. See Levin, *supra* note 21.

23. The ACLU’s litigation revealed that immigration officials separated numerous families for unjustified reasons between June 2018 and 2020, including: a father deemed unfit because his daughter’s diaper was “dirty,” a father separated from his children because he had HIV, and other parents deemed unfit or dangerous for minor transgressions, such as traffic tickets. See *id.*; see also S. POVERTY L. CTR., *supra* note 20.

24. S. POVERTY L. CTR., *supra* note 20.

25. Physicians for Human Rights conducted psychological evaluations of seventeen adults and nine children who had been separated under the Zero Tolerance Policy and found pervasive evidence of trauma. Almost all interviewees exhibited severe trauma symptoms including: feeling confused, upset, and constantly worried; crying consistently, unable to sleep, not eating well, and experiencing nightmares; and physiological manifestations of panic, including racing heart, shortness of breath, and headaches. Children also experienced a regression in age-appropriate behaviors. As a result of the traumatic family separations, interviewees met the diagnostic criteria for at least one severe mental health condition including post-traumatic stress disorder, major depressive disorder, or generalized anxiety disorder. HAJAR HABBACH, KATHRYN HAMPTON, & RANIT MISHORI, PHYSICIANS FOR HUM. RTS., “You Will Never

and human rights advocates argue that family separation constitutes torture under both domestic and international law.²⁶

Since 2019, the Trump administration also effectively closed the southern border to asylum seekers under the Migrant Protection Protocols (also known as the “Remain in Mexico Policy”).²⁷ Under this policy, U.S. border officials sent more than 71,000 non-Mexican asylum seekers to dangerous locations in Mexico while their asylum claims remained pending in U.S. immigration courts, in violation of both domestic and international law.²⁸ Human Rights Watch documented that adults and children in this program are routinely murdered, raped, kidnapped, tortured, extorted, and robbed at gunpoint in dangerous Mexican border towns as they indefinitely wait for their asylum claims to be processed in U.S. courts.²⁹

Within immigration detention centers throughout the United States, advocates have documented inhumane conditions and systemic human rights abuses against detained asylum seekers for decades. Detention centers are considerably overcrowded and immigrants frequently lack access to adequate medical care and medication, hygiene products, potable water and safe food, and legal representation.³⁰ Since 2017, at least thirty-nine people have died in immigration detention centers, with most deaths linked to neglectful medical care.³¹ Between 2010 and 2016, immigrants submitted at least 33,126 complaints of sexual assault and physical abuse in detention centers.³² Furthermore, between 2015 to 2018, the Department of Health and Human Services (HHS) received more than 4,500 allegations of sexual abuse committed against migrant children in their custody.³³ At the Adams County correctional center in Louisiana, immigration advocates recently filed a complaint with DHS detailing credible allegations that ICE officials tortured and subjected Cameroonian asylum seekers to extreme physical violence to force them into signing deportation papers and abandoning their asylum

See Your Child Again”: The Persistent Psychological Effects of Family Separation (Feb. 25, 2020), <https://perma.cc/ZM3D-WLR7>.

26. Beth Van Schaack, *The Torture of Forcibly Separating Children from Their Parents*, JUST SEC. (Oct. 18, 2018), <https://perma.cc/92GJ-SCXZ>.

27. *Mexico: Abuses Against Asylum Seekers at the Border*, HUM. RTS. WATCH (Mar. 5, 2021), <https://perma.cc/GEW3-72FF>.

28. *Q&A: Trump Administration’s “Remain in Mexico” Program*, HUM. RTS. WATCH (Jan. 29, 2020), <https://perma.cc/8KKU-XCDR> (discussing the scope of the Remain in Mexico program and the principle of non-refoulement in domestic and international law, whereby asylum seekers cannot be forcibly returned to countries where they would likely face persecution).

29. *“Like I’m Drowning”: Children and Families Sent to Harm by the U.S. Remain in Mexico Program*, HUM. RTS. WATCH (Jan. 6, 2021), <https://perma.cc/GJ5W-Y82P>.

30. See ACLU, HUM. RTS. WATCH, & NAT’L IMMIGR. JUST. CTR., *Justice Free Zones: U.S. Immigration Detention under the Trump Administration* 30 (2020), <https://perma.cc/EG3W-FT46>.

31. *Id.* at 31.

32. Altaf Saadi, Maria-Elena de Trinidad Young, Caitlin Patler, Jeremias Leonel Estrada, & Homer Venters, *Understanding US Immigration Detention: Reaffirming Rights and Addressing Social-Structural Determinants of Health*, 22 HEALTH & HUM. RTS. J. 187, 189 (June 2020), <https://perma.cc/P584-G6MQ>.

33. Richard Gonzalez, *Sexual Assault of Detained Migrant Children Reported in the Thousands Since 2015*, NPR (Feb. 26, 2019, 7:40 PM), <https://perma.cc/6E4Z-FZG8>.

claims.³⁴ In violation of federal law and the Convention Against Torture, ICE subsequently deported many of these Cameroonian asylum seekers, including five who lodged the formal torture complaint.³⁵

Additionally, female asylum seekers in detention centers have been subjected to pervasive reproductive rights violations, including forced sterilizations and hysterectomies, as well as denial of abortion care. On September 14, 2020, Dawn Wooten, a nurse at the Irwin County Detention Center, filed a whistleblower complaint with the DHS Inspector General alleging pervasive medical abuse at the facility, including a high rate of forced sterilizations and other unnecessary gynecological procedures performed by a private contract doctor on immigrant women.³⁶ Nurse Wooten described this doctor as “the uterus collector” and reported that he sterilized multiple women without their informed consent, failing to provide accurate translation or full information about the procedures.³⁷ Since the whistleblower complaint, at least fifty-seven women at the Irwin detention center have reported that they experienced forced sterilizations or other medically unnecessary gynecological surgeries.³⁸ Furthermore, administration officials also instituted policies to deny abortion care to minor girls in HHS custody.³⁹ In March 2017, the Office of Refugee Resettlement announced that all shelters housing unaccompanied immigrant minors were prohibited from facilitating access to abortion without express approval from Director Scott Lloyd.⁴⁰ Director Lloyd then denied every request for abortion, including cases where the pregnancy resulted from rape, which violated the girls’ constitutional right to abortion.⁴¹

B. *The Biden Administration’s Response*

When President Biden assumed office in January 2021, he committed to restoring human rights conditions and addressing many abuses perpetrated

34. Adams County Complaint, *supra* note 12.

35. *Id.*; see also Sarah Gardiner, *Mass Deportations to Cameroon Undermine U.S. Foreign Policy and Violate International Law*, JUST SEC. (Nov. 25, 2020), <https://perma.cc/KZ8X-935S>.

36. *Re: Lack of Medical Care, Unsafe Work Practices, and Absence of Adequate Protection Against COVID-19 for Detained Immigrants and Employees Alike at the Irwin County Detention Center*, PROJECT S. (Sept. 14, 2020), <https://perma.cc/PW87-TX7P>.

37. *Id.*

38. Ten women subsequently filed a medical grievance complaint with the state of Georgia seeking revocation of the doctor’s medical license. DHS’s Inspector General is investigating the complaints as well. Liz Vinson, *Medical Mistreatment: Woman Seeks Justice after Gynecological Abuse in ICE Detention*, S. POVERTY L. CTR. (Mar. 26, 2021), <https://perma.cc/2NQY-J3SE>; see also Lisa Reinsberg & Sarah Paoletti, *The U.S. Bears International Responsibility for Forced Sterilization of Women in ICE Detention*, JUST SEC. (Sept. 29, 2020) (discussing how forced sterilization violates domestic and international law), <https://perma.cc/AL8U-QP6G>; John Washington, *Number of Women Alleging Misconduct by ICE Gynecologist Nearly Triples*, INTERCEPT (Oct. 27, 2020), <https://perma.cc/5TAF-5AH4>.

39. Mica Rosenberg, *U.S. Court Rules Against Trump Administration in Immigrant Teen Abortion Case*, REUTERS (June 14, 2019), <https://perma.cc/H74L-G4ZE>.

40. *Id.*

41. In June 2019, the U.S. Court of Appeals for the DC Circuit ruled that the government cannot deny access to abortion for minors in federal immigration custody and blocked enforcement of this policy. *Id.*

against asylum seekers, particularly the family separation policy.⁴² On January 26, 2021, the Department of Justice officially rescinded the Zero Tolerance Policy,⁴³ and President Biden signed an Executive Order on February 2, 2021, creating an Interagency Task Force on Family Separations to identify all children separated from their parents between January 2017 and January 2021 and to provide recommendations for reuniting separated families.⁴⁴ Since the federal judge's reunification order in June 2018, lawyers have successfully located more than 600 parents, yet they have been unable to locate the parents of 506 children despite significant on-the-ground searches in the United States and Central American countries.⁴⁵ The Task Force announced in March that it will allow migrant children and parents separated under the Trump administration to reunite in the United States, and DHS recently admitted the first four eligible parents in May 2021 to reunite with their children after years of separation.⁴⁶ In June, the Task Force submitted its initial progress report, which discussed reunification efforts and estimated that 2,127 children still remain separated from their parents.⁴⁷

With respect to the Remain in Mexico Policy, DHS suspended new enrollments in the program on January 21, 2021, and President Biden later signed an Executive Order instructing DHS to consider a phased strategy for safely admitting asylum seekers into the United States and to determine whether to terminate the Remain in Mexico Policy entirely.⁴⁸ On February 11, 2021, DHS announced it would begin processing approximately 25,000 individuals with active court cases into the United States from Mexican border towns,

42. See WHITE HOUSE, *The Biden – Harris Administration Immediate Priorities*, <https://perma.cc/EKP5-KC2R>.

43. Mem. from Monty Wilkinson, Acting Att'y Gen., to all Federal Prosecutors, Rescinding the Zero-Tolerance Policy for Offenses under 8 U.S.C. § 1325(a) (Jan. 26, 2021), <https://perma.cc/2DDX-BW2K>.

