FACING THE PAST, FACING THE FUTURE:
APPLYING THE TRUTH COMMISSION MODEL TO THE HISTORIC
TREATMENT OF NATIVE AMERICANS IN THE UNITED STATES

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I. INTRODUCTION

We have to face the unpleasant as well as the affirmative side of
the human story, including our own story as a nation, our own
stories of our peoples. We have got to know the ugly facts in order
to protect us from the official view of reality.2

Bill Moyers, Journalist

The history of the United States is rife with “allegations”3 of the most
serious mistreatment of Native Americans:4 broken treaties and abandoned promises;
massacres of noncombatants; genocide; germ warfare; forced relocations; kidnapping
for a global slave trade in American Indians; religious suppression; and abduction of
young children to isolated “Indian schools” to achieve forced cultural assimilation.5

1. Candidate for J.D., 2002, University of Arizona James E. Rogers College of Law;
M.S.W., 1991, Arizona State University.
2. An Interview With Bill Moyers: Facing History and Ourselves, NEWS, 1991, at 4,
quoted in JAMES W. LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN
HISTORY TEACHER GOT WRONG 208 (1995).
3. While some consider historical accounts of mistreatment to be well-documented and
factual, others do not accept even the most authoritative accounts and consider them to be
mere allegations.
4. No single descriptor for all native people in North America is entirely satisfactory.
The term “Indigenous peoples of the United States” is sometimes used instead of the more
common term “Native Americans” since the latter may presuppose that peoples of Indigenous
ancestry seek to assimilate into and become part of American society, while the former honors
those who wish to preserve their distinct existence and rights of self-determination. Some
prefer to use the newer descriptor “Original Peoples.” While this note will use the more
commonly recognized descriptor, the writer wishes to express respect for the integrity and
autonomy of all Indigenous peoples. See generally Robert B. Porter, The Demise of the
Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing
5. See generally L.R. BAILEY, INDIAN SLAVE TRADE IN THE SOUTHWEST: A STUDY OF
SLAVE-TAKING AND THE TRAFFIC IN INDIAN CAPTIVES (1966); DEE BROWN, BURY MY HEART AT
WOUNDED KNEE; AN INDIAN HISTORY OF THE AMERICAN WEST (1970); RICHARD DRINNON,
FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE BUILDING (1980); ROGER C.
ECHO-HAWK & WALTER R. ECHO-HAWK, BATTLEFIELDS AND BURIAL GROUNDS: THE INDIAN
STRUGGLE TO PROTECT ANCESTRAL GRAVES IN THE UNITED STATES (1994); BRUCE E.
JOHANSEN, DEBATING DEMOCRACY: THE IROQUOIS LEGACY OF FREEDOM (1998); WINONA
LADUKE, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE (1999); DAVID
Despite the pervasive nature of these allegations, the United States government, has never, in its two hundred and twenty five year history, undertaken the task of compiling an authoritative account of the incidents involved in the long history of its relations with Native Americans. Nor has the government issued a comprehensive, official acknowledgment or apology for alleged misdeeds committed against Native Americans by citizens and government officials.6

Typical citizens of the United States know little about the historical treatment of the Native Americans during the settlement of the United States, perhaps because the founding myths of the country invariably offer highly flattering accounts of its origins and revise or ignore the rights and treatment of Native Americans.7 Many citizens either deny or do not know about the United States government’s openly hostile policies nor about the egregious actions of early settlers and government soldiers against Native Americans.8 Consequently, disputes and debates continue to arise over the accuracy of such claims and even well-documented incidents are disbelieved or denied by many citizens.9

A truth commission provides a means to settle these kinds of disputes by investigating broad patterns of human rights abuses in a country and creating an authoritative, officially recognized record of past crimes and misdeeds.10 Truth

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8. LOEWEN, supra note 2. (James W. Loewen, a historian at the University of Vermont, spent two years at the Smithsonian Institution researching the truth behind distorted and inaccurate accounts of historical events that are presented in twelve high school and college American history textbooks.)


Truth commissions operate on the fundamental principle that the truth, if faced squarely, discussed openly, documented thoroughly, and acknowledged officially, will reduce the likelihood that a repetition of human rights abuses will recur in the future. Thus, a truth commission can be seen as an anti-revisionist effort to face the past and thereby create a more positive future.

The truth commission model can be compared to a psychological model of recovery from emotional trauma. Expert practitioners maintain that psychological healing typically requires that victims admit and talk about the traumatizing experience and that perpetrators acknowledge and express regret for the transgression. Specifically, professionals seek to encourage aggressors to admit and reveal the nature and extent of each offense; provide victims and families with opportunities to talk openly about their injuries while receiving support and interpretive assistance; and guide perpetrators through a process of acknowledgment, apology, and repentance, which often involves learning to empathize with their victims while simultaneously admitting the truth of their misdeeds. When misdeeds in a country or region have been pervasive and long-lasting, truth commissions provide a way for the entire society to begin the process of reconciliation. A truth commission can give victims and perpetrators an opportunity to talk about the past truthfully, tell their stories honestly, and face the painful truth courageously in order to put the past to rest and create a different future. Viewed from this perspective, truth commissions are, in essence, a country-wide process of healing and recovery.

This article undertakes to explore and explain the truth commission model and to apply its framework to the historic treatment of Native Americans in the United States. The truth commission model offers the government and citizens of the United States an opportunity to confront the truth about the country’s past, establish an accurate and authoritative record, and thereby settle factual disputes about the past in order to promote healing among the cultures that continue to coexist in the United States. The article’s objective is to encourage authoritative investigation and documentation of the history of human rights abuses, including allegations of genocide, that have occurred over the last several hundred years against Native Americans in the United States. A truth commission’s authoritative record, if acknowledged officially, could help settle long-standing disputes over the facts, educate the public about the actual treatment of Native Americans in the distant and recent past, provide a conclusive resource for judges, and chart a positive and constructive path forward.


11. Id.


inclusive course for the future for all residents of the United States. Such a record would help prevent continued denial, misunderstanding, forgetting, and revisionism by citizens and officials in the United States.

Part II of this article will first lay out the framework of truth commissions, including their history, purposes and concerns, jurisdiction, problems, and effects. Part III explores Australia’s Council for Aboriginal Reconciliation will examine a potential model for a truth commission such as the one being proposed. Part IV A 1 of this article will present potential justifications for a truth commission in the United States by examining some examples of historic and recent treatment toward Native Americans. Part IV A 2 will explore the applicability of the international definition of genocide to the historic and enduring treatment of Native Americans in order to determine whether any policies or incidents qualify as genocide and, thereby, justify a truth commission. Part IV B anticipates objections to the proposal and discusses them. Finally, Part IV C will discuss both the national and international possibilities for convening the proposed truth commission.

II. THE STRUCTURE AND FUNCTION OF TRUTH COMMISSIONS

[When information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and - eventually - incapable of determining their own destinies.] 14

Richard M. Nixon, United States President,

Concealment of the historical truth is a crime against the people. 16

General Petro G. Grigorenko, U.S.S.R.

A. Truth Commissions Defined

Truth commissions are official bodies, all of which have a mission to investigate and document a pattern of alleged human rights abuses during a specific period of time in a particular country. 17 Truth commissions are investigative bodies only; they prepare and “submit reports of their findings” yet possess no power to


15. Despite his infamous mendacity, apparently even President Nixon understood the importance of knowing the truth.


17. See Hayner, supra note 10, at 598.
Truth commissions seek to ensure a balanced treatment of the facts and promote greater knowledge and acceptance of the truth as documented by the commission.19

According to Priscilla B. Hayner, an international affairs expert who worked on the United Nations-sponsored Commission on the Truth for El Salvador, the definition of a truth commission includes four basic elements.20 First, truth commissions typically convene to investigate past abuses.21 Second, truth commissions investigate and report on broad patterns of human rights violations and not simply on single incidents of atrocities.22 Third, truth commissions are temporary bodies that are created for a clearly defined period of time and are typically disbanded after the preparation and submission of an official report.23 Fourth, truth commissions are vested by the sponsor of the commission with sufficient authority to enable members to access information, to conduct the investigation with a measure of security and protection, and to gain legitimacy for the commission’s official, published report.24

In 1996, a set of potentially far-reaching principles that defined minimum standards for the formation of truth commissions was proposed by the United Nations Subcommission for Prevention of Discrimination and Protection of Minorities.25 In these principles, the United Nations recommended that the following guidelines be followed when forming and convening truth commissions: (1) adopt a universal investigative standard that will protect and allow access to evidentiary documents; (2) form extrajudicial investigative bodies; (3) designate nonremovable commission members; (4) protect and preserve the findings of the commissions; and (5) publish a final report that is public, widely available, and permanently preserved.26

Truth commissions differ significantly from adjudicative mechanisms such as domestic criminal trials and international war crimes tribunals that result in findings of liability.27 Where criminal trials and war crimes tribunals typically involve bringing explicit charges against specific individuals based on discrete incidents involving criminal acts, truth commissions, in contrast, seek to discover the

19. Id. at 384.
21. Id. at 604.
22. Id.
23. Id.
24. Id.
26. See id.
larger pattern of facts and conditions that led to massive human rights violations. Primarily, war crimes tribunals are convened to investigate conduct that violates international laws governing war, including “killing of hostages, abuse of civilians in occupied territories, abuse of prisoners of war, and devastation that is not justified by military necessity.” While war crimes tribunals focus on individual perpetrators and emphasize prosecution, truth commissions focus on gaining knowledge and understanding of the entire pattern of human rights abuses in a country without proceeding to conduct prosecutions of offenders. Despite differences in the fundamental orientation and the methods used, adjudicative processes and truth commissions exist as attempts to expose the truth of what actually happened during the commission of crimes and as a means of establishing final accountability for wrong-doing.

