Speaking Truth to Torture: Legal Meta-Ethics in the Work of David Luban

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Abstract

This philosophical paper harvests from international criminal legal theory and meta-ethics to reshape and reconfigure our "legal thought and talk," as David Plunkett and Tim Sundell term it, concerning alleged acts of torture authorized and executed under the United States government's watch in Afghanistan. The Rome Treaty authorizes the International Criminal Court's ("ICC") jurisdiction over such alleged war crimes, and the ICC Appeal's Chamber approbated an Article 15 prosecutorial propio motu investigation in March 2020 (later set aside in 2021). Nonetheless, critics of American conduct relative to Afghanistan suggest that the United States continues to minimize or trivialize the ICC's authority, aptness, capacity, and compass when it comes to the alleged post-9/11 CIA perpetration and legal rationalization of "torture."

I adopt a meta-ethical approach to query what kind of meta-normative reframing would behoove transitional justice pursuits. This effort requires reevaluating some of the legalist axiomata of American criminal and evidentiary law, if not an exclusively and context-invariantly legalist strategy generally, for at least three reasons, all of which draw inspiration from legal ethicist David Luban's work, the ICC, truth-commissions, and various legal scholars and philosophers. First, as it is often noted, truth-commissions proper approach truth-seeking and fact-finding distinct from prosecution in criminal law: sourced from diverse community members, truth-commissions register grave atrocities by collectively upbuilding that truth through testimonial sharing and communal contribution. I resort to Catherine Elgin's notion of the "true

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enough" and Heidi Grasswick's conception of "epistemic trust," among others, to unpack this. Second, responsibility is not, as philosopher Iris Marion Young would say, solely framed in a conventionally legalist and causal manner culminating in individualized conviction, but also framed as an accountability forged in prospective political alliance against a "structural injustice." I adopt from Young and the philosophers Robin Zheng and Maeve McKeown to flesh out this nuance. Third, as I remark in conclusion, there is a link to human dignity in "having one's own story" be told and heard, as Luban puts it, that is not easily captured in our adversarial system of law, but which non-legal or legally adjacent fora might adjunctively foster.

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INTRODUCTION

A. TRUTH TELLING AND TORTURE

This philosophical paper harvests from international criminal legal theory and meta-ethics to reshape and reconfigure our "legal thought and talk" concerning the "unspeakable,"[1] namely, alleged acts of torture authorized and executed under the U.S. government's watch "since 1 May 2003" in Afghanistan.[2] The Rome Treaty authorizes the International Criminal Court's ("ICC") jurisdiction over such alleged war crimes, and the ICC Appeal's Chamber approbated an Article 15 prosecutorial *propio motu* investigation in March 2020.[3] Nonetheless, critics of American conduct related to Afghanistan suggest that U.S. administrations continue to minimize or trivialize the ICC's authority, aptness, capacity, and compass[4] when it comes to the alleged post-9/11 CIA perpetration and legal rationalization of "torture" and "cruel, inhuman, or degrading treatment" of "enemy combatants."[5] All of which, if found and prosecuted by the ICC, would

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1. David Plunkett & Tim Sundell, *Antipositivist Arguments from Legal Thought and Talk: the Metalinguistic Response, in* PRAGMATISM, LAW, AND LANGUAGE, 56 (Graham Hubbs & Douglas Lind eds., 2014); *see* David Luban & Katherine S. Newell, *Personality Disruption as Mental Torture: The CIA, Interrogational Abuse, and the U.S. Torture Act*, 108 GEO. L.J. 333, 335–36 (2019). Although my own approach to meta-ethics in this paper is pragmatist (as informed by variable thinkers like Elgin, Brandom, Rorty, Patterson, and others), I am not pragmatist in Heney's Piercian sense. *See also* Todd Lekan, *Toward a Pragmatist Metaethics,* NOTRE DAME PHIL. REV. (2016) (reviewing Heney's work and takes on Dewey, Pierce, and Rorty); *see generally* PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2d ed. 2011); DIANA B. HENEY, TOWARD A PRAGMATIST METAETHICS, xvi (2016) (describing *metaethics* as "the study of the preconditions and presuppositions of moral thought and discourse"). Later in the writing and editing process on this paper, I discovered a similarly titled comment by Scott Horton, *Speaking Truth to Torturers,* HARPER'S MAGAZINE (Oct. 12, 2007), https://harpers.org/2007/10/speaking-truth-to-torturers/ [https://perma.cc/NQX4-V26M], but the title of this parallelly conceived title wasn't originally intended to allude to Horton's comment.

2. *Afghanistan,* INT'L CRIMINAL CT., https://www.icc-cpi.int/afghanistan [https://perma.cc/3BLE-NGYT] (last visited Sept. 15, 2023); Maya Kliger (personal communication, 2022).

3. *See* INT'L CRIMINAL CT., *supra* note 2; *see also* Alex Whiting, *The ICC's Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigations?,* JUST SECURITY (Apr. 12, 2019), https://www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations/ [https://perma.cc/PC7Q-8HSY]; Alex Whiting, *ICC Prosecutor Signals Important Strategy Shift in New Policy Document,* JUST SECURITY (May 17, 2019), https://www.justsecurity.org/64153/icc-prosecutor-signals-important-strategy-shift-in-new-policy-document/ [https://perma.cc/7J3C-R2MR] (reporting that the prosecutor decided to "narrow" the investigation and only pursue "modest cases").

4. DAVID LUBAN, TORTURE, POWER, AND LAW 271 (2014); BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW: INTERSECTIONS AND CONTRADICTIONS 44, 49 (2021) (describing ICC jurisdiction); DAVID LUBAN, JULIE R. O'SULLIVAN, DAVID P. STEWART & NEHA JAIN, INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 174 (3d ed. 2019); *see* U.N. General Assembly, The Rome Statute of the International Criminal Court art. 5 (July 17, 1998), https://www.refworld.org/docid/3ae6b3a84.html [https://perma.cc/LE6X-GRUU]. Afghanistan is a "state party" to the Rome Statute and hence are covered by ICC jurisdiction; *see generally* Judith Butler, *Guantanamo Limbo,* THE NATION (March 14, 2002), https://www.thenation.com/article/archive/guantanamo-limbo/ [https://perma.cc/J75S-PHPE].

5. LUBAN, *supra* note 4, at 13 (on "enemy combatants"), 71 (on "cruel, inhuman, or degrading treatment"), and 284–85 (detailing CIA mistakes and malfeasances, as well as the "torture lawyers" who enabled them); VAN SCHAACK & SLYE, *supra* note 4, at vi–vii, (referring to "torture and terrorism as 'treaty crimes'"); LUBAN,

amount to "atrocity" and "treaty crimes" committed by the United States, although such findings portend to be unlikely, given that the current prosecutor, Karim A. Khan, has decided to deemphasize and set aside this inquiry into torture as no longer a priority.[6]

To crystallize the meta-ethical issue in this paper: from and within an American context, if one were to reconceive what transitional justice would entail for these legal wrongs and human harms, what kinds of meta-ethical frameworks should underwrite that endeavor? Skeptics maintain that the American federal government appears insusceptible to officially undertake "domestic" measures at home to cognize and ameliorate these wrongdoings through criminal prosecutions or civil suits.[7] They query: why has there been no hybridized or mixed tribunal within its territories (thus eliding possibilities of Article 17 "complementarity")?[8] Why has the United States failed to become party to the ICC, or refer the matter under Article 12(b) as a P-5 United Nations Security Council member,[9] or shutter Guantanamo Bay?[10] Why has the United States balked at the prospect of ICC investigation when jurisdictionally that might be possible?[11]

O'Sullivan, Stewart & Jain, *SUPRA* NOTE 4, AT 315; BUTLER, *SUPRA* NOTE 4; VAN SCHAACK & SLYE, *SUPRA* NOTE 4, AT 40, 41; *SEE* SCOTT HORTON, *THE ACCOUNTABILITY IMPERATIVE,* HARPER'S MAGAZINE (MARCH 28, 2009), HTTPS://HARPERS.ORG/2009/03/THE-ACCOUNTABILITY-IMPERATIVE/ [HTTPS://PERMA.CC/33LL-J2BY].

6. VAN SCHAACK & SLYE, *supra* note 4, at vi–vii (regarding "atrocity" and "treaty crimes"); Karim A. Khan QC, *Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan*, INT'L CRIMINAL CT. (September 27, 2021), https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application [https://perma.cc/GRE4-J6C2]. Thanks to Professor Luban for reminding me to cite this "deprioritization" and pointing to this source.

7. As will become clear *infra*, I shall also underline some of the conceptual limitations or restrictions of American law.

8. JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 274 (2006); *see* Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy,* 16 CHI. J. INT'L L. 482, 484 (2016); VAN SCHAACK & SLYE, *supra* note 4, at 51 (regarding "complementarity"); *see generally* Laura Dickinson, *The Promise of Hybrid Tribunals*, 97 AM. J. INT'L L. 295 (2003).

9. VAN SCHAACK & SLYE, *supra* note 4, at 45, 49–50.

10. Ian Moss, *There Is a Way to Close Guantanamo,* JUST SECURITY (Jan. 11, 2022), https://www.justsecurity.org/78166/there-is-a-way-to-close-guantanamo/ [https://perma.cc/2XXV-8PUC]; LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 674; *see also* Luban & Newell, *supra* note 1, at 338–40 (detailing the Trump administration's approach).

11. Alex Whiting, *Why John Bolton vs. Int'l Criminal Court 2.0 is Different from Version 1.0* (Sept. 10, 2018), https://www.justsecurity.org/60680/international-criminal-court-john-bolton-afghanistan-torture/ [https://perma.cc/9ANY-6XM4]; Alex Moorehead & Alex Whiting, *Countries' Reactions to Bolton's Attack on the ICC,* JUST SECURITY (Sept. 18, 2018), https://www.justsecurity.org/60773/countries-reactions-boltons-attack-icc/ [https://perma.cc/V6R5-43M9]; Stephen Pomper, *The U.S. and Int'l Criminal Court May Still Steer Past Each Other—Why and How,* JUST SECURITY (Apr. 5, 2018), https://www.justsecurity.org/54543/intl-criminal-court-steer-other-why/ [https://perma.cc/U9BV-VRUN]; Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS, 47, 56 (2003); Mirjan Damaska, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 330 (2008); DAVID BOSCO, ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS (2014); BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 87, 127, 206–07 (3d ed., 2015). I leave aside the interesting question of whether a theory of "universal jurisdiction" might be deployed to assert ICC jurisdiction as used in "maritime piracy." VAN SCHAACK

This skepticism, however, calls for further nuance, inasmuch as a medley of governmental, political, and legal actors, agencies, and administrations are at issue. For one, American congressional, military, and non-profit "non-criminal investigations" and reports into torture partially (and crucially) exposed the possibility of cruelties and executive power abuses under the Bush-Cheney administration.[12] Second, as legal ethicist David Luban notes, scores of judicial, legislative, and executive acts have furnished the groundwork to indemnify detainees from mistreatment in the wake of reports and revelations of misconduct:[13] the Detainee Treatment Act of 2005;[14] *Hamdan v. Rumsfeld* (2006) (enforcing Geneva Conventions); *Boumediene v. Bush* (2008) (assuring habeas); Office of Legal Counsel ("OLC") Steven Bradbury's revocation of "nine of the most extreme OLC opinions [justifying torture] of 2001-3, most of them by Jay Bybee or John Yoo"; and President Obama's "executive order forbidding torture and cruel, inhuman, or degrading treatment."[15]

Still, skeptics are likely warranted in their stance that, these important efforts and gains notwithstanding, the problem and holdover of unaddressed alleged acts of torture cut across political and governmental administrations. For example,

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& Slye, *supra* NOTE 4, AT 68; JIEWUH SONG, *PIRATES AND TORTURERS: UNIVERSAL JURISDICTION AS ENFORCEMENT GAP-FILLING,* 23 J. POL. PHIL. 471, 471 (2015), *CITED IN* VAN SCHAACK & SLYE, *SUPRA* NOTE 4, AT 66 N.16. ON UNIVERSAL JURISDICTION, AS IT RELATES TO "PIRACY" IN A COMPARATIVE LITERARY CONTEXT, SEE GENERALLY DANIEL HELLER-ROAZEN, THE ENEMY OF ALL: PIRACY AND THE LAW OF NATIONS (2009), *CITED IN* LUBAN, O'SULLIVAN, STEWART, & JAIN, *SUPRA* NOTE 4, AT 214 N.75. *SEE GENERALLY* KATE CRONIN-FURMAN, *MANAGING EXPECTATIONS: INTERNATIONAL CRIMINAL TRIALS AND THE PROSPECTS FOR DETERRENCE OF MASS ATROCITY*, 7 INT'L J. TRANSITIONAL JUST. 434 (2013).

12. LUBAN, *supra* note 4, at 280–81 (detailing the limits of the Durham inquiry), 283 (noting that the non-profit "Constitution Project" produced a "577-page report" on torture); John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 43 HARV. J. LEGIS. 486, 509–14 (2006), *reprinted in* LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1141–42 (noting three "defenses" by torturers); VAN SCHAACK & SLYE, *supra* note 11, at 15; Brian Finucane & Stephen Pomper, *Crossing Back Over: Time to Reform Legal Culture and Legal Practice of the "War on Terror,"* JUST SECURITY (Sept. 10, 2021), https://www.justsecurity.org/78169/crossing-back-over-time-to-reform-the-legal-culture-and-legal-practice-of-the-war-on-terror/ [https://perma.cc/5E9B-SWBE] (demystifying and debunking the "myths" that "[t]he President's war-making powers are already sufficiently constrained by law," "strong executive branch processes and highly trained lawyers ensure compliance with the best reading of the law," and "there are no realistic alternatives" to "current" arrangements). Maya Kliger details the extent and limits of the thirteen U.S. "non-criminal investigation[s]" into its own war crimes and draws on *complementarity* in a paper and presentation, so I shall not provide that overview here (personal communication, 2022).

13. LUBAN, *supra* note 4, at 272–73.

14. 42 U.S.C. § 2000dd-2 (proscribing "CIDTP"); *see also* LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1131–32, 1139; The War Crimes Act, 18 U.S.C. § 2441(d), *reprinted in* O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1138.

15. LUBAN, *supra* note 4, at 274. Luban also remarks: "the Obama administration took three vital steps against the torture legacy of its predecessor: prohibiting torture, annulling the Bush administrations legal opinions on detainee treatment, and releasing the torture memos . . . [as well as] other OLC memos and a fuller version of an already-released CIA Inspector General's report on torture." *Id*. at 275. As Luban further observes, so-called "enhanced interrogation" would nonetheless carry over into 2008 (and, allegedly, into Obama's administration as well to some extent). *Id*.

Luban remarks that even though the Obama administration sought to spurn and disacknowledge torture, it also "rejected any form of accountability for torture," with "Obama [himself] rebuff[ing] a recommendation for a truth commission to examine the Bush-era program, repeating that he wanted to look forward and not litigate the past."[16] For Luban, the Obama and Bush administrations would often rely on a "state secrets defense," meaning that substantive details could not be advertised or prosecutions undertaken which might uncloak state secrets—as was seen in Wikileaks documents betraying the Obama Administration's discouragement of "foreign investigations" by Spain into American torture.[17]

At best, for skeptics, most of these efforts can be viewed as steps toward transitional justice—but as only that.[18] After all, they assert, a declassified congressional report does not equate to a forum for victims to speak their truth or for acknowledgment, restitutions, or reparations to be delivered. Nor does it account for perpetrators and enablers of alleged torture under the government's watch. So how to strive for transitional justice? How to reappraise legal discourse around truth-telling and accountability, especially if that truth is, so to speak, alleged acts of torture?

In the remainder of this introduction, I preliminarily limn the definitions, scope, methodological considerations, and obstacles to this project and strategize about the remaining structure of the argument that seeks to address these queries.

B. WHAT IS TRANSITIONAL JUSTICE?

Any effort to contend with skepticism around the possibilities of realizing transitional justice for alleged acts of American torture will encounter a myriad of obstacles and objections, many of which are not particular to this paper's quandary but obtrude unto most endeavors seeking to address and redress intergenerational atrocities through transitional justice. Generally, scholars theorize that transitional justice in the wake of "atrocity" and "treaty crimes"[19] comprise "truth, justice, reparation, memory and guarantees of non-recurrence [of the

16. *Id*. at 275–76; *see also* VAN SCHAACK & SLYE, *supra* note 11, at 15 (noting that "Senator Patrick Leahy (D-VT) Leahy had introduced legislation to establish a truth commission [for torture], but President Obama and the majority in Congress opposed the proposal."). I will have more to say about "truth commissions proper," see discussion of HAYNER, *infra* note 43.

17. LUBAN, *supra* note 4, at 282–83. Luban astutely notices as a consequence, that everyday Americans can only conjecture from the Durham inquiry that investigators failed to discover "evidence" "beyond a reasonable doubt" to convict past interrogators of torture, not that evidence of torture did not exist. *Id*. *See also* VAN SCHAACK & SLYE, *supra* note 11, at 86–87.

18. *See Accountability for Torture,* AM. CIV. LIBERTIES UNION, https://www.aclu.org/issues/national-security/torture/accountability-torture [https://perma.cc/GNF3-X78J] (last visited Sept. 15, 2023) (recommending the following: "appoint a special prosecutor"; "reform the CIA"; "provide apology and compensation"; "honor courage"; and "more transparency").

19. VAN SCHAACK & SLYE, *supra* note 11, at 427–29 (outlining ICTY Art. 5, ICTR, Art. 3 and ICC, Art. 7 on "crimes against humanity").

crimes]."[20] Consider, for example, the transitional justice "mandate" of the current United Nations Human Rights Special Rapporteur, Fabian Salvioli:

- Ensure accountability and serve justice;
- Promote truth and memory about past violations;
- Provide remedies to victims;
- Reform the national institutional and legal framework and promote the rule of law in accordance with international human rights law, and restore confidence in the institutions of the state;
- Ensure social cohesion, nation-building, ownership and inclusiveness at the national and local levels; and promote healing and reconciliation;
- Prevent the recurrence of crises and future violations of human rights.[21]

Culling from this cluster, legal scholars and advocates tend to pick out at least five elements of transitional justice: (i) *"accountability*"; (ii) "*truth seeking"*; (iii) "*redress for victims*"; (iv) "*reconciliation*"; and (v) "*prevention*."[22] I take (i) to be accountability in a twin sense. I shall later thematize a view of accountability that draws on Iris Marion Young and others. For the moment we can say that accountability conjugates the moral and legal sense of *holding to account* (what Jane Stromseth christens "substantive *justice*" and procedural "*fair process*" through, for example, prosecutions, civil suits, or reparations),[23] and a more literal sense of accounting *qua* recording (what Nir Eiskovits terms the "*reliable record*[*keeping*] *of past human rights abuses*").[24] As legal philosopher Anita Allen would have it, accountability threads together accounting ("reporting," "explaining") and accountability ("justifying acts and omissions," "submit[ting] to sanctions") in order to alter our future comportment (installing "reliable patterns of behavior").[25]

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20. *Special Rapporteur on Truth, Justice, and Reparation*, U.N. HUM. RTS. OFF. HIGH COMM'R ("OHCHR") [hereinafter OHCHR], https://www.ohchr.org/en/special-procedures/sr-truth-justice-reparation-and-non-recurrence [https://perma.cc/M9UZ-Z7X3] (last visited Sept. 17, 2023); s*ee also* GAOR, U.N. Hum. Rts. Couns., *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence* (Aug. 28, 2013), http://www.refworld.org/docid/522dba6c4.html [https://perma.cc/VQ7Y-GTL7].

21. OHCHR, *supra* note 20.

22. Jane E. Stromseth, *Peacebuilding and Transitional Justice: The Road Ahead*, *in* MANAGING CONFLICT IN A WORLD ADRIFT, 571, 573 (Chester A. Crocker et al., eds., 2015) (rearranged for clarity); *see also* LUBAN, *supra* note 4, at 304 (discussing "transitional justice" and the limits of "civil" and "criminal" options).

23. Stromseth, *supra* note 22.

24. Nir Eisikovits, *Transitional Justice*, STAN. ENCYCLOPEDIA PHIL. 2 (2017), https://plato.stanford.edu/archives/fall2017/entries/justice-transitional/ [https://perma.cc/PRB3-FLEL] (schematizing and interrelating the elements of transitional justice: "*[c]reating a reliable record of past human rights abuses*"; "*[s]etting up a functional, professional bureaucracy and civil service,*"; "*[h]elping victims restructure and repair their lives*"; and "*[s]topping violence and consolidating stability*"). For a literary study of "accounting" puns, see Eliza Zingesser, *The Value of Verse: Storytelling as Accounting in Froissart's "Dit du Florin,"* 125 MOD. LANGUAGE NOTES 861, 861 (2010).

25. *See* ANITA ALLEN, WHY PRIVACY ISN'T EVERYTHING: FEMINIST REFLECTIONS ON PERSONAL ACCOUNTABILITY 15 (2003).

This view of accountability annexes this concept to element (ii), "truth seeking." For if accountability is not just about holding perpetrators to account but also recording and recounting the perpetration of the wrong, then truth-seeking embodies a central function. As Stromseth puts it, "[t]ruth seeking" comprises a kind of publicization of "[*t*]*ruth telling* and *truth hearing*" amongst the victims and survivors of atrocities for whom recounting and accounting is especially important.[26] To be clear, this is not to sub-conclude that truthful accounts are only narratable in one kind of way. As theorist Judith Butler has claimed, some experiences and events cannot be narrativized or testimonialized in accessibly straightforward or transparently comprehensible fashion, such as the recounting of trauma, and some truths cannot be recounted in full or at all.[27] Rather, the idea here from Allen and Butler is that accountability conceptually and ethically interwreathes *holding to account* and *providing an account*.