44. Exec. Order No. 14011 (Feb. 2, 2021), <https://perma.cc/9S7H-CCWK>; see also Sabrina Rodriguez, *Biden Signs Executive Orders on Family Separation and Asylum*, POLITICO (Feb. 2, 2021), <https://perma.cc/FG5B-ZD36> (quoting a senior administration official as saying "President Biden has been very clear about restoring compassion and order to our immigration system and correcting the divisive, inhumane and immoral policies of the last four years.").

45. Joe Walsh, *Lawyers Still Haven't Found Parents Of 506 Children Separated at U.S.-Mexico Border*, FORBES (Feb. 24, 2021, 7:59 PM), <https://perma.cc/52A3-DMK6>.

46. Sabrina Rodriguez, *Biden to Allow Migrant Families Separated under Trump to Reunite in the U.S.*, POLITICO (Mar. 1, 2021, 1:46 PM), <https://perma.cc/8V9Z-423K> (noting that the Administration is also exploring avenues for granting legal permanent residency for separated parents and children); Miriam Jordan, *Migrants Separated from Their Children Will Be Allowed into the U.S.*, N.Y. TIMES (May 3, 2021), <https://perma.cc/4QVM-VBJQ> (the first four parents - from Honduras, Guatemala, and Mexico - were deported without their children under the family separation policy years ago).

47. DEP'T OF HOMELAND SEC., INITIAL PROGRESS REPORT: INTERAGENCY TASK FORCE ON THE REUNIFICATION OF FAMILIES 6 (June 2, 2021), <https://perma.cc/DL2J-AEX5>.

48. Dep't of Homeland Sec., DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), <https://perma.cc/W2LR-PE8Q>; *Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, WHITE HOUSE (Feb. 2, 2021), <https://perma.cc/H23H-9SMM>.

pursuant to social distancing guidelines.⁴⁹ As of May 2021, the United States had processed approximately 11,200 migrants into the country and on June 1, 2021, Secretary Mayorkas formally ended the Remain in Mexico Policy.⁵⁰ DHS later announced that it would begin allowing asylum seekers whose court cases were closed under the program to enter the United States to pursue their claims.⁵¹

Additionally, Secretary Mayorkas directed ICE to close the Irwin County and Bristol County detention centers amidst the allegations of pervasive human rights abuses.⁵² President Biden also sent a bill to Congress, the U.S. Citizenship Act of 2021, on his first day in office, which contains numerous provisions related to asylum seekers.⁵³ Furthermore, in June 2021, Attorney General Garland vacated two controversial Trump-era decisions from 2018 that restricted access to asylum for survivors of domestic violence and families fleeing gang violence.⁵⁴ Despite these positive developments, this Note argues that the Biden administration must do more by establishing a truth commission in order to seek truth, justice, reparations, and institutional reforms for the pervasive atrocities committed against asylum seekers.

II. WHAT IS A TRUTH COMMISSION?

A. *Truth Commission Objectives*

In the aftermath of mass human rights violations, governments often adopt truth commissions to investigate, document, and acknowledge these atrocities.⁵⁵ Priscilla Hayner, a leading transitional justice scholar, defines a truth commission as a temporary, state-authorized body that: investigates a pattern

49. Dep't of Homeland Sec., DHS Announces Process to Address Individuals in Mexico with Active MPP Cases (Feb. 11, 2021), <https://perma.cc/9UKA-G2N2>.

50. Mem. from Sec'y Mayorkas, Dep't of Homeland Sec., Termination of the Migrant Protection Protocols Program (June 1, 2021), <https://perma.cc/EFL2-L63R>; Ted Hesson, *U.S. Formally Ends Trump's 'Remain in Mexico' Asylum Policy*, REUTERS (June 1, 2021, 2:55 PM), <https://perma.cc/F35K-X6Z3>.

51. According to government data, more than 30,000 asylum seekers could be eligible under this phase. Molly O'Toole, *Asylum Seekers with Cases Closed under "Remain in Mexico" Can Come to the U.S. to Pursue Claims*, L.A. TIMES (June 22, 2021, 10:20 PM), <https://www.latimes.com/politics/story/2021-06-22/asylum-seekers-remain-in-mexico-trump-biden> [archived at <https://perma.cc/G8S3-ZXC8>].

52. Julia Ainsley, *ICE to Close 2 Troubled Detention Centers in Georgia and Massachusetts*, NBC NEWS (May 20, 2021, 11:14AM), <https://perma.cc/VSD4-8UQK>.

53. With respect to asylum seekers, the proposed bill would: provide funding to improve infrastructure at ports of entry to expedite processing of asylum seekers; provide funding and technical assistance to reduce immigration court backlogs and provide legal orientation programs for asylum seekers; increase the number of special agents at DHS' Office of Professional Responsibility to investigate officer misconduct; eliminate the one year filing deadline for asylum claims; provide funding to develop guidelines for standards of care for DHS detention centers; provide \$4 billion in funding to address underlying causes of migration in Central American countries, including reducing corruption, violence, and poverty; provide funding to establish designated processing centers for refugees in Central American countries. *See Factsheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System*, WHITE HOUSE (Jan. 20, 2021), <https://perma.cc/9SLH-W3E3>.

54. Matter of A-B-, 28 I. & N. Dec. 307 (A.G. 2021), <https://perma.cc/W7HU-EDCH>; Matter of L-E-A-, 28 I. & N. Dec. 304 (A.G. 2021), <https://perma.cc/3GRW-UKUU>.

55. *In Search of the Truth: Creating an Effective Truth Commission*, INT'L CTR. FOR TRANSITIONAL JUST., <https://perma.cc/J44W-XFUF> (last visited April 4, 2021); INT'L CTR. FOR TRANSITIONAL JUST.,

of past human rights abuses occurring over a period of time, engages directly with victim populations to gather testimony on their experiences, and typically concludes with a final report.⁵⁶ Truth commissions must be tailored to the unique circumstances of each country, however most truth commissions share similar objectives.⁵⁷

First, the principal objective of truth commissions is sanctioned factfinding: commissions investigate and document human rights violations to establish an accurate and holistic record of the facts, causes, and consequences of the abuses.⁵⁸ Second, truth commissions are focused primarily on survivors of atrocities: commissions aim to officially acknowledge survivor experiences and support survivor empowerment.⁵⁹ Additionally, truth commissions frequently have the objectives of recommending reparations, as well as institutional reforms to prevent the recurrence of future human rights violations.⁶⁰ Truth commissions typically engage in a range of activities for several years including: taking statements from thousands of survivors and community members, conducting public outreach, holding private and public hearings, conducting research and investigations, and publishing a final report with their findings.⁶¹

B. *The History of Truth Commissions in the Transitional Justice Field and the United States*

Historically, truth commissions have served a central role in the transitional justice field.⁶² Researchers document that over eighty national truth commissions have been established in sixty-three countries since 1970.⁶³ South Africa's Truth and Reconciliation Commission, one of the most well-known commissions, was established in the 1990s to address the legacy and atrocities of apartheid.⁶⁴ Other prominent truth commissions include

Truth Seeking: Elements of Creating an Effective Truth Commission (Eduardo González & Howard Varney eds., 2013), <https://perma.cc/SJ79-8DYK>.

56. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 11-12 (Routledge 2d ed. 2011).

57. INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55, at 9.

58. *Id.*; HAYNER, *supra* note 56, at 20.

59. HAYNER, *supra* note 56, at 22; INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55, at 9.

60. INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55, at 9; Julissa Mantilla Falcón, *The Peruvian Truth and Reconciliation Commission's Treatment of Sexual Violence Against Women*, Human Rights Brief 12, 1 (2005), <https://perma.cc/5728-RGSD>; Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN HUM. RTS. COUNCIL 1, 7 (2013), <https://perma.cc/5PM3-VH99>.

61. INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55.

62. Transitional justice is the process of seeking accountability for egregious human rights abuses that violate international law. Transitional justice encompasses several different mechanisms: criminal prosecutions, truth commissions, reparations, and institutional reforms. Jane Stromseth, *Peacebuilding and Transitional Justice: The Road Ahead*, in *MANAGING CONFLICT IN A WORLD ADRIPT*, 572, 574 (Chester Crocker ed., 2015).

63. Kelebogile Zvobgo, *Demanding Truth: The Global Transitional Justice Network and the Creation of Truth Commissions*, 64 INT'L STUDIES QUARTERLY 609, 613 (2020).

64. James L. Gibson, *The Contributions of Truth to Reconciliation: Lessons from South Africa*, 50 J. CONFLICT RESOLUTION 409, 409 (2006).