The Chief Prosecutor at Nuremberg, United States Supreme Court Justice Robert Jackson, emphasized the importance of establishing an official record after World War II that would discourage denial and revisionism over time. He advocated documenting Nazi atrocities “with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people.” Jackson’s statement acknowledges the possibility and danger of revisionism and asserts the value of establishing an authoritative record of the facts after extensive and widespread incidents of human rights abuses.

In situations where neither individual criminal trials nor war crimes tribunals are appropriate, truth commissions offer a way to create an officially sanctioned body that will facilitate a comprehensive exploration of the truth so that resolution is still possible. Clearly, there are circumstances where adjudication is neither feasible nor appropriate. For example, trials can be impossible when the numbers of perpetrators requiring prosecution would overwhelm the country’s criminal justice and court system. Historically, war crimes tribunals have not been suitable when the human rights offenses and mistreatment occurred under conditions other than war. Neither criminal trials nor war crimes tribunals are particularly useful nor productive when the perpetrators of grave offenses have died. In all of these situations, alternative avenues of seeking justice are necessary. Truth commissions offer another way to promote justice and create resolution after grave and extensive human rights abuses.

By focusing on the overall patterns, circumstances, governmental policies, and social dynamics that led to the alleged abuses, truth commissions can promote

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29. Hayner, supra note 10, at 605.
31. Id. at 184.
32. Balint, supra note 27, at 118.
resolution by allowing members of a society to learn as much as possible about all that happened in the past. 33 Where criminal trials and war crimes tribunals focus on individual responsibility for illegal acts, truth commissions focus on multiple acts by numerous individuals or groups and the overall circumstances of human rights violations in an entire society. When many, or even all, of the perpetrators of human rights abuses are long dead, a truth commission provides a way to investigate the allegations and establish an official record in order to prevent reoccurrence and promote healing for the remaining victims and relatives. In sum, the truth commission process provides a method for seeking the truth and setting the record straight while simultaneously discouraging or eliminating the possibility of revisionism and denial of crimes that would otherwise go uninvestigated. Although the goal of truth commissions is not necessarily to bring to justice some of the individuals who perpetrated abuses, the possibility is that truth commissions, by encouraging truthful accounts and facilitating an open national dialogue, can further a society’s knowledge and understanding of events, heal cultural wounds, and prevent future human rights abuses.

B. Purposes of Truth Commissions

The general purposes of truth commissions are fourfold: truth commissions (1) provide an historic record; (2) promote a sense of justice for victims; (3) encourage and expedite national reconciliation; and (4) discourage similar crimes in the future. 34 While the purposes of commissions of inquiry may overlap and serve numerous purposes simultaneously, 35 the fundamental objective is to establish a candid, genuine account of a country’s history and its government’s and citizens’ human rights abuses.

Given, however, that the nature of the violent repression is often witnessed and widely understood, and that the identities of the perpetrators are often generally known, the larger purpose of truth commissions may be to facilitate a state’s acknowledgment of its officials’ and citizens’ egregious misdeeds, as well as the state’s own responsibility. 36 According to some observers, official acknowledgment of wrongdoing through official recognition of events and acts that have been long-denied may herald the beginning of the country’s psychological healing process. 37

South Africa’s Truth and Reconciliation Commission has stated goals that express effectively the essential purpose of all truth commissions. The primary goal of the Truth and Reconciliation Commission is to promote reconciliation and facilitate multicultural, interracial, and interpersonal healing by filling the

33. Id.
34. Scharf, supra note 18, at 379.
35. Hayner, supra note 10, at 607.
36. Id.
37. Id. at 608.
psychological gap left by the abolishment of apartheid. In order to accomplish this goal, the Truth and Reconciliation Commission seeks to provide acknowledgment through survivor storytelling, perpetrator confessions and acceptance of culpability, and to encourage or require acceptance of appropriate responsibility and ameliorative acts such as apologies and restitution.

The inability to prosecute all of the alleged perpetrators of serious human rights abuses creates a motivation for finding an alternative means of achieving justice. For some, truth commissions can satisfy the search for justice by offering one effective alternative to prosecution. By creating a body that is responsible for investigating abuses and creating an authoritative historical account that is detailed enough to convince skeptics, yet broad enough to explain overall patterns of human rights violations, truth commissions may be able to achieve a measure of justice when traditional means are unavailable.

C. Effects of Truth Commissions

When a broad variety of groups and individuals participate in and observe a process as complex and intricate as a truth commission, the effects are difficult to generalize. Yet, the success of a truth commission may hinge on its success in investigating the facts and establishing the truth about what happened, and on its ultimate effects on the nation as a whole. Effects on victims may turn on the ability of the final report to inform relatives of the fate of family members, promulgate international condemnation of human rights abuses, and encourage positive changes for the future. Perhaps the best potential outcome from any truth commission is the possibility that future occurrences of human rights abuses would be reduced. Another highly desirable outcome would be the creation of a viable, lasting state of peaceful coexistence and cultural reconciliation between the peoples of a country.

Truth commissions seek these hoped-for effects in a variety of ways. For example, truth commissions encourage victims to come forward and speak openly about their actions and experiences. Truth commissions facilitate and encourage participants to name names, acknowledge misdeeds, and make apologies. Each of these avenues of reconciliation is based on the idea that some form of reckoning with

39. Id.
40. Various reasons for failure to prosecute might include inadequate court resources, lack of funding for judicial action, the death and consequent unavailability of defendants, and dauntingly large numbers of perpetrators.
41. See Scharf, supra note 18, at 384.
42. See Hayner, supra note 10, at 609.
44. Hayner, supra note 10.
past evil is an essential component in the ongoing struggles of a country to put the past to rest and move on with greater hope and optimism.\textsuperscript{45}

Truth commissions have a variety of potential effects. Perhaps the most important effect results from publication of the commission’s official investigative report, recounting past crimes and patterns of abuses. A truth commission’s report is an official publication that aims to provide an accurate and authoritative record of the country’s past history.\textsuperscript{46} The creation and publication of an official, trustworthy account that communicates all of the known truth can prevent the past from being rewritten, denied, or forgotten. Thus, the report may establish an official record that is not subject to revisionism.\textsuperscript{47} Such a complete and authoritative report may provide a foundation for judges who seek authoritative bases for innovative decisions that establish new legal precedents.

The honest accounting sought by truth commissions may also “allow[ ] a society to learn from its past in order to prevent a repetition of such violence in the future.”\textsuperscript{48} Thus, an authoritative report can help to reduce the potential for future atrocities by contributing to an informed citizenry that would recognize and resist future abuses.\textsuperscript{49} According to this theory, citizens are more likely to recognize, talk about, and take early action against future human rights violations when they have collectively experienced the investigative process of a truth commission by listening to the stories told by victims and perpetrators and accepting the commission’s final authoritative report.

Truth commissions, through the process of official recognition and acknowledgment of the past, may encourage some victims and families to accept the reality of past events and begin the process of psychological healing.\textsuperscript{50} Some human rights activists assert that after widespread human rights abuses, a full truth-telling must precede this process.\textsuperscript{51} While not all observers agree that exposure of the truth facilitates reconciliation,\textsuperscript{52} others believe that truth commissions “play a critical role in a country struggling to come to terms with a history of massive human rights crimes” by “serving a ‘cathartic’ [e]ffect” in a society’s efforts to formally acknowledge a long-silenced past.\textsuperscript{53} Still others argue that an inherent right to the truth exists in human rights laws and that the mere existence of such an inherent right

\begin{itemize}
\item \textsuperscript{46} Hayner, supra note 10, at 607.
\item \textsuperscript{47} Id. at 607-609.
\item \textsuperscript{48} Hayner, supra note 10, at 607.
\item \textsuperscript{49} Id. at 609.
\item \textsuperscript{50} Id. at 607.
\item \textsuperscript{51} Id. at 609.
\item \textsuperscript{53} Hayner, supra note 10, at 600.
\end{itemize}
justifies the formation of truth commissions.  

A truth commission’s final report often makes specific and definite recommendations for reform, and these recommendations potentially have another effect on the country and its people. Suggested reforms may include improvements to a country’s military and police forces, reparations to victims, and reform of the judicial system. A report’s recommendations may provide information and authority to lobby for beneficial change, as well as educate and motivate the populace in accepting necessary changes. The content of the recommendations may serve to assist government officials in making the recommended changes. All of these effects can have significant positive impacts on survivors, on perpetrators, on the government, on the country’s society, and on the world community.