Items (iii) and (iv) plausibly capture a victim-centered approach, one that scaffolds a local and governmental infrastructure for justice- and accountability-furthering[28] to permit "*victims* [*to*] *restructure and repair their lives*"[29] in relation to the crimes and criminals to which they have been subjected.[30] The goal of (v) "*prevention"* is that of "deterrence"[31] and forestallment of future harms, thus "[*s*]*topping violence and consolidating stability*."[32] Deterrence signifies both *immediate* "harm-mitigation"—forfending against *further* harms from eventuating in the present—and *prospective* harm-preclusion—preventing *future* harms from eventuating in the long run.[33]

This paper theorizes the meta-ethical bases of (i) and (ii)—i.e., *accountability* and *truth seeking*. In lieu of a first-order normative-ethical or applied-ethical approach—oriented around the prudential means and evaluative assessment of

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26. Stromseth, *supra* note 22, at 573.

27. *See generally* JUDITH BUTLER, GIVING AN ACCOUNT OF ONESELF (2005) (drawing inspiration from ADRIANA CAVARERO, RELATING NARRATIVES: STORYTELLING AND SELFHOOD (2000)).

28. *Id.* In seminar, my colleague Sabrina Lowrie, referred to this as "community building" (personal communication, 2022).

29. Eisikovits, *supra* note 24.

30. Stromseth, *supra* note 22, at 573.

31. *Id.*

32. Eisikovits, *supra* note 24.

33. I borrow this notion of immediate "harm-mitigation" from Professor Stromseth, who mentioned it in passing as a further piece alongside "justice" and "peace" in the context of ongoing war, such as Russia's crime of aggression against Ukraine (personal communication, 2022). *See also* Jane Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law,* 38 GEO. J. INT'L L. 251, 257 (2007) ("explor[ing] . . . the relationships . . . between retrospective accountability proceedings and prospective domestic capacity-building and reform"); James Edwards, *Theories of Criminal Law*, STAN. ENCYCLOPEDIA PHIL. 10 (2021), https://plato.stanford.edu/archives/fall2021/entries/criminal-law/ [https://perma.cc/287W-L42J] (distinguishing the "harmful conduct principle" from "harm prevention principle" in criminal legal theory); Kathryn Sikkink & Hun Joon Kim, *The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations*, 9 ANN. REV. L. & SOC. SCIENCE 269, 269 (2013) (offering empirical evidence showing that when war criminals have been prosecuted under international criminal law, a "justice cascade" can be unleashed with downstream effects within and across nations).

concretizing and actualizing plans for what ought to be done relative to a given subject matter[34]—I adopt a meta-ethical approach to query what kind of meta-normative reframing would behoove transitional justice pursuits.[35] Meta-ethics undersees and scrutinizes "the metaphysical, epistemological, semantic, and psychological presuppositions and commitments of [normative-ethical and applied-ethical] moral thought, talk, and practice."[36] It assays the "grounds" of the precepts, premises, and praxes operative within a given, local context: if "normative ethics" establishes and estimates whether a given precept (say) is "action-guiding"—one ought to perform X—and "applied ethics" considers the applications and extensions of said principle, a meta-ethical or meta-normative inquiry concerns what substantiates the action-guiding-ness of that precept to begin with—what renders matters such that one ought to perform X in the first instance.[37] The framework I

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34. *See* HENEY, *supra* note 1 (describing "normative ethics" as "the study of the criterion of good and bad conduct" and "applied ethics" as the application of "theory in real, morally vexed domains"). For legal and policy suggestions on torture and accountability, see AM. CIV. LIBERTIES UNION, *supra* note 18; *The U.S. Torture Program: A Blueprint for Accountability,* AM. CIV. LIBERTIES UNION (Dec. 9, 2014), https://www.aclu.org/documents/us-torture-program-blueprint-accountability?redirect=national-security%2Fus-torture-program-blueprint-accountability [https://perma.cc/PY7S-GJGP].

35. On the importance of moral philosophy, ethics, and meta-ethics for pursuits of justice, see DIANE JESKE, THE EVIL WITHIN: WHY WE NEED MORAL PHILOSOPHY 10–11 (2018); Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions, in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 22 (Robert I. Rotberg & Dennis Thompson eds., 2000). For a discussion of "applied," "normative," and "meta-ethical" approaches in developing frameworks, see Ariel Antonio Morán-Reyes, *Towards an ethical framework about Big Data era: metaethical, normative ethical and hermeneutical approaches,* HELIYON (Feb. 2022), https://www.sciencedirect.com/science/article/pii/S2405844022002146 [https://perma.cc/9SPZ-6TUE]; Pekka Vayrynen, *Normative Commitments in Metanormative Theory,* METHODOLOGY AND MORAL PHILOSOPHY 193 (Jussi Suikkanen & Antii Kauppinen eds., 2019). Meta-methodologically speaking, I vacillate in this paper between what Tristram McPherson and David Plunkett characterize as dual "projects": describing the meta-ethical grounds of a subject-matter ("meta-normative inquiry" or trying to comprehend "normative and evaluative thought and talk") and debating what kinds of "normative" conceptualizations at a meta-level ought to be used and why ("conceptual ethics of normativity," or making "normative and evaluative" claims in "normative and evaluative thought and talk"). *See* Tristram McPherson & David Plunkett, *Metaethics and the conceptual ethics of normativity,* INQUIRY (Mar. 4, 2021), https://www.tandfonline.com/doi/full/10.1080/0020174X.2021.1873177 [https://perma.cc/8GQ3-EZUS].

36. Geoff Sayre-McCord, *Metaethics*, STAN. ENCYCLOPEDIA. PHIL. 1 (2023), https://plato.stanford.edu/archives/spr2023/entries/metaethics/ [https://perma.cc/4APD-RYDJ].

37. David Copp & Justin Morton, *Normativity in Metaethics,* STAN. ENCYCLOPEDIA PHIL. 1–2, 4 (2022), https://plato.stanford.edu/archives/fall2022/entries/normativity-metaethics/ [https://perma.cc/S7HJ-GD55]. Copp and Morton utilize the example of torture to talk about kinds of normative realism (assuming normative "properties," "facts," and "states of affairs" to which our normative "concepts" allude). *Id.* In this paper, I am not concerned with debating metaphysical realism (concept-independent, world-grounded "properties" and "facts" about normativity) and am mostly concerned with debates over normative *concepts* (see McPherson & Plunkett, *supra* note 35 on "conceptual ethics"). My presumption is that normativity is "mind-dependent": normativity is "grounded" in relative "mental state[s]" or attitudes, even if normativity isn't thereby reducible to radical idealism, subjectivism, or relativism at all levels. *Id.* Copp and Morton talk in the metaphysical language of grounding, as do I. However, I prefer talking about grounding as "making x the case," which is how it is sometimes characterized in the literature. *Cf.* Samuele Chilovi, *Grounding-based formulations of legal positivism*, 177 PHIL. STUD. 3283, 3286 (2020); Sara Bernstein, *Grounding is not Causation,* 30 PHIL. PERSP. 21, 21 (2016); Gideon Rosen, *Real Definition* 56 ANALYTIC PHIL. 189, 209 (2015); Ricki Bliss & Kelly Trogdon, *Metaphysical Grounding,* STAN. ENCYCLOPEDIA PHIL. 7 (2022), https://plato.stanford.edu/archives/win2021/entries/grounding/ [https://perma.cc/5T8Z-XTQ9].

synthesize and systematize in this paper meta-ethically dynamizes context-invariant conceptions of *responsibility* and *truth*. I take conventional legalist notions of *responsibility* and *truth* to contextually supervene upon[38] other kinds of normative praxes and premises, namely, those we find in the ICC and truth commissions: expansive normative notions of *accountability* and *trust*.[39] Operationalizing a capacious and context-dependent, rather than a constrictedly legalist and context-invariant, conception of *responsibility* and *truth*, I submit, affords the opportunity to formulate the kind of meta-ethical framework conducive to more embracingly account for alleged acts of American torture in some transitional justice efforts.[40] In this sense, my approach complements contemporary work on the law, torture, and accountability such as that of John Katner, who has proposed novel legal theories and means to inculpate the various actors responsible for setting the stage for torture, such as deploying the professional licensing boards of the "licensed professionals" who enabled and propelled the institutionalization of torture ("psychologists," "physicians," and "lawyers") to have their licenses rendered inoperative.[41]

This framework is of course not original to me, but instead relies heavily on the expertise of Luban, whose work comprehensively theorizes the legal-ethical,

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38. Tristram McPherson, *Supervenience in Ethics,* STAN. ENCYCLOPEDIA PHIL. 1–4, 18–19 (2022), https://plato.stanford.edu/archives/sum2022/entries/supervenience-ethics/ [https://perma.cc/A72Q-MM2] (distinguishing "predicates" from "properties").

39. It is probably more precise to say that this critique is levelled against *legalist* conceptions of truth and responsibility, rather than legal conceptions *tout court,* as my proposal does not call for a total departure from legal considerations and systems even as it encourages a re-envisioning of certain legal(ist) precepts by looking at the ICC and truth commissions *qua* normative praxes. On legalism, see JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 1, 3 (Rev. ed. 1986). I am not the first to do so. My inspiration is foremost from LUBAN, *supra* note 4, at 283 (claiming "that criminal investigations might not be the best form for accountability to take"). While I agree with Luban that a literal truth commission might not be feasible, it still remains possible to meta-ethically extract important valuations therefrom for transitional justice efforts. *See* Eisikovits, *supra* note 24 (noting that "the creation of public trust and the restoration of political normalcy, can clash with the desire for accountability"). *See also* Onora O'Neill, *Trust, Trustworthiness, and Accountability, in* CAPITAL FAILURE: REBUILDING TRUST IN FINANCIAL SERVICES 172, 173 (Nicholas Morris & David Vines eds., 2014) (formulating "intelligent conceptions" of "trust" and "accountability"); C. STEPHEN EVANS, LIVING ACCOUNTABLY: ACCOUNTABILITY AS A VIRTUE 17–26, 28–34 (2022).

40. This is a long-recognized friction between transitional justice and "legalism." *See* Eisikovits, *supra* note 24, at 5 (noting that "[t]he need to provide victims with meaningful, respectful public forums in which they can tell their stories and receive a degree of acknowledgment . . . also comes into conflict with some of the basic commitments of legalism."). Eisikovits also points out to the tension between "amnesty" and "accountability" as well as between "peace" and "justice." *Id.* The meta-ethical approach of this paper does not downplay, cut against, or compete with the immensely important and ongoing work by several organizations and clinical programs exploring legal and legally adjacent avenues, such as the University of Berkeley Law's *Accountability and Transitional Justice* clinical program, https://www.law.berkeley.edu/experiential/clinics/international-human-rights-law-clinic/projects-and-cases/accountability-and-transitional-justice/ [https://perma.cc/CF4Z-875T] (last visited Oct. 19, 2023).

41. *See* David R. Katner, *Torture, Ethics, Accountability?* 53 LOY. U. CHI. L.J. 513, 516 (2022); *see also* Steven H. Miles, *Settled precepts: normative ethics, applied ethics, and physician complicity with torture,* 27 MEDICINE, CONFLICT & SURVIVAL 191 (2011); Chiara Lepora & Joseph Millum, *The tortured patient: A medical dilemma*, 41 HASTINGS CENT REP. 38 (2011), https://pubmed.ncbi.nlm.nih.gov/21678814/ [https://perma.cc/CY3Y-QQJM]. On torture *qua* "institution"/institutionalization, see Wolfendale, *infra* note 104.

political, and philosophical facets of torture. Both explicating and extending Luban's work, I also cull from the thought of heterogeneous philosophers and legal scholars to argue that we need to reconceptualize both *truth* and *responsibility* relative to context, when it comes to tracking alleged American perpetration of torture, beyond their circumscribed and compressed American legalist meanings in criminal and evidence law. In my concluding remarks, I add that we need to accord, as Luban's work suggests, a place to *dignity* and, as Hilde Lindemann also posits, to counter-narrative.[42]

Note again, I am not propounding a programmatic blueprint for literally *instituting* a truth-commission in the United States.[43] This is for two reasons: (i) there are already American organizations which helpfully synchronize with international truth-commissions, such as the U.S. Institute of Peace;[44] and (ii) the prospects of establishing an official truth-commission[45] or a commission of

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42. *Cf.* LUBAN, *supra* note 4, at 146–51 (suggesting that "torture" exemplifies "humiliation" derogating dignity); CLAUDIA CARD, LESBIAN CHOICES 197 (1995) (describing dignity as "the absence of various indignities, rather than . . . the presence of anything special"); John Stanton-Ife, *The Limits of Law*, STAN. ENCYCLOPEDIA PHIL. 27–29 (2022), https://plato.stanford.edu/archives/spr2022/entries/law-limits/ [https://perma.cc/L5QJ-2DV6]; Thomas Kelly, *Evidence*, STAN. ENCYCLOPEDIA PHIL. 22–23 (2016), https://plato.stanford.edu/archives/win2016/entries/evidence/ [https://perma.cc/HQV5-QRL5]; Hock Lai Ho, *The Legal Concept of Evidence*, STAN. ENCYCLOPEDIA PHIL. 35–37 (2021), https://plato.stanford.edu/archives/win2021/entries/evidence-legal/ [https://perma.cc/N2PT-KDB8]; ERIN I. KELLY, THE LIMITS OF BLAME 3 (2018).

43. Here I am referring to *truth commissions proper*. HAYNER, *supra* note 1. Hayner delineates truth-commissions, writing that they are:

> (1) focused on past, rather than ongoing, events; (2) investigating a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; and (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorized or empowered by the state under review.

Id. at 11–12. Hayner also considers adding elements from Mark Freeman:

> (1) a truth commission focuses on severe acts of violence or repression; (2) the acts occurred during recent periods of abusive rule or armed conflict; (3) these commissions describe the causes and consequences of the violations; (4) they investigate violations that occurred in the sponsoring state and (5) the commissions themselves are based in that state; (6) these bodies are victim centered; [. . .] (7) they operate relatively independently from the state,

and they are affected by "the perception by the local (and sometimes global) population." *Id.* at 11 (internal quotation marks omitted). Hayner further adds that:

> [t]ruth commissions are typically tasked with some or all of the following goals: to discover, clarify, and formally acknowledge past abuses to address the needs of victims; to "counter impunity" and advance individual accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past.

Id. at 20. *See* Eisikovits, *supra* note 24 (discussing "war crime tribunals," "truth commissions," and "lustration" and citing PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGES OF TRUTH COMMISSIONS 26 (2001)); HAYNER, *supra* note 1, at xv (discussing surveys on "South Africa, Guatemala, Peru, Timor-Leste, and Morocco").

44. *See Truth Commission Digital Collection*, U.S. INST. PEACE (Mar. 16, 2011), http://www.usip.org/publications/truth-commission-digital-collection [https://perma.cc/B8VQ-VFDR].

45. *See* James L. Gibson, *The Contributions of Truth to Reconciliation: Lessons from South Africa,* 50 J. CONFLICT RES. 409, 409 (2006); HAYNER, *supra* note 1; VAN SCHAACK & SYLE, *supra* note 11, at 12

inquiry[46] venture (beyond the bounds of congressional investigations) seem unlikely to immediately materialize in the United States.[47] Still, there are truths of torture that need to be told, and heard, as Stromseth would say. But for whom and on behalf of whom are we pursuing justice and accountability? Or, as Luban, compellingly propounds: "What would a truthful collective memory look like?"[48] A nuanced meta-ethical framework is arguably necessary to motivate and facilitate the kind of transitional justice efforts that might eventually transpire in the United States.

C. ARGUMENT

As a philosophical paper engaging with legal ethics and meta-ethics, the analytic strategies harnessed herein include value theory, meta-philosophy, feminist philosophy, and conceptual jurisprudence.[49] Deploying these and other methodologies, I study the norms and frames of the ICC, and select truth-commission inquiries in order to re-envision what truth-seeking and -telling might resemble in a U.S. context. I loosely borrow Butler's understanding of "frames of war," in that how we "recognize" lives gauged and adjudged as "livable" or expendable fundamentally and ontologically depends, in their view (and mine), on the socio-political and normative conceptual schemes that organize and categorize how we apperceive who or what matters as legible, "intelligible," or "recognizable":[50] "frames . . . govern the perceptible . . . exercis[ing] a delimiting function, bringing an image into focus on condition that some portion of the visual field is ruled out."[51] Hence, we must be sure to interrogate the presumptions and predicates that typically, and unquestioningly, frame how we conceptualize justice, responsibility, and truth.[52]

This effort necessitates reevaluating some of the axiomata of our criminal and evidentiary law, if not an exclusively legal-criminal strategy generally, for at least three reasons, all of which shall draw inspiration from Luban's work, the ICC,

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(describing different kinds of Truth & Reconciliation Commissions in El Salvador, South Africa, and Kenya); *see generally*, ALISON BISSET, TRUTH COMMISSIONS AND CRIMINAL COURTS 12 (2012).

46. OHCHR, COMMISSIONS OF INQUIRY AND FACT-FINDING MISSIONS ON INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: GUIDANCE AND PRACTICE 7 (2015).

47. *See* the critiques of truth commissions *infra* note 57 and *in passim*.

48. LUBAN, *supra* note 4, at 304.

49. *Cf.* Kenneth Einar Himma, *Conceptual Jurisprudence: An Introduction to Conceptual Analysis and Methodology in Legal Theory,* 26 REVUS J. CONST. THEORY & PHIL. L. 65 (2015); DENNIS PATTERSON, LAW & TRUTH 4 (1996) (suggesting that "the task of jurisprudence is to be that of providing a philosophical account of what it means to say that propositions of law are true and false"); Tristram McPherson & David Plunkett, *Evaluation Turned on Itself: The Vindicatory Circularity Challenge to the Conceptual Ethic of Normativity,* 16 OXFORD STUDIES IN METAETHICS 207, 207, 211 (Russ Shafer-Landau ed., 2021); Tristram McPherson & David Plunkett, *Topic Continuity in Conceptual Engineering and Beyond,* INQUIRY (Dec. 21, 2021), https://www.tandfonline.com/doi/full/10.1080/0020174X.2021.1980095 [https://perma.cc/YNX2-V6KT].

50. *See* JUDITH BUTLER, FRAMES OF WAR: WHEN IS LIFE GRIEVABLE? 1–4, 6 (2009). On conceptual schemes, see Michael P. Lynch, *Three Models of Conceptual Schemes*, 40(4) Inquiry 407, 407–26 (1997).

51. *Id*. at 74.

52. Although, I am not a phenomenologist, in continental philosophical methodologies, this act of "waiving" or "bracketing" accustomary presumptions is attributed to phenomenologist Edmund Husserl. *See* GAIL WEISS, GAYLE SALAMON & ANN V. MURPHY, 50 CONCEPTS FOR A CRITICAL PHENOMENOLOGY xiii-xiv, 5 (2019).

truth-commissions, and various legal scholars and philosophers. First, truth-commissions proper, as is often noted, approach truth-seeking and fact-finding distinctly from prosecution in criminal law: sourced from diverse community members, truth-commissions proper register grave atrocities by collectively upbuilding that truth through testimonial sharing and communal contribution, such that they become a "shared truth."[53] Here I shall resort to modified versions of Catherine Elgin's notion of the "true enough" and Heidi Grasswick's postulate of "epistemic trust" to unpack this, although admittedly it is only a draft. Second, *responsibility* is not, as philosopher Iris Marion Young would say, solely calculated in a legal and causal manner culminating in terms of individualized conviction but also formulated as a "shared responsibility" forged in prospective or future-facing political alliance to deal with "structural injustices."[54] I adopt from Young, Robin Zheng, and Maeve McKeown to flesh out this further difference from American criminal and evidentiary legalism. Third, as I remark in conclusion, there is a link to *human dignity* in "having one's own story" be told and heard, as Luban puts it, that is not easily captured in our adversarial system of law, but which non-legal or legally adjacent fora might adjunctively foster.[55]

D. OBSTACLES TO THIS PROJECT

This project comes up against a myriad of hindrances. First, official truth-commissions proper encounter practical, social and administrative predicaments, obstructions, and failures.[56] Practical and social problems with truth-commissions proper are seemingly redoubled with a proposal of a framework predicated on truth-commission and the ICC as normative practices.[57] Second, the legal wrongs

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53. Thanks to Sabrina Lourie (personal communication, 2022) for initially suggesting this difference. "Shared truth" comes from one of the speakers in CONFRONTING THE TRUTH (York Zimmerman Inc., United Stated Institute for Peace, et al. 2006), a documentary watched on Feb 17, 2022 in seminar. *See* U.S. INST. PEACE, *supra* note 44 (describing Hayner's account of truth commissions proper); HAYNER, *supra* note 1, at 57–60 (distinguishing truth commissions from "trials"). On performative enactment, see MARY KATE MCGOWAN, JUST WORDS: ON SPEECH AND HIDDEN HARM 22 (2019). Although the ICC is committed to criminal prosecution, as I will suggest below, the norms oriented the ICC differ somewhat than American legalist conceptions. Thanks to Professor Luban for pressing me on this.