Guatemala's commission to address civil war atrocities, particularly violence committed against indigenous populations;⁶⁵ Peru's commission to investigate atrocities committed by state armed forces and the Shining Path;⁶⁶ Timor Leste's commission to address human rights abuses of Indonesian-backed militias;⁶⁷ commissions in Argentina⁶⁸ and Chile⁶⁹ to investigate forced disappearances; Morocco's commission on detention and torture practices of the previous monarchy;⁷⁰ and Canada's commission on the forced assimilation of indigenous children in residential schools.⁷¹ UN Special Rapporteur Pablo de Greiff concluded that truth commissions have promoted critical advancements in these countries by formally recognizing victims as rights holders, fostering civic trust, and strengthening the rule of law.⁷²

Although truth commissions have predominantly been utilized in the transitional justice field, the United States has adopted truth commissions in several instances, primarily at the local and state levels. In 2004, civil society groups in Greensboro, North Carolina established a truth commission to investigate the 1979 Greensboro massacre, in which Ku Klux Klan and American Nazi party members shot peaceful protestors, killing five individuals.⁷³ In 2013, Maine created a truth commission to investigate the history of child-welfare abuses that separated indigenous children from their families.⁷⁴ In 2019, Maryland established a truth commission to research racially-motivated lynching in the state from 1854 to 1933.⁷⁵ The United States has only adopted one national-level truth commission: in 1980, Congress created the Commission on Wartime Relocation and Internment of Civilians to investigate the forced internment of Japanese Americans during World War II.⁷⁶ In the aftermath of George Floyd's murder by Minneapolis police in 2020, there has been a surge of interest in creating truth commissions to address institutionalized racism and police violence in the United States.⁷⁷ Numerous state and city governments have already adopted plans for local truth commissions.⁷⁸ At the national level, Representative Barbara Lee introduced a

65. HAYNER, *supra* note 56, at 32.

66. *Id.* at 35–36; Falcón, *supra* note 60, at 1.

67. HAYNER, *supra* note 56, at 39.

68. *Id.* at 45.

69. *Id.* at 46.

70. *Id.* at 43–44.

71. *Id.* at 72.

72. de Greiff, *supra* note 60, at 6–7.

73. HAYNER, *supra* note 56, at 62.

74. WABANACKI REACH, *Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission*, <https://perma.cc/K8HR-VZ7A> (last visited March 18, 2021); Eduardo Gonzalez & Kelebogile Zvobgo, *As America Seeks Racial Justice, It Can Learn from Abroad*, FOREIGN POLICY (Mar. 14, 2021, 6:00 AM), <https://perma.cc/BKQ3-2VQG>.

75. Maryland Lynching Truth and Reconciliation Commission, <https://perma.cc/5FMR-53AX>; see also Maryland H.B. 307, <https://perma.cc/FCY3-MNWM>.

76. Kelebogile Zvobgo and Carla Winston, *Some Lawmakers Are Calling for Truth Commissions on Racial Violence. How Do These Work?*, WASH. POST (June 9, 2020), <https://perma.cc/4PFN-LGNG>.

77. Gonzalez & Zvobgo, *supra* note 74.

78. *Id.*

bill to create a truth commission on the effects of slavery and institutionalized racism,⁷⁹ and Representative Deb Haaland and Senator Elizabeth Warren introduced a second truth commission bill to examine the federal government's cultural genocide and boarding school policy against Native Americans.⁸⁰

III. BENEFITS OF TRUTH COMMISSIONS: WHY THE UNITED STATES SHOULD ADOPT A TRUTH COMMISSION TO ADDRESS ATROCITIES COMMITTED AGAINST ASYLUM SEEKERS

This section will explore the benefits of utilizing a truth commission to address the atrocities committed against asylum seekers, drawing on both theory and practical examples from international truth commissions. The United States should adopt a truth commission in order to: A) investigate and establish the facts, causes, and consequences of these pervasive abuses; B) formally acknowledge immigrant survivors' experiences and support survivor empowerment; C) recommend reparations for survivors; and D) propose institutional reforms to prevent future abuses against those seeking asylum. These four objectives of truth commissions can serve a vital role in securing justice and accountability for atrocities committed against asylum seekers. A truth commission is not a substitute, however, for criminal prosecutions, and the two measures should be pursued together in an integrated fashion.⁸¹

A. *Establishing the Facts, Causes, and Consequences of Human Rights Violations*

Principally, the Biden administration should utilize a truth commission in order to establish the full scope of atrocities committed against asylum seekers. The principal objective of truth commissions is to document and establish the facts, causes, and consequences of human rights abuses.⁸² This section examines how truth commissions establish a detailed record of human rights violations, uncover underreported crimes, and document institutional patterns. A truth commission is vitally necessary in the asylum context because the full scale of human rights abuses against asylum seekers is still unclear.

In comparison to other judicial mechanisms, truth commissions can provide a more detailed and holistic record of human rights violations.⁸³ By

79. H.R. Con. Res. 100, <https://perma.cc/D2YP-4Q8A> (last visited Apr. 4, 2021). Similarly, in April 2021, the House Judiciary Committee approved a separate bill to create a commission to study slavery reparations for Black Americans. Savannah Behrmann, *House Committee Approves Bill to Study Slavery Reparations for the First Time*, USA TODAY (Apr. 14, 2021, 1:01 PM), <https://perma.cc/96WS-QTZS>.

80. See Press Release, Elizabeth Warren, Haaland Introduce Bill to Seek Healing for Stolen Native Children and Their Communities (Sept. 29, 2020), <https://perma.cc/WYA5-EMA3>.

81. de Greiff, *supra* note 60, at 7–8, 14 (discussing how truth commissions are not a substitute for criminal accountability and that there is empirical evidence that truth commissions and prosecutions work best when designed together).

82. INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55.

83. HAYNER, *supra* note 56, at 13.

institutional design, truth commissions take statements from thousands of survivors, witnesses, and perpetrators in narrative format, and consequently, both the breadth and detail of information is often far better than other justice mechanisms.⁸⁴ For example, truth commissions have collected 21,000 victim statements (South Africa),⁸⁵ 17,000 statements (Peru),⁸⁶ 20,046 statements (Morocco),⁸⁷ 35,000 statements (Chile),⁸⁸ and 20,560 statements (Liberia).⁸⁹ The Peruvian Commission's work uncovered the sheer scale of abuses during the conflict. Previous estimates indicated that only 34,000 individuals died or disappeared, yet through interviews the commission concluded that at least 69,280 individuals were killed or disappeared.⁹⁰

Furthermore, a truth commission's focus on narrative testimony and its survivor-centered approach can uncover more underreported crimes, such as sexual and gender-based violence.⁹¹ Survivors of many crimes, including gender-based violence, often feel more comfortable disclosing their experiences in a confidential manner, as opposed to an adversarial public process.⁹² For example, in Guatemala, the extent of pervasive sexual violence was unknown until the truth commission collected thousands of statements;⁹³ on the basis of this testimony, the truth commission concluded that armed forces systematically utilized sexual violence to target Mayan women.⁹⁴ Survivors in both Peru and Timor-Leste also disclosed sexual violence to the commissions after initially feeling reluctant to discuss these experiences.⁹⁵

A truth commission's broader mandate to analyze patterns and causes of abuses also enables the commission to conduct more systematic investigations and articulate the full responsibility of State institutions and

84. *Id.* at 20; *see also* INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55 (documenting that the creation of broadly inclusive mechanisms "is critical to developing a rich understanding of abuses under inquiry.").

85. HAYNER, *supra* note 56, at 28, 269.

86. *Id.* at 36, 270.

87. *Id.* at 271.

88. *Id.* at 61, 271.

89. *Id.* at 67, 272.

90. *Id.* at 36–37.

91. Stromseth, *supra* note 62, at 574; AMRITA KAPUR & KELLI MUDDLELL, INT'L CTR. FOR TRANSITIONAL JUST., WHEN NO ONE CALLS IT RAPE: ADDRESSING SEXUAL VIOLENCE AGAINST MEN AND BOYS IN TRANSITIONAL CONTEXTS 14–17 (2016), <https://perma.cc/R7EP-GXPA> (discussing how the design of truth commissions can facilitate more testimony on sexual violence, including by offering interviewers of the same sex, using *in camera* testimony procedures, and offering women-only or men-only hearings; additionally discussing how the Kenyan Commission received 346 statements from male victims of sexual violence despite the fact that male survivors face intense social stigma in reporting sexual violence); U.N. HIGH COMM'R FOR HUM. RTS., Analytical Study Focusing on Gender-Based and Sexual Violence in Relation to Transitional Justice, U.N. Doc. A/HRC/27/21, 6 (June 30, 2014) (discussing how truth commissions are particularly well-suited to uncover the systematic nature of sexual violence).

92. *See* UN WOMEN, A WINDOW OF OPPORTUNITY: MAKING TRANSITIONAL JUSTICE WORK FOR WOMEN 6–7 (2012); Stromseth, *supra* note 62, at 574.