South Africa’s Truth and Reconciliation Commission has taken testimony from thousands of alleged perpetrators with mixed results. The Truth and Reconciliation Commission’s goal of interracial healing has thus far resulted in successes and failures, but observers emphasize that perpetrator apologies are only one step in a complex process of psychological healing and cultural reconciliation. However, the long-term effects of this effort are not yet known nor is the project universally accepted as positive. Still, contrary to some initial concerns, the work of the Truth and Reconciliation Commission had not led to widespread demands for revenge or exorbitant compensation but, instead, seems to have resulted in satisfaction among some participants at having their suffering acknowledged. Ultimately, the Truth and Reconciliation Commission may meet its goal of genuine interracial reconciliation. On the other hand, it may in the long run fail to accomplish the hoped-for results of reduced racism and a greater sense of healing and justice among all of the people of South Africa. However, when analyzing South Africa’s effort, perhaps it is useful to remember that none of the fifteen truth commissions examined by scholar Patricia Hayner in her extensive and ground-breaking study of truth commissions had the effect of fueling violence or causing a situation in a country to become worse. Thus, while the efforts of truth commissions in South Africa and other countries may ultimately prove ineffective, apparently there is little

54. Id. at 611.
55. Id. at 609.
56. Id.
58. Yamamoto, Race Apologies, supra note 38, at 56.
60. Allen, supra note 52.
61. See Yamamoto, Race Apologies, supra note 38, at 52.
62. Hayner, supra note 10, at 610.
to lose by making the attempt.

D. A Brief History of Truth Commissions

Truth commissions are neither new nor rare. The first modern international commission to gather information and create a record of alleged war crimes was established during the Balkan Wars of 1912 and 1913.63 Following World War I, the Allies convened the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties in order to investigate German and Turkish atrocities.64 During World War II, two investigative commissions were created to investigate German and Japanese war crimes.65

After more than twenty years of dormancy, the truth commission concept was revived in response to political upheaval and repressive regime practices in South America.66 In 1978, the International Fact-Finding Commission was established to investigate grave violations of the Geneva Conventions of 1949.67 The first United Nations-sponsored truth commission, convened in 1991, was called the “Commission on the Truth for El Salvador”68 and its success led to a notable increase in the status and use of truth commissions.69

Between 1974 and 1994 alone, fifteen major truth commissions were convened in Africa, Europe, South America, Central America, and Southeast Asia.70 Between March of 1992 and the end of 1993, six truth commissions were established.71 Some countries, such as Uganda and South Africa, have seen the operation of more than one truth commission.72 Despite the long history and well-established presence of truth commissions, however, truth commissions have been insufficiently studied; only one comprehensive survey has been published, and that study covered only the twenty-year period between 1974 and 1994.73

The form of truth commissions is steadily evolving beyond the traditional state-sponsored model.74 Increasingly, truth commissions are sponsored by the United Nations on behalf of the international community, by an opposition party, or

63. Scharf, supra note 18, at 377.
65. Scharf, supra note 18, at 377.
66. Hayner, supra note 10, at 627.
67. Scharf, supra note 18, at 377.
68. Hayner, supra note 10, at 627.
69. Id. at 605.
70. Id. at 601-603, tbl.I.
71. Id. at 606.
72. Id. at 600.
73. Id.
74. Hayner, supra note 10, at 607.
by an alliance of nongovernmental organizations. Some have criticized old-style, government-sponsored truth commissions due to the potential for political limitations and manipulations that could influence the course of the investigation and dilute the strength of the final report. In response to allegations of susceptibility to political exploitation, some observers have called for a permanent international truth commission to operate under the United Nations as an adjunct to the International Criminal Court. The arguments for a permanent international truth commission illustrate four of the primary needs facing any truth commission. First, every truth commission must secure sufficient funding to conduct a thorough and detailed investigation and prepare an authoritative history. Second, truth commissions must operate in a manner and with a staff that can assure neutrality and independence. Third, truth commissions must be able to operate in safety, insulated from domestic reprisals. Fourth, a truth commission should be initiated as quickly as possible after grave human rights violations are recognized.

E. Universal Jurisdiction as the Legal Framework for Convening Truth Commissions

Some crimes are so abhorrent to the world that customary norms have sprung up among nations obligating all states to deal similarly with them. The legal term *jus cogens* refers to norms so fundamental to the exercise of international law that individual states cannot, as a matter of international law, contravene them. *Jus cogens* norms prevail over all other norms and are deemed to be “‘peremptory’ and non-derogable.” Consequently, all states are obligated to prioritize the enforcement of these norms and to avoid taking any action that would limit their implementation.

Although there is some disagreement as to exactly which crimes do and do not contravene *jus cogens* norms, broad agreement exists to include the crimes of “aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture.” These crimes are considered to be so egregious

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75. *Id.*
76. Scharf, *supra* note 18, at 381.
77. *See id.*
78. *See id.*
79. *See id.* at 380-381.
80. *See id.*
81. *See id.* at 381-382.
82. *See id.* at 382.
85. *Id.* at 68.
that every state may assert jurisdiction over the perpetrators. Thus, jurisdiction is universal and exists regardless of where the violations were committed, by whom, against whom, and whether in peace or war and, as a result, any state may prosecute perpetrators of crimes that qualify as jus cogens norms regardless of the nationality of the perpetrator or victim.


90. See filartega v. pena-irala, 630 F.2d at 889.

91. See Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (concluding the perpetrators of especially heinous crimes against humanity should be treated as hostis humanis, or the enemies of all humanity, over which all states may assert jurisdiction).
which has custody of the perpetrators may punish them according to its law.\textsuperscript{94}

The newly created International Criminal Court may bring to justice greater numbers of human rights violators than occurred when states were exclusively responsible for prosecution of offenders. For instance, the International Criminal Court may become especially active in countries where the necessary prosecution can not or does not proceed swiftly and appropriately. However, the International Criminal Court is unlikely to be useful in addressing contemporary claims of Indigenous peoples in the United States. First, in such circumstances, the International Criminal Court will operate primarily on the basis of “ceded jurisdiction” where jurisdiction is given through state consent,\textsuperscript{95} and the United States is unlikely to give such consent. Second, the new Court is likely to be preoccupied with claims involving very recent, and perhaps ongoing, offenses that will leave few resources to investigate the long-term mistreatment of indigenous peoples in many countries throughout the world. Third, the structure of the International Criminal Court simply does not lend itself to the kind of broad-based historical and cultural inquiry that is necessary to investigate broad, cultural patterns of mistreatment of Indigenous peoples in the United States. Nor is long-past mistreatment within the jurisdiction of the International Criminal Court.\textsuperscript{96} In addition, the goals of prosecution do not address the needs presented in the aftermath of a historical pattern of abuses that has persisted for hundreds of years. Therefore, under the circumstances that exist in the United States, a truth commission, with its focus on overall societal patterns, is a better choice than the International Criminal Court.

Even when jurisdiction is available, however, prosecution is not always feasible or possible. In such cases, a truth commission can provide an alternative for those who seek a degree of justice.\textsuperscript{97} Thus, under certain circumstances, a truth commission can claim the requisite universal jurisdiction and can operate as a useful and acceptable substitute for prosecution. However, despite broad legal authority to prosecute, some states continue to behave as though the operation of a truth commission is simply a substitute for the prosecution of perpetrators of gross violations of human rights.\textsuperscript{98} Instead, prosecution of human rights violators should proceed whenever possible. Truth commissions should not, without cause, simply be substituted for legal prosecution. Few would dispute, however, that when full

\textsuperscript{94} Id.
\textsuperscript{96} Under Article 24, the International Criminal Court has limited its jurisdiction to criminal conduct that occurred after the treaty enters into force. Rome Statue of the International Criminal Court, July 17, 1998 U.N. Doc. A/Conf. 183/9, art. 24.
\textsuperscript{97} Reasons that prosecution might be impractical or impossible include the death or disappearance of perpetrators, lack of access to necessary records, and numbers of perpetrators that exceed the ability of a country’s legal resources to prosecute effectively.
prosecution is not realistically possible, it is appropriate to seek a viable alternative. A truth commission would provide that alternative.

**F. The Role of Impunity in the Search for Justice**

In exchange for participation in a truth commission process, perpetrators may receive immunity from prosecution and civil liability.99 When truth commissions act to grant immunity or amnesty to perpetrators of atrocities, many international observers express concern and alarm.100 Some observers contend that the very idea of truth commissions involves a sacrifice of justice for expediency.101 Others argue that when prosecution is unrealistic, impractical, or simply impossible, an alternative must be found so that the incidents will not be denied, revised, or simply forgotten.

Ideally, all states would honor the duty to investigate, immediately and thoroughly, grave violations of human rights. All states have an obligation to take measures to prosecute the perpetrators of such violations.102 However, prosecutions and trials following the report of a truth commission are very rare.103 In general, there are two broad justifications for forgoing prosecution and granting immunity to perpetrators. First, the manifest realities of limited resources and weak cases prevent prosecution of every single case, even when human rights violations are undisputed. Second, the greater good may be served by convincing lower-level criminals to give information and testimony to the truth commission in order to gather evidence against even high-ranking officials that orchestrated criminal activity.104

International documents such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on

102. See Joyner, Redressing Impunity, supra note 100, at 592.
103. See Hayner, supra note 10, at 604.
Human Rights, the American Convention on Human Rights, and the United Nations Convention Against Torture all recognize the right of victims to be compensated for injuries including loss of life, loss of liberty, physical or psychological injury, loss of or damage to property, and loss of opportunity caused by human rights abuses. Satisfactory compensation, however, need not always be in the form of financial or property reparations, just as effective punishment need not always be in the form of a prison term.