54. *See* Martha Nussbaum, IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE xci, xx (2011) (regimenting Young's theory thus: "An agent is responsible . . . only if (a) the agent is causally embedded in processes that produce a problematic result and (b) the agent is in a position to assume ongoing forward-looking responsibility (in cooperation with others) for ameliorating those conditions."); *see also* LUBAN, *supra* note 4, at 288 (discussing the differences between "act-ownership" and "responsibility-ownership" when it comes to torture); Hanna Pickard, *Responsibility without Blame: Therapy, Philosophy, Law,* 213 PRISON SERV J. 10, 13 (2014). I explicate Young's framework via Robin Zheng's and Maeve McKeown's scholarship, see *infra* subpart II.B.1-2.

55. *See* LUBAN *infra* note 76, at 86 and § 3 for discussion.

56. *See* HAYNER, *supra* note 1, at 5–6 (describing the high "expectations for truth commissions," problems inherent to the "inquiries" themselves, and unintended "long-term consequences"). On the variety of truth commissions, see LUBAN, O'SULLIVAN, STEWART, & JAIN, *supra* note 4, at 1230; *see also* PHILIP ALSTON & SARAH KNUCKEY, THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING: CHALLENGED AND OPPORTUNITIES 283–84 (2016).

57. *See* HAYNER, *supra* note 1, at 30–31; Hobbs, *supra* note 8, at 487 (discussing the issue of how to make up "international to . . . hybrid" tribunals in a way that "mirror[s] the society over which the judges exercise

and harms of 9/11, as Luban and others note, far exceed CIA torture, making it difficult to delimit the class of victims and malefactors: in addition to Afghan and Iraqi civilian causalities under war,[58] scholars record domestic harms and wrongs to American subjects (in particular Muslim subjects) from racial profiling, "surveillance," and the "targeting of communities of color and political dissent."[59] Third, I am focused on the American context while also developing a meta-normative framework that draws from international political and best practice norms, even as it presses into service *some* legal norms.[60] This focus therefore elides many legal strategies and remedies both within the American "domestic legal system"—such as constitutional litigation over Fourteenth and Fifth Amendment "due process"[61]—and from without—such as ICC intervention and investigation, either with or without the United States' "consent" (such as Article 14 initiation by Afghanistan or Article 12(3) "*ad hoc* referral" by the United States).[62] Fourth, as I am not devising first-order normative or applied-ethical policy advice to be espoused by non-federal-governmental actors or agencies, possible solutions Luban points to, like "firings and internal discipline[s]" or prosecutions of "torture lawyers," are unavailable (indeed, as Luban also observes, so much time has elapsed that it is unclear how many of the original Bush-Cheney CIA interrogators remain in current administrations).[63]

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jurisdiction" to secure "sociological legitimacy"). Hobbs' approach is "principled and pragmatic": "[t]he international dimension can be particularized in order to favor selection of judges from regional states (provided the states were not involved in the conflict), judges from states of the same legal tradition, and judges who speak a language of the affected state." *Id.* at 488, 489, 520–22. *See* Paul Gready & Simon Robins, *Transitional Justice and Theories of Change: Towards evaluation as understanding,* 14 INT'L J. OF TRANSITIONAL JUST., 280, 285–86 (2020) (describing "four core challenges facing the development of theories of change within transitional justice . . . [including] links to very broad, macro-level goals; the relationship between levels of impact; the lack of theorizing about transitional justice mechanisms and the changes they seek to effect, as well as on the connections between mechanisms; and prioritization and sequencing within complex, 'holistic' interventions").

58. *Cf.* BUTLER, *supra* note 50, at 24; LUBAN, *supra* note 4.

59. *See* Faiza Patel, *The Costs of 9/11's Suspicionless Surveillance: Suppressing Communities of Color and Political Dissent,* JUST SECURITY (Sept. 8th, 2021), https://www.justsecurity.org/78133/the-costs-of-9-11s-suspicionless-surveillance-suppressing-communities-of-color-and-political-dissent/ [https://perma.cc/BGL9-U5C6]. For a contemporary philosophical and legal analysis of gendered Islamophobia, see FALGUNI A. SHETH, UNRULY WOMEN: RACE, NEOCOLONIALISM, AND THE HIJAB 1, 9–10, 137 (2022).

60. On this Nussbaumian idea of human rights law being politically motivating and a set of norms to which one may appeal, see Eloy LaBrada, *In Our Hands: Realizing Economic, Social, and Cultural Rights in the U.S.* (2021) (unpublished manuscript) (on file with the Journal) (quoting Martha C. Nussbaum, *Women's Progress and Women's Human Rights*, 38 HUM. RTS. Q. 589, 595–96, 610 (2016)).

61. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 355 (mentioning that "Fifth (and Fourteenth) Amendment due process . . . provide[s] some protection against torture"), 349 (discussing *Boumediene* and habeas).

62. VAN SCHAACK & SLYE, *supra* note 4, at 49, 44–71. As already mentioned, the former Prosecutor Bensouda's Article 15 "*propio motu*" investigation was approved by the ICC Appeals Chamber in 2020 (after being rejected by the pre-trial court in 2019). *See* VAN SCHAACK & SLYE, *supra* note 11, at 127 (describing "U. N. Charter" "Chapter VII" "*ad hoc* war crimes tribunal[s]").

63. LUBAN, *supra* note 4, at 285 (reviewing possible solutions); VAN SCHAACK & SLYE, *supra* note 4, at 145–55 (outlining ICC jurisdiction and process); AM. CIV. LIBERTIES UNION, *supra* note 18; Katner, *supra* note 41, at 516–17.

These obstacles, however, are not unique to this paper—they arguably beset *any* effort to set the stage for transitional justice. Still, I formulate some tentative responses to these obstacles and objections to my framing of the problem, and my Lubanian proposal, in §§2−3, *infra*. Readers anticipating a global legal solution for 'next steps' will find those expectations disappointing or underwhelming. But, the problem, and the proposal are not purely legal, nor must they by necessity be inaugurated at the global level. "Human rights begin at home," a famous apothegm reads, and although the purpose of the paper is not to particularize normative-ethical and applied-ethical plans to establish a truth commission, nothing in this analysis excludes the eventual motivation and galvanization of such efforts at the local and global levels.[64] While variable legal and ethical implications might ensue from my analysis, my main effort here is to query what becomes possible when we meta-ethically reconfigure our frameworks for what transitional justice might resemble in times when conventional legalist mechanisms and frames have fallen short.

Hence, on the one hand, I mine from transnational and international criminal law for some of the norms that will inform the proposed framework;[65] on the other, I pull from legal ethics and meta-ethics to pinpoint conceptions of accountability and trust that American legalism cannot (yet) fully comprehend or cannot (yet) fully cognize. I do so by proposing a novel, Lubanian, meta-ethical framework for efforts moving toward transitional justice for alleged American torture as informed by Elgin, Young, and others. To parochialize the subject-matter of my inquiry, I evade protracted discussions of neighboring controversies in legal ethics and international law, as I am more concerned with clarifying a Lubanian meta-normative framework for theorizing the fallout of alleged atrocity crimes, and the taking account thereof, when it comes to alleged American torture. [66] So

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64. *See* LUBAN, O'SULLIVAN, STEWART, & JAIN, *supra* note 4, at 355. Thanks to Professor Stromseth for introducing me to the phrase and concept. The phrase "human rights begin at home" is typically attributed as a direct quote from Eleanor Roosevelt, however, Roosevelt actually promulgated that, "[human rights begin] . . . in small places, close to home[.]". Eleanor Roosevelt, First Lady, Remarks by the First Lady at the United Nations (Dec. 10, 1997). Another way of setting up this project is to borrow from Young and say that I am interested in the "parameters of reasoning" around formulating plans of action. YOUNG, *supra* note 54, at 144. I also think, in Brandomian fashion, it has to do with "rules of inference" rather than laying down "axioma[ta]." *See generally* Jason Stanley, *Comments on Judith Butler's Tanner Lectures,* 2–3 (2016) (unpublished manuscript) (on file with the Journal) (discussing Carroll's regress); *What the Tortoise Said to Achilles*, WIKIPEDIA, https://en.wikipedia.org/wiki/What_the_Tortoise_Said_to_Achilles#Summary_of_the_dialogue [https://perma.cc/VK57-H9PA] (last visited Sept. 21, 2023).

65. Following Van Schaack and Slye, I construe criminal law variably "as a subset of public international law, with an emphasis on relevant treaties and customary international law, international law-making, and the creation and operation of institutions and organizations that adjudicate [international criminal law]." *See* VAN SCHAACK & SLYE, *supra* note 4, at v. I also take "transnational criminal law" to refer to "crimes with a transnational dimension that are prohibited and prosecuted primarily at the domestic level." *Id.* at vii. For the purposes of this paper, I follow Van Schaack and Slye along with, see generally LUBAN, O'SULLIVAN, STEWART, & JAIN, *supra* note 4, in thinking of transnational criminal law as referencing U.S. crimes with an international involvement.

66. *See generally* LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, has chapters devoted to a variety of related matters; same for VAN SCHAACK & SLYE, *supra* note 11.

while the meta-ethical and legal implications of my analysis will be potentially widespread, the subject-matter focus of my inquiry shall stay thematically localized.

E. ROADMAP FOR THE REMAINDER

In Part I, I single out the legal and conceptual contours of torture, relying on Luban's, Katherine Newell's, Claudia Card's, and others' expertise. I also slightly supplement Luban's account. This part is more descriptively stage-setting than it is creatively argumentative. My own views take more delineated shape in the subsequent part, although they continue to expound upon and expand Luban's *oeuvre*.

In Part II, I theorize that legalist conceptualizations of responsibility and truth, according to evidentiary and criminal law, can be meta-normatively restyled and reworked by way of the ICC, truth commissions, and various thinkers—Young, Zheng, McKeown, Elgin, and Grasswick among them—into *accountability* and *trust* relative to context. In Part III, I speculate on the role of dignity and indignity in this analysis via Luban, Hilde Lindemann, and Margaret Walker.

I. TALK OF TORTURE

A. THEORIZING TORTURE

This part briefly, and mostly descriptively, summarizes theorizations of torture in the American context. How should we apprehend torture? How does it appertain to truth and talk? What and whom do the "torture debates" concern? And what do theories of torture say about us?[67] I begin with some fundamental premises of the analysis and the limitations of a restrainedly legalist conceptualization of torture, before proceeding to canvass some of the theoretical and political debates about torture's definition, and I terminate the part by settling on an enriched version of Luban's "communicative" theory of torture.

Article 7 of the Rome Statute holds that torture instantiates a "crime against humanity" if and only if it partakes of a "widespread or systematic attack directed against any civilian population," with knowledge of the attack.[68] For the purposes

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67. *See* STEVEN J. BARELA, MARK FALLON, GLORIA GAGGIOLI & JENS DAVID OHLIN, EDS., INTERROGATION AND TORTURE: INTEGRATING EFFICACY WITH LAW AND MORALITY 22 (2020); LUBAN, *supra* note 4, at 111–12, also begins with "legal definitions" of torture before introducing his "communicative conception," in slightly similar structural fashion. Jessica Wolfendale, The Erasure of Torture in America, 54 CASE W. RSRV. J. INT'L L. 231, 237 (2022), also begins with "legal definitions" before elaborating an "*experiential definition of torture*: [t]orture is the experience of complete vulnerability to extreme suffering in a context of domination, where the experience of vulnerability reinforces and expresses the torture victim's moral exclusion from equal moral consideration."

68. David Luban, *A Theory of Crimes Against Humanity,* 28 YALE J. INT'L L. 85, 96–99 (2004), *cited in* LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 960, 961–62; LUBAN, *supra* note 4, at 929. Thanks to Professor Luban for this point and for inspiring this formulation, although his preferred conditional is "only if it takes part" rather than the biconditional adopted here. For more, see generally Richard Vernon, *What is Crime Against Humanity?*, 10 J. POL. PHIL. 231, 234–35 (2002), *cited in* LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 958–59.

of this inquiry, we can commence with Claudia Card's rendition of atrocity and the legal delineations of *torture* in the UN Convention Against Torture (CAT).[69]

An indisputable premise of the analysis here is that torture is an atrocity, in the sense precisified by Card: an atrocity consists of "evils [that] are reasonably foreseeable intolerable harms produced ["(maintained, supported, tolerated, and so on)"] by inexcusable wrongs,"[70] which "depriv[e], or seriously ris[k] depriving, others of the basics that are necessary to make a life possible and tolerable or decent (or to make a death decent)."[71] Card notes that atrocities can have multifarious agents—institutional structures[72]—and furthermore, that atrocities "need not be extraordinary," but can even be routinized, habituated, and "tolerated" by a given regime, majority, or social space.[73] I presume, then, Card's premise of torture as atrocious—the word torture, after all, has etymological roots in both "twisting" ("torsion") and wrongdoing ("tort").[74] Torture is twisted and wrong.[75]

The United States is party to the "International Covenant on Civil and Political Rights"[76] and to CAT.[77] The latter stipulates that torture comprises:

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69. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1109–24. For a detailed legal analysis of CAT, see LUBAN, *supra* note 4, at 112–14; Katner, *supra* note 41. *See generally* J.M. Bernstein, *Torture, Dignity, and the Rule of Law*, *in* INTERROGATION AND TORTURE: INTEGRATING EFFICACY WITH LAW AND MORALITY 395 (Steven Barela et al., eds., 2020); Craig Duncan, *Review of Torture and Dignity: An Essay on Moral Injury by J.M. Bernstein*, NOTRE DAME PHIL. REV. (2016).

70. CLAUDIA CARD, CONFRONTING EVILS: TERRORISM, TORTURE, GENOCIDE 16–17 (2010) (italics removed). Card notes that "inexcusable" means here that there is no "excuse" emanating from "the ontology of agency" (someone cannot do or help but do x) or from moral "mitigat[ions of] culpability *without* reducing responsibility." *Id*. at 5.

71. CLAUDIA CARD, THE ATROCITY PARADIGM: A THEORY OF EVIL 16 (2002).

72. CARD, *supra* note 70, at 18 (describing "norms or rules," execution of those "rules," and effects of the "rules" being executed).

73. *Id*. at 4, 224–25 (enumerating five kinds of "ordinary torture"); VAN SCHAACK & SLYE, *supra* note 11, at 608 (describing "feminist" views of "private" violence as "torture").

74. *See Torture*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/torture [https://perma.cc/KS6N-256F] (last visited Sept. 21, 2023); *see also* CARD, *supra* note 70, at 208 (noting the Latinate etymology of "torture" as "*torquere,* which means 'to twist'"); LUBAN, *supra* note 4, at 116 (looking at dictionary definitions). On the history of torture, see John Langbein, *The Legal History of Torture*, *in* TORTURE: A COLLECTION 93 (John H. Levinson ed., 2004), *in* VAN SCHAACK & SLYE, *supra* note 11, at 592–93; MATTHEW H. KRAMER, TORTURE AND MORAL INTEGRITY: A PHILOSOPHICAL INQUIRY 29–219 (2014) (surveying definitions of torture and analyzing torture's "wrongness"); *see generally* MICHEL FOUCAULT, SURVEILLER ET PUNIR: NAISSANCE DE LA PRISON 4 (1975).

75. Here, I differ from those philosophers who defend an "exceptional cases" defense of torture, for example, FRITZ ALLHOFF, TERRORISM, TICKING TIME-BOMBS, AND TORTURE: A PHILOSOPHICAL ANALYSIS 57 (2012). Luban analyzes the case against "ticking time-bomb" hypotheticals in LUBAN, *supra* note 4, at 45–46 and *passim*. *See also* Claudia Card's panel conference, "Ticking Bombs and Interrogations" arguing that "torture" *qua* "response to terrorism" is ""vil.", University of Chicago Law School, *Torture, Law, and War: Philosophy & Torture*, YouTube (Feb. 29, 2008), https://www.youtube.com/watch?v=Uiymij3vAOQ [https://perma.cc/55PA-TTVQ] (arguing that "torture" *qua* "response to terrorism" is "evil"); Peter Brian Barry, *The Kantian Case Against Torture,* 90 ROYAL INST. PHIL. 593, 596 (2015); Gregory Fried, *Review of Uwe Steinhoff, On the Ethics of Torture,* NOTRE DAME PHIL. REV. (2014).

76. DAVID LUBAN, *The Torture Lawyers of Washington, in* LEGAL ETHICS AND HUMAN DIGNITY 161, 166 (2007). I shall not perlustrate the "background" of the 9/11 torture memo fallout, as many others have. *See id.* at 165–69.

77. *Id*. at 167.

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[78]

Luban, O'Sullivan, Stewart, and Jain note that while the CAT evinces a capacious category of "severe . . . *mental* pain or suffering," when the United States ratified the Convention they submitted a reservations, understandings, and declarations ("RUD") tailoring and winnowing down this category to designate solely "prolonged mental harm caused by or resulting from" physical torture or threatened physical torture, mind-altering substances and techniques, or death threats, all of which fails to elaborate on what constitutes "severe physical pain or suffering."[79] As Luban, O'Sullivan, Stewart, & Jain comment, the RUD and U.S. Code specify that there must be "specific intent" to wreak insufferable pain, in contrast to the CAT's broad language of "intentionally."[80]

In further perlustrating conceptualizations of torture, Luban later refined his conception of the contours of torture in collaboration with Katherine Newell.[81] They recently recommended that the torture the CIA engaged in plausibly

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78. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) art. 5, 1465 U.N.T.S. 85, *cited in* LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 112–13, 1105–06.

79. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1109–10 (noting that "CAT does not attempt to define the word *severe*"), 1106–07 (describing U.S. Reservations, Declarations, and Understandings to the Conventions Against Torture in 1830 U.N.T.S. 320 and the U.S. Code's definitions in 18 U.S.C. § 2340(A)); *see also* Luban & Newell, *supra* note 1, at 372; Torture (18 U.S.C. § 2340A), DEPT. JUST., https://www.justice.gov/archives/jm/criminal-resource-manual-20-torture-18-usc-2340a [https://perma.cc/YS48-TLG8] (last visited Sept. 21, 2023); LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1108–09 (describing the ICC's definition in Article 7(1)(f) and Article 8(2)(A)(II)-1 and Article 8(2)(A)(II)-2, ICC-ASP/1/3 (part II-B) and the European Convention of Human Rights, Art. 3); Seumas Miller, *Torture*, STAN. ENCYCLOPEDIA PHIL. (2017) https://plato.stanford.edu/archives/sum2017/entries/torture/ [https://perma.cc/U2VN-H3UQ] (defining torture as "(a) the intentional infliction of extreme physical suffering on some non-consenting, defenceless person; (b) the intentional, substantial curtailment of the exercise of the person's autonomy (achieved by means of (a)); (c) in general, undertaken for the purpose of breaking the victim's will"); LUBAN, *supra* note 4, at 125 (epitomizing the "legal definition" thus: "severe mental or physical pain or suffering").

80. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1115 n.9; *see also* David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law, in* LUBAN, *supra* note 4, at 153–54 (arguing that the U.S. RUD for "mental torture" displays "three basic fallacies"), 166 (drawing from Almerindo E. Ojeda to enumerate kinds of "mental torture"); Nils Melzer & Steven Barela, *The Méndez Principles: Beware Crossing the Line to Psychological Torture,* JUST SECURITY (Jun. 25, 2021), https://www.justsecurity.org/77115/the-mendez-principles-beware-crossing-the-line-to-psychological-torture/ [https://perma.cc/ZKD3-M9PT] (enumerating seven of the 2020 Special Rapporteur's aspects of "psychological torture," including: "security (inducing fear, phobia, and anxiety)," "self-determination (domination and subjugation)," "dignity and identity (humiliation, breach of privacy, and sexual integrity)," "environmental orientation (sensory manipulation)," "social and emotional rapport (isolation, exclusion, betrayal)," "communal trust (institutional arbitrariness and persecution)," and "torturous environments (accumulation of stressors)").

81. *See* Luban & Newell, *supra* note 1.

extends beyond the "torture memos" and "enhanced interrogation techniques," to include "abusive conditions . . . that the torture memos never bothered to discuss."[82] Luban and Newell qualify a "family of interrogational abuses," that cannot be exhausted by restricting reference to enhanced interrogation techniques alone, as torturous: "Under U.S. law, the right word for the CIA's family of interrogational abuses is 'torture.'"[83]

B. DEBATING TORTURE

The last subpart adverted to Card's definition of atrocity and CAT's definition of torture and specified some fundamental premises of the analysis. But, as I presaged, the legalist conception is, as Luban and Newell note, inapt to fully singularize the descriptive, evaluative, and normative contours of torture. Further elaboration is required, so this subpart addresses some of the ways theorizations and accounts of torture are debated. I believe Luban has one of the most nuanced accounts on offer to unearth the theoretical and ethical presumptions undergirding the CAT's definition once his account is recontextualized and nuanced by the updated conception of torture that appears in his co-authored work with Newell. Luban's early account cashes out torture as a quinary-place relation that "tyrannize[s] and dominate[s] the victim"; "isolates and privatizes" the victim through "pain"; "terrorizes" the victim through fear; and "humiliates" the victim through degradation.[84] On this rendition, torture has been deployed for "cruelty," "terror," "punishment," "extracting confessions," and "intelligence gathering."[85]

It was ostensibly, or pretextually, the last two items upon which John Yoo's and Jay Bybee predicated their torture memos.[86] Consider Bybee's "Torture Memo" (Aug. 1, 2002), that there was a "choice of evils defense" of "necessity" against torture "allegation[s]," if the defendant can show that their "intention [was] to avoid [a] greater harm."[87] OLC memoranda stipulated that CIA

82. Luban & Newell, *supra* note 1, at 334. Thanks to Professor Luban for pointing me to his recent thinking in these pieces co-authored with Newell (personal communication, 2022).