93. HAYNER, *supra* note 56, at 87.

94. U.N. HIGH COMM'R FOR HUM. RTS., *supra* note 91, at 7.

95. Stromseth, *supra* note 62, at 574; Falcón, *supra* note 60, at 3–4 (discussing how the Peruvian commission also uncovered cases of sexual slavery, sexual mutilation, and forced pregnancy, and discovered that doctors treating rape survivors frequently further victimized them with sexual assault).

nongovernmental actors.⁹⁶ For instance, South Africa's commission held special hearings to investigate the role of various institutional actors in the apartheid regime, including religious, medical, legal, business, police, and media actors.⁹⁷ Guatemala's truth commission starkly concluded that the State committed acts of genocide against Mayan populations, and the report detailed underlying causes including racism, structural injustice, the anti-democratic nature of institutions, and the United States' support for the regime.⁹⁸

Compared to truth commissions, criminal and civil trials often fail to reveal the full truth of abuses due to strict rules of evidence,⁹⁹ the adversarial nature of the proceedings,¹⁰⁰ and settlements.¹⁰¹ An inherent tension exists in prosecutions between survivors' rights to have the full truth emerge and evidentiary rules as well as the due process rights of the accused.¹⁰² Additionally, the focus on individual cases often inhibits the ability of prosecutors to outline broad conclusions about institutional patterns.¹⁰³

In the asylum context, the full scope of human rights abuses is still unclear. A truth commission is vitally necessary to thoroughly investigate and document the *facts and causes* of these atrocities. Despite extensive litigation on the family separation policy, the total number of children subjected to this horrific abuse is still unknown. In 2019, HHS's Office of the Inspector General disclosed that thousands more children than previously known may have been separated at the border prior to the enactment of the Zero Tolerance Policy in 2018 and the total number of separated children is "unknown."¹⁰⁴ The total number of separations is unknown due to the lack of an integrated formal tracking system between DHS and HHS, as well as poor recordkeeping practices.¹⁰⁵

96. HAYNER, *supra* note 56, at 13.

97. *Id.* at 28.

98. *Id.* at 34–35.

99. *See id.* at 107.

100. UN WOMEN, *supra* note 92, at 6–7 (demonstrating how women's participation in trials has been "hampered by a range of difficulties, including the adversarial nature of the court process, which is ill-suited in particular to crimes of a sexual nature; the stigma attached to testifying as a victim of sexual violation; the insensitivity with which victims are often treated; the unevenness of protection measures for testifying witnesses[.]").

101. *See generally* NAT'L WOMEN'S L. CTR., LIMITING NONDISCLOSURE AND NONDISPARAGEMENT AGREEMENTS THAT SILENCE WORKERS: POLICY RECOMMENDATIONS (2020), <https://perma.cc/ZH26-KUGB> (highlighting how non-disclosure agreements in sexual assault settlements can inhibit survivors from speaking publicly about their assaults, allowing perpetrators to hide widespread harassment, abuse, and exploitation from public scrutiny and accountability).

102. Marie Soueid, Ann Marie Willhoite, & Annie Sovcik, *The Survivor-Centered Approach to Transitional Justice: Why a Trauma-Informed Handling of Witness Testimony Is a Necessary Component*, 50 GEO. WASH. INT'L L. REV. 125, 171 (2017).

103. HAYNER, *supra* note 56, at 108.

104. U.S. DEP'T OF HEALTH AND HUM. SERVS., OFF. OF INSPECTOR GEN., SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE 1, 13 (2019) [hereinafter HHS OIG 2019 REPORT], <https://perma.cc/6WKP-7UJ3>. *See also* Joshua Barajas, *Why We May Never Know the True Number of Family Separations*, PBS (Jan. 18, 2019, 4:58 PM), <https://perma.cc/7V6W-ZT73>.

105. HHS OIG 2019 REPORT, *supra* note 104, at 13. After the release of the Inspector General's report, a federal judge ordered the government to identify the potentially thousands more children separated prior to 2018. In October 2019, the Trump administration complied with the order, identifying that at least 1,556 additional children were separated from their parents prior to the Zero Tolerance Policy.

Furthermore, the full scope of family separation is also unclear due to discrepancies in federal reporting. The government's official count only includes children separated from their parent or legal guardian, and does not encompass children separated from other family members at the border, such as an adult sibling, aunt, uncle, or grandparent.¹⁰⁶ For example, the Texas Civil Rights Project identified that 939 children were separated in McAllen, Texas between June 2018 to April 2020, and 356 of these children were separated from a parent while the other 583 children were separated from non-parent family members.¹⁰⁷ Consequently, because the government's official count would only include 356 children in McAllen, it severely underrepresents the number of family separations occurring at the border. Immigration advocates argue there needs to be "a full accounting of the scope of family separations, and recognition by the government of the enduring consequences."¹⁰⁸

Additionally, other human rights abuses are also likely severely underreported in immigration detention. Immigrants frequently do not report sexual assault in immigration detention centers due to "fears of retaliation, social isolation, language barriers, and knowledge that allegations are not seriously investigated."¹⁰⁹ The prevalence of illegal, forced sterilizations and hysterectomies in state prison systems across the United States indicates that the forced sterilizations at the ICE detention center in Georgia were likely not isolated incidents.¹¹⁰ In addition to sexual and reproductive rights violations,

Nicole Narea, *The Trump Administration Just Admitted that It Separated an Additional 1,500 Immigrant Families*, Vox (Oct. 25, 2019, 1:30 PM), <https://perma.cc/P6GU-8P9W>. However, in April 2021, President Biden's administration identified 5,600 unreviewed files from the first six months of the Trump administration that could include even more cases of family separations. A senior DHS official commented, "[w]e found the list we had when we came in was not comprehensive and included large timeframes that had not been reviewed." John Moore, *Biden Task Force Finds 5,600 Files that May Identify More Migrant Families Separated under Trump*, NBC NEWS (Apr. 7, 2021, 12:37 PM), <https://perma.cc/8VPH-KL9W>. The ACLU estimates that this list could potentially encompass hundreds of additional family separation cases. Franco Ordonez, *Task Force Investigates Whether Trump Separated Families Earlier than Known*, NPR (Apr. 7, 2021, 3:38 PM), <https://perma.cc/FDD8-K4NQ>.

106. S. POVERTY L. CTR., *supra* note 20; Sarah Abdel-Motaleb, Roberto Lopez, & Andy Udelsman, *Family Separations Continue in South Texas, Years After They Allegedly Ended*, TCRP MAGAZINE (Oct. 21, 2020), <https://perma.cc/3PJY-RAWN>.

107. Abdel-Motaleb, Lopez, & Udelsman, *supra* note 106.

108. Levin, *supra* note 21; see also Michael Bochenek, *US Takes Steps to Reverse Family Separations: More Is Needed to Address Trauma Caused By Trump Policies*, HUM. RTS. WATCH (Feb. 2, 2021, 5:47 PM), <https://perma.cc/P37F-5PDR> (arguing that the U.S. government must undertake a "full, public accounting of what happened and how. It means fully investigating the "zero tolerance" program and those involved in authorizing it, and ensuring punishment, as appropriate.").

109. Saadi, Young, Patler, Estrada, & Venters, *supra* note 32, at 189. Between January 2010 to July 2016, DHS received 33,126 complaints of sexual assault and physical abuse, yet only initiated investigations in 570 cases. *Id.*

110. See Shilpa Jindia, *Belly of the Beast: California's Dark History of Forced Sterilizations*, GUARDIAN (last modified July 1, 2020, 2:46 PM), <https://perma.cc/27Y2-S2RJ> (explaining how a group of survivors and activists in California recently uncovered that at least 1,400 sterilizations occurred in California state women's prisons between 1997 and 2013; and in violation of federal law, California paid doctors nearly \$150,000 to sterilize female prisoners – predominately Black and Latina prisoners – as a mechanism of birth control without their informed consent); see also Elizabeth Wong, *A Shameful History: Eugenics in Virginia*, ACLU VA. (Jan. 11, 2013, 10:59 AM), <https://perma.cc/46JX-QMMW>

many other human rights abuses are not reported in detention centers because asylum seekers fear that making a complaint will negatively affect their asylum claims.¹¹¹ A truth commission could investigate and uncover the full scope of these human rights abuses through its broad survivor-centered statement taking process, as well as its investigative and research powers.¹¹²

In addition to documenting the facts of these atrocities, a truth commission can also analyze the underlying causes of these abuses. Advocates uncovered that the Trump administration purposely crafted the family separation policy to deter migration and punish asylum seekers.¹¹³ A truth commission could analyze the causes of family separation and other human rights abuses on a significantly deeper level, answering critical questions: Why did family separation continue at an alarming rate after President Trump signed an executive order in June 2018 to stop the practice?¹¹⁴ How did the judicial system allow the Executive Branch to continue implementing the Remain in Mexico Policy when the DHS civil servants tasked with administering the policy publicly argued the program was clearly illegal and immoral?¹¹⁵ Why do LGBTQ migrants face substantially higher rates of sexual violence in detention centers?¹¹⁶ What institutional factors contributed to the pattern of forced

(discussing that in Virginia, the state forcibly sterilized between 7,200 and 8,300 individuals in mental institutions and other state facilities during the twentieth century).

111. See Tom Wong, Sebastian Bonilla, & Anna Coleman, *Seeking Asylum: Part 1*, U.S. IMMIGR. POL'Y CTR. (Aug. 28, 2019), <https://perma.cc/44PD-NU7E>; Tom Wong, *Opinion: Every Aspect of America's Asylum System Now Seems Broken*, L.A. TIMES (Sept. 4, 2019, 3:00 AM), <https://perma.cc/4GSY-9BDF>.

112. A truth commission can uncover the scope of these abuses through both direct engagement with survivor populations as well as NGOs. The commission should encourage NGOs to share their non-confidential records and research with commission staff. In El Salvador, Chile, Guatemala, and South Africa, nongovernmental organizations submitted extensive information to the commissions which was utilized as secondary source material. See HAYNER, *supra* note 56, at 225, 230.