Differences in punishment and compensation paradigms may be at least partly cultural. For instance, although Western legal systems largely favor adversarial and adjudicative processes in their approach to dispute resolution, African and other indigenous customs and traditions emphasize the role of consensus, mediation, and conciliation. While Western legal systems engage extensively in plea bargaining – a well-established model of negotiating punishment – not all cultures accept that model of criminal justice.

Acknowledging that different perceptions of justice exist in different cultures and countries is fundamental to acceptance of the operation of truth commissions. Some believe that, if grants of amnesty or impunity will result in more people coming forward to tell the truth about what they saw and did, then such grants are justified. Others simply accept that, for some victims and relatives, justice and compensation might come in the form of welcome information about missing relatives or sincere apologies from individuals or governments rather than in the form of reparations or strict prosecution of offenders.

III. AUSTRALIA’S COUNCIL FOR ABORIGINAL RECONCILIATION

The history of a nation is, unfortunately, too easily written as the history of its dominant class.

Prime Minister Kwame Nkrumah, Ghana

Australia’s efforts to come to terms with its past history of enduring racism against Aboriginal and Torres Strait Islander peoples provide an informative

105. Scharf, supra note 18, at 388-389.
106. See Burns H. Weston et al., International Law and World Order 628 (3d ed. 1997).
107. One example of this is the South African Truth and Reconciliation Commission’s de-emphasis on the “Western” concepts of prosecution and plea-bargaining. Guela, supra note 57.
109. The Torres Strait Islands consist of three island groups in the western Pacific Ocean just northeast of Australia, located in the passage between the Coral Sea and the Arafura Sea, south of the island of New Guinea and north of Cape York Peninsula, near Queensland, Australia. New Encyclopedia Britannica, 14 Macropedia 475 (15th ed. 1989).
illustration of one country’s use of a truth commission to attempt to set the record straight, acknowledge past abuses and injustices, and create a better future. Australia’s innovative and wholly domestic efforts to reconcile its past history have also demonstrated that the truth commission model can be successfully adapted to a greatly expanded purpose.

Australia’s history is similar to that of the United States in that both countries were colonized by Europeans without regard for the rights of existing civilizations of Indigenous inhabitants. When the British first arrived in Australia, intending to establish a penal colony, they created records claiming that the continent was uninhabited, despite the presence of the Aboriginal and Torres Strait Islander peoples throughout the continent and its surrounding islands. For the next nearly two hundred years of colonialism, the Indigenous peoples of the region were variously ignored, attacked, or excluded, both legally and culturally.

Beginning in about 1937, Australia’s official policy shifted toward “assimilation” of Indigenous peoples into the dominant culture. The goal of assimilation is to induce minorities to adopt the practices and characteristics of the larger culture to the extent that they are transformed and, ultimately, are indistinguishable from the dominant culture. By 1962, the official policy had shifted away from assimilation and toward integration of Indigenous peoples into the larger culture. For example, in 1967, the Australian Constitution was finally amended to include Indigenous peoples and specifically allowed Aboriginal peoples to vote and be counted in the national census. However, at the same time, the government continued its policy of removing Indigenous children from their families for placement in “proper” Christian homes.

Although the last decade in particular has evidenced a political and legal shift toward multi-culturalism and self-determination in Australia, the devastating effects of racial discrimination are still readily apparent in the country. For example, Indigenous Australians are so disproportionately represented in Australia’s criminal justice system that researchers can predict, solely on the basis of race, rates

111. See id.
112. See id. at 167.
113. See id.
115. See Sarre, supra note 110, at 165.
116. See id.
117. See id.
118. See id. at 168.
of arrest, remand in custody, sentences, and terms of imprisonment.\footnote{119} Gradually, the Indigenous people of Australia, like groups of indigenous peoples around the world, have grown more vocal about their treatment, disenfranchisement, and legal status.\footnote{120} Conventional legal approaches have not adequately addressed historical disadvantages such as dispossession of lands, health problems, forced cultural assimilation, and lack of control over their lives and cultures.\footnote{121} Increasingly, Indigenous Australians are demanding to be treated as equal to other inhabitants of their state.\footnote{122} At the same time, the international community has responded to racism around the world with treaties prohibiting cultural and racial discrimination in participant countries.\footnote{123}

Finally, in 1991, Australia’s Commonwealth Parliament voted unanimously to establish the Council for Aboriginal Reconciliation [hereinafter Council] in order to address the country’s pervasive racial discrimination and to promote reconciliation between Aborigines and Torres Strait Islanders and European settlers.\footnote{124} The Council’s objective was to improve relations between all Australians by providing Australians with an opportunity to “build a nation that lives out the values it proclaims.”\footnote{125}

The preamble to the Council for Aboriginal Reconciliation Act of 1991 recognized that Australia “was occupied . . . for thousands of years before British settlement . . . [in] 1788,” that the Indigenous people of Australia “suffered dispossession and dispersal from their traditional lands by the British Crown,” and that reconciliation is a “most desirable” goal that has not yet occurred.\footnote{126} The statute incorporated seven functions: (1) promoting Indigenous cultures and history; (2) considering reconciliation initiatives; (3) advising Ministers of State; (4) developing strategic plans; (5) promoting open discussion forums among all Australians; (6) making recommendations regarding the need for a formal reconciliation document; and (7) making periodic progress reports to the Australian Government.\footnote{127} For its part of the reconciliation process, the Commonwealth promised to

\begin{itemize}
  \item \footnote{119} See id. at 165.
  \item \footnote{121} Id. at 412.
  \item \footnote{122} See id. at 413.
  \item \footnote{125} Id.
  \item \footnote{126} Id.
  \item \footnote{127} Smith, supra note 120, at 422.
\end{itemize}
seek an ongoing national commitment from governments at all levels to cooperate and to coordinate with the Aboriginal and Torres Strait Islander Commission as appropriate to address progressively Aboriginal disadvantage and aspirations in relation to land, housing, law and justice, cultural heritage, education, employment, health, infrastructure, economic development and any other relevant matters in the decade leading to the centenary of Federation [in] 2001 [when the Council’s term will end].

The Council consists of twenty-five representatives from Aboriginal and Torres Strait islander areas, major business interests, and industry leaders. The Council includes at least twelve Aborigines and two Torres Strait Islanders as well as an Aboriginal Chairperson, a Deputy Chairperson, and representatives nominated by the Parliament. Initially, the Parliament instructed the Council to work with all parties to determine the appropriateness of a formal document or documents of reconciliation. After extensive consultations, the Council concluded that any documents prepared by the Council would need to “express the Australian people’s hopes and aspirations for reconciliation,” share responsibility for negotiating steps toward overcoming disadvantages, design an ongoing process of collaboration, and “recognise that much remained to be done.” The Council also expressed its belief that documents of reconciliation would need to gain acceptance and commitment from groups throughout Australia, including parliaments, local authorities, organizations, institutions, and communities. In structuring efforts to achieve true reconciliation, the Council emphasized the need for participation and efforts of Australians in their everyday lives. The Council formed a vision of “[a] united Australia which respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all.” In its plan, the Council identified “the four Cs” (communication, consultation, cooperation, and community action) to be methods for achieving each of the three major steps toward reconciliation: first, looking together at the issues and recognizing the need for change; second, looking forward and agreeing to make the needed changes; and third, implementing change.

The Council was designed to be a formal nine-year process of reconciliation.
divided into three 3-year terms, each with different priorities and explicit goals.\textsuperscript{137} For example, the Council’s three primary goals for the period between 1998 and 2000 were stated as follows:

Goal 1: Documents of Reconciliation
Achieve recognition and respect for the unique position of Aboriginal and Torres Strait Islander peoples as the indigenous peoples of Australia through a national document of reconciliation and by acknowledgment within the Constitution of this country.

Goal 2: Partnerships in Reconciliation
Gain the commitment of governments, business, peak organisations and community groups to form partnerships which will achieve social and economic equality for Aboriginal and Torres Strait Islander peoples.

Goal 3: The People’s Movement for Reconciliation
Encourage and support the people’s movement for reconciliation to achieve justice and equity for all Australians, to embrace the unique place of indigenous peoples in the life of the nation and to ensure that the work of reconciliation continues beyond the life of the Council.\textsuperscript{138}

Despite its modest successes,\textsuperscript{139} the Council has yet to achieve the sweeping changes envisioned for Australia during the Council’s inception.\textsuperscript{140} Perhaps because the Council is an entirely domestic process, the exceptionally rigorous fact-finding functions that have occurred during investigations by other truth commissions seem absent here.\textsuperscript{141} Yet, throughout Australia, the Council for Aboriginal Reconciliation has opened a nationwide dialogue in an attempt to educate the citizenry and set the record straight about the country’s treatment of Aboriginal and Torres Strait Islanders.\textsuperscript{142} Though not a perfect solution, at least the Council has begun the process of officially recognizing the brutality and tragedy of the country’s origins and reconciling that reality with Australia’s established modern society. Certainly, there

\textsuperscript{137} See Reconciliation Australia, \textit{About the Council, supra} note 129.
\textsuperscript{138} Id.
\textsuperscript{139} Success for a process as complex and extensive as a truth commission is particularly difficult to define and measure. Some changes that might be considered indicators of success include an increase in discussion and dialogue among citizens, greater scrutiny of potentially discriminatory governmental policies, and a more open acknowledgement of past wrongs by some citizens and government officials.
\textsuperscript{140} See generally Smith, \textit{supra} note 120.
\textsuperscript{141} Id.
\textsuperscript{142} See Sarre, \textit{supra} note 110; see also Smith, \textit{supra} note 120.
is much room for improvement in the structure and function of future bodies convened for similar purposes. However, Australia’s Council for Aboriginal Reconciliation has demonstrated that an official, domestic body convened to create reconciliation after centuries of oppression and mistreatment is realistic, feasible, and potentially useful.