83. Luban & Newell, *supra* note 1, at 347–48 (writing that "family of interrogational abuses" extends to both "enhanced interrogation techniques" as well as "all the physical and psychological abuses connected to the intended or actual psychological debilitation of detainees, singly and as a course of conduct . . . [it thus] includes [enhanced interrogation techniques] but other abuses as well, including physical violence, psychological stressors, environmental manipulations, and abusive conditions of confinement."), 387. Luban and Newell state that they consider these to be "torture" but shirk the "label" to obviate definitional circularity. *Id.* at 348. As they put it later in the paper, the accurate legal query (one which the torture memos overlooked) is "whether the entire program of detention and abuse, experienced holistically by the subjects, amount to torture," rather than to focus exclusively on "individual [enhanced interrogation techniques] or specific combinations [thereof]." *Id.* at 365.

84. LUBAN, *supra* note 4, at 48–49.

85. *See id.* at 50–54.

86. *See* LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1098–1103 (surveying the torture memos); *see also What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Testimony Before the S. Judiciary Comm., Subcomm. on Admin. Oversight and the Cts.,* 111th Cong. (2009) (testimony of David Luban) *in* LUBAN, *supra* note 4, at 243–53 (providing an exhaustive legal analysis of the OLC's illogic).

87. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 899–900 (internal quotation marks omitted).

"enhanced interrogation techniques"—"dietary manipulation," "nudity," "attention grasp," "walling," "facial hold," "facial slap or insult slap," "abdominal slap," "cramped confinement," "wall standing," "stress positions," "water dousing," "sleep deprivation (more than 48 hours)," "waterboard[ing]"[88]—were legally justifiable.[89] In OLC's view, unless "the pain" led to "death, organ failure, or serious impairment of body functions," and unless the interrogators deliberately sought to visit traumatic psychological "damage," a "necessity" defense was available to protect the conduct.[90] Bybee also wrote in 2002 that the executive branch was authorized to disregard Article 3 Geneva conventions toward enemy combatants.[91]

Luban has offered an exacting analysis of these memos and their "loophole legalism,"[92] so I shall not rehearse that here. Instead, I want to clarify what the "torture debates" are partially about. As Newell and Luban note, the "torture debates" are trifold, they concern "legal," "moral," and "pragmatic" justifications and refutations for the application of torture or torture-adjacent conduct for consequentialist and deontological reasons.[93] This includes, as Seumas Miller enumerates them, the imposition of torture for one of the reasons CAT proffers: "(1) to obtain a confession; (2) to obtain information; (3) to punish; (4) to coerce the sufferer or others to act in certain ways."[94]

Political scientist Darius Rejali condenses all four of these components of the torture debate in an eponymous essay: "Is There Truth in Pain?"[95] Or as Luban, O'Sullivan, Stewart, & Jain frame it: "does torture work?"[96] Does it assist with

88. *Id.* at 1104–05 (italics removed).

89. *Id.* at 1109; *see also* Stephen Bradbury, *Memorandum for John A. Rizzo Acting Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that Mat Be Used by the CIA in the Interrogations of High Value al Qaeda Detainees*, U.S. DEPT. JUST. OFF. LEGAL COUNS. (July 20, 2007), https://www.justice.gov/media/852936/dl?inline [https://perma.cc/8QTL-NA7E]. For a fulsome analysis of the torture memos, see Katner, *supra* note 41.

90. LUBAN, *supra* note 4, at 67 (paraphrasing the memoranda). I am paraphrasing Luban's paraphrase.

91. LUBAN, *supra* note 76, at 175; LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1119–23 (excerpting the Bybee and Levin memos and analyzing them).

92. *See* LUBAN, *supra* note 76, at 185.

93. Luban & Newell, *supra* note 1, at 341; *see also* Jessica Wolfendale, *The Torture Debate and the Toleration of Torture,* CRIM. JUST. ETHICS 1 (2019) (reviewing SCOTT A. ANDERSON AND MARTHA C. NUSSBUAM, EDS., CONFRONTING TORTURE: ESSAYS ON THE ETHICS, LEGALITY, HISTORY, AND PSYCHOLOGY OF TORTURE (2018) and positing links between "the torture debate and the toleration of torture").

94. Miller, *supra* note 79, at 7.

95. Darius Rejali, *Is There Truth in Pain?* REPRESENTATIONS (2020); *see also* David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in US law, in* LUBAN, *supra* note 4, at 153 (discussing theories of pain); *see generally,* DARIUS REJALI, TORTURE AND DEMOCRACY (2007); Murat Aydede, *Pain*, STAN. ENCYCLOPEDIA PHIL. (2019) https://plato.stanford.edu/archives/spr2019/entries/pain/ [https://perma.cc/EW4B-9VFM] (reviewing theories of pain).

96. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1165–70 (reviewing the literature and adducing reasons why torture does not "work").

"intelligence gathering" and serve as the most efficacious or utilitarian means to guard innocent people from terrorists?[97] Does torture "talk"?

C. COMMUNICATING TORTURE

There are manifold reasons to hypothesize that torture does not "talk," that is, that it does not yield intelligence to the torturers, even if torture might well itself be, as Luban suggests, "communicative" in certain respects.[98] I will present and slightly modify Luban's account of torture *qua* communicative act in light of his later co-authored work with Newell. First, consider Luban's account of torture as "communicative":

> Torture of someone in the torturer's custody or physical control is the assertion of unlimited power over absolute helplessness, communicated through the infliction of severe pain or suffering on the victim that the victim is meant to understand as the display of the torturer's limitless power and the victim's absolute helplessness.[99]

For Luban, torture communicates in a dual sense: it is the vehicle of administering or delivering "power" and pain, and therein also lies a communicative tenor or "content" of the torturing act, namely that the torturer enjoys imperializing over them: "pain is the medium and absolute domination is the message . . . [indeed] the medium *is* the message."[100] Luban's theory could be further nuanced, especially in light of the "family of interrogational abuses" that he and Newell have come to discern: one of the ironies of torture on the communicative account is that, while it may convey this overwhelming power to the victim, the physical and mental torment of torture can actually, and often does, render the victim speechless from pain.[101] Speechlessness does not equate to non-communication, however, and communication is likely just as complex a "family" of social and semantic praxes as the range of the "family of interrogational abuses" that Luban and Newell have identified. First, as philosopher Joel Reynolds points out in another context, although propositional linguistic expression might be thwarted when a body is agonizing, "the body stricken with unbearable pain,

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97. *Id.* at 1153–64 (reviewing competing views by Charles Krauthammer, Jeff McMahan, David Luban, & Michael Ignatieff). For Rejali, torture does not "work" for its ostensive purposes. He explores four misconceptions undergirding the view that "torture works." *See* Rejali, *supra* note 95.

98. LUBAN, *supra* note 4, at 127–28; *see also* Luban & Newell, *supra* note 1, at 351–52 (refuting the "torture worked" contention); Nayef Al-Rodhan, *The Wrongs, Harms, and Ineffectiveness of Torture: A Moral Evaluation from Empirical Neuroscience,* J. SOC. PHIL. 1 (2022); Shane O'Mara, *The captive brain: torture and the neuroscience of humane interrogation,* 111 QJM: INT'L J. MED. 73 (2018).

99. LUBAN, *supra* note 4, at 128.

100. *Id.* at 128–29, 132 (citing David Sussman, *What's Wrong with Torture?*, 33 PHIL. & PUB. AFF. 1, 1 (2005)).

101. ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD (1985). Luban does respond to these objections—*see* LUBAN, *supra* note 4, at 129–31—but my nuancing is a bit different than the objections he addresses.

speaks very loudly: it groans, cries, moans, yelps, and screams," meaning that pain communicates, or signifies, even when verbalization seemingly falters.[102] Second, even if someone in pain might, at a given synchronic point in time, be verbally speechless (although communicating through other bodily means), this does not mean that they could not later narrate and testify to torture diachronically over time, as powerful testimonies of survivors of torture indicate.[103] So the communicative status of torture in Luban's earlier account must be temporalized and contextualized to account for whether (as he and Newell later write) "detention and abuse, experienced holistically by the subjects, amount to torture": while torture might be communicative to third-parties (as a warning or threat) and might be communicative *to* the victim (as a means of "asserting" power) at a given point, it also *undercuts* the typical construal of language and communication for the victim who, in their bodily agony, cannot think, speak, or act in standardly recognized communicative fashion *qua* verbalization at that time, even if that torture might be narrativized and verbalized by the survivor at a later interval.[104] A related complication comes from the scholar Beth van Schaack, who observes that a victim might not speak the language of the torturer, or be too

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102. JOEL MICHAEL REYNOLDS, THE LIFE WORTH LIVING: DISABILITY, PAIN, AND MORALITY 29 (2022). To be clear, Reynolds' discussion and theory of pain are *not* related to the particular experience or phenomenological-legal-ethical context of torture (although Reynolds does survey the vast literature here, including Scarry's work, cited *supra* note 101). So, the specific insight about the body in pain I cite from Reynolds' work is not related to Reynolds' discussion of disability, phenomenology, chronic pain, and ethics, nor should the reader deduce from this quotation that Reynolds (or me) is positing a parallel between theorizations of disability and theorizations of torture. I am solely drawing on Reynolds' hyper-specific phenomenological insight that a body in pain, generally speaking, is not therefore incommunicative. Nothing further should be assumed or implied about pain in other areas of philosophical study (disability, perception, etc.). On pain in philosophy, see Aydede, *supra* note 95.

103. Thanks to Victor J. Diaz Solano for this insight (personal communication, 2023). *See* Wolfendale, *supra* note 67, at 237 n.24 (citing JEAN AMÉRY, AT THE MIND'S LIMITS: CONTEMPLATIONS BY A SURVIVOR OF AUSCHWITZ AND ITS REALITIES (1980)). Améry is also discussed at length in J.M. BERNSTEIN, TORTURE AND DIGNITY: AN ESSAY ON MORAL INJURY 20 (2015).

104. See Luban & Newell, *supra* note 1, at 365 for the first quote. I am here updating Luban's account via his later work with Newell, as he suggested to me there was a change in his thinking in collaboration with Newell (personal communication, 2023). *See also* SCARRY, *supra* note 101. Luban & Newell, *supra* note 1, at 363 points out that "enhanced interrogation techniques" alongside *other* "abuses . . . collectively inflict[ed] severe pain or suffering," which likewise means, I am extrapolating, that the "communicative" scene, as Luban's earlier account discretely marks it off, should be nuanced to account for the more encompassing view of abuses falling under the category of torture that he and Newell have come to specify. In nuancing Luban in this way, I take seriously Jessica Wolfendale's critique of Luban's (and related) accounts, which seem to privilege "the relationship between torturer and victim" over and above the phenomenology and "experiential" perspective of the victim of torture as well as the structural or institutional nature of torture. *See* Jessica Wolfendale, *Prison as a Torturous Institution,* 97 RES PHILOSOPHICA 297, 304 (2020). In following Young in referring to "structural injustice" *infra* over individualistic liability, I align with Wolfendale in considering torture as a "torturous institution" rather than as an individualized act. *See infra* note 186. Note that Luban's communicative account itself, if modified by the lights of his work with Newell as I am attempting to sketch here, probably brings his account in line with Wolfendale's claim that we need a "broad" conception of torture to elucidate its institutionalization. Furthermore, Luban's and Newell's account of "holistic" experience by the victim also partially anticipates and converges with Wolfendale's "experiential" account.

young to conceptualize and vocalize, as befell children under the "Family Separation" border policy, exacerbated under the Trump Administration, which she demonstrates is torture.[105] Understanding the variety of ways that torture manifests and both communicates and undermines communication is important for measuring and adjudging why torture fails as a means of interrogation and information-collection. It is for this and other reasons that General Mattis took the view, in contrast to President Trump, that torture was an ineffective and inefficient means of intelligence-gathering.[106]

Luban and Newell note that the "torture debates" have transmogrified in the last few years from a debate about whether torture "works" to whether the United States will be held accountable for its alleged atrocity crimes, either by the ICC or from internal pressures.[107] When Prosecutor Bensouda originally opened investigation in 2018, General Wesley Clark suggested that this might well serve as an occasion for the United States to establish a "truth commission" to finally face its atrocities.[108] In so doing, General Clark was ostensibly suggesting that the United States abdicate legal and judicial business as usual. What change of mind and frame would it take, he seemed to ask, to pursue these truths about torture when legal theories and avenues have seemingly fallen short?

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105. Beth Van Schaack, *The Torture of Forcibly Separating Children from their Parents,* JUST SECURITY (Oct. 18, 2018), https://www.justsecurity.org/61138/torture-forcibly-separating-children-parents/ [https://perma.cc/2WTZ-DHPP]. Thanks to Professor Stromseth for suggesting this point and source (personal communication, 2022).

106. Sheri Fink & Helene Cooper, *Inside Trump Defense Secretary Pick's Efforts to Halt Torture*, N.Y. TIMES (Jan. 2, 2017), https://www.nytimes.com/2017/01/02/us/politics/james-mattis-defense-secretary-trump.html [https://perma.cc/57HB-9PPE]. Thanks to Professor Stromseth for this point and source (personal communication, 2022). LUBAN, *supra* note 4, at 133–35, spells out twelve "evils" of torture ("the *form* of the message"; "the *content* of the message"; "the *means* or *manner* by which torture sends the message"; "the *intended effect* of the message"; "the *moral falsehood* of the message"; "the self-fulfilling . . . character of the message"; "the totalitarian relationship that torture establishes"; "the lasting aftereffects of the torture"; "the torture's indifference to those lasting aftereffects"; "the corruption of the torturer"; "the further corruption induced by the inevitable coverups"; "the tendency of institutionalized torture to metastasize"). As Victor J. Diaz Solano correctly suggests, there is an equivocation in Luban's claim between torture being an ineffective means of information-gathering and the communication of information in the torturous act itself quasi "communicative" act: if torture might not succeed at getting truthful information from the victim, does not the torturer successfully communicate their dominion and power to the victim? (personal communication, 2023). There is likely a tension in both Luban's account and in the torture debates generally about how to specify truths of torture, depending on subject-position, context, and various normative, evaluative, and descriptive considerations. How one answers Rejali's query ("is there truth in pain?," see *supra* note 95) or Luban, O'Sullivan, Stewart, and Jain's query ("does torture work?," see *supra* note 4) will vary with these factors.

107. *See* Luban & Newell, *supra* note 1; *see also* LUBAN, *supra* note 4.

108. Wesley Clark, *John Bolton is Wrong: The U.S. has every reason to cooperate with the International Criminal Court,* WASH. POST (Sept 21, 2018), https://www.washingtonpost.com/news/global-opinions/wp/2018/09/21/john-bolton-is-dead-wrong-the-u-s-has-every-reason-to-cooperate-with-the-international-criminal-court/ [https://perma.cc/9DUA-H5HA]; John Bolton, *Speech Two: Reject and Oppose the International Criminal Court, in* TOWARD AN INTERNATIONAL CRIMINAL COURT? THREE OPTIONS PRESENTED AS PRESIDENTIAL SPEECHES 37 (1999), in VAN SCHAACK & SLYE, *supra* note 4, at 165–66. Thanks to Professor Stromseth for recommending this (personal communication, 2022).

II. SHARING TRUTHS, SHARING RESPONSIBILITIES

In this Part, I submit that the ICC and truth commissions might well serve as a norm-laden frame to meta-ethically reorient the "legal thought and talk" (Plunkett and Sundell's phrase) about torture and truth in the United States. I first outline why the ICC serves as a promisingly creative meta-normative framework, and then I exposit the ways in which truth commissions depart from core principles and preconceptions of truth and responsibility in American criminal and evidence law.[109] To be clear, this is *not* a doctrinal survey or a legal exegesis of criminal law and procedure, either of American or of international and transnational penal codes.[110] Rather, I am meta-ethically inquiring into the "philosophical foundations" underpropping legal concepts.[111]

A. ICC AS META-NORMATIVE FRAMEWORK?

Why approach the ICC as partially a fecund source of norms when U.S. administrations have maintained a wary and "ambivalent" relationship thereto?[112] First, Beth Simmons and Kathryn Sikkink have demonstrated through empirical evidence that international human rights norms are politically operationalized and, at times, legally adopted and incorporated, for example in local human rights commissions and state governments in the United States.[113] For instance, the D.C. Human Rights Commission allows for the validation and legitimization of human rights not explicitly mandated by the Constitution.[114]

Second, as legal scholars affirm, international law's basis—in "international agreements," "customary international law," "general [legal] principles," "judicial decisions and teachings of the most highly qualified publicists," and

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109. As will become clear below, here I am in part adopting an insight from Margaret DeGuzman on the ICC *qua* "norm"-generator. *See infra* note 131.

110. One would have to consult "Article 38 of the Statute of the International Court of Justice." VAN SCHAACK & SLYE, *supra* note 4, at 81; LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 43; Paul Roberts, *Groundwork for a Jurisprudence of Criminal Procedure, in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 379, 394–97 (R.A. Duff & Stuart Green eds., 2011). One would also have to consider federal constitutional matters. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 315–16.

111. Markus D. Dubber, *Foundations of State Punishment in Modern Liberal Democracies: Toward a Genealogy of American Criminal Law, in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, 83 (R.A. Duff & Stuart Green eds., 2011); Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice,* 15 HARV. HUM. RTS. J. 39 (2002), *in* VAN SCHAACK & SLYE, *supra* note 11, at 17–21 (surveying "foundational philosophies of criminal law"); LARRY MAY & ZACHARY HOSKINS, EDS., INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY (2014).

112. *See In Our Hands*, *supra* note 60 for discussion.

113. *Id.* (citing and discussing the arguments of BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); Cosette D. Creamer & Beth A. Simmons, *The Dynamic Impact of Periodic Review on Women's Rights*, 81 L. & CONTEMP. PROBS. 31, 31 (2018); KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY 56 (2017) and Martha Nussbaum's conception of human rights law as motivating political norms).

114. *DC Commission on Human Rights*, DC OFF. HUM RTS., https://ohr.dc.gov/commission [https://perma.cc/AH3Z-2E33] (last visited Sept. 22, 2023).

"peremptory norms" of *jus cogens*[115]—elaborates a broad array of ethical and 'best practice' norms of which domestic courts and political coalitions may avail themselves as normative preconditions of livability and humanity among Nations.[116] For Luban, O'Sullivan, Stewart, & Jain, the United States recognizes *jus cogens* norms in more than a nominal way—norms the transgression of which gainsay the foundations of "international law"[117]—since "U.S. courts have sometimes described torture as a *jus cogens* violation; and of course Congress *has* implemented CAT by making torture a crime and creating a civil remedy."[118] "Torture" is thus one such "*jus cogens* crime," namely "a bedrock violation of international law," to which the United States adheres.[119] As Luban pointedly notes, "even if [the] USA doesn't recognize what the CIA did as torture under [American] law, it is still torture under international law."[120] The United States thus remains beholden to "international legal obligation[s]," with the effect that "U.S. law may place the [U.S.] in violation of international law" to the extent that the United States abides by its own domestic laws.[121]

This is an insight partially derived from Luban, O'Sullivan, Stewart, & Jain, but also from Martha Nussbaum: even though some international norms might not command or harbor the force of law in the United States (for a variety of reasons), this does not thereby abrogate the United States' "international legal obligation" to them—they are the norms to which the United States is held up and to which it is held to account.[122] As Nussbaum puts it, even if international human rights laws and treaties might not be legally enforceable in the United States, they "help people to network across national boundaries and to develop a sense of common purpose, a common language, a common set of demands, and a sense that progress is being made."[123] A more specific example still, again from Luban, O'Sullivan, Stewart, & Jain, concerns the Convention Against Torture: the authors note that while "Articles 1 through 16 of CAT are non-self-executing," in

115. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 46–51.

116. *Id*. at 44–46.

117. *Id*. at 52–53.

118. Professor Luban (personal communication, 2023). *See* also LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 56, 68–69; Deborah M. Weissman, *Understanding Accountability for Torture: The Domestic Enforcement of International Human Rights Treaties,* UNC SCHOOL OF LAW, HUMAN RIGHTS POLICY LAB 92, 92 (2016–2017).

119. *See* LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 53; *see also* Regina v. Bow Street Metropolitan Stipendiary Magistrate (ex parte Pinochet Ugarte) (2000) 1 A.C. 147, 300. *But see* Luban & Newell, *supra* note 1 (suggesting that "if we read the convoluted U.S. torture statute correctly, the CIA's program is torture even under U.S. law"). Professor Luban (personal communication, 2023).

120. Professor Luban (personal communication, 2023). On questions of international treaty self-execution, see LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 69.

121. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 69.

122. *See* Martha C. Nussbaum, *Women's Progress and Women's Human Rights*, 38 HUM. RTS. Q. 589, 594 (2016).