113. See S. POVERTY L. CTR., *supra* note 20; see also *The Trump Administration's Family Separation Policy: Trauma, Destruction, and Chaos*, Majority Staff Rep., U.S. H. of Rep. Comm. on the Judiciary 6, 8, 21 (Oct. 2020) (concluding the administration adopted the family separation policy to deter migration and revealing internal communication between Executive Branch officials discussing this deterrence policy), <https://perma.cc/FJ6K-4BE5>.

114. See generally Liz Vinson, *Family Separation Policy Continues Two Years after Trump Administration Claims It Ended*, S. POVERTY L. CTR. (June 18, 2020), <https://perma.cc/ZYU6-N2G4> (discussing how family separation continued after the executive order with more clandestine practices); S. POVERTY L. CTR., *supra* note 20 (highlighting that thousands of families continue to be separated at the border for minor issues, like traffic offenses).

115. In March 2020, the Supreme Court granted the government a stay of the 9th Circuit's preliminary injunction, allowing the administration to continue enforcing the MPP policy while litigation continued. *Wolf v. Innovation Lab*, 140 S.Ct. 1564, 1564 (2020). In the litigation in the 9th Circuit, the labor union for DHS asylum officers filed a powerful amicus brief, in an unusual rebuke of the Executive Branch, arguing that the Migrant Protection Protocols program starkly violates both domestic and international law, and requesting the court affirm an immediate injunction. See Bobby Allyn, *Asylum Officers: Trump's 'Remain in Mexico' Policy Is Against 'Moral Fabric' of the U.S.*, NPR (June 27, 2019, 12:01 AM), <https://perma.cc/Z6GP-APB7>.

116. Research estimates that LBGT immigrants in ICE detention are 97 times more likely to be sexually assaulted than non-LGBT detained immigrants. Sharita Gruberg, *ICE's Rejection of Its Own Rules Is Placing LGBT Immigrants at Severe Risk of Sexual Abuse*, CTR. FOR AM. PROGRESS (May 30, 2018, 12:00 PM), <https://perma.cc/U2HP-UYZS>.

hysterectomies and lack of informed consent?¹¹⁷ Why did DHS fail to initiate investigations over thousands of sexual assault claims?¹¹⁸ What institutional and political factors promulgated aggressive detention policies against asylum seekers and how did institutional racism affect the development and execution of these policies? The commission can examine the role of not only the White House, HHS, and DHS in perpetuating these abuses, but it can also examine the complicity of private prison companies and local governments who operate detention centers, local law enforcement, medical staff, and other relevant actors.¹¹⁹

Unfortunately, the current oversight systems in the United States will not sufficiently reveal the full scale and causes of human rights abuses committed against asylum seekers. As discussed above, the United States cannot rely on criminal or civil trials alone to reveal the full scope of these abuses given that evidentiary rules, the adversarial system, and settlements all restrict the ability of trials to reveal the full truth.¹²⁰ Moreover, the United States cannot rely on a congressional inquiry or FOIA records alone to establish the truth. Congressional investigations often possess a narrow scope and are hampered by partisan issues.¹²¹ Specifically in the immigration context, DHS and DOJ already refused to cooperate with House Committee investigations on family separation.¹²² Furthermore, eight members of Congress have already called for an independent UN inquiry into immigration abuses, arguing that the scale and breadth of human rights violations merits an independent and transparent inquiry.¹²³ Although the FOIA process provides invaluable insight into Executive department practices and policies, FOIA requests in isolation cannot uncover the full truth because government records often do not capture the personalized and traumatic impact of these policies on individual survivors. DHS also routinely refuses to comply with FOIA requests on

117. As part of an independent medical review, nine board-certified OB-GYNs reviewed the records of nineteen women who alleged misconduct by an ICE affiliated gynecologist, and the team “found a disturbing pattern of aggressive treatment . . . and a failure to obtain informed consent.” John Washington & Jose Olivares, *Number of Women Alleging Misconduct By ICE Gynecologist Nearly Triples*, INTERCEPT (Oct. 27, 2020, 4:10 PM), <https://perma.cc/4ZQ7-9L77>.

118. Between January 2010 to July 2016, DHS received 33,126 complaints of sexual assault and physical abuse, yet only initiated investigations in 570 cases. Saadi, Young, Patler, Estrada, & Venters, *supra* note 32, at 189.

119. As of January 2020, 81 percent of individuals in ICE custody were detained in facilities owned or operated by private prison corporations. Asylum seekers are also frequently detained in city or county jails as well. *See generally* ACLU Report, *supra* note 30, at 5–6.

120. *See supra* notes 99–103 and accompanying text.

121. Jordan Tama, *How a January 6 Commission Can Succeed: What Empirical Research Tells Us*, JUST SEC. (Feb. 24, 2021), <https://perma.cc/YJ7B-925A>.

122. Majority Staff Rep., U.S. H. of Rep. Comm. on the Judiciary, *supra* note 113, at 2 (discussing how only one department, HHS, meaningfully cooperated with the Committee’s request for documentation).

123. Letter from Reps. Rashida Tlaib, Ayanna Pressley, Ilhan Omar, Alexandria Ocasio-Cortez, Veronica Escobar, Mark Pocan, Alan Lowenthal & Mary Gay Scanlon, to Michelle Bachelet, High Comm’r for Hum. Rts., U.N. (Oct. 23, 2020).

immigration matters,¹²⁴ and it has attempted to destroy certain records pertaining to civil rights violations in detention centers.¹²⁵ Additionally, some components of DHS, including Customs and Border Protection, are now exempt from providing certain information under FOIA requests due to their designation as security agencies.¹²⁶ A truth commission is therefore vitally necessary to document and establish the facts, causes, and consequences of human rights abuses against asylum seekers.

B. *Formally Acknowledging Survivors' Experiences and Supporting Survivor Empowerment*

Furthermore, the Biden administration should additionally implement a truth commission to formally acknowledge asylum seekers' experiences and support survivor empowerment. Unlike other accountability and justice mechanisms, truth commissions are centered fully on survivors and victims.¹²⁷ Collecting survivor statements and engaging broadly with survivor communities is *the central* activity of truth commissions.¹²⁸ Truth commissions provide an important platform for survivors to share their experiences in a manner that is culturally and psychologically meaningful to them, and the commissions can provide survivors with recognition and validation after years of abuse.¹²⁹ Centering survivor experiences in the final report often

124. *Council Sues Government to Compel Release of Records about Remain in Mexico Program*, AM. IMMIGR. COUNCIL (May 13, 2020), <https://perma.cc/D2ZN-9H5E> (discussing how DHS agencies failed to respond to multiple FOIA requests related to the Migrant Protection Protocols, and consequently the American Immigration Council had to file a lawsuit).

125. In December 2019, the National Archives granted ICE permission to destroy certain records from President Trump's first year in office, including detainee complaints about civil rights violations, sexual assault, and deaths in detention centers, which would effectively erase the only public record of many of these abuses. On March 12, 2021, a federal judge ruled that ICE could not destroy these documents and that the documents must be preserved under the Federal Records Act due to their important research value. This litigation demonstrates the extent to which ICE frequently attempts to evade public disclosure of information through the FOIA system. See Justine Coleman, *Judge Rules ICE Must Keep Records about Sexual Assault and Detainee Deaths*, HILL (Mar. 14, 2021), <https://perma.cc/L2YZ-8PM5>; see also Matthew Connelly, *Why You May Never Learn the Truth About ICE*, N.Y. TIMES (Feb. 4, 2020), <https://perma.cc/H2N2-4D4H> (discussing how ICE can start destroying records, including complaints about human rights violations and poor medical care); Kate Oh & Eunice Cho, *ICE's Destruction of Records Must Be Stopped*, ACLU (Feb. 18, 2020), <https://perma.cc/R2ZA-CBVK> ("Given their important role documenting decisions by government officials and offering proof of the harm that people suffer in detention, the destruction of these records in such a short period of time will further obscure important evidence.").

126. Hilda Bonilla, *CBP Hides Itself from Public View and Lacks Accountability*, IMMIGR. IMPACT (Mar. 18, 2020), <https://perma.cc/2RYW-GPLW>.

127. INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55, at 11.

128. *Id.*

129. de Greiff, *supra* note 60, at 7 ("[C]ommissions can create platforms for victims to tell their stories – for example, by holding public hearings – thereby giving them a place in the public sphere for the very first time. This is part of the process of affirming the status of victims, often members of socially marginalized groups, as equal rights holders."); HAYNER, *supra* note 56, at 22 ("By listening to victims' stories, perhaps holding public hearings and publishing a report that describes a broad array of experiences of suffering, commissions effectively give victims a public voice and bring their suffering to the awareness of the broader public."); INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55 ("By giving special attention to testimonies, they provide victims with recognition, often after many years of their voices being silenced or ignored."); Gibson, *supra* note 64, at 425 ("[P]erhaps the most important aspect of the

represents “the first acknowledgement by any state body that their claims are credible and the atrocities were wrong.”¹³⁰

In contrast, adversarial trials are often not well-suited to acknowledging and validating survivors’ experiences. Principally, cross-examination and credibility attacks at trials frequently re-victimize survivors, compounding their trauma.¹³¹ Additionally, survivor testimony at trial is directly shaped through direct and cross-examination questions, inhibiting survivors’ abilities to testify to their full experiences in narrative format.¹³² “Too often legal actors usurp the role of survivors as the story tellers by determining legally relevant information to be presented at trial.”¹³³ Researchers document that survivors are often “let down by the very selective account of past events which criminal trials tend to produce,” and survivors frequently report the trial testimony experience as “disempowering and emotionally exhausting.”¹³⁴ At international criminal trials in Sierra Leone and the former Yugoslavia, survivors reported that their central dissatisfaction with the process was the “inability to convey their full story.”¹³⁵ Similarly, a study of torture survivors in the United States documented that survivors of mass atrocities often want to discuss their experiences without being interrupted and want to be asked about the historical contexts of their experiences.¹³⁶ Adversarial models are therefore often inadequate to acknowledge the full individual, cultural, and psychological experiences of survivors, whereas truth commissions can acknowledge these experiences through their survivor-centered, narrative format.¹³⁷

Additionally, truth commissions offer an important platform for supporting survivor empowerment. Some psychologists maintain that participating in a truth commission can be an empowering experience for survivors who have already worked with a therapist to process the trauma.¹³⁸ These psychologists posit that the act of sharing one’s story again in a safe environment can validate a survivor’s feelings, affirm their dignity and value, and potentially help reduce trauma and anxiety.¹³⁹ The truth-telling process can be empowering

truth and reconciliation process was that victims were given voice—they were provided the opportunity to come forth and tell their stories and receive acknowledgment and, to some degree, a restoration of their dignity.”); *see also* Falcón, *supra* note 60, at 1.