IV. APPLYING THE TRUTH COMMISSION MODEL TO THE UNITED STATES

God has not been preparing the English speaking and Teutonic peoples for a thousand years for nothing . . . He has given us the spirit of progress to overwhelm the forces of reaction throughout the earth. He has made us adept in government that we may administer government among savage and senile peoples . . . And of all our race He has marked the American people as His chosen nation to finally lead in the regeneration of the world.\(^\text{143}\)

U.S. Senator Albert J. Beveridge

The invaders also anticipated, correctly, that other Europeans would question the morality of their enterprise. They therefore [prepared] . . . quantities of propaganda to overpower their own countrymen’s scruples. The propaganda gradually took standard form as an ideology with conventional assumptions and semantics. We live with it still.\(^\text{144}\)

Francis Jennings, Historian

When extensive human rights abuses have occurred in a country, some investigation is considered both necessary and desirable, and the truth commission model presents one potential vehicle for achieving these ends. In order for a truth commission to gain acceptance in the United States, the conduct of the government, its agents, and citizens would probably need to rise to the level of the most serious crimes and misdeeds.\(^\text{145}\) The history of westward expansion of European settlers in the United States includes serious, and at times shocking, allegations of crimes

\(^{145}\) Historically, neither the government nor the citizens of the United States have displayed a ready willingness to openly accept culpability for even overt acts of mistreatment or oppression of minorities. Exceptions, however, include such situations as the lengthy, but ultimately successful, struggle of Americans of Japanese descent to obtain reparations after unwarranted incarceration in concentration camps during World War II, as well as the apology issued to native Hawaiians by Congress on behalf of the United States government. S.J. Res. 19, supra note 6.
against the country’s original inhabitants. However, despite authoritative evidence of innumerable incidents of grave human rights abuses, uncertainty and ignorance about the record of treatment of Native Americans persist among citizens of the United States.

If even a few of the historical records, authoritative reports, and first-person accounts of past mistreatment of Native Americans are true, such mistreatment would constitute genocide that would justify convening a truth commission. However, in order for a truth commission to be warranted in the United States, it is not necessary that the entire truth already be established or widely recognized beforehand. Rather, it is only necessary that there exist credible reports and indicators pointing to incidents or patterns of grave human rights abuses that deserve comprehensive, authoritative investigation and full exposure. It is the truth commission itself that would ultimately have to establish the truth or falsity of the historical and contemporary records alleging human rights violations against Native Americans in the United States.

A. Justifications for a Truth Commission in the United States

Suppose the government of the United States took your land, lost or stole your money, and broke virtually every promise it ever made to you. Suppose your rights, your constitutionally guaranteed rights, were being violated. . . what would you do to get justice?146

John E. Echohawk, Executive Director, Native American Rights Fund147

What type or extent of offenses constitute justification for the convening of a truth commission? Historically, truth commissions have been formed to investigate only the most serious and far-reaching patterns of ethnic cleansing, mass genocide, torture, mutilation, murder, rape, disappearances, child abduction, forced assimilation, enslavement, dislocation, repression, and annihilation.148 In some cases, however, even a single incident might serve to expose and illuminate the existence of a

146. Fundraising letter from John E. Echowhawk, Executive Director of the Native American Rights Fund (Sept. 2001) (on file with the Arizona Journal of International and Comparative Law).

147. John EchoHawk is a member of the Pawnee tribe and co-founder and executive director of NARF, whose purpose is to preserve tribal existence, protect natural resources, promote human rights, and develop Indian law. For more information on Mr. EchoHawk and NARF, see Ralph W. Johnson, Indian Law into the Twenty-First Century: Indian Tribes and the Legal System, 72 WASH. L. REV. 1021 (1997); Garrett Epps, To an Unknown God: The Hidden History of Employment Division v. Smith, 30 ARIZ. ST. L.J. 953 (1998).

148. See generally Hayner, supra note 10.
widespread pattern of abuse that deserves authoritative investigation. To that end, consider whether the following event should trigger a truth commission:

During the course of peace negotiations between official representatives of a democratic government and several groups of displaced ethnic minorities, military officials helped create a temporary refugee encampment that consisted of hundreds of men, women, and children living in tents. During the peace talks, the government representatives gave specific and repeated assurances of safety and protection to the lead negotiators from the refugee camp. On one occasion during the course of the peace negotiations, the head government representative instructed nearly all of the adult men to go on an expedition away from the camp. The next morning at sunrise, about seven hundred government soldiers brutally attacked the women, elderly people, children, and remaining men who were asleep in the camp. During the slaughter, many people, including children, tried to surrender by raising the official flag of the soldiers’ government as well as white surrender flags, but these signs of peace were disregarded by the soldiers. Later, the official government report concluded that four to five hundred refugees and nine government soldiers had been killed. Official eye-witness testimony (including at least one government lieutenant) provided documentation of the soldiers’ war crimes, including the murder of unarmed people while attempting to surrender. Eye-witness accounts of atrocities committed by the soldiers included mutilation of all or nearly all of the victims’ bodies. Soldiers were observed chopping out and placing on display the genitals of women, men, and children and skinning off, exhibiting, and proudly wearing the scalps of victims.149

This incident, detailed during hearings conducted by the United States Congress soon after, is an account of the 1874 attack on Native Americans by United States government soldiers that came to be known as the Sand Creek Massacre. Reading about the events that occurred that day could lead some to conclude that a pattern of official abuse toward Native Americans must have existed at the time that was so grave as to require, even at this late date, a process of investigation beyond the usual official inquiry. Others might argue that one such incident, no matter how

149. This retelling of the 1864 Sand Creek incident was summarized from the detailed description that appeared in Dee Brown, supra note 5, at 68-102. Brown’s description was drawn from accounts contained in Congressional reports of that period, including U.S. Congress 39th, 2nd session, Senate Reports 142 and 156, and Senate Executive Document 26. See also STAN HOIG, THE SAND CREEK MASSACRE (1961).
shocking or reprehensible, cannot justify an entire truth commission process and should, instead, result in a more typical process of investigation and adjudication. Still others may conclude that the incident is historical in nature, and argue that it was adequately discussed and recorded at the time, and, thus, that it has little or no relevance to modern issues.

It is true that truth commissions usually focus on only the most pervasive patterns of human rights abuses, and that one incident such as the one described above is unlikely to trigger a truth commission. Yet a larger or more extensive pattern of similar human rights offenses over time represents the prototypical justification for convening a truth commission in order to conduct an extensive investigation, establish the truth of what happened, and create an authoritative, officially acknowledged report. Sadly, records in the United States show that the Sand Creek Massacre, although perhaps one of the best-documented, is not the only massacre of Native Americans. These past massacres and other examples of mistreatment that will be discussed infra, strengthen the justification for some additional measure of official investigation into the pattern or patterns of human rights abuses that preceded and followed these incidents in the United States.

In other countries, truth commission reports have revealed that even the most shocking and monstrous treatment of ethnic groups was often widely and generally known by citizens of the country, and that the human rights abuses were carried out with the implicit or explicit approval of high-ranking government officials. Certainly, this was the case in the United States. For most of the country’s history, officials of the United States government publicly promoted, sanctioned, and orchestrated mistreatment and alleged human rights abuses against Native Americans. In addition, at least some incidents and perhaps even some patterns of mistreatment of American Indians were generally known to and accepted by many American citizens at the time and may be known to many Americans in the present as

150. See generally Hayner, supra note 10.
151. Id.
152. In addition to the Sand Creek Massacre, documented massacres of noncombatants occurred at Wounded Knee and in Washita, Oklahoma in the last years of the nineteenth century. See Drinnon, supra note 5; Fredrick E. Hoxie, A Final Promise: The Campaign to Assimilate the Indians, 1880-1920 (1984); Brown, supra note 149; Limerick, supra note 5; see also Steve Russell, Seeking Justice: Critical Perspectives of Native People: A Black and White Issue: The Invisibility of American Indians in Racial Policy Discourse, 4 Geo. Public Pol’y Rev. 129 (1999).
154. Brown, supra note 5; Hoxie, supra note 152. (establishing that the United States government, through its official representatives, sanctioned abuses against indigenous peoples., including, the Sand Creek Massacre which occurred under the military authority of U.S. Army Colonel Chivington. The Seventh Cavalry, under George Armstrong Custer, pursued and attacked Native American tribes on numerous occasions prior to the Battle of Wounded Knee in 1876).
well.  