123. *Id*. at 589.

the United States, "limit[ing] the domestic effect of CAT," the United States still remains beholden to the "international law," norms, and requirements.[124]

Third, it makes sense to draw from the ICC as more than a simple legal outfit or prosecutorial apparatus, as doing justice to the victims of American torture arguably cannot proceed through the legal system alone.[125] This is because, at times, the wrongs committed were themselves deliberately shaded under the cover of law or national security secrets: as Luban's analyses demonstrate, the Bush-Cheney regime was an amalgamated "war-law" apparatus that itself often breached the law in trying to extend its executive power under the cover of law.[126] This included (what Luban terms) the legal "limbo of rightlessness" for enemy combatant detainees in the first phases of the "war on terror,"[127] or the fact that in the so-called "war on terror" pursued an irreferential adversary: "[t]he enemy, terrorism, is not a territorial state or nation or government," but an indefinite, moving target.[128] Luban helpfully specifies this conceptual and ethical problem as that of "organizational evil," where "organizations . . . can subdivide moral responsibility out of existence by parceling out tasks and knowledge so that no individual . . . owns the action."[129] Hence, it would make little sense to propound a legal framework against a regime whose precise intent was to circumvent and subvert the law under the very cover of the law and whose agents, so far as we can specify them, are structurally dispersed and bestrewn rather than centralized. Luban, once again, states the matter eloquently: "the fight against torture is not merely a legal fight. It never was, and it never should be."[130]

Fourth, legal scholar Margaret M. DeGuzman correctly observes that the ICC's role is ill-judged by a prosecutorial metric ("deterrence and retribution") or even by a "restorative justice" metric ("rebuilding relationships"), insofar as it embodies a complex apparatus "expressing global norms."[131] However, I hesitate to reduce the ICC to a purely "expressivist" entity, as DeGuzman's analysis implies. I would concur with Luban, O'Sullivan, Stewart, & Jain instead, that the ICC does not just engender norms but also actuates or enforces them through the (i) "incapacitation . . . [of] political criminals" through "stigmatiz[ation] and marginaliz[ation],"; (ii) "capacity-building" and "norm-reinforcement" for states in

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124. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1117–18.

125. *See generally* Eisikovits, *supra* note 24 (discussing the limits of "prosecution" for transitional justice); HAYNER, *supra* note 1 (discussing the tensions between prosecution and transitional justice).

126. LUBAN, *supra* note 4, at 9–10, 27–40.

127. *Id*. at 4. Butler also refers to this as a "limbo". *See* Butler, *supra* note 4.

128. LUBAN, *supra* note 4, at 17.

129. LUBAN, *supra* note 76, at 7.

130. LUBAN, *supra* note 4, at 306.

131. Margaret M. DeGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court,* 33 MICH. J. INT'L L. 265, 265–70 (2012), *excerpted in* LUBAN, O'SULLIVAN, STEWART, & JAIN, *supra* note 4, at 733. *But see* VAN SCHAACK & SLYE, *supra* note 11, at 26 (quoting from Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?,* 84 WASH. U. L. REV. 777, 781 (2006)).

partnering with variable domestic courts; (iii) offering fora to victims for "truth-telling"; (iv) fact-finding and accounting of atrocities; and (v) inspiring initiatives for "restorative justice" "through testimony, accountability, and perhaps reparations."[132] Luban, O'Sullivan, Stewart, & Jain reinforce the point that we miss out on the ICC's integral norm-catalyzing role when we confine it to one function.[133] It is within this framework as norm-inaugurator, but not just that alone, that we may challenge and innovate accustomed apperceptions of responsibility and truth in American law.

Finally, I think we can draw inspiration from the ICC and its partnering with truth commissions, along with international law more generally, to conceptualize a "right to truth."[134] I will have more to say about this, *infra* subpart II.2.C.

Again, I will not be suggesting ways in which we might institute a "truth commission" in the United States; nor plunge into scholarly debates about what "justifies" (or not) truth commissions in general.[135] I am instead interested in what we can derive meta-ethically about the truth-commission's framework, scope, and methods. These include, as the International Center for Transitional Justice notes, "complementarity" with judicial and "criminal" systems; a "focus on gross violations of human rights"; "investigation"; "evidence"-gathering; and a "victim-centered approach."[136]

The next two subparts further the project of elucidating and elaborating Luban's and others' work as well as utilizing the ICC as a meta-normative framework, but this time with a trained focus on remodeling *responsibility* and *truth* (in certain contexts) beyond their circumscribed and compressed American legal meanings in criminal and evidence law. In subpart III.B, I address how criminal law's conception of responsibility, once expanded, transports us toward a robust conception of accountability for "structural injustice," per Young, Zheng, and McKeown. Then in subpart III.C, I turn to truth and trust. In conclusion, I finalize this account with the Lubanian suggestion that *dignity* ought to also contribute, alongside a notion of counter-narrative as proposed by Hilde Lindemann.

B. FROM RESPONSIBILITY TO ACCOUNTABILITY

1. CRIMINAL LAW ON RESPONSIBILITY

First, let us consider conventional legalist conceptions of responsibility and culpability in criminal law before addressing the ways in which such accounts

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132. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 733; *see* OTP, *The Interests of Justice* (Sept. 2007), *in id*. at 743–44.

133. *Id*. at 791–92.

134. INT'L CTR. FOR TRANSITIONAL JUST., TRUTH SEEKING: ELEMENTS OF CREATING AN EFFECTIVE TRUTH COMMISSION 1–4 (2013).

135. *Id*. (regarding debates over "justifying truth commissions"); *see* Eisikovits, *supra* note 24 (surveying theories of "deliberative democracy," "recognition," "more truth," and "forgiveness"); *see also* HAYNER, *supra* note 1, at xvi, 19–25.

136. INT'L CTR. FOR TRANSITIONAL JUST., TRUTH SEEKING: ELEMENTS OF CREATING AN EFFECTIVE TRUTH COMMISSION 10–11 (2013).

might be supplemented and renovated. Luban, O'Sullivan, Stewart, & Jain draw from Hart's classic essay, *The Aims of Criminal Law* (1958), to frame what an expressivist view of criminal law would resemble: a given "community's" legally codified "moral" view about an action,[137] emanating from a "guilty mind," evaluatively regarded as "bad" either in itself or "because prohibited,"[138] and, if committed, demanding "punishment" or "restorative justice" of some kind.[139] Others describe paradigmatic criminal law as the "*ex ante*" or "*ex post*" "criminalization" of certain kinds of "acts" and their exemplars relative to "powers and permissions," viz. what you can and cannot do.[140]

One of the key concepts in criminal law is *legal responsibility* (rather than *political responsibility* or *accountability*) as John Hasnas, Iris Marion Young, and others point out.[141] For example, R.A. Duff maintains that criminal law "calls to account;" it demands a "response" from "public wrongdoers" on behalf of all "citizens" of the relevant community:[142] "*A* is called to answer by and to *B*, who claims the right thus to hold *A* to account."[143] This makes responsibility a matter of being responsive to or respond-able to the address of law and "liability" to its infringement and "culpability" against its edict.[144]

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137. Some contemporary legal scholars of criminal law propose "insufficient concern" for the standard of "culpability." *See* Larry Alexander & Kimberly Kessler Ferzan, *Beyond the Special Part, in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, 253–52 (R. A Duff & Stuart Green eds., 2011).

138. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 7–8.

139. *Id.* at 9–11. *See also* Christopher Heath Wellman, *Piercing Sovereignty: A Rationale for International Jurisdiction over Crimes that do not Cross International Borders*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 462, 467 (R.A. Duff & Stuart Green eds., 2011).

140. Edwards, *supra* note 33 ("[C]riminalizing ϕing does much more than make ϕing a legal wrong. It also makes it the case that ϕing triggers a set of legal rights, duties, powers, and permissions."); *see also* MODEL PENAL CODE §2.02 (AM. L. INST. 1962), *in* LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 817 (defining *culpability* relative to *mens rea*); U.N. General Assembly, The Rome Statute of the International Criminal Court art. 30 (July 17, 1998), https://www.refworld.org/docid/3ae6b3a84.html [https://perma.cc/LE6X-GRUU] (defining *mens rea,* as Luban, O'Sullivan, Stewart, and Jain note, as "knowledge *and* intent"); LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 820–21; *see also* VAN SCHAACK & SLYE, *supra* note 11, at 210–11.

141. *Cf.* John Hasnas, *Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible,* 54 HASTINGS L. J. 1, 49–51 (2002), *cited in* LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 15; Alice Ristroph, *Responsibility for the Criminal Law, in Foundations of State Punishment in Modern Liberal Democracies: Toward a Genealogy of American Criminal Law, in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, 107, 122, 122 n.64 (R.A Duff & Stuart Green eds., 2011) (describing "incarceration" as "bureaucratic violence"); *see also* ALLEN, *supra* note 25; Robin Zheng, *Attributability, Accountability, and Implicit Bias, in* 62 IMPLICIT BIAS & PHILOSOPHY 63–64 (Jennifer Saul & Michael Brownstein eds., 2016); Iris Marion Young, *Responsibility and Global Labor Justice,* 12 J. POL. PHIL. 365, 388 (2004); Isabelle Aubert, Marie Garrau & Sophie Guérard de Latour, *Iris Marion Young and Responsibility*, 20 CRIT HORIZONS: J. PHIL. & SOC. THEORY 103, 105 (2019). As I specify in discussing Young, Zheng, and McKeown, I will utilize "accountability" following Zheng, rather than responsibility, *infra*.

142. R.A. Duff, *Responsibility, Citizenship, and Criminal Law, in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, 125, 148 (R.A. Duff & Stuart Green eds., 2011).

143. *Id.* at 131; *see also* Edwards, *supra* note 33 (calling Duff's the "answerability account").

144. *See* Edwards, *supra* note 33. It's beyond the scope of this paper to address the philosophy of action and mind, but it would be important for a full-fledged account to qualify Edwards and Moore's accounts. *Cf.* PETER A. MORTON & MYRTO MYLOPOULOS, PHILOSOPHY OF MIND: HISTORICAL AND CONTEMPORARY PERSPECTIVES

Notice all of the legalist presumptions baked into this conception: you must be the right kind of "responseable"[145] person who commits the act (*cf.* Duff, someone who can be responsive to the law); they are causally (factually and proximally) responsible for the act committed; and they have a certain kind of provably incriminating mental state.[146] As Butler puts it in a more metaphysical register, "responsibility requires responsiveness . . . not merely [as] a subjective state, but [as] a way of responding to what is before us with the resources that are available to us."[147]

But behold the difficulties of employing this kind of framework for "atrocity" crimes.[148] As Luban, O'Sullivan, Stewart, & Jain note, it is difficult to target multi-stranded, diffuse organizational networks, from planning to execution when it comes to genocide and other collectivized atrocity crimes.[149] They query: who is primarily responsible? The person who foreplanned the order, the person who officialized the order, or the person who exercised and effectuated it?[150] The Rome Statute's Article 25(3)(i)–(iv) proffers a wide-angled perspective, quantifying over both "direct" and "indirect" "perpetrat[ors]" and "co-perpetrat[ors]."[151] Here there is a difference between U.S. "conspiracy" laws—18 U.S.C. § 371[152]—and the distinctions found in the International Criminal Tribunal for the Former Yugoslavia's (ICTY): "*A plurality of persons*" acting in concert, "*a common plan, design or purpose,*" and "[*p*]*articipation of the accused in the common*

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9 (3d ed. 2020); David Shoemaker, *Personal Identity and Ethics*, STAN. ENCYCLOPEDIA PHIL. (2021), https://plato.stanford.edu/archives/fall2021/entries/identity-ethics/ [https://perma.cc/A8VU-5YRG]; Sarah Buss & Andrea Westlund, *Personal Autonomy*, STAN. ENCYCLOPEDIA PHIL. (2018), https://plato.stanford.edu/archives/spr2018/entries/personal-autonomy/ [https://perma.cc/5SRF-3PTE]. On *liability* and *culpability*, see Michael S. Moore, *Intention as a Marker of Moral Culpability and Legal Punishability, in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, 179, 183 (R.A. Duff & Stuart Green eds., 2011).

145. This is largely a point made in Butler's theories. *See* BUTLER, *supra* note 27, at 35–37.

146. Moore, *supra* note 144. I leave aside potential complications and refinements once we include "inchoate offences." *See* Andrew Ashworth & Lucia Zedner, *Just Prevention: Preventive Rationales and the Limits of the Criminal Law, in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 279, 283–93 (R.A. Duff & Stuart Green eds., 2011).

147. BUTLER, *supra* note 50, at 50. *See also* VAN SCHAACK & SLYE, *supra* note 11, at 206–07; LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 16–17; Edwards, *supra* note 33.

148. LUBAN, O'SULLIVAN, STEWART, & JAIN, *supra* note 4, at 23.

149. *Id.* at 808; *see also* MAEVE MCKEOWN, WITH POWER COMES RESPONSIBILITY (forthcoming), as described in Maeve McKeown, *Structural Injustice,* 16 PHIL. COMPASS 4–5 (2021), which typologizes a triad of *structural injustices*, among them "[Youngian] structural injustice" ("injustices where there is no identifiable perpetrator, and the injustice is the sum of multiple agents' nonblameworthy actions that can only be changed through collective action"); "avoidable structural injustices" ("there are powerful agents with the capacity to change unjust structures, but they fail to do so"); and "deliberate structural injustice," ("agents are deliberately perpetuating unjust background conditions for their own gain and they have power to change them").

150. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 809 (discussing "command responsibility"). *See also* CARD, *supra* note 70, at 18.

151. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 808–09. Professor Luban reminds me (personal communication, 2023), that it remains "open" whether Article 25 has actually done away with "[joint criminal enterprise] liability."

152. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 826.

design": while in American law, conspiracy "is a self-standing crime, distinct from the object offense," for the ICTY a "joint criminal enterprise" constitutes a "mode of liability" for the "completed object offense."[153] Or consider, as Beth Van Schaack and Ronald Slye emphasize, that the ICC requires not only *mens rea* ("intent") but also *chapeau*, "knowledge of the existence of a widespread or systematic attack," which increases the scope and centralizes the structural or diffuse nature of the crime in comparison to the individualizing aspect of the American *mens rea* requirement.[154]

The point is not that the ICC should adopt American conspiracy law, nor that American conspiracy law ought to be doctrinally modified in light of the ICC.[155] Rather, the claim is that we could potentially take the ICC and ICTY to contextually enlarge the legalist compass of what it means to consider collective and diffuse enterprises and actors behind atrocity crimes already committed in taking joint criminal enterprises as complex modalities. This induces the thought, along Lubanian lines, that some of the postulates of American criminal law ought to be unsettled as the primary framework of reference relative to context. Borrowing from Card, we can say that the ICC and ICTY recognize a granular, but significant difference: just because a group of agents may be "equally responsible and thereby equally *liable* to blame," does not mean that each and every individual is "liable to equal *degrees* of blame."[156] Perhaps, furthermore, the ICC and truth commissions, taken as fruitful norm-generators, can help to refashion conventional conceptions of responsibility and truth when it comes to transitional justice in a more fine-grained fashion depending on the context at issue. In any event, that will be the claim and analytic strategy in the next part.

2. YOUNG'S NOTION OF POLITICAL RESPONSIBILITY

One of the innovations of the ICC was, in collaborating complementarily with various states, to expand what "justice" and "responsibility" mean and entail.[157] Although in "South Africa, East Timor, and Sierra Leone," the ICC was not yet in existence to complement and facilitate truth-commissions in addition to prosecution, we can make a broad point that fruitful alliances can be configured between prosecutorial and non-prosecutorial bodies.[158] Scholars have detailed the advantages and disadvantages between prosecution and truth-commission "coordination" or non-"coordination," as well as the problems and promises of

153. *Id*. at 833–35. Thanks to Professor Luban for the further distinction (personal communication, 2023) in the second quotation.

154. VAN SCHAACK & SLYE, *supra* note 11, at 441.

155. *See* LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 827–28.

156. CARD, *supra* note 70, at 23.

157. Prosecutor v. Lubanga, ICC-01/04-01/06-3129, Judgment on Appeals (Mar. 3, 2015), *in* LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4 at 800.

158. BISSET, *supra* note 45, at 76. Thanks to Professor Stromseth for this point and correcting my understanding of the timelines here (personal communication, 2022).

utilizing "amnesties" to get at truth.[159] However, my purpose in drawing from "truth-commission" "tools" abstracts from the detailed and textured particularities of these cases in order to ask more broad meta-ethical questions about our normative framework. Hence, I will not focus on case studies that other scholars have fulsomely analyzed, but instead seek to glean broader meta-philosophical and meta-ethical insights therefrom.[160]

Consider, for example, the important document proposed by the Office of the United Nations High Commissioner for Human Rights: "Rule-of-Law Tools for Post-Conflict States: Truth Commissions."[161] The "tools" in the document emphasize the extent to which every particular implementation of a truth commission will be "unique" and "country-specific," co-varying with geopolitical and local dynamics.[162] However, what remains invariant in the multiply realizable tool-set, is the adoption of "a comprehensive transitional justice perspective," and a requirement that the truth-commission be able to productively interrelate "prosecutions," "reparations," "vetting," and "reforms."[163] And here, the ICC and truth-commissions allow us to reconstruct and diversify our normative framework.

For example, a 2015 Appeals Chamber Reparations Order in the wake of the conviction of Thomas Lubanga Dylio, enlarges the notion of harm. First, harm does not have to be "direct" but might also be diffuse and intersectional: it "does not necessarily need to have been direct, but it must have been personal to the victim, . . . [and] may be material, physical and psychological," and it ought to include considerations of "dignity" and "gender-inclusiv[ity]."[164] Second, it greenlights multiple "modalities of reparations" such as "restitution," "compensation," and "rehabilitation."[165] Third, it lowers the standard of proof and causal bar for showing harm, allowing for both "direct" and "indirect" victimized people to repair.[166]

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159. *See* BISSET, *supra* note 45, at 76; *see also* James L. Gibson, *The Contributions of Truth to Reconciliation: Lessons from South Africa,* 50 J. CONFLICT RES. 409, 417 (2006); LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1230 (describing the "common characteristics" of truth commissions).

160. HAYNER, *supra* note 1; BISSET, *supra* note 45.

161. Off. U.N. High Comm'r for Hum. Rts., *Rule-of-Law Tools for Post-Conflict States: Truth Commissions* (2006), https://www.ohchr.org/sites/default/files/Documents/Publications/RuleoflawTruthCommissionsen.pdf [https://perma.cc/C2FN-VLJW].

162. *Id*. at 5–7.

163. *Id*. at 5, 27–31. On multiple realizability, see generally John Bickle, *Multiple Realizability*, STAN. ENCYCLOPEDIA PHIL. (2020), https://plato.stanford.edu/archives/sum2020/entries/multiple-realizability/ [https://perma.cc/EU2D-BPR8].

164. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 801–04; *see also Questions and Answers on the Reparation Order in the Ntaganda case*, INT'L CRIM. CT. (Mar. 8, 2021), https://www.icc-cpi.int/sites/default/files/itemsDocuments/210308-ntaganda-reparations-order-questions-and-answers-eng.pdf [https://perma.cc/2GYT-BUWW].

165. INT'L CRIM. CT., *supra* note 164.

166. *Id*. *See also* Eisikovits, *supra* note 24 (noting that "since [truth] commissions are not subject to the rules of evidence, they are able to collect more information, expose a more comprehensive picture of past injustices and to include a greater emphasis on the role of institutional and commercial actors indirectly involved in supporting injustices").

Here, I want to evade discussions of "excuses"—owning up to a wrong but contesting one's "responsibility" for it—and "justification"—accepting "responsibility" but contesting that one committed a wrong—insofar as there remains philosophical controversy over when and whether "an excuse can explain one's agency, rather than explaining it away."[167] While it is beyond the scope of this paper to extensively address reparations in the United States concerning the atrocity crimes of slavery, I will take inspiration from Olúfémi O. Táíwo's work on reparations. For Táíwo, reparations consist of "a worldmaking project" confronting a *structural injustice* like (what he terms) the "Global Racial Empire."[168] I will return to theorizations about reparations toward the end of this part.

I submit that we can "rethink responsibility"[169] into accountability from Young and from the International Center on Transitional Justice.[170] I am certainly not the first to appropriate and apply Young's work on political responsibility: in particular, Robin Zheng has extensively theorized the ways that Young's model "provid [es] a conception of responsibility as *accountability*," and Maeve McKeown and Sally Haslanger have similarly expanded on Young's notion of "structural injustice."[171] In posthumously published work on responsibility, Young contends that

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167. CARD, *supra* note 70, at 21; *see also* Pickard, *supra* note 54 (arguing that "responsibility" and "accountability" are different than "blame").

168. In particular, see OLÚFÉMI O. TÁIWO, RECONSIDERING REPARATIONS 20–21, 98 (2022) (describing reparations as the effort "to learn how to distribute capabilities justly in order to make a new world"); *see also* Wolfendale, *supra* note 67, at 240 (analyzing "case studies of torture during colonization, slavery, and in the war in the Philippines").

169. KELLY, *supra* note 42.

170. *See generally In Search of the Truth: Creating an Effective Truth Commission,* INT'L CENT. FOR TRANSITIONAL JUST., https://www.ictj.org/in-search-of-truth/ [https://perma.cc/8A6D-GE6K] (last visited Sept. 17, 2023).