130. HAYNER, *supra* note 56, at 13.

131. Soueid, Willhoite, & Sovcik, *supra* note 102, at 168.

132. *Id.* at 167–68.

133. *Id.* at 168.

134. *Id.*

135. For example, in Sierra Leone, survivors of sexual violence were not allowed to testify about their assaults since the court deemed these crimes outside the scope of the official charges. Consequently, “many of the women felt that their narratives had been stifled and justice had not been served. Prioritizing evidentiary issues and procedural law over the concerns of survivors makes the witnesses feel detached from the legal exercise in which they become ‘weapons’ against the adversary.” *Id.* at 170.

136. *Id.* at 166–67.

137. INT’L CTR. FOR TRANSITIONAL JUST., *supra* note 55, at 4, 38; *see also* Soueid, Willhoite, & Sovcik, *supra* note 102, at 171.

138. Soueid, Willhoite, & Sovcik, *supra* note 102, at 152–54.

139. *Id.* at 152, 167.

exactly because it enables a survivor to take control of their story and narrative.¹⁴⁰ There are few empirical studies that directly address the relationship between truth commission participation and psychological healing.¹⁴¹ However, the limited research available indicates that the truth commission process has been empowering for some survivors, but not all. In an empirical study focused on survivor participants in Timor Leste and the Solomon Islands, many interviewees indicated that they experienced empowerment, social acknowledgement, and catharsis through testifying publicly at commission hearings.¹⁴² Yet, some interviewees also noted feelings of disillusionment since they did not receive any tangible benefits after participating in the commissions despite implicit or explicit promises by commission staff.¹⁴³

In order to support survivor empowerment, a truth commission must integrate a trauma-informed approach to minimize risks of re-traumatizing and triggering survivors.¹⁴⁴ A trauma-informed approach to survivor participation involves: adequately preparing survivors for what to expect and affording survivors choice throughout the process; creating a safe physical space for survivors to rebuild a sense of control; thoroughly discussing and planning for safety concerns; explaining confidentiality procedures and offering in camera testifying options; setting boundaries and avoiding making promises to survivors about outcomes; providing holistic mental health support during survivors' participation; recognizing signs of trauma and providing frequent breaks; and conducting thorough follow-up procedures with survivors after their participation, including regular mental health and safety check-ins.¹⁴⁵ Ultimately, truth commissions cannot and should not replace comprehensive mental health services for survivors, but the truth commission process can contribute to survivor empowerment in important ways.

Furthermore, a truth commission's survivor-centered approach can have a powerful effect on society. Transitional justice scholar Priscilla Hayner maintains that "by bringing victims' voices directly to the public through hearings, a commission can encourage public understanding and sympathy for victims, [and] reduce the likelihood of continued denial of the truth by large sectors of society."¹⁴⁶ In South Africa, survivors recounted the atrocities of apartheid in "highly personalized and excruciating detail," which captivated the public's

140. *Id.* at 153.

141. *Id.* at 156.

142. HOLLY GUTHREY, VICTIM HEALING AND TRUTH COMMISSIONS: TRANSFORMING PAIN THROUGH VOICE IN SOLOMON ISLANDS AND TIMOR LESTE 5–6 (Springer 2015).

143. Holly Guthrey, *Expectations and Promises in the Quest for Truth: Examining Victims' Perceptions of Truth Commission Participation in Solomon Islands and Timor-Leste*, 22 PEACE & CONFLICT: J. PEACE PSYCH. 306, 315 (2016).

144. Soueid, Willhoite, & Sovcik, *supra* note 102, at 130–33, 157–59 (arguing that if transitional justice mechanisms do not adopt trauma-informed precautions, survivors can experience re-traumatization and engage in harmful coping mechanisms).

145. *Id.* at 159–64. See also *Implementing a Trauma Informed Approach*, U.S. DEP'T OF STATE OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERSONS (June 2018), <https://perma.cc/MG2Y-W66W>.

146. HAYNER, *supra* note 56, at 218.

attention in a way that would not have been possible through an adversarial proceeding.¹⁴⁷ As a result of the truth commission hearings, therapists documented an increase in the public's understanding and appreciation of survivors' needs.¹⁴⁸ Similarly, truth commission hearings in Peru had a powerful effect on citizens in Lima who were isolated from the conflict's effects.¹⁴⁹

After experiencing horrific abuses at the border and in the detention system, asylum seekers deserve a formal platform to share their experiences and an official acknowledgement from the State that these atrocities were both legally and morally wrong. Some immigrant survivors have already expressed a strong desire to share their experiences publicly. One survivor of gynecological abuse stated, “[e]ver since I came back to [the detention center], I have been determined to tell my story . . . at first, I was nervous to share my story, but it is so important to me that the world knows what is happening here at [the Irwin detention center] . . . I want to help all the women who have been hurt . . . I want to speak up . . . We are women, not animals.”¹⁵⁰ A father who experienced family separation said, “I am willing to give my testimon[y] to the authorities and the American public about how much I suffered with this separation . . . we have suffered greatly, and this has left huge scars.”¹⁵¹ A truth commission would provide a survivor-centered mechanism for giving asylum seekers a public voice, recognizing and validating their experiences, and potentially contributing to their empowerment. A truth commission's survivor-centered format could also potentially foster greater awareness and empathy towards asylum seekers in the United States.

C. *Recommending Reparations for Survivors*

The Biden administration should also implement a truth commission as a mechanism for recommending appropriate and holistic reparations for survivors of these atrocities. This section discusses why truth commissions are an important platform for recommending reparations and how the truth commission process itself can build political support for financing reparations. The section additionally proposes several potential reparations in the asylum context.

A truth commission is well-equipped to offer reparation recommendations for mass atrocities because reparation proposals are often best designed by institutions that have close contact with many survivors, understand the scope and severity of the harm, and can propose reparation policies that align with

147. Gibson, *supra* note 64, at 416.

148. HAYNER, *supra* note 56, at 22.

149. *Id.* at 36.

150. *Georgia Medical Board Complaint Form Submitted on Behalf of Yanira Yesenia*, S. POVERTY L. CTR. (Nov. 18, 2020), <https://perma.cc/GEJ4-6B7P>.

151. “*The Harm Is Irreparable*”: 11 Stories of Family Separation, CLINIC (July 24, 2020), <https://perma.cc/2GUM-85HX>.

other necessary institutional reforms.¹⁵² Truth commissions can recommend a range of detailed, tailored reparations given their close consultations with thousands of survivors. For example, the truth commission in Sierra Leone recommended fistula surgeries as reparations for survivors of sexual violence after documenting the extensive and enduring physical harm experienced by these survivors.¹⁵³ Over two hundred survivors subsequently received fistula surgeries, alongside other reparations.¹⁵⁴ Furthermore, utilizing a truth commission to catalyze reparations can also reduce the burden of individual survivors who would otherwise have to pursue restitution in court, where many survivors often lack corroborating evidence to sustain a claim, cannot afford to hire a lawyer, or do not want to endure an arduous adversarial trial.¹⁵⁵

The process of a truth commission itself can also help build the political will and public support to fund reparations.¹⁵⁶ In several countries, truth commissions served as a catalyst for instituting sweeping reparation policies for thousands of survivors and family members.¹⁵⁷ The Moroccan government rapidly instituted its commission's recommendations by providing \$85 million to 9,000 individual survivors and family members, as well as comprehensive medical and psychological services.¹⁵⁸ Chile instituted a substantial reparations program for family members of those killed or disappeared during the Pinochet regime encompassing monthly pension checks, educational and health benefits, waivers of mandatory military service, and full coverage of university tuition.¹⁵⁹ Argentina's reparations program paid surviving family members, detained individuals, and exiles up to \$220 thousand.¹⁶⁰ Ecuador's truth commission drafted a model reparations bill that was later enacted into law by the National Assembly.¹⁶¹ In the United States, the

152. HAYNER, *supra* note 56, at 179. *See also* U.N. HIGH COMM'R FOR HUM. RTS., *supra* note 91, at 14 (discussing how survivor consultation is essential for successful reparations programs because survivors know their own needs best and are well-positioned to ensure that reparations are "accessible, equitable, and effective").