For example, the Trail of Tears, the infamous forcible relocation of Native Americans by government troops that resulted in the deaths of four thousand Cherokee, was common knowledge at the time and is still well known today.

However, while some incidents of mistreatment, and perhaps even some patterns of abuse, may be well-known to many people, the complete history of westward expansion in the United States and the overall fate of the Indigenous inhabitants of the North American continent has not been widely known and understood by average citizens in past or current generations. In the United States, misinformation and lack of information is the norm when it comes to understanding and acknowledging the history of the country and the treatment of Native Americans over the last several hundred years. Schools in the United States, routinely teach children revisionist accounts of American history, including reports about the country’s original inhabitants that misstate, misrepresent, or delete basic historical truths. 

According to Smithsonian Institution researcher James W. Loewen, American history “[t]extbooks . . . leave out anything that might reflect badly upon our national character.” “Startling errors of omission and distortion mar American histories,” and some of the information presented in elementary, high school, and college textbooks currently in use is “flatly wrong or unverifiable.” Consequently, many American children grow into adults who continue to believe myths, defend false accounts, and deny basic truths that are well known to historians. As a result, unfair and unjust treatment of Native Americans, too often, is not recognized, accepted, or generally understood, a fact which may contribute to the persistence of problems and tensions between the cultures and the failure of efforts to create a tolerant, integrated culture in the United States.

In the United States, there are those who doubt or deny that Native Americans in the United States were mistreated, enslaved, subjected to germ warfare, exterminated or displaced. Others may acknowledge this treatment but justify it by

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155. See TRENERT, supra note 5. The government’s long-standing policy of forcibly removing Indian children from their homes for acculturation and education in Indian Schools constitutes an obvious example of racially-based mistreatment that was once common knowledge in the United States. For example, one of the major city thoroughfares in Phoenix, Arizona has long been called Indian School Road because of the long-established location of the local Indian School on that road. See generally TRENERT, supra note 5.


157. See LOEWEN, supra note 2; Russell, supra note 152.

158. See generally LOEWEN, supra note 2.

159. See id.

160. Id. at 2.

161. Id. at 4.

162. See generally id.

163. See id.

maintaining that repression and annihilation of indigenous peoples were justified because of ruthless attacks by “blood-thirsty savages” against “innocent settlers” who were forced to use violence only to defend themselves and their families against unwarranted attacks. This view, though unsupported by the historical record, persists in some regions. For example, controversies over the historical facts, apparent in efforts to replace undisputedly inaccurate, racist monuments with historically accurate monuments, lead to vigorous disputes over the representational accuracy, historical legitimacy, and cultural appropriateness of the country’s memorials and monuments. Even at sites of well-documented offenses against Native Americans, some citizens continue to insist on retaining monuments and statues that praise the heroism of “settlers” against ruthless “savages.” Some monuments, like those in Sand Creek, Colorado and Washita, Oklahoma, have memorialized the sites as “battlefields” and celebrate the heroism of the immigrant settlers despite historical records that document the landmarks as sites of infamous massacres of Native Americans men, women, and children at the hands of the United States Cavalry and groups of volunteer militia. In other parts of the country such as Wisconsin, Minnesota, and the Pacific Northwest, white citizens routinely protest the legitimacy of the exercise of Native American hunting and fishing rights, using slogans such as “Spare a fish, spear an Indian.”

These few examples of strained relations over the historical record demonstrate some of the ongoing controversy over Native American treatment and rights and support the call for a comprehensive, officially sanctioned investigation and authoritative report. As one scholar has noted, the abuses and wrongs suffered by Native Americans in the United States over hundreds of years have included a broad variety of well-documented examples of racially-motivated mistreatment and violence, including “brutal massacres, efforts to extinguish entire cultures, theft of

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165. See Linenthal, supra note 9, at 260-61.
166. See generally id.
167. In Santa Fe, New Mexico’s central town square, the historic monument memorializing the heroism of the town’s Spanish founders has been defaced since at least 1978 by chisel marks that have obliterated the monument’s reference to Native Americans as “savages.”
168. See Linenthal, supra note 9, at 258-60. Certainly it is possible for a more representative historical account to be presented and promoted. For instance, the Little Bighorn Battlefield National Monument was, at one time, a shrine to the “hero” George Armstrong Custer and the Seventh Cavalry despite allegations in the historical record that Custer and his men committed murder at this site and others. Now, however, the Monument manages to tell both sides of the stories at once; the accounts of the indigenous peoples as well as the perspective of the Seventh Cavalry. Thus, the site has become a historic monument that is neither claimed nor monopolized by either side’s interpretation of the incident. Id.
169. Robert Johnson, Indians Send Signals that Rile Neighbors of Station WOJB, WALL ST. J., July 8, 1988, at 1. Note that this newspaper headline subtly creates the impression that it is the Native Americans who, by participating in traditional hunting and fishing activities, are responsible for generating conflict with their white neighbors.
land with recognized title, routine treaty violations, and the whole range of exclusionary practices.”

Taken collectively, these actions constitute the gravest forms of mistreatment that can qualify as genocide. When a variety of records document such actions, the case for convening a truth commission becomes even stronger.

1. Allegations of Genocide

One is astonished in the study of history at the recurrence of the idea that evil must be forgotten, distorted, skimmed over. We must . . . [only] remember the things we find creditable and inspiring. The difficulty, of course, with this philosophy is that history loses its value as an incentive and example; it paints perfect men and noble nations, but it does not tell the truth. W.E.B. Du Bois, Historian

The record of mistreatment and exploitation of Native Americans contains accounts of human rights abuses as barbarous and cruel as any encountered during the last century by investigators conducting official inquiries into alleged genocide in countries around the world. However, to determine whether the mistreatment of Native Americans qualifies as genocide, the word must first be defined, and then some acts of maltreatment and exploitation must be documented and compared to that definition.

Polish scholar Raphael Lemkin coined the term genocide in the 1940s to describe a coordinated attempt to annihilate a racial, national, or religious group. In essence, “[g]enocide is a modern word for an old crime” that derives from the combination of the Greek word genos, meaning “race or tribe,” and the Latin word caedo, meaning “to kill.”

Following World War II, the United Nations negotiated within its membership to adopt a Convention on Genocide that would clearly define the term

170. Williams, supra note 164, at 818 n.205.
173. Raphael Lemkin, Axis Rule in Occupied Europe 79 (1944). Lemkin, a distinguished scholar, wrote that the term “ethnocide” could be used interchangeably with “genocide” since both refer to attempted annihilation based on race or ethnicity. Id.
175. Van Schaack, supra note 88, at 2262 n.20.
and describe the types of treatment that would qualify under the definition.\footnote{176. See id. at 2263-64.} The General Assembly, at its fifty-fifth session in 1946, unanimously adopted a resolution\footnote{177. Legal and Administrative Decisions, U.N. WKLY. BULL, Dec. 31, 1946, at 17-18.} which condemned genocide as:

\begin{quote}
[the] denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and the spirit and aims of the United Nations. The General Assembly, therefore, affirms that genocide is a crime under international law which the civilized world condemns.\footnote{178. G.A. Res. 96, 1 GAOR, 1st Sess., 55th mtg. at 188-89, U.N. Doc. A/64/Add. 1 (1947); Universal Declaration of Human Rights, G.A. Res. 217 (III 1948), Dec. 10, 1948.}
\end{quote}

Although the final version of the resolution differed somewhat from this initial declaration,\footnote{179. The final version differed most importantly by dropping from the list of protected groups human beings aligned by political beliefs. Van Schaack, supra note 88.} the eventual codification clearly included protections for groups based on racial, national, linguistic, and religious categories.\footnote{180. Van Schaack, supra note 88, at 2263. Scholar Beth Van Schaack argues that genocide is so clearly prohibited by customary international law that even groups aligned merely by political opinion are functionally included in the definition. Thus, she contends that the resulting “prohibition of genocide represents the paradigmatic \textit{jus cogens} norm” from which no derogation can be permitted since genocide is “a crime under international law which the civilized world condemns . . . whether the crime is committed on religious, racial, political or any other grounds.” Even though the final Genocide Conventions specifically excluded political groups from classes protected from genocide and limited the scope of protection to only national, ethnic, racial, and religious groups, Van Schaack argues persuasively that the Genocide Conventions’ failure to protect political groups exists without legal force. If so, perpetrators of genocide cannot easily use the pretext of political affiliations to persecute otherwise-covered groups, as has been alleged in some cases. However, the inclusion of groups categorized by race and religion is undisputed. Van Schaack, supra note 88, at 2261, 2264, 2291.} However, the United States refused to adopt the 1948 Genocide Convention for nearly forty years.\footnote{181. Symposium, Critical Perspectives on the Nuremberg Trials and State Accountability: Panel II: Comparative Analysis of International and National Tribunals, 12 N.Y.L. SCH. J. HUM. RTS. 545, n.122 (1995). After decades of resistance to signing the 1948 Genocide Convention treaty, the United States in 1994 finally adopted the Genocide Convention, codifying it as 18 U.S.C. §1091(d). Id.}
collectives has two general phases: first, the oppressor endeavors to destroy the cultural patterns of the oppressed group; and second, the oppressor seeks to impose its own national and cultural patterns on any survivors. Historical records document a variety of assertions and claims alleging grave mistreatment of Native Americans by European settlers that fit the definition of genocide. For instance, early British forces in North America advocated and practiced germ warfare under Commander General Lord Jeffrey Amherst, who was the namesake of Amherst, Massachusetts and Amherst College. Amherst corresponded in writing with Captain Simeon Ecuyer and Colonel Henry Bouquet regarding their plan to “exterminate this execrable race” by collecting blankets and handkerchiefs from smallpox hospitals and distributing them as gifts among Native Americans. This early policy of extermination is summed up in the statement by Captain Ecuyer that “out of our regard for [the Indians] we gave them two blankets and a handkerchief out of the smallpox hospital [in the] hope it will have the desired effect.”