171. Zheng, *What Kind of Responsibility Do We Have for Fighting Injustice? A Moral-Theoretic Perspective on the Social Connections Model,* 20 CRITICAL HORIZONS, 109, 110 (2019); *see also* Zheng, *Bias, Structure, and Injustice: A Reply to Haslanger,* 4 FEMINIST PHIL Q. art. 4 (2018); Maeve McKeown, *Backward-looking Reparations and Structural Injustice,* 20 CONTEMP. POL. THEORY 771, 771 (2021); Maeve McKeown, *Iris Marion Young's "Social Connection Model of Responsibility": Clarifying the Meaning of Connection,* 49 J. SOC. PHIL. 484, 484 (2018) (suggesting that "connection" means "*reproduc*[*ing*] *the background conditions in which* [*agents*] *act*" rather than "existential, dependent and causal" meanings of connection); McKeown, *supra* note 149. I draw inspiration throughout this part from Zheng, who has labelled Youngian's model as "accountability," a convention I shall follow, even if I do not fully adopt Zheng's own rendition of accountability. *See* Robin Zheng, *What is My Role in Changing the System? A New Model of Responsibility for Structural Injustice*, 21 ETHICAL THEORY MORAL PRAC. 869, 870 (2018) (arguing that "we are each responsible for structural injustice through and in virtue of our social roles . . . because *roles are the site where structure meets agency*"). I direct interested readers to Zheng's and McKeown's various papers building on Young; the following is a mere sketch of Young's work in light of Zheng and McKeown's insights. That is, my summary of Young is inflected by Zheng and McKeown's writings although I do not fully endorse either's further extrapolations. McKeown, for example, finds Zheng's model of accountability to be too individualistic, but I cannot enter that debate here. *See* McKeown, *supra* note 149, at 9 (characterizing Zheng's theory and McKeown's critique thereof thus: "On [Zheng's] role-ideal model of responsibility, the individual should push the boundaries of each of their social roles to promote alleviation of structural injustice. This has a built-in *accountability* mechanism [. . .]—if the individual does not do these things, there will be sanctions [. . .] But McKeown argues that Zheng's role-ideal model of responsibility strays too far into the arena of privatized virtue ethics to operate as a likely opponent to Young's political responsibility.") (internal citations omitted). Sally Haslanger has

we need to untether responsibility from "blame, fault, or liability" when we think of holding others to account.[172] Young wants to pinpoint what "structural injustice" is and what renders it "wrong": she holds that social structures and diffuse norms can "position" one at a disadvantage where it is impossible to target one sole "particular, unjust law or policy," or "bad luck."[173] Rather, it flows from "the combination of actions and interactions of a large number of public and private individual and institutional actors, with different amounts of control over their circumstances and with varying ranges of options available to them."[174] Young prefers to title these as "*processes* rather than structures" that are at once "objective social facts" which both "enable[e]" and "constrai[n]" social actors; "a macro social space in which positions are related to one another"; as constituted "in actions" by the social actors and forces; and a set of "unintended consequences of the combination of the actions of many people."[175]

For Zheng and McKeown, what Young is suggesting, and what I find especially useful in the atrocity context, is that "retrospective" responsibility—ascribing criminal liability to a singularly locatable, monocausal perpetrator in terms of the perpetrator's agency—cannot properly handle "structural injustice" (which may be appropriate for other contexts).[176] As noted earlier, both U.S. conspiracy

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devised a slightly different account whereby interfacing "structures" would compose larger "systems" ("a set of things working together in a way that forms a whole"): "systems [are] historically particular, concrete, dynamic processes; structures are the networks of relations that hold between the parts." Sally Haslanger, *Systemic and Structural Injustice: Is There a Difference?,* 98 PHILOSOPHY 1, 3 (2023). Structures are defined as "networks of social relations that are constituted through practices, and practices are learned patterns of behavior that draw on social meanings to enable us to coordinate around the production, management, disposal of things of (positive or negative) value." *Id.* at 14. Haslanger goes on to characterize "structural injustice" as taking place "when the practices that create the structure . . . distort our understanding of what is valuable, or . . . organize us in was that are unjust/harmful/wrong, e.g., by distributing resources unjustly or violating the principles of democratic equality." *Id.* at 22. These structural injustices can be features constituting "systemic injustice," which "occurs when an unjust structure is maintained in a complex system that its [sic] self-reinforcing, adaptive, and creates subjects whose identity is shaped to conform to it." *Id.* Justice for Haslanger is a general category-type of which a token is "oppression." *Id.* at 2 n.2. Unlike Haslanger, I do not adopt a particular metaphysics (hers is "Aristotelian hylomorphic realism"). *See id.* at 5 n.8. Haslanger's account is also briefly cited in Matthew Andler, *What is Masculinity?* SYNTHESE (forthcoming).

172. YOUNG, *supra* note 54, at 40.

173. *Id.* at 45–47. Young also holds that social-ontologically speaking agents' "positions" are bound up with "power, privilege, interest, and collective ability." *Id.* at 147; *see also* McKeown, *supra* note 149; Zheng, *supra* note 171, at 873 (describing Zheng's definition of social roles which might also comport with Young's understanding of position: "A social role *R* is a set of expectations *E* —predictive and normative—that apply to an individual *P* in virtue of a set of relationships *P* has with others (such that anyone standing in the same type of relationships as *P* occupies the same *R*), and where *E* is mutually maintained by *P* and others through a variety of sanctions.")

174. YOUNG, *supra* note 54, at 52.

175. *Id.* at 53. McKeown quotes Young's features of social structural injustice as "*objectively constraining,*" shot through with "*social positions*," reenacted "*through the actions of individuals*," and carrying "*unintended consequences*." *See* McKeown, *supra* note 149, at 3; *see also* Haslanger, *supra* note 171, at 6–8.

176. YOUNG, *supra* note 54, at 96; Zheng, *supra* note 171, at 872 (defining *attributability* as "what actions count as genuine exercises of agency" in contrast to *accountability* as "[w]hen a person fails to carry out a duty, [and] the burdens of redress must be distributed across the community"); Zheng, *supra* note 171, at 111, 114,

law and the ICC Article 30 struggle to identify malfeasance when a plurality of actors, structures, and acts are at issue. Young encourages us to "rethink"[177] *political responsibility*—which I will rename, following Zheng, *accountability*—[178] as a way of reckoning with the past by prospectively addressing the "*now*" and the "future," rather than exclusively be tied down to *only* retrospection and retroactive punishments.[179] Young is not asseverating that "liability" and prosecution for "guilt" need be abjured. However, as Zheng and McKeown point out, Young is suggesting we aggrandize our notion of what *accountability* and justice consist of, especially when accountability exceeds the criminal and prosecutorial frame. In Young's terminology, we should adopt a "social connections model" of accountability rather than one of "legal" "liability" when it comes to addressing structural injustice.[180]

As Zheng and McKeown note, and as Young puts it, Youngian accountability does not reduce to just "finding [someone] at fault or liable for a past wrong"; it also implicates the notion of someone "carrying out activities in a morally appropriate way and seeing to it that certain outcomes obtain."[181] This is because, in the "social connection" view, we partake in structures that generate injustices for others that we cannot see. We may not be solely responsible or liable but we must still hold ourselves *accountable*: "[Accountability] in relation to injustice thus derives not from living under a common constitution, but rather from participating in the diverse institutional processes that produce structural injustice."[182] This displaces our focus from solely *one* malefactor, rule, or law, to larger "background conditions," with a look to what can be done, not only for the immediate

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115–16 (contrasting the liability model as *"attributability* . . . determining what makes a person's actions count as exercises of her own agency" whose scope is "moral wrongdoing" and whose "grounds" are "moral reasons" that are evaluated as to whether they are "justifiable" with the *accountability* model as "the problem of organizing society," whose "scope" is social "roles" and "social location," whose "grounds" are being "members of a moral community" that are evaluated insofar as they "rectif[y] some harm"); McKeown, *supra* note 149 *passim*. While Zheng opts for a model of accountability based on one's "social role," McKeown contends that we ought to think of accountability in non-individualized terms. *Id*.

177. *See* KELLY, *supra* note 42 (suggesting that "retributive" justice, "responsibility," and "blame" all need to be rethought in more "humane" terms).

178. Zheng, *supra* note 171, at 116 (distinguishing *attributability* as "appraising agents" from *accountability* as "apportioning burdens").

179. *See* YOUNG, *supra* note 54, at 92, 95.

180. Id. at 96–97. *See* Zheng, supra note 171 (elaborating on the "social connections model" versus a liability model) and passim. As McKeown points out, Zheng responds to the critique that we cannot properly ascribe blame under Young's view of structural injustice with a notion of accountability *qua* social role. However, McKeown prefers a non-individualistic model. *See* McKeown, supra note 149 (summarizing Zheng's view thus: "When considering responsibility as accountability, different considerations are in play; in particular, whether or not an agent can be assigned the burdens of remediating a situation regardless of whether they are morally blameworthy for it").

181. YOUNG, *supra* note 54, at 104. *See also* Zheng, *supra* note 171 and *passim*. As I indicated in note 173, *supra*, Zheng cashes this out in terms of "social roles" whereas McKeown worries that this is too individualistic, going astray, she argues, of the *interconnectedness model* Young contemplates.

182. YOUNG, *supra* note 54, at 105.

present, but also for the future, near and far.[183] This makes each and every one of us accountable—not simply as an undifferentiated amalgam—but as all having a "shared responsibility," or what we can term (following Zheng) shared *accountability*, that must be undertaken with and alongside others.[184]

Luban, O'Sullivan, Stewart, & Jain point out that truth commissions step in or fill in the gap when criminal prosecutions are not feasible, due to the structural extent of the atrocity.[185] The ICTJ describes how truth commissions are well poised to expansively address "legac[ies] of abuse" that extend intergenerationally.[186] Rather than focalizing and localizing *one* moment or "event," accountability takes the form of a participatory recounting and accounting over time.[187] This capacious comprehension of accountability in truth commissions tracks the complex diffusion of action and reticulated network of actors in atrocity crimes.[188] Such a framework would yield a robust kind of accountability.

Myriads of thinkers have already moved in this direction with regard to the atrocity crime of slavery, applying Young-like insights on accountability to considerations of reparations for the descendants of enslaved people in the United States. As Young would say, the movement for reparations calls for systemic change against "structural injustices" (e.g., racial capitalism, dispossession, exploitation, domination, imperialism, oppression, coercion, etc.).[189] Philosophers Robin Dembroff and Dee Payton observe that "racial inequality accumulates

183. Id. at 105, 108. Note again that I am not surveying all of the critiques and refinements of Young's theory, but merely offering a brief overview inflected by Zheng's and McKeown's respective (and discordant) elaborations of Young's work.

184. Id. at 109–11. Note that I am not addressing Young's diagnoses for why some shirk accountability (e.g., "reification," "denying connection," "the demands of immediacy," and "not my job"). Id. at 154–68. *See* also JUDITH BUTLER, UNDOING GENDER 189 (2004); JUDITH BUTLER, NOTES TOWARD A THEORY OF PERFORMATIVE ASSEMBLY (2015). I am also not entering debates here on how to cash out what it means mereologically or distributively for an individual to be responsible for collective injustices (are they individually or collectively responsible?). McKeown surveys the debates adeptly in McKeown, supra note 149. *See* Nussbaum, supra note 54; Zheng, supra note 171.

185. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1231 (suggesting that "in Rwanda, it is believed that approximately 100,000 individuals took part in the genocide . . . [such that] [n]o court system . . . could try that many cases in a reasonable period of time."); Jessica Wolfendale, *The Making of a Torturer, in* THE ROUTLEDGE INTERNATIONAL HANDBOOK OF PERPETRATOR STUDIES 84 (Suzanne C. Knittel & Zachary J. Goldberg eds., 2019) has demonstrated through analysis of "the post-9/11 US torture program" that "torture perpetration . . . goes beyond . . . [an] individual act" and instead constitutes "an institutionalized practice." Although Wolfendale does not cite to Young, her analysis would seem to comport with Young's critique of "individualized" accounts.

186. *In Search of Truth*, INT'L CTR. FOR TRANSITIONAL JUST., https://www.ictj.org/sites/default/files/subsites/in-search-of-truth/ [https://perma.cc/NJX9-SBJR] (last visited Sept. 23, 2023).

187. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1230.

188. Thanks to Victor J. Diaz Solano for suggesting this emphasis (personal communication, 2023).

189. *See generally* TÁIWO, *supra* note 168; Sherally Munshi, *Dispossession: An American Property Law Tradition,* 110 GEO. L.J. 1021, 1025 (2022); Bernard Boxill, Black Reparations, STAN. ENCYCLOPEDIA PHIL. (2016), https://plato.stanford.edu/archives/sum2016/entries/black-reparations/ [https://perma.cc/G8XW-J2ZR]; Rose Lenehan, Reparations, Racial Exploitation, and Racial Capitalism (2019) (PhD dissertation, Mass. Inst. Tech.); Ta-Nehisi Coates,The Case for Reparations, THE ATLANTIC (June 2014), http://www.theatlantic.com/magazine/archive/2014/06/the-case-forreparations/361631/ [https://perma.cc/8P3H-QQW7].

intergenerationally" given the legal, historical, healthcare, and socioeconomic structuring of the United States. [190] If such an analysis is apt, then limited, legalist, causal, and temporal accounts of individualistic responsibility will fail to account for the intergenerationally and geographically diffused nature of some atrocity crimes, like the history of slavery in the United States, for which restrictive legalist conceptions of liability or culpability will founder.[191]

C. TRUTH AND TRUST

What about truth? As with the preceding part, I shall not be canvassing doctrinal matters or case law in American or international evidentiary law.[192] Instead, I meta-philosophically focalize some of the fundamental legal and theoretical principles that found evidentiary law in our American system, both criminal and "non-criminal"/"quasi- criminal."[193]

Legal scholars are of (at least) two minds here. Some, like Luban, maintain that truth is not constitutive of the law: our American adversarial system is not obviously committed to "truth"-seeking as its ultimate purport or purpose—in a civil case, in fact, juries "can't learn directly whether the facts are really as the trier determined them because [they] don't ever find out [all] the facts" pertaining to "what *really* happened."[194] Our civil system, Luban contends, may be about "legal justice" in terms of "rewards and remedies," and our criminal system may concern the "protection" of the accused's "legal rights,"[195] but we ought not to infer from either that *truth* is the system's final goal: the adversarial system can often push lawyers to defend or prosecute by withholding some truths (think of the work-product doctrine or attorney-client privilege);[196] utilizing sophistries to

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190. Dee Payton & Robin Dembroff, *Why We Shouldn't Compare Transracial to Transgender Identity*, BOSTON REV. (2020); also cited in Eloy La Brada, *The Faces of Aging: Feminist Jurisprudence and Elder Law* (2022) (unpublished manuscript) (on file with the *Georgetown Journal of Legal Ethics*).

191. Payton & Dembroff, *supra* note 190. In this sense, I would support Maeve McKeown's claim that a Youngian model of "structural injustice" need not only be "forward looking" but might also need to be "backward looking" to render justice. *See* McKeown, *Backward-looking Reparations, supra* note 171 at 771–72. HAYNER, *supra* note 1, discusses "reparations" in the context of truth commissions.

192. It should be noted, again, that I am not concerned with constitutional admissibility evidence rules here but on the meta-philosophical implications of legal principles more broadly. *See* David Luban, *Torture Evidence and the Guantanamo Military Commissions*, JUST SECURITY (May 26, 2021), https://www.justsecurity.org/76640/torture-evidence-and-the-guantanamo-military-commissions/ [httpls://perma.cc/25L6-CGUR] (indicting both the ICC and military commissions for "traffick[ing] in torture evidence").

193. *Cf.* LUBAN, *supra* note 76, at 31. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 379–417 (discussing "rogatory letters," 28 U.S.C. § 1782, 28 U.S.C. § 1783, Fed. R. Crim. P. 17(e)(2) subpoenas, 28 U.S.C. § 1784 "sanctions for contempt," mutual legal assistance treaties, "constitutional constraints," and "digital evidence").

194. LUBAN, *supra* note 76, at 32; *see also* Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J. L. ETHICS & PUB. POL'Y 209, 212 (2006) (quoting this Lubanian insight in the context of arguing that "honesty" rather than "truth" orients lawyer professional ethics). Note that the split I have in mind here differs from other kinds of "two mind" issues, like the one highlighted by Bert I. Huang, *A Court of Two Minds,* 122 COLUM. L. REV. F. 90 (2022) (analyzing the Supreme Court's dual "appellate" and "curatorial" approach to taking and handling cases).

195. LUBAN, *supra* note 76, at 51, 40–41.

196. *Id*. at 231 (noticing the tension between "confidentiality" and "truth").

get confessions; painting pictures through persuasive arguments; or pressuring plaintiffs to drop "cases."[197] Remarkably, Luban asseverates, our adversarial system's push for lawyers to promote and protect their clients "trades on a confusion," namely that "legal rights [*qua*] *what a person is in fact legally entitled to*" is commensurate with "*what the law can be made to give*."[198] Just because a lawyer can "win" a case, Luban surmises, does not mean that justice has been served, the truth revealed, or rightful "entitlements" earned.[199]

Others, however, suggest that American evidence law *does* pivot on truth. As legal theorist Hock Lai Ho, reminds us, "many judges and legal scholars" believe "that a trial aims primarily at determining the truth of disputed propositions of facts, and that evidentiary rules regulating the trial ought, therefore to promote the realization of that end."[200] Ho furthermore notes that the Federal Rules of Evidence, such as Rule 102, at times centers truth as a part of its apparatus: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, **to the end of ascertaining the truth** and securing a just determination."[201]

"Truth"—whatever this metaphysically totals up to in the world or conceptually refers to in our discourse—counts as one of the most eminently controversial terms, concepts, norms, facts, predicates, "objects," "properties," etc. across all fields of philosophy and possibly within all fields of human inquiry more generally.[202] For our purposes, and as Ho points out, legal "truth" seems to operate somewhat differently from other varieties of truth. As he notes, truth is sometimes construed as the "aim" to which a trial conduces—that is, to get the facts straight, to determine the fact of the matter, to prove one's legal "theory" of the case, to render "justice." However, on other occasions, it instantiates a "norm." For example, legal "witnesses" are expected to "tell 'the truth, the whole truth, and nothing but the truth," and attorneys abide by rules of professional conduct

197. *Id*. at 36.

198. *Id*. at 43.

199. *Id*. at 42.

200. Hock Lai Ho, *Evidence and Truth, in* PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW, 11, 14 (Dahlman et al. eds., 2021). As Andrew Nisco (personal communication, 2023) points out, "There is a school of thought that many exceptions (i.e., dying declarations, party opponent, etc.) were created because the statements are more often than not particularly truthful." However, this does not mean that the situational declarations listed are themselves true, or that they even statistically tend to be true, only that there is a legally encoded assumption and convention that, all things being equal, it is presumably true that someone at death would propend to proffer a true statement.

201. Ho, *supra* note 200, at 11 n.3. Ho references but does not quote the rule, but I do. *See* FED. R. EVID. 102. (emphasis added).

202. The literature on theories of "truth" is immense and unstoppable, as any sampling from the online resource Stanford Encyclopedia of Philosophy attests.

that demand their veracity and candor.[203] Truthfulness is meant to assure "coherence" in burdens of proof, explanation, and evaluation of evidence.[204]

Doctrinal complexities of evidentiary law are not the focus here, rather, the difference between legal truth, as Ho defines it, and the way truth operates in a truth commission, which arguably cuts against hyper-circumscribed notions of legal truth.[205] To cite Ho again, legal truth is about ferreting out "the truth in order to do justice," in the sense that we must have the right facts upon which to predicate our legal judgments.[206] That is: "truth must be found to do justice."[207] But truth operates differently in truth-commissions where, by contrast, "justice must be done in search of truth."[208]

Essentially, as Dennis Patterson would say, a conventionally legalist notion of legal truth assumes that there are truth-making extra-legal facts for which legal propositions possess bivalent truth-values:[209] facts are the "truth-makers" for legal propositions.[210] This might well apply to many cases, but contrast this

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203. Ho, *supra* note 200, at 12–17, 16–17. *See also* Ho, *supra* note 200, at 19 n.47 ("It is not only that truth must be found to do justice, justice must be done in the search for truth."); PATTERSON, *supra* note 49, at 19, 44 (critiquing the correspondence theory in Michael Moore's work).

204. *Cf.* Amalia Amaya, *Coherence in Legal Evidence, in* PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW 231, 235 (Christian Dahlman, Alex Stein & Giovanni Tuzet eds., 2021) (proposing five "constraints" for coherence); CHRISTIAN DAHLMAN, ALEX STEIN & GIOVANNI TUZET, PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW (2021); Julia Simon-Kerr, *Relevance through a Feminist Lens*, PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW 364 (2021); Jasmine B. Gonzales Rose, *Race, Evidence, and Epistemic Injustice*, *in* PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW, 380 (Christian Dahlman, Alex Stein & Giovanni Tuzet eds., 2021); Ronald J. Allen & Michael S. Pardo, *Inference to the Best Explanation, Relative Plausibility, and Probability, in* PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW, 201 (Christian Dahlman, Alex Stein & Giovanni Tuzet eds., 2021); Alisa Bierria, *Racial Conflation: Agency, Black Action, and Criminal Intent,* 53 J. SOC. PHIL. 575 (2022); *see generally* Quill Kulka & Mark Lance, *Intersubjectivity and Receptive Experience,* 52 S. J. PHIL. 22 (2014).

205. *Cf. In Search of the Truth: Creating an Effective Truth Commission,* INT'L CTR. FOR TRANSITIONAL JUST., https://www.ictj.org/in-search-of-truth/ [perma.cc/3MB6-KA76]; *International Commissions of Inquiry, Fact-Finding Missions and Other Investigations*, U.N. RESEARCH GUIDES, http://libraryresources.unog.ch/factfinding [perma.cc/Y3QA-HN4S]; Ted Piccone, *U.N. Human Rights Commissions of Inquiry: The Quest for Accountability,* BROOKINGS INST. (Dec. 8, 2017), https://www.brookings.edu/wp-content/uploads/2017/12/fp_20171208_un_human_rights_commisions_inquiry.pdf [perma.cc/B8WL-KQHH]; SIRACUSA GUIDELINES FOR INT'L, REG'L AND NAT'L FACT-FINDING BODIES (2013).

206. Ho, *supra* note 200, at 19.

207. *Id.* at 19 n.47.

208. *Id.* Here, I am appropriating and applying Ho's distinction to truth-commissions. He makes passing reference to the distinction and would probably not endorse my redeployment. *See also* Eisikovits, *supra* note 24 (distinguishing truth commissions from trials in terms of allowable "evidence").