153. SIERRA LEONE TRUTH AND RECONCILIATION COMM'N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE COMMISSION 14, 194 (2004), <https://perma.cc/HCG9-YMH9>.

154. UN WOMEN, *supra* note 92, at 17. The physical trauma of sexual violence can produce a fistula, a hole or tear between the vagina and urinary tract or rectum, which results in uncontrollable leakage of urine and feces. In addition to intense physical trauma, fistulas can also cause emotional distress as women and girls who experience fistulas are frequently neglected and abandoned by their families due to the stench of urine and feces. Surgeries can completely repair fistulas in nearly ninety percent of cases. *See generally* Ahuka Ona Longombe, Kasereka Masumbuko Claude, & Joseph Ruminjo, *Fistula and Traumatic Genital Injury from Sexual Violence in Conflict Setting in Eastern Congo: Case Studies*, 16 REPROD. HEALTH MATTERS 132, 133–39 (May 2008); *Surgical Repair and Rehabilitation*, FISTULA CARE PLUS, <https://perma.cc/NY5U-R7UW> (last visited Aug. 26, 2021).

155. Luke Moffett & James Gallen, *From Truth to Repair: Implementing Truth Commission Recommendations on Reparations*, QUEEN'S UNIV. BELFAST 15 (Jan. 2020), <https://perma.cc/WV6M-DBG8>.

156. HAYNER, *supra* note 56, at 163; Moffett & Gallen, *supra* note 155, at 4.

157. HAYNER, *supra* note 56, at 5.

158. *Id.* at 45, 172.

159. At the height of the reparations program in Chile, the program cost roughly 16 million dollars a year to administer. *Id.* at 47, 167, 257, 280.

160. *Id.* at 169–70, 274.

161. Moffett & Gallen, *supra* note 155, at 16.

federal government implemented many recommendations of the Commission on Wartime Relocation and Internment of Civilians, including an official apology and the allocation of \$1.2 billion in compensation for Japanese American and Japanese national survivors of the internment atrocities.¹⁶²

An asylum truth commission in the United States should explicitly be tasked with developing comprehensive reparation proposals, including individual and collective reparations for all survivors. President Biden's task force on family separations announced that it will allow migrant children and parents separated under the Trump administration to reunite in the United States and that the task force is exploring avenues for granting legal residency.¹⁶³ Although this announcement is very positive, the administration still must provide comprehensive reparations for children who were separated from non-parent family members,¹⁶⁴ as well as other systemic abuses including the Remain in Mexico program, forced hysterectomies, sexual assault, forced deportation, torture, and inhumane detention conditions.

A U.S. truth commission could recommend a range of immediate and long-term reparations for these abuses based on extensive consultations with immigrant survivors including: a grant of asylum or path to legal permanent residency; monetary reparations; medical and psychological services; and educational, housing, and employment assistance. For example, the commission could recommend financing assistive reproductive technology services and surrogacy options for women subjected to forced sterilization. The United Nations maintains that reparations should be transformative: reparations should focus not only on restoring survivors to pre-existing conditions but should also subvert structural discrimination in society.¹⁶⁵ Consequently, a U.S. truth commission should recommend reparations to address underlying inequalities experienced by asylum seekers, in addition to remedying the direct traumatic impact of these abuses.

To complement material reparations, a U.S. truth commission should also offer symbolic reparations, such as an official government apology admitting responsibility and a memorial acknowledging survivors. In the transitional justice field, public apologies have served a critical role in acknowledging a country's past abuses and moving towards a more equitable future.¹⁶⁶ Government officials should pay close attention to the time, place, manner, and vocabulary used in an official apology and should consult with survivor

162. HAYNER, *supra* note 56, at 15.

163. Rodríguez, *supra* note 46.

164. See Bochenek, *supra* note 108 (arguing that the Task Force is a welcome step but will not help those children who were separated from extended family members since the E.O. is limited to parent-child separations).

165. U.N. HIGH COMM'R FOR HUM. RTS., *supra* note 91, at 15.

166. Beth Van Schaack & Daniella Stoltz, *It's Never Too Late to Say 'I'm Sorry': Sovereign Apologies over the Years*, JUST SEC. (Mar. 16, 2021), <https://perma.cc/GN4V-U8HL>.

communities in advance to ensure the official apology is meaningful to them and not merely a mechanism for state atonement.¹⁶⁷

Ultimately, the successful implementation of an asylum truth commission's reparation proposals will depend heavily on political will in Congress and the Executive Branch.¹⁶⁸ However, as noted above, the process of a truth commission itself—hearing directly from immigrant survivors about the horrors they experienced—can help foster this political will.¹⁶⁹ As the commission engages with survivor participants in statement taking initiatives, it should carefully manage expectations regarding possible reparations and should not promise the delivery of any specific reparations to survivor participants.¹⁷⁰ Finally, any ultimate reparations adopted by Congress or the Executive Branch should be available to all survivors, not only those who participated in the truth commission process.¹⁷¹

D. *Recommending Institutional Reforms to Prevent Future Violations*

In addition to serving as a platform for recommending reparations, an asylum truth commission can also recommend critical institutional reforms to prevent future atrocities against asylum seekers. Without accurate and holistic knowledge of past human rights violations, a society will often struggle to prevent future atrocities.¹⁷² Truth commissions are well-positioned to offer institutional reforms given their extensive analysis of the patterns and underlying causes of atrocities.¹⁷³ Previous truth commissions have recommended very detailed and comprehensive reforms to the judiciary, prison systems, police, and executive agencies, as well as federal legislation and educational initiatives.¹⁷⁴ Similar to reparations, the ultimate enactment of institutional reforms is heavily dependent on political will.¹⁷⁵ From international experience, implementation has been most successful when commissions provided very detailed institutional reforms, as opposed to broad recommendations.¹⁷⁶ In El Salvador, the truth commission's detailed recommendations afforded significant leverage for civil society actors and the United Nations to ensure implementation. El Salvador subsequently enacted a constitutional amendment to prohibit the use of extrajudicial confessions, overhauled the process

167. *Id.*; Moffett & Gallen, *supra* note 155, at 28.

168. *See* HAYNER, *supra* note 56, at 12; Moffett & Gallen, *supra* note 155, at 15.

169. *See* HAYNER, *supra* note 56, at 12; Moffett & Gallen, *supra* note 155, at 4.

170. Moffett & Gallen, *supra* note 155, at 29 (arguing that truth commissions should clearly communicate that reparations are not guaranteed, as well as that reparations might take considerable time and will likely not equate to full compensation); *see also* Guthrey, *supra* note 143, at 306–17 (discussing how many survivors in the Solomon Islands and Timor Leste truth commissions reported dissatisfaction with their participation because staff made explicit or implicit promises about tangible benefits that never materialized).

171. *See* HAYNER, *supra* note 56, at 163.

172. INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55, at 4.

173. *See* HAYNER, *supra* note 56, at 13.

174. *Id.*

175. *Id.* at 17.

176. *Id.* at 194.

of appointing and reviewing judges, and created a new criminal code to protect procedural rights.¹⁷⁷

In the United States, a truth commission could recommend numerous needed reforms to the asylum and detention system including: expediting the processing of asylum claims and reducing court backlogs, ensuring universal legal representation for all asylum seekers, mainstreaming trauma-informed practices into the asylum adjudication system, eliminating the practice of detaining families, improving conditions in detention systems (at minimum) or abolishing the immigration detention system all together, overhauling oversight mechanisms at DHS, increasing resources for processing asylum seekers at the border, and many other necessary reforms. The commission could also recommend judicial and non-judicial sanctions against perpetrators of these abusive policies, including prosecution, removal from office, or a ban on holding public office in the future.¹⁷⁸ An asylum truth commission should be pursued alongside criminal prosecutions and the commission can consider sharing some of their files with prosecutors to inform any future criminal trials.¹⁷⁹

IV. CHALLENGES IN CREATING AN ASYLUM TRUTH COMMISSION

All truth commissions ultimately must be tailored to the specific country conditions and engage local populations in the design and implementation of the commission.¹⁸⁰ An asylum commission will face several distinct challenges, including ensuring the commission's legitimacy and engaging with the broad group of affected immigrants. This section will discuss these challenges and outline several proposals for developing a truth commission in our unique national context.

A. *Ensuring the Commission's Legitimacy*

In the United States, the issue of immigration is often one of the most polarizing political topics.¹⁸¹ The challenges of minimizing politicization and ensuring the commission's legitimacy will therefore be considerable. To help minimize politicization and ensure a successful commission, the Biden administration should closely analyze the best legal method for establishing the commission, develop a broad commission mandate encompassing violations of human rights that occurred both prior to and during the Trump

177. *Id.* at 191.

178. *Id.* at 144, 280 (discussing how Chile uses the commission's list of perpetrators to screen military promotions).

179. *See id.* at 22; ALISON BISSET, TRUTH COMMISSIONS AND CRIMINAL COURTS 74–103 (Cambridge University Press, 2012) (discussing how to pursue criminal trials and truth commission processes simultaneously).

180. HAYNER, *supra* note 56, at 5; INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55, at 48–50.

181. *See* Andrew Daniller, *Americans' Immigration Policy Priorities: Divisions Between and Within the Two Parties*, PEW RES. CTR. (Nov. 12, 2019), <https://perma.cc/8KAY-T8CQ>.

administration, and identify commissioners who will draw wide respect and legitimacy on this topic.