The Indian slave trade that existed during the early history of the United States constitutes another example of mistreatment that qualifies as genocide. As one scholar and researcher discovered, “the capture and selling of Indian women and children” into slavery was highly lucrative and resulted in “many a man’s fortune.” The Indian slave trade along the east coast of the United States resulted in the routine capture, international export, and enslavement of Native Americans. However, records of the period provide only meager, careless documentation of this slave trade. For instance, some ship records contain only vague references to carrying captive Native Americans who were being “carried [sic] away with divorce [sic] others

182. LEMKIN, supra note 173, at 79.
183. For purposes of this paper, the term “European settlers” includes representatives from all ethnicities and nationalities who immigrated to the North American continent.
185. STEARN, supra note 184, at 45.
187. JONES, supra note 186, at 1.
188. FOREMAN, supra note 186, at 3-21; see also BAILEY, supra note 5.
... [by ship captains] who thought to sell them for slaves in Spain."190 Another early record referred to "sending sundry Indian lads and girls aboard ship, to be taken to Boston and 'educated,' [meaning] sold for slaves."191 Early accounts of the American colonies show that colonists routinely sold into slavery "once hostile Indians" who were taken as prisoners of war.192 Yet, while the enslavement of African Americans is universally known and widely discussed in the United States, the contemporaneous abduction and enslavement of Native Americans in the United States is not similarly well-known nor generally discussed.193

Many accounts document that entire tribes of Native Americans were relentlessly pursued and many individuals murdered from the time of the earliest contact with Europeans; as a result, entire tribes were forcibly relocated from their homes and required to move inexorably westward.194 Between 1835 and 1842, United States government troops assisted in the "removal and relocation" of tribes when "bribery, fraud, and intimidation had not cleared all the Indians from the East" quickly enough to satisfy the European settlers.195 The United States government created reservations on marginal or worthless land deliberately to isolate and control Native Americans, and widely prohibited the free exercise of many forms of Native American religion on those reservations, in some cases imposing prison sentences for such practices.196 The United States government has rewritten or ignored lawful treaties between it and tribes of Native Americans, breaking promises assuring property and hunting rights; courts have failed to uphold the rights of Native Americans.

190. BRADFORD, supra note 186, at 111.
191. FISKE, supra note 186, at 277.
192. RANLET, supra note 186, at 113.
193. Even well-educated people report that they were taught nothing about the enslavement of Native Americans in high school, college, or graduate school. After personally questioning numerous law professors and classmates, this author has yet to find someone who previously knew about the Native American slave trade in the United States.
194. See WASHBURN, supra note 5, at v (documenting "the knotty problem of defining the relationship between the American Indian and the United States government" in four detailed, lengthy volumes); see also Linenthal, supra note 9 (discussing the controversies over efforts to replace monuments and memorials with historically accurate representations).
195. WASHBURN, supra note 5, at 62.
Americans, and this has contributed to a broad sense of cultural imperialism with its whole range of exclusionary practices.\footnote{Linenthal, supra note 9, at 205; see generally Wilcomb E. Washburn, Red Man’s Land, White Man’s Law: A Study of the Past and Present Status of the American Indian (1995).} Generations of Native American children were abducted from their families and confined in isolated boarding schools whose purpose, often openly stated, was to assimilate native tribes by destroying the connection between the children and their native cultures.\footnote{Getches, supra note 196; Trennert, supra note 5.}

These historical examples of violence and mistreatment constitute only part of the chronicle of human rights abuses against Native Americans. More recent examples of mistreatment, combined with the historical record of abuses, have created an enduring legacy of oppression and harm that has not ended but, instead, persists into the present era.\footnote{Assistant Secretary of Indian Affairs Kevin Gover, Dept. of Interior, Speech at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs (Sept 8, 2000), available at http://www.rosecity.net/cherokee_trails_newsletter/links/kevin_gover_statement.html (last visited Sept. 14, 2001).}

### 2. The Enduring Legacy of the Treatment of Native Americans in the United States

*In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.*

Frank Murphy, United States Supreme Court Justice

*[The Bureau of Indian Affairs of the United States] participated in the ethnic cleansing that befell the western tribes . . . This agency set out to destroy all things Indian. The legacy of these misdeeds haunts us.*

Kevin Gover, Assistant Secretary of the Interior for Indian Affairs\footnote{Board of County Comm’rs v. Seber, 318 U.S. 705, 715 (1943).}

\footnote{Official Apologizes to Indians: Agency’s legacy ‘haunts us,’ he says, DALLAS MORNING NEWS, Sept. 9, 2000, at 10A.}

\footnote{Ironically, Kevin Gover, the first governmental official ever to publicly acknowledge that the United States government has any culpability for the mistreatment of Native Americans, is an American Indian. Vanessa Ho, Indians Receive Apology from Bureau of...}
In a controversial speech given at an official ceremony celebrating the 175th Anniversary of the Bureau of Indian Affairs of the United States (BIA)\(^{203}\) in 2000, Assistant Secretary of Indian Affairs at the Department of the Interior, Kevin Gover, publicly acknowledged that many Native Americans continue to “live lives of unrelenting tragedy” where “[t]he trauma of shame, fear, and anger [is] passed from one generation to the next, and manifests itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian country.”\(^{204}\) In the interval since the speech, the United States government has refused to issue an official apology to Native Americans and has taken no official responsibility for its role in past human rights abuses.\(^{205}\)

In addition to the insidious and widespread social ills referred to by Mr. Gover, reports about other, subtler forms of mistreatment of Native Americans have emerged as well. For example, in the 1940s, the United States Bureau of Reclamation designed and constructed a series of dams on the Missouri River in North Dakota. Although a variety of designs were considered and could have been chosen, the Bureau selected the one plan that deliberately spared all of the white towns and cities but completely inundated the thriving Fort Berthold Reservation.\(^{206}\) As a result, the tribe was displaced and its robust self-sufficiency and 400-year-old way of life was completely altered and virtually destroyed.\(^{207}\)

In another example, for many years BIA-operated health clinics subjected Native American women “to forced sterilization in appalling numbers.”\(^{208}\) Records

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\(^{203}\) In 1824 when the Bureau (then “Office”) of Indian Affairs was created, it was established under the authority of the War Department. Washburn, supra note 5, at Vol.1 p.5.

\(^{204}\) Gover, supra note 199. While some welcomed Gover’s remarks, others found them to be controversial. First, not all observers found his verbal acknowledgment and apology on behalf of the Bureau of Indian Affairs to be sufficient in light of the extensive mistreatment and losses suffered by Native Americans. Second, some protested that the apology should have been issued officially from the United States government rather than spoken unofficially by a lower level government official. Ho, supra note 202; see also Mark Shaffer et al., Indians Hear BIA Apology, Arizona Tribes Want Action, Not Words, ARIZONA REPUBLIC, Sept. 9, 2000, at A1.

\(^{205}\) Hundreds of major newspapers and other publications carried stories of Gover’s speech, and many referenced calls for an official apology from the United States government. See, e.g., BIA Head Apologizes for Legacy of Racism, L. A. TIMES, Sept. 9, 2000, at A16; Matt Kelley, U.S. agency apologizes to Indians; Admits racism, inhumanity, CHICAGO SUN-TIMES, Sept. 9, 2000, at 13; Matt Kelley, U.S. Official Apologizes To Indian; ‘Legacy of Racism’ Is Acknowledged, WASH. POST, Sept. 9, 2000, at A2; Shaffer, supra note 204; Official apologizes to Indians: Agency’s legacy ‘haunts us,’ he says, supra note 201.

\(^{206}\) MARC REISNER, CADILLAC DESERT 411 (1980).