209. *See* PATTERSON, *supra* note 49. For a critique of Patterson's view by Luban, see David Luban, *Lawyers Rule: A Comment on Patterson's Theories of Truth,* 50 SMU L. REV. 1613, 1621, 1624 (1997) (characterizing Patterson's view as a "proposition of law is true if a good lawyer could justify ["argue skillfully for"/"argue successfully for"] its assertion" and suggesting that this is either contradictory or circular).

210. *See* PATTERSON, *supra* note 49. On truth-makers, from which I borrow this characterization thereof, see Fraser MacBride, *Truthmakers*, STAN. ENCYCLOPEDIA PHIL. (2021), https://plato.stanford.edu/archives/fall2021/entries/truthmakers/ [https://perma.cc/5BR8-UYTH].

notion of evidence as supplying legal truth with the "right to truth"[211] operative in truth commissions: a *community,* working with a commission, collectively contributes to generating and discovering a *shared truth*. This does *not* mean that truth commissions fabricate, confabulate, or fictionalize to get to the truth. Rather, the point is that there is communal participation and collective narration, investigation, and sharing in inquiry.[212]

For the matter is not just about truth, but truth in and as transitional justice. Truth-commission truth-making seems to partially diverge from legal truth-making, relative to context. The International Center for Transitional Justice, for example, suggests that this right came to the fore in discussions and documents concerning the U.N. Commission on Human Rights, Protocols to the Geneva Conventions, the International Convention of the Protection of All Persons from Enforced Disappearances, and the Rome Statute in light of "enforced disappearances" and "violations of human rights" in various countries.[213] The Center advances the view that this right constitutes a remedial "right to an effective investigation, verification of facts, public disclosure of the truth; and the right to reparation," as well as a personal and communal "right to know the truth" about atrocities, such as the "identity of perpetrators," and the "causes," "circumstances," and "fate" of victims.[214] As the Center observes, this contrasts from "the judicial establishment of truth," since "trials" may be either inefficient, cabined to only "notorious cases," restricted by evidence issues, and ill-equipped to "acknowledge the personal, cultural, or psychological experiences of victims."[215]

Again, this paper is not methodizing first-order ways to institute a "truth commission" in the United States, nor is it suggesting (or implying) the untenable claim that legal and prosecutorial strategies and concepts ought to be abdicated wholesale.[216] To the contrary, I am instead interested in what we can extract from the ICC's and truth-commissions' normative frameworks, scope, and methods to highlight fruitful crosshatchings and cross-pollinations among legal, legally adjacent, and non-legal strategies and concepts. These include, as the Center notes, "complementarity" with judicial and "criminal" systems; a "focus on gross violations of human rights"; "investigation"; "evidence"-gathering; and a "victim-

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211. *Truth Seeking: Elements of Creating an Effective Truth Commission*, INT'L CTR. FOR TRANSITIONAL JUST. (2013), https://www.ictj.org/publication/truth-seeking-elements-creating-effective-truth-commission [https://perma.cc/ST3C-EMA5]. Thanks to Professor Stromseth for suggesting this (personal communication, 2022).

212. *See* Eisikovits, *supra* note 24 (discussing views that truth commissions engender "more truth": "Some defenders of truth commissions claim that these bodies are better than trials at producing comprehensive accounts of past abuses"). I am reminded of feminist consciousness-raising praxes, although I concede the analogy may be inapt. *See* Tabatha Leggett, *Consciousness-Raising,* PHILOSOPHY FOR GIRLS 232 (Shew & Garchar eds., 2020). As I also explain *infra,* this notion of "shared truth" as normative praxis owes to pragmatist conceptions of truth, especially Richard Rorty, Richard Brandom, Dennis Patterson, Catherine Elgin, and others.

213. INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 211, at 4.

214. *Id*. at 3–4.

215. *Id*. at 4.

216. *Id*. (suggesting these along with "protection of the freedom of information and expression").

centered approach."[217] One could even go so far as to propound that revolutionizing and nuancing "legal truth," on this construal, approximates Patricia Collins' account of *Black feminist epistemology*, Helen Longino's *social knowledge* model, Shamik Dasgupta's pragmatic theory of truth, or Richard Rorty's pragmatist account of trust over truth.[218] The idea is that a diverse participatory community vetting, exchanging, and evaluating one another is better equipped at reaching a communal "social objectivity" or shared objectivity, as it were, than otherwise in certain contexts.[219]

Indeed, given the limitations on information and resources, expectations about what discerning truth will sometimes consist of shall have to be recalibrated relative to context. Perhaps *truth* or *truth-likeness* ought to be revisualized in a context-dependent, pragmatic fashion, so that in *some* contexts legalist conceptions of truth are not the only standard, concept, or measure.[220] John Capps formulates a "neo-pragmatic" truth thus:

> Pragmatic theories of truth have the effect of shifting attention away from what makes a statement true and toward what people mean or do in describing a statement as true . . . [and these theories] also tend to view truth as more than just a useful tool for making generalizations. Pragmatic theories of truth thus emphasize the broader practical and performative dimensions of truth-talk, stressing the role truth plays in shaping certain kinds of discourse. These practical dimensions, according to pragmatic theories, are essential to understanding the concept of truth.[221]

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217. *Id.* at 10–11.

218. PATRICIA HILL-COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT, 169–290 (2009); Elizabeth Anderson, *Feminist Epistemology and Philosophy of Science*, STAN. ENCYCLOPEDIA PHIL. (2020), https://plato.stanford.edu/archives/spr2020/entries/feminism-epistemology/ [https://perma.cc/8CLP-FLFF]. On Dasgupta, see Shamik Dasgupta, *Undoing the Truth Fetish: The Normative Path to Pragmatism* (2020) (unpublished draft) (on file with the Journal) (enumerating "four core theses" of pragmatism); Michael Unger, *Rethinking Truth: Richard Rorty's Revolutionary Departure,* IAI NEWS (2023); *see also* Heidi Feldman, *Objectivity in Legal Judgment,* 92 MICH. L. REV. 1187 (1994); Sara Worley, *Feminism, Objectivity, and Analytic Philosophy*, 10 HYPATIA 138 (1995).

219. *See* PATTERSON, *supra* note 50; Feldman, *supra* note 218 for discussions of "intersubjective[ly]"-elaborated objectivity. Kenneth Boyd has developed extensive work on the epistemology of groups and when the dynamics establish "warrant" amongst members or end up with baleful echo chambers; *see also* Kenneth Boyd, *Epistemically Pernicious Groups and the Groupstrapping Problem*, SOCIAL EPISTEMOLOGY, 61-73; Kenneth Boyd, *Group Understanding,* 198 SYNTHESE 6837 (2019).

220. Graham Oddie, *Truthlikeness*, STAN. ENCYCLOPEDIA PHIL. (2016), https://plato.stanford.edu/archives/win2016/entries/truthlikeness [https://perma.cc/8LBC-5VCT] (last visited Sept. 21, 2023) (describing verisimilitude as "propositions according to their closeness to the truth, their degree of *truthlikeness*, or their *verisimilitude*").

221. John Capps, *The Pragmatic Theory of Truth*, STAN. ENCYCLOPEDIA PHIL. (2019), https://plato.stanford.edu/archives/sum2019/entries/truth-pragmatic [https://perma.cc/NFR3-LSGY] (last visited Sept. 21, 2023); *see also* ROBERT B. BRANDOM, PERSPECTIVES ON PRAGMATISM: CLASSICAL, RECENT, AND CONTEMPORARY 32 (2011); JOHN J. STUHR, PRAGMATIC FASHIONS: PLURALISM, DEMOCRACY, RELATIVISM, AND THE ABSURD 82 (2016) (describing pragmatic "epistemology" thus: "1) a temperament; 2) a way of framing problems; 3) a method or approach for addressing them; and 4) an awareness of the inseparable cultural context of all this").

On this account, truth is in some contexts a "norm of inquiry", managing what counts as "warrantedly assertible" within a given community: truth tracks a normative praxis, namely, what one is considered warranted to assert within a given inquiry.[222] Catherine Elgin's project of moving us away "from the knowledge of individual facts to the understanding of a broader range of phenomena," through her notion of "true enough," in specific contexts, illuminates this notion.[223] Although Elgin is solely concerned with epistemological goals, I wish to briefly apply her theory to the meta-ethical grounds of the "prudential" and "the practical," which she might reject, but which I see as a possible extension of her theory.[224] I furthermore will include, in Brandomian fashion, different kinds of speech acts and "inference"-practices, rather than simply "assertoric" ones, as I think there is more than one way to account for the truth or the "true enough" depending on context.[225] Last, I will take this theory to be loosely informed by

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222. Capps, *supra* note 221 (referring to Hilary Putnam and others). Capps' description of pragmatic truth also comes close to Richard Rorty's, which focuses on "warrant" rather than belief," as observed by Bjørn Ramberg and Susan Dieleman. *Richard Rorty*, STAN. ENCYCLOPEDIA PHIL. (2023), https://plato.stanford.edu/archives/fall2023/entries/rorty/ [https://perma.cc/FJ99-4NVZ] (last visited Sept. 21, 2023); BRANDOM, *supra* note 221 (describing normative inferential praxes). For an overview of the literature on norms of assertion and an original account, see RACHEL MCKINNON, THE NORMS OF ASSERTION: TRUTH, LIES, AND WARRANT (2015). I should note here that in adopting a Wittgensteinian, Brandomian, Rortyian, and Elgian-influenced pragmatic account of truth, I am departing slightly from some of Luban's earlier expressed views which find "warranted assertability" to be "untenable," in light of the work of Crispin Wright, insofar as "I can be fully justified in saying something and still be wrong—for example, because of information unavailable to me." *See* David Luban, *Lawyers Rule: A Comment on Patterson's Theories of Truth,* 50 SMU L. REV. 1613, 1618 (1997). Luban quotes Dennis Patterson's view with which he disagrees: "to say that some proposition is true is to say that 'a sufficiently well placed speaker who used the words in that way would be fully warranted in counting the statement as true of the situation.'" *Id.* at 1623. Patterson, Luban notes, views the law as just one kind of Wittgensteinian "language-game" that is, "a set of practices combining verbal and non-verbal actions." *Id.* at 1625. Patterson's account comes close to the account I'm rendering here, which is somewhat at odds with Luban's own views in 1997, although Luban has mentioned recently that he hasn't theorized truth for some time now and forwards no specific "meta-theory" of truth. Thanks to Professor Luban for bringing this point and article to my attention (personal communication, 2023). The neo-pragmatic element of this account also overlaps with Mathias Thaler's "pragmatist defense of the ban on torture" which likewise focuses on Brandomian "constitutive rules" of "social practices" rather than "moral absolutes." Mathias Thaler, *A Pragmatist Defence of the Ban on Torture: From Moral Absolutes to Constitutive Rules of Reasoning,* 64 POL. STUD. 765 (2016).

223. CATHERINE Z. ELGIN, TRUE ENOUGH 2 (2017)*; see also* Catherine Z. Elgin, *Disagreement in Philosophy,* SYNTHESE 1 (2022); Capps, *supra* note 221.

224. ELGIN, *supra* note 223, at 19. In this way, I am extending Elgin's view to a Brandomian picture of inferential praxes. *See* Robert B. Brandom, *Foreword*: *Achieving the Enlightenment, in* RICHARD RORTY, PRAGMATISM AS ANTI-AUTHORITARIANISM, xviii (2021); Dennis Patterson, *Neuroscience and the Explanation of Human Action*, *in* NEUROLAW AND RESPONSIBILITY FOR ACTION: CONCEPTS, CRIMES, AND COURTS 11 (Donnelly-Lazarov ed., 2018) (describing Robert Brandom's "theory of linguistic competence as deontic score-keeping" in the law as inherently "normative" "rule-following" and reasons-based). In other work, I have briefly alluded to Elgin's notion of the "true enough" to upscale a neighboring notion of the "reliable enough" in the context of legal testimony, but in this paper my use of Elgin's notion more elaborately draws from her version. *See* Eloy LaBrada, *Solving a Philosophical Puzzle in Domestic Violence Law* (2020) (unpublished manuscript) (on file with the author).

225. ELGIN, *supra* note 223, at 19. I have briefly encapsulated Brandom's work in *In Our Hands, supra* note 60, at 5: "Robert Brandom [takes] normative justification to stem from our irreducibly *social* and *normative*

the pragmatist notion proffered by Rorty that conventional notions of metaphysical truth sometimes underexplain pragmatic trust relations among communities under certain circumstances, even if I do not therefore subscribe to some of the extreme deflationary consequences of Rorty's brand of pragmatism, just as Luban never has.[226] To be clear, the argument here is *not* that we abjure truth or truth-talk in the law (or elsewhere). The finer, limited point is that legalist notions of truth, when the *sole* standard and measure in context-invariant fashion, infelicitously bypass other kinds of context-dependent practices that mobilize other conceptions of truthfulness oriented on relations of normative practices of trust which, if taken seriously, might illuminate both the dimensions and the limitations of some legalist notions.

Elgin insists that we refashion our frame of thinking about truth: "epistemic responsibility," she writes, should depend, first, on "acceptability": what we take to be serviceable or useful for our "epistemic ends."[227] Second, these ends ought to be construed "holistically," rather than based on irrefragable "reliability," or the total assurance that our comprehension of a state of affairs contains no untruths.[228] After all, Elgin reports, there are "useful fictions," slogans, generalizations, mythologization, "thought experiment[ation]," modellings, and idealizations in science

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status as socially communicative, affective, and care-dependent creatures: every day we find ourselves with others in "*practices* of giving, asking, for and assessing reasons, [and] of justifying our commitments (both theoretical and practical) to [others]" (citing Robert B. Brandom, *Foreword*: *Achieving the Enlightenment, in* RICHARD RORTY, PRAGMATISM AS ANTI-AUTHORITARIANISM, xviii (2021) ("[t]o call something a *reason* is to offer a *normative* characterization of it: to attribute to it the capacity to confer on a commitment a distinctive kind of *entitlement* or *authority*")); *see also* ROBERT B. BRANDOM, PERSPECTIVES ON PRAGMATISM: CLASSICAL, RECENT, AND CONTEMPORARY 32 (2011) (describing our "sayings" and "doings" as "practical attitudes of taking or treating each other *as* responsible and committed"). Also cited in *In Our Hands, supra* note 60, at 5. *See also* Thaler, *supra* note 222.

226. *See* Unger, *supra* note 218 ("According to Rorty, truth is not a mirror reflecting an objective reality; instead, it emerges from the collective agreements within a specific community. Rorty's departure from traditional notions of truth challenges us to reimagine our understanding of knowledge and reality. He proposes that truth should be evaluated based on its usefulness and coherence within a particular social context, rather than its correspondence to an external, objective reality. In this perspective, truth becomes a social construct, a product of human practices and interactions . . . At the core of Rorty's philosophy lies the notion of trust. Trust serves as the foundation upon which our shared beliefs and understandings are built. Just as trust is essential in interpersonal relationships, it becomes the cornerstone of our shared truths."). Unger proposes a Rortyian way of life that would take on a focus on "trust" over "truth," in a way that extends far more broadly and radically than my limited account here, although we do share the Rortyian premise that "[t]rust becomes the catalyst for the construction of truth, grounding us in our linguistic and cultural communities," even if I would relativize this claim to specific contexts rather than committing to a metaphysically global claim. *Id*. Rorty reacts to Luban in RICHARD RORTY, PHILOSOPHY AND SOCIAL HOPE 104 (1999). Thanks to Professor Luban for reminding me of this (personal communication, 2023) and pointing me to the tribute: https://balkin.blogspot.com/2007/06/tanfor-rorty-1931-2007.html [https://perma.cc/2M2X-PNPY] (last visited Sept. 26, 2023). While skeptical of Rorty's totalizing irrealism, I do not commit to metaphysical, moral, or "epistemological realism," as David Hommen does (with respect to the last) in arguing that realism follows from Wittgensteinian rule-following. *See* David Hommen, *Seizing the World: From Concepts to Reality*, METAPHYSICA (2023).

227. ELGIN, *supra* note 223, at 2–3, 19; Frederica Isabella Malfatti, *Introduction to the topical collection "True enough? Themes from Elgin"* 199 SYNTHESE 1293 (2021).

228. ELGIN, *supra* note 223, at 2–3, 19.

and physics, etc.[229] Although not wholly true, or not true in and of themselves, these "true enough" claims operate within "[a] network of commitments . . . [that reaches] reflective equilibrium when each of its elements is reasonable in light of the others, and the network as a whole is as reasonable as any available alternative in light of our relevant previous commitments," and in relations of "trustworthiness" with others. [230]

For Elgin, to find something *true enough*—as worthy of being assented to—is that we work with "a constellation of mutually supportive commitments that bear on a topic," which she designates "*an account*."[231] This is not an anything-goes fictionalization, fabulation, or mythologization. An account fructifies "coherence" not just from "[l]ogical consistency" alone but from "mutually consistent, cotenable, and supportive" parts.[232] What I am essaying to tease out is that the narratives, testimonials, and stories that people tell in some contexts also consist of relationships of "trust" and mutuality and that these testimonials need not meet some maximal legalist burden of proof to be true, or true enough, for consideration.[233] Logicians sometimes refer to non-bivalent truth-values as "fuzzy truth values" along a spectrum of varying "truth" degrees: "*true*, *very true*, *not very true*, etc."[234] In short, for Elgin and myself, the idea would be to supplement (not substitute) "belief, assertion, and knowledge" with fuzzier notions of "acceptance, profession, and understanding," when it comes to contextualizing truth in certain instances.[235]

Seeing truth as, in *some* contexts, *true-enough* redirects us to pragmatic and political questions of intersubjective and "interpersonal" trust as well as the right to truth.[236] As Carolyn McLeod writes, trust entails putting oneself in relationship to others, "hop[ing they] will be trustworthy"— one banks on those one trusts or to whom one entrusts something.[237] This is not, again, to advocate that we should

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229. *Id*. at 26–27 (describing "*stylized facts*," "ceteris paribus claims," "*idealizations*," and "[*a*] *fortiori arguments from limiting cases*," in the sciences); *see also id*. at 221–247, 257.

230. *Id*. at 4.

231. *Id*. at 12–13.

232. *Id*. at 71.

233. *Id*. at 159. Elgin also endorses a "procedural objectivity." *Id*. at 183. On *trust,* see KATHERINE DORMANDY, ED., TRUST IN EPISTEMOLOGY 1 (2020).

234. Shramko, Yaroslav & Heinrich Wansing, *Truth Values*, STAN. ENCYCLOPEDIA PHIL. (2021), https://plato.stanford.edu/archives/win2021/entries/truth-values [https://perma.cc/4NY4-ZXGT] (last visited Sept. 21, 2023) (describing Lofti Zadeh's work on "fuzzy sets").

235. ELGIN, *supra* note 224, at 11. *See also* Boyd, *supra* note 219, at 9.

236. Carolyn McLeod, *Trust*, STAN. ENCYCLOPEDIA PHIL. (2021), https://plato.stanford.edu/archives/fall2021/entries/trust/ [https://perma.cc/Q72J-ATGL] (last visited Sept. 23, 2023). *See also* Unger, *supra* note 218 (outlining Rorty's pragmatic reorientation from "truth" toward "trust").

237. McLeod, *supra* note 236. Katherine Dormandy, like Mcleod, suggests that there are several components making up trust: first, "psychology" and "rational[ity]"—are there grounds to trust someone?; second, "testimony" and the "epistemic goods" trust delivers to us—what do we get (to know) by trusting?; and third, social relations of "reliance" and "self-trust"—what does one hope to achieve in trusting, and can one trust oneself? *See* Katherine Dormandy, *Introduction: An Overview of Trust and Some Key Epistemological Applications*, *in* KATHERINE DORMANDY, ED., TRUST IN EPISTEMOLOGY 1 (2020).

surrender truth and simply trust others; nor is this to say that everything bottoms out in subjectivist relativism or "post-truth"/"alternative facts" Trumpism—but it does raise questions regarding which parties, publics, audiences, or constituents are engaging in relations of truth, in which context, by which epistemological standards, and in pursuit of what kinds of justice: "in the context of US torture whose trust we are talking about: the people's trust in their government? Members of the polity's trust in each other? Our allies' (and adversaries') trust in us?"[238] It is beyond the scope of this paper's purpose and purview to answer such questions in detail. The more restricted, meta-ethical purpose is to speculate that an exclusive focus on a legalist, evidentiary notion of truth overpasses something crucial about what it means to *bear witness* in a non-legal setting when there are multiple parties and histories at issue and the matter is diachronic "structural injustice."[239] Finding the truth with respect to a "structural injustice," in a truth-commission sense, involves community trust over time in a way that a legalist notion of burden-proofing in the law might likely not easily contemplate or countenance. As Heidi Li Feldman puts it, there are some legal concepts—and perhaps *truth* in legal discourse is sometimes one of them—which to some extent hinge on "interpersonal validity," the way in which agents trade "reasons" in support of a context-dependent fixing of the state of affairs as "objective" or "true" on interpersonal grounds, such as "*shared goals, values, and interests*," and interpersonal judgments that "converge" and stack on similar interpersonally validated determinations.[240]

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238. Professor Luban (personal communication, 2023). On relativism, see Feldman, *supra* note 203, at 1212–13. I appreciate Professor Luban's insistence that I distinguish Elgin's neo-pragmatic "true enough" from propaganda, "bullshitting," and "the new conspiracism" mentioned in RUSSELL MUIRHEAD AND NANCY L. ROSENBLUM, A LOT OF PEOPLE ARE SAYING: THE NEW CONSPIRACISM AND THE ASSAULT ON DEMOCRACY (2019). As I specify in the body of the text, while my account is partially motivated by anti-realist and neo-pragmatic notions of truth and trust in context-specific fashion, it is not globalizing or universalizing the meta-physical claim that truth-seeking is impossible or that the "true enough" should wholesale repudiate and replace alternative concepts of truth and truth-making. While I borrow from Rorty, Brandom, Elgin, and scores of others, I do not attempt to render seamless the warring differences amongst them nor the contradicting meta-physics of each of their theories. My more limited point in this paper is that *in some contexts* (such as "structural injustices"), a legalist notion of truth, when considered to constitute the only standard and measure, bypasses contexts where considerations of trust, bearing witness, and testimony—that do not necessarily meet a legal standard of proof or are aptly intelligible within a restrictive legalist framework—are perhaps more pertinent. *See* Thaler, *supra* note 222. For extended work on group epistemology and the problem of conspiracy theorization and propaganda see Boyd, *supra* note 219. On propaganda, see STANELY, *infra* note 252. *See also* HARRY G. FRANKFURT, ON BULLSHIT (2005).