Truth commissions are typically created through either legislative acts or executive decrees, and the form chosen heavily depends on the political and institutional context in the country.¹⁸² Given the intense partisan gridlock in Congress, the best method for establishing an asylum truth commission might be through an Executive Order. With an Executive Order, President Biden could establish the commission more swiftly, without unpredictable congressional tradeoffs that could affect the integrity of the commission's mandate.¹⁸³ Numerous successful truth commissions have been established through executive orders including most Latin American commissions, Morocco, and Timor-Leste.¹⁸⁴ The Biden administration should initially gauge support amongst members of Congress to discern whether a congressionally-created asylum commission would receive bipartisan support,¹⁸⁵ but then it should also be prepared to establish the commission through an Executive Order in order to minimize politicization of the issue.

Another potential solution for minimizing politicization is ensuring that the legal mandate encompasses human rights violations committed over the past several decades, not solely during the Trump administration. Although the Trump administration's policies eviscerated the U.S. asylum system, human rights violations against asylum seekers have occurred systematically for decades.¹⁸⁶ A legal mandate that encompasses this broader timeframe will both increase the accuracy of the commission's factfinding and potentially garner more support from both political parties.

Additionally, an asylum commission's legitimacy will also heavily depend on the selection of the commissioners. To a large extent, truth commissions often derive their power and legitimacy from the moral authority and reputation of the commissioners.¹⁸⁷ One of the principal challenges will be

182. INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55, at 9.

183. *See id.* at 9–10 (discussing how in some countries, executive decrees might be just as strong as legislative action and be more well suited to the political realities). In the United States, Presidents have routinely established advisory commissions through Executive Orders to investigate and advise the Executive Branch on a range of topics including public health, women's rights, technology, and international relations. *See generally* LOUIS BOOKHEIM, REPORTS OF U.S. PRESIDENTIAL COMMISSIONS AND OTHER ADVISORY BODIES: A BIBLIOGRAPHIC LISTING (William S. Hein & Co., Inc., 2017).

184. INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55, at 10.

185. For example, there are some members of Congress who have already indicated the need to establish an independent investigation into family separations and other human rights abuses committed against asylum seekers. Eight members of Congress recently called for an independent UN inquiry into immigration abuses, arguing that the scale and breadth of human rights violations merits an independent and transparent inquiry. *See* Letter from Members of Congress, *supra* note 123. Representative Joaquin Castro also recently publicly called for the establishment of some type of commission to investigate family separations, make policy recommendations to ensure these abuses never happen again, and identify individuals for prosecution. *See* Nicole Narea, *How the US Could Make Amends for Family Separation: Rep. Joaquin Castro Explains Why He Is Calling for a Human Rights Commission*, VOX (Nov. 2, 2020), <https://perma.cc/T99P-87VJ>.

186. *Chaos, Cruelty, & Illegality: The Trump Administration's Record on Asylum*, *supra* note 17, at 1.

187. de Greiff, *supra* note 60, at 16; HAYNER, *supra* note 56, at 212.

identifying potential candidates who enjoy wide respect on this politically fraught subject. Ultimately, the administration should select commissioners after a broad consultation with members of the public.¹⁸⁸ Important factors to consider include the candidate's human rights record, neutrality, and expertise, as well as broad representation of diverse perspectives and backgrounds.¹⁸⁹ The Biden administration should also consider appointing a survivor to the commission to enhance legitimacy amongst affected communities.¹⁹⁰

B. *Engaging with Affected Individuals*

The United States also faces unique challenges related to survivor engagement. An asylum truth commission will need to engage with a broad group of survivors located both in the United States and in numerous other countries since many asylum seekers who suffered abuses were either deported or forced to remain indefinitely at the Southern Border. The Liberian, Chilean, and Argentinian truth commissions provide critical examples of how to successfully conduct statement taking with survivors located in other countries. In both Argentina and Chile, the truth commissions allowed survivors in other countries to submit statements in embassies and consulates throughout the world.¹⁹¹ Liberia pioneered an innovative approach to accepting statements from Liberians in the diaspora: the commission formally partnered with an American nonprofit to facilitate statement taking and public hearings in the United States.¹⁹² Given the sheer number of survivors located in other countries, an asylum truth commission should work closely with the U.S. State Department to enable survivors to submit testimony at any U.S. embassy or consulate throughout the world. However, many deported asylum seekers might feel skeptical of the U.S. government after experiencing horrific abuses perpetrated by government officials and contractors. Therefore, like the Liberian truth commission, the U.S. commission should consider developing formal partnerships with NGOs in Central American countries and other countries with high numbers of deported asylum seekers to help facilitate greater trust and offer statement taking opportunities outside of an

188. See INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55, at 15, 17; HAYNER, *supra* note 56, at 213–15.

189. INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55, at 18.

190. See HAYNER, *supra* note 56, at 43 (discussing how Morocco selected a survivor as the commission chair—an individual who was a political prisoner in Morocco for seventeen years).

191. *Id.* at 46, 61 (highlighting how Argentina accepted statements from exiles in embassies and consulates around the world and Chile accepted written statements from exiles in forty different countries).

192. The Liberian Truth Commission partnered with a U.S.-based human rights organization, the Advocates for Human Rights, to facilitate statement taking and hearings abroad. This partnership gathered 1,631 statements from Liberians living in the U.S., the UK, and Ghana (which accounted for over 9 percent of the total statements). The statements included information about 6,398 survivors and 10,154 human rights violations. The commission also hosted five days of public hearings in the United States where thirty-one witnesses testified. Laura Young & Rosalyn Park, *Engaging Diasporas in Truth Commissions: Lessons from the Liberia Truth and Reconciliation Commission Diaspora Project*, 3 INT'L J. TRANSITIONAL JUST. 341, 341–61 (2009).

official embassy context. The commission should also consider holding public hearings in these affected countries so deported survivors have the option to testify publicly.

In addition to working with survivors dispersed throughout the world, an asylum truth commission must mainstream a gender approach and child-centered approach given that many survivors of these abuses are women and children. Integrating a gender perspective and ensuring women's full participation involves: including female staff members in all commission divisions; establishing a gender unit; training all staff on gender issues; ensuring the commission's mandate explicitly includes language to investigate gender-specific crimes; allowing participants to choose to speak with female or male statement takers; holding dedicated women's hearings; creating alternative procedures for women to participate confidentially (i.e., in camera hearings); and addressing barriers to participation by providing childcare at hearings, safe transportation, gender-sensitive witness protection, and psychosocial support.¹⁹³

The commission should also integrate a child-centered approach while engaging with child survivors of family separation and other abuses. A child-centered approach prioritizes the wellbeing, comfort, and wishes of the child at each aspect of the statement taking process.¹⁹⁴ Prior to any interview, commission staff should conduct a safety assessment to ensure the child has the psychological resilience and social support network to safely participate.¹⁹⁵ Statement takers should also invest time before the interview to build rapport and trust with the child and should thoroughly explain the process using child-friendly language, encouraging the child participant to ask any questions.¹⁹⁶ During interviews, statement takers should utilize open ended questions, which serves the dual strategies of fostering a comfortable environment and increasing the accuracy of the child's answers.¹⁹⁷ An asylum commission should prioritize the welfare and safety of children, but also must recognize "the changing, growing capacities of children to understand facts, make decisions, and participate in the truth-seeking process."¹⁹⁸ An asylum truth commission should also consider partnering with local child protection agencies, HHS' Children's Bureau, and nonprofits serving immigrant youth in order to successfully promote children's participation and safety in the truth commission process.¹⁹⁹

193. UN WOMEN, *supra* note 92, at 21; *see also* U.N. HIGH COMM'R FOR HUM. RTS., *supra* note 91.

194. VALERIE WATERS, INT'L CTR. FOR TRANSITIONAL JUST., LISTENING TO YOUNG VOICES: A GUIDE TO INTERVIEWING CHILDREN AND YOUNG PEOPLE IN TRUTH SEEKING AND DOCUMENTATION EFFORTS (Jan. 2018), <https://perma.cc/GB34-5BET>.

195. *Id.* at 4.

196. *Id.* at 1, 6.

197. *Id.* at 1.

198. *See* INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 55, at 59.

199. *See* UNICEF, CHILDREN AND TRUTH COMMISSIONS 21–28 (Aug. 2010) (discussing how partnerships with child protection agencies and nonprofits can help facilitate children's participation and safety in truth commission processes), <https://perma.cc/CK2M-XK4R>.

Ultimately, an asylum truth commission can strengthen prospects for successful survivor engagement initiatives by developing targeted strategies for working with survivors across the world, as well as mainstreaming trauma-informed, gender, and child-centered approaches to all facets of the commission's work.

CONCLUSION

Immigrants have the *legal right* to seek asylum in the United States. Yet, Sammy, Pauline, B, and countless other asylum seekers have endured pervasive human rights violations in the United States while exercising this legal right. Asylum seekers deserve meaningful justice and accountability for these atrocities. A truth commission can serve a critical role by establishing the full scope of these abuses, formally acknowledging asylum seekers' experiences and supporting survivor empowerment, and recommending needed reparations and institutional reforms to prevent future abuses against those seeking asylum. Ultimately, the Biden administration should engage survivors in the design and implementation of the commission and should pursue a truth commission alongside criminal prosecutions. The United States will encounter numerous obstacles in creating this truth commission, but we owe such a resolution to all immigrant survivors of these horrific atrocities.