\(^{207}\) Id.

show that as recently as the 1970s, the BIA-operated Indian Health Service Hospital in Claremore, Oklahoma was still performing sterilization procedures on Native American women as a routine matter without appropriate consent, information, or knowledge.209 Reports of these forced sterilizations have surfaced in "alarming numbers" and include accounts of women who were subjected to coercion, "blatant misinformation," and threats to terminate health services or welfare benefits unless consent for sterilization was given.210 In addition, the BIA clinics routinely misinformed Native American women about the risks of surgical sterilization and misled them about the permanency of the contraceptive procedure.211

The widespread existence of "Indian Schools" constitutes a notorious example of mistreatment of Native Americans. For over a hundred years, in fact until relatively recently, the United States and Canadian governments have forcibly abducted Native American children as young as five from their homes and taken them to government-sponsored "Indian schools" where they were "educated" and "assimilated" into the dominant culture.212 Under this system, the Bureau of Indian Affairs of the United States assigned enormous numbers of children to boarding schools that "brutaliz[ed] them emotionally, psychologically, physically, and spiritually."213 Typically, the schools deprived the children of their native clothing, required them to wear only school uniforms, and forbade them from speaking their native languages even to each other.214 The schools would not allow children to observe their traditional cultural or spiritual practices and, instead, forced them to practice Christianity, the religion of the dominant culture.215 In many cases, the adults who were charged with the care of these children were actually abusing and molesting them.216 Perhaps the most disruptive feature of all was the requirement that the children live at the schools for years at a time and see their parents and families for a few days once or twice a year.217

Other examples of abuses, inequities, and patterns of discrimination continue to emerge. Thus, the effects of past human rights abuses continue to oppress and marginalize native people in the present. BIA Director Gover expressed this view
poignantly in his 2000 speech.\textsuperscript{218} He acknowledged that the BIA, created by the United States government first to control and then later to “assist” Native Americans, has more often served to oppress, persecute, and disenfranchise individuals and tribes.\textsuperscript{219} Gover suggested that the problems created by centuries of racism and genocidal practices directed against Native Americans in the United States are far from over, considering the serious and extensive social problems that exist on reservations all over the country.\textsuperscript{220} Gover stated that for generations, the BIA has “abused, brutalized and even sought to destroy Indian peoples and cultures,”\textsuperscript{221} and that grave negative effects endure due to the Bureau’s history of participation in “ethnic cleansing” of Native American tribes through the use of the “deliberate spread of disease, the decimation of the mighty bison herds, the use of the poison alcohol to destroy mind and body, and the cowardly killing of women and children [that] made for tragedy on a scale so ghastly that it cannot be dismissed as merely the inevitable consequence of the clash of competing ways of life.”\textsuperscript{222} Concluding, Gover promised Native Americans that the BIA will “[n]ever again . . . attack your religions, your languages, your rituals or any of your tribal ways . . . [nor] seize your children, nor teach them to be ashamed of who they are.”\textsuperscript{223}

Yet, despite the candid comments and the sweeping promise, one public speech by a single mid-level government official - especially one who is a member of the oppressed minority - is unlikely to have much lasting impact without actual changes in government policies and citizen attitudes in the United States.\textsuperscript{224} Few would argue that the relationship between the United States government and Native tribes is settled.\textsuperscript{225} One can glimpse the extent of the troubled relationship in actions of the United States government to defeat legally valid treaties and deny reparations, in court decisions that either have not upheld legally valid treaties or that have substituted meager financial reparations for the promises contained in valid treaties, and in Congressional acts that have disenfranchised individual Native Americans and tribal groups.\textsuperscript{226} Perhaps some of the most significant indices of the

\begin{itemize}
\item 218. See Government Executive Apology to a Nation, GOV’T EXECUTIVE, Nov. 1, 2000, at 20.
\item 219. Gover, supra note 199.
\item 220. Id.
\item 221. Footnote to Indian History, PRESS ENTERPRISE, Sept. 18, 2000, at A8.
\item 222. Matt Kelley, Head of U.S. Agency Apologizes for Long Mistreatment of Indians, CHI. TRIB., Sept. 9, 2000, at 1N.
\item 223. Id.
\item 224. See Footnote to Indian History, supra note 221.
\item 225. According to a survey of the history of federal Indian policy, “inconsistency is a recurrent theme in the diverse programs and reforms of the dominant society for resolving its ongoing 200-year-old ‘Indian problem.’” DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 259 (1993).
\end{itemize}
unsettled relationship are the fundamental contradictions inherent in attempts by Congress and the courts to confer sovereign status on tribes and yet retain the absolute “power to terminate or restrain that sovereignty at any time.”

One enduring element of this troubled relationship is the debate over the severity of abuse of Native Americans over the centuries. Seemingly, the problem is not that elements of the mistreatment of Native Americans are not known. Rather the United States has failed to document them in a cohesive and comprehensive form that can be publicly and officially acknowledged. Thus, controversies continue among citizens and within governmental agencies over what actually happened and what is continuing to happen to Native American peoples throughout the United States.

Establishing a truth commission would enable the United States to document the entire record and face its own role in the harm done to Native Americans. A truth commission could facilitate a nationwide dialogue by creating an official record of human rights abuses and violations. An authoritative record would also allow the United States government the opportunity to publicly acknowledge its past misdeeds and, where merited, to apologize. This acknowledgment would help the United States to maintain credibility and authority in the world community as a defender of human rights. By recognizing the mistreatment of Native Americans and apologizing for misdeeds, the United States government would be sending a message to countries around the world that the United States does not limit its support to investigations of human rights abuses in other countries, but is also willing to honestly assess violations that occur or have occurred in its own territory.

B. Countering Objections to Convening a Truth Commission in the United States

The road to equality of treatment is long, and the fact that we no longer stand at the beginning of that road is hardly a reason to call a halt.228

Professor Sheri Lynn Johnson, Cornell Law School

Truth commissions operate on the fundamental premise that a complete understanding and genuine acknowledgement of past wrongs, no matter how painful, are useful steps in a nation’s efforts to make positive changes and to master forces that led to past abuses. According to scholar Jonathan Allen, because of this foundational premise, advocates of truth commissions assert that “recognition and disclosure of past offenses are necessary” in order for a democracy to distance itself from the past and establish – or maintain – its legitimacy.229 Some experts posit that

227. Id. at 87.
229. Allen, supra note 52, at 315.
participation in truth commissions can result in a collective social catharsis or collective healing, and can thus serve as an important step by a government or a nation toward “formally acknowledging a long-silenced past.”

However, in light of the history of ruthlessness and inconsistency of the United States government and citizens toward Native American tribes, some observers believe that it is “naive in the extreme to believe that we can achieve any genuine consensus” about our past. However, this objection assumes that consensus is necessary. Perhaps consensus is less important than the process of investigation and publication of a complete, accurate, and authoritative report. Nonetheless, a truth commission could finally assemble the larger picture and facilitate understanding that would resist continued denial and revisionism by authoritatively investigating and documenting in an official record the true nature, extent, and severity of the historic and recent mistreatment of Native Americans.

Not all observers agree, however, that truth commissions create resolution and national reconciliation. Some scholars fear that truth commissions can exacerbate old issues and, thus, create deeper resentment and frustration. However, in countries where truth commissions have convened and successfully concluded, citizens report satisfaction or relief at official efforts to understand and come to grips with past events and social forces that contributed to human rights abuses. Some human rights organizations assert the existence of an inherent right to know the truth and argue that such a right obliges honest investigation and official acknowledgment of state-sanctioned violations of human rights. Other observers point out that official apologies for past misdeeds can play a pivotal role in national healing. These observers use as examples, reparations for Japanese Americans wrongfully interned during World War II and Congress’ recent Joint Resolution officially apologizing to indigenous Hawaiians for aiding in the overthrow of the lawful government of the sovereign Hawaiian nation. The recent World Conference on Racism in Durban, South Africa, involving 190 nations in discussion on improving racial relations worldwide indicates that there has been progress.

230. Hayner, supra note 10, at 600.
231. See Footnote to Indian History, supra note 221.
232. Linenthal, supra note 9, at 260.
233. Hayner, supra note 10, at 609; see also Allen, supra note 52, at 316.
234. See Hayner, supra note 10.
235. Id. at 611.
237. Yamamoto, Race Apologies, supra note 38, at 47; see also Farber, supra note 6.
238. See World Conference Against Racism (National Public Radio, Morning Edition radio broadcast, Aug. 30, 2001). The Durban Conference, formally entitled the World Conference Against Racism: Racial Discrimination, Xenophobia, and Related Intolerance,
It could be argued that, even if allegations of widespread genocide and human rights abuse allegations are true, any crimes committed are long past and, therefore, are better left unexposed and unexplored. According to this argument, truth commissions should only convene to investigate recent abuses, and since any genocide that might have taken place against Native Americans in the United States occurred in the distant past, a truth commission is not appropriate. This argument is flawed. First, it presumes that human rights abuses against Native Americans are all in the past. Without investigation, we cannot know that this is true. Second, this argument supposes that past wrongs have no lasting effects on victims in the present, which is simply improbable and implausible. Third, there is “no statute of limitations on the prosecution and punishment of the crime of genocide” or murder. Instead, according to one prominent international law scholar, “national statutes of limitation violate international law if they apply to crimes against humanity.”

Consequently, nations regularly bring national or international perpetrators to justice decades after egregious crimes. For instance, despite the passage of nearly forty intervening years, law enforcement agencies have continued to investigate and prosecute former members of the Klu Klux Klan whom they suspect committed a 1963 church bombing that killed four girls. In another


241. Joyner, supra note 100, at 614.

242. Id.

243. Jean Marbella, Sins of Past Still Cry Out for Justice: Conscience: Witnesses are Breaking Years of Silence and Calling Aging Men to Answer for Crimes of the 1960s, BALTIMORE SUN, May 20, 2001, at 1C; see also Colbert I. King, No Thanks to Hoover, WASH. POST