239. *Cf.* SYBILLE KRÄMER & SIGRID WEIGEL, EDS., TESTIMONY/BEARING WITNESS: EPISTEMOLOGY, ETHICS, HISTORY, AND CULTURE (2017).

240. *See* Feldman, *supra* note 218, at 1213, 1227 (understanding objectivity as a multiply realizable "concept" for which there are many conceptions, some of which depend on "interpersonal validity," combining "dialogic" and "empirical" facets). Feldman, in talking of "blend judgments" (what contemporary meta-ethicists would refer to as "thick judgments") combine "*shared values, interests and goals; constraints upon judgment* in the form of *dialogical methodology* and *empirical constraints; interpersonally available reasons; convergence;* and *regulation of power disparities*." *Id.* at 1230. I also briefly cite to Feldmanian *blend concepts* in *Faces of Aging, supra* note 190 and I have elaborated on "thick concepts" in my *Bad By Design: Conceptualizing Administrative Violence* (2020) (unpublished manuscript) (on file with the Journal). On truth commissions and trust, see HAYNER, *supra* note 1 and Eisikovits, *supra* note 24. The "interpersonal validity"

Such a conception also points to the fact that our normative and sociopolitical "values" around community trust and relationships, outside the courtroom, deserve eminence in some contexts, particularly those dealing with "structural injustice."[241] This does not entail, as Feldman would say, that trust should necessarily *supplant* legal truth or judicial process in any and all contexts, only that we perhaps ought to contextually nuance what it means to seek truth and interrogate when and why legal truth is the only measure (when it appears to be). I am fond of citing Mari Mikkola's take on Elizabeth Anderson's notion of *doing justice to* a topic, which Anderson means as both epistemologically getting things right/getting the facts right, but *also* ethically doing right by someone.[242] These can and do come apart, but we do not do justice, for Anderson, if we sacrifice one for the other.

However, it might be observed here that it is difficult to establish trust when (i) there are competing (and contradictory) stories and histories about whether torture has occurred, especially if (ii) those subjected to torture have been sidelined or silenced;[243] and (iii) if there are not only multiple communities, constituencies, agencies, entities, publics, etc. at issue but that *within* a given community, constituency, etc. there are racialized, gendered, and other "power disparities" as Feldman puts it, and diverse subgroups and members.[244] It would be erroneous to homogenize any community as a representative monolith and to impose external, ahistorical or decontextualized categories upon said community without proper engagement with the community in its diversity and history—and without attending to the ways in which the community interacts with its own members and contemplates itself.[245] Responding to these concerns requires that we zero in on

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(Feldman) and "warranted assertability" (Putnam, Capp, et al.) to an extent secures the notion of the "true enough" (Elgin) from absolute relativism (Rorty) since there is communal checking and evaluation taking place within a normative practice (Brandom), although it is also possible for "groupstrapping" and groupthink to occur, which requires further normative theorizing that is beyond this paper's scope. *See* Boyd, *supra* note 219.

241. KRÄMER & WEIGEL, *supra* note 239; ELGIN, *supra* note 223.

242. *Cf.* Mari Mikkola, *Doing Ontology and Doing Justice: What Feminist Philosophy Can Teach Us About Meta-Metaphysics*, 58 INQUIRY 780, 784 (2015). I also allude to and cite this notion of "doing justice" in LaBrada, *supra* note 240, at 1 n. 3 (noting that I also cite to this in Eloy LaBrada, *Rape as Relational Inequality: A Defense of MacKinnon's Metaphysics and Politics* (2020) (unpublished manuscript) (on file with the author)).

243. *See also* Wolfendale, *supra* note 67, at 234 (suggesting that there has been an "erasure of the *fact* of torture . . . the *experience* of torture . . . and erasure of the *victims* of torture"). J.M. Bernstein connects the "trauma" of torture to a loss of trust, namely, "losing one's trust in the world [as] losing a sense of one's standing in the world." BERNSTEIN, *supra* note 103, at 13.

244. On "power disparities", see Feldman, *supra* note 218; on power and unjust structure, see Haslanger, *supra* note 171, at 15–18. On the issue of representative dynamics and politics, see Linda Alcoff, *The Problem of Speaking for Others*, 20 CULTURAL CRITIQUE 5 (1991). Thanks to Professor Stromseth for pressing me to elaborate further (personal communication, 2022).

245. Although it is beyond the scope of this paper, such endeavors would have to account for problems of "epistemic injustice," which has been carefully theorized by Black feminist metaphilosophy. *See* Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 HYPATIA 236 (2011) (identifying "testimonial silencing" and "smothering" as kinds of ills against testifiers based on "pernicious ignorance"); Katherine Puddifoot & Marina Trakas, *Epistemic Agency and the Generalisation of Fear*, 202 SYNTHESE 1, 15–16 (2023).

"epistemic trust," which Heidi Grasswick characterizes thus: "those forms of normative or affective trust that are involved in the care of, and achievement of, a variety of epistemic goods, such as knowledge, understanding, true beliefs, justified or well-grounded beliefs, and reliable practices of inquiry."[246] Under what conditions can this be obtained?

While this paper proffers no programmatic and prudential response, if these thinkers on trust are correct, then it would seem that trust-building in a truth-commission context with respect to a "structural injustice" occurs on at least two fronts, both *within* a given community and *between* that community and the relevant governmental body, external community, commission, non-profit, etc.[247] One might surmise that it is a necessary condition for the community to trust one another in sharing truth in order to share that truth outside the community, but that this is certainly not a sufficient one: it is possible that a community might have intra-"communal trust" and *not* want to share with extra-communal members for a variety of political and other reasons.[248] The trust within the community establishes discursive or counter-discursive responses to stories and histories seemingly emitted from outside that community, but in order for there to be transfer and translation among communities, relations of trust must bridge communities to the commissions and to other communities.

Grasswick theorizes that relations of "epistemic responsibility"—I would say, in light of Young, Zheng, and others' *epistemic accountability*—transmute testimony depending on whether we are upbuilding a trust relation versus working with a trust that has already been gained but needs to be maintained.[249] The former is more difficult, but requires, Grasswick maintains, that we attend to how (i) "beliefs" arise from testimony (does one trust that the events whereof someone speaks obtain?); (ii) how we "practice" trust (what kinds of behaviors exhibit trustworthiness?); and (iii) how we assess the "norms" that guide our trust-making praxis (how does one become trustworthy to someone?).[250] Note that it is not a question of "fictionalizing," but about trust-building in shared normative

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246. Heidi Grasswick, *Reconciling Epistemic Trust and Responsibility, in* TRUST IN EPISTEMOLOGY 161, 164 (Dormandy ed., 2020).

247. On the difference between *within* and *between*, see BARBARA JOHNSON, A WORLD OF DIFFERENCE (1987).

248. *See* Jesper Kallestrup, *Groups, Trust, and Testimony, in* TRUST IN EPISTEMOLOGY 136, 151–52 (Dormandy ed., 2020); Hobbs, *supra* note 8, at 487 (arguing that composition of tribunals must "mirror the society" involved). On communities and translation, see Judith Butler's contributions in JUDITH BUTLER, ERNESTO LACLAU, & SLAVOJ ZIZEK, CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT (2000). Notice too, as Melzer and Barela underline, that the violation of "communal trust" is a part of "psychological torture" insofar as it inflicts "arbitrary sanction or punishment," such as "enforced disappearance, instrumentalizing prolonged detention, or imposing grossly disproportionate pentalities." *See* Melzer & Barela, *supra* note 80.

249. Grasswick, *supra* note 246, at 184.

250. *Id.* I cannot enter into nearby disputes about "epistemic injustice," "hate speech," and "defamation," but see Mari Mikkola, *Self-Trust and Discriminatory Speech, in* TRUST IN EPISTEMOLOGY 265 (Dormandy ed., 2020).

praxes.[251] We must query, under what conditions can trusting relations be instated such that we can circumvent or forestall disinformation, misinformation, and propaganda?[252] And we must further specify in fine-grained fashion *who* is engaging in the relationships with whom else, under what context, and in light of what complex history? And, in light of Butler's meta-theoretic or meta-critical insight that I referenced at the start of this paper, we must query what conceptual scheme is at work such that we "frame" the matter, conceptually or legally, as we do. Again, this paper proffers no definitive first-order, applied-ethical or legal answers on how to "keep going,"[253] but is speculating about the meta-theoretical and meta-ethical conditions under which trust might eventuate, given these potential concerns. At the very least, the ICC, truth commissions, and these diverse thinkers suggest that restricted legalist notions of responsibility and truth will not fully suffice by themselves or without regard to context if we are to "keep going."

CONCLUSION: WHAT TORTURE SAYS (ABOUT US)

Luban comments that it is empirically contestable whether there is, or has ever been, pervasive public endorsement in the United States for torture in certain circumstances and for particular reasons.[254] There are manifold public narratives in the media about what Americans have to say about torture.[255] But what does torture say about us?

I wish to proffer a final remark on another meta-ethical dimension that should be considered going forward. The insight is in part Lubanian: "human dignity"—"non-humiliation" and a right "to be heard"—does not necessarily equate to a "right to counsel" or that legal representation in civil or criminal legal contexts is the only possible avenue.[256] "[*H*]*aving a story of one's own*," as Luban

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251. *See generally* PETER GOLDIE, THE MESS INSIDE: NARRATIVE, EMOTION, AND THE MIND, 171–72 (2012) (describing four perils of narrativity); Unger, *supra* note 218; GREGORY CURRIE, NARRATIVES & NARRATORS: A PHILOSOPHY OF STORIES (2010); HELENA DE BRES, ARTFUL TRUTHS: THE PHILOSOPHY OF MEMOIR (2021).

252. *Cf.* JASON STANLEY, HOW PROPAGANDA WORKS (2015); JASON STANLEY, HOW FASCISM WORKS (2018).

253. CARRIE JENKINS, SAD LOVE: ROMANCE AND THE SEARCH FOR MEANING 3 (2022) (paraphrasing Wittgenstein: "The way we go on is not determined by pre-existing constraints: it's up to us. We are creating the rule by going on the way we do."). Thanks to Professor Luban (personal communication, 2023) for underlining that a fulsome account of trust in a first-order ethical and applied normative-ethical context would have to specify the *who* here with particular detail.

254. LUBAN, O'SULLIVAN, STEWART & JAIN, *supra* note 4, at 1097 (citing 2015 Pew poll); LUBAN, *supra* note 4, at 298 (citing a "Pew poll" that "pro-torture sentiment" increased during the start of the Obama administration); Paul Gronke, Darius Rejali, Dustin Drenguis, James Hicks, Peter Miller & Bryan Nakayama, *U.S. Public Opinion on Torture, 2001-2009,* 43 PS: POL. SCI. AND POL. 437 (2010) (contesting the view that Americans largely favor torture).

255. LUBAN, *supra note* 4.

256. LUBAN, *supra* note 76, at 69 (critiquing Alan Donagan); *see also* LUBAN, *supra* note 4, at 139–40 (describing dignity as "a property of relations between human beings" and as "not humiliating people"); Bernstein, *supra* note 69 (linking the response to torture with considerations of human dignity); BERNSTEIN, *supra* note 103, at 20 (referring to dignity as a "conceptual family" related to nearby notions but is decidedly less

eloquently puts it, means that chances to narrate and truth-tell will, and must, proliferate beyond courtrooms; stifling that voice amounts to "humiliation," or infringing upon one's "human dignity."[257]

Note that Luban's definition of dignity is pragmatic and even deflationary rather than metaphysically substantial.[258] Akin to the pragmatic view of truth or Elgin's "true enough" sketched above, Luban forwards a pragmatic rendition of *human dignity*—"the meaning of the phrase "human dignity" is not defined by a philosophical theory, but rather determined by its use in human rights practice"—that pluralizes the concept: "what we confront . . . is not a unitary conception of human dignity, but a network of human dignit*ies* bearing family resemblances to each other").[259] Following Luban, I think of human dignities as a "[family-]resemblance class," that is, a "family" of resemblant items that share *some* commonalities but are not therefore composed of identical members all exemplifying equivalent necessary and sufficient identity-conditions.[260] Although there are disparate concepts of *dignity,* writes Luban, they cluster together in reference to "status" and "rank."[261] *Status* wise, as Luban puts it, human dignity has to do with having the relevant moral standing: one matters qua human being.[262] *Rank* wise, one is entitled to "non-humiliation" and non-supplication for rights.[263] Luban thus, correctly in my view, describes *human dignity* as (pragmatically operating as) a "virtual foundation" of human rights discourse and law: we need not presume robust metaphysical views of human dignity as the basis for human rights to pragmatically and politically talk, mobilize, and legislate *as though it were the case* that human rights are founded in human dignity.[264]

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deflationary than Luban in grounding dignity in "intrinsic worth"). Some also contend that dignity could and should be extended to non-humans as well, as many countries have enacted toward non-human animals. *See* Lori Gruen, *Dignity, Captivity, and an Ethics of Sight, in* THE ETHICS OF CAPTIVITY 231 (Gruen ed., 2014).

257. LUBAN, *supra* note 76, at 72. In other words, Luban is claiming that "human dignity" arises from "relations" of "humiliation" rather than pre-dating those relations. I adopt Luban's pragmatic definition of human dignity in *In Our Hands, supra* note 60. On "dignity" infringements as an aspect of "psychological torture," see Melzer & Barela, *supra* note 80.

258. I explain this further in *In Our Hands*, *supra* note 60, citing to David Luban, *Human Rights Pragmatism and Human Dignity, in* THE PHILOSOPHICAL OF HUMAN RIGHTS 263, 275, 277 (Cruft et al. eds., 2015). This paragraph and its notes are from *In Our Hands*, *supra* note 60, with slight modifications.

259. Luban, *supra* note 258, at 275, 277. For a metaphysically substantial/substantive version of dignity, see Stephen Riley & Gerhard Bos, *Human Dignity*, INTERNET ENCYCLOPEDIA PHIL., https://iep.utm.edu/humdign/#H2 [https://perma.cc/N3TT-2CK2] (last visited Sept. 23, 2023) and John Tasioulas, *On the Foundation of Human Rights, in* THE PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 46, 54 (Cruft et al. eds., 2015). *See* also Melzer & Barela, *supra* note 80 on dignity infringement.

260. Luban, *supra* note 258, at 277. On *"*resemblance classes," see KAREN BENNETT, MAKING THINGS UP, 30–32 (2017) (describing and defending a *resemblance class* approach).

261. Luban, *supra* note 258, at 277. Cluster-conceptualizations here are looser and differ from more robust metaphysical conceptions of "homeostatic property cluster kinds." *See* Matthew Andler, *What is Masculinity?* SYNTHESE (forthcoming).

262. Luban, *supra* note 258, at 277.

263. *See id.*

264. *Id.* at 278. On other kinds of "foundationless foundations", see Judith Butler, *Contingent Foundations: Feminism and the Question of "Postmodernism," in* FEMINISTS THEORIZE THE POLITICAL 3 (Judith Butler & Joan

But this insight about dignity also draws from the ICTY, which conceives of torture, especially sexual torture, as a kind of "outrag[e] upon personal dignity," which eventualizes when "the accused intentionally commit[s] or participate[s] in an act or an omission which would be generally considered to cause serious humiliation, degradation, or otherwise be a serious attack on human dignity, and . . . he [knows] that the act or omission could have that effect."[265] Indignities induced by torture denote not just particular physical acts of violence but also, as Van Schaack and Slye observe, "subjecting individuals to inappropriate conditions of confinement, forcing individuals to engage in subservient acts or to relieve bodily functions in their clothing; and placing someone in fear of being subjected to physical, mental, or sexual violence."[266] Under this conception, enhanced interrogation techniques and the humiliations and violence to which detainees at Abu Ghraib were subjected would not be "abuses," as Defense Secretary Donald Rumsfeld euphemized, but "torture."[267] This would mean that the eleven military perpetrators "charged with dereliction of duty, maltreatment, aggravated assault and battery" might have been convicted of worse crimes, and that the victims and their kin would have earned more than an "apology" from President Bush and Rumsfeld "for . . . abuses."[268]

Luban remarks that Attorney General Eric Holder's warning to President Obama to disavow torture explicitly—otherwise he would "own the policy"—requires that we hold in mind three things: (i) we cannot accept "continuity of government" when it comes to torture—we must routinely and indefinitely disavow torture with every new administration;[269] (ii) we will bear, intergenerationally, a "*moral* debt;"[270] and (iii) we must make explicit, Luban insists, that we disapprove of torture in any and all forms, irrespective of the government's silence or stated approval.[271] Otherwise, he warns, we will fail to "impede the downstream consequences of prior wrongdoing."[272]

Scott eds., 1992); Thaler, *supra* note 222. In this sense, Luban's pragmatic and deflationary view of dignity escapes the kind of critique of Kantian dignity proffered by Martha Nussbaum and Andrea Sangiovanni, since it is a pragmatic, working consideration rather than a metaphysically foundationalist presumption. *See* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004); ANDREA SANGIOVANNI, HUMANITY WITHOUT DIGNITY: MORAL EQUALITY, RESPECT, AND HUMAN RIGHTS (2017).

265. Prosecutor v. Kunarac, et al., Case No. IT-96-23 & 23-1A, Sentencing Judgement (Int'l Crim. Trib. For the Former Yugoslavia June 12, 2002), *in* VAN SCHAACK & SLYE, *supra* note 4, at 612. *See also id.* at 611 (citing ICTR, Art. 3(i)4(a); Geneva Convention, Art. 3; Protocol II; ICTY Art. 2(b), Art. 5). Thanks to Professor Luban for correcting the reference to the ICTY (personal communication, 2022).

266. VAN SCHAACK & SLYE, *supra* note 4, at 613–14. *See also* Luban & Newell, *supra* note 1 (making a similar point).

267. *See Abu Ghraib Torture and Prisoner Abuse*, WIKIPEDIA, https://en.wikipedia.org/wiki/Abu_Ghraib_torture_and_prisoner_abuse#Prisoner_rape [https://perma.cc/5UFZ-GP6V] (last visited Sept. 15, 2023).

268. *Id.*; *see* VAN SCHAACK & SLYE, *supra* note 4, at 613–14; *see also* Luban & Newell, *supra* note 1, at 343–47.

269. LUBAN, *supra* note 4, at 289.

270. *Id.* at 290.

271. *Id.* at 295 (detailing "symbolic affiliation").

272. *Id.*

Resonant with these claims, this paper has sought to devise a Lubanian, meta-ethical framework for the kinds of considerations integral to such endeavors. Dignity *qua* a "story of one's own" is a part of that framework, aligning with the genres of "narrative repair"[273] to healing from trauma which some scholars have proposed. Hilde Lindemann, for example, explains that our identities are perspective-dependent "complex narrative constructions"—the stories we tell ourselves, and others[274]—such that crafting "counterstories," counter-discourses, and community "self-definitions," are essential to reclaiming one's history; counter-narrating against the oppressor's silences and efforts to disappear its crimes; passing on one's story.[275]

Luban's pragmatic, narratival notion of dignity and Lindemann's "narrative repair" seem to be determinates of what Margaret Urban Walker terms "moral repair," a general moral determinable which she characterizes as "*restoring or creating trust and hope in a shared sense of value and responsibility"* in the wake of "wrongdoing."[276] Walker believes that contending with "resentment," "forgiveness," and "making amends" requires that we reestablish a hopeful "trust" toward rightdoers—and toward ourselves—in the wake of wronging, echoing the reflections on trust of the preceding pages.[277] Likewise, this paper has sought to fashion a Lubanian meta-ethical framework for reconceptualizing truth and responsibility in terms of trust and accountability in some contexts to fully account for certain "structural injustices" like torture. For we must speak out against torture; we must speak truth to torture. To say nothing would be unaccountable. Indeed, if we were to say nothing about torture's wrongs, what would such silence ultimately say about us?

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273. HILDE LINDEMANN NELSON, DAMAGED IDENTITIES: NARRATIVE REPAIR (2001).

274. *Id*. at 20.

275. NELSON, *supra* note 273; Hilde Lindemann, *Counter the Counterstory: Narrative Approaches to Narrative,* 17 J. ETHICS & SOC. PHIL. 286 (2020).

276. MARGARET URBAN WALKER, MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING 28 (2006), *cited and quoted in* Brad Wilburn, *Moral Repair: Reconstructing Moral Relations after Wrongdoing*, NOTRE DAME PHIL. REV. (2007).

277. *Id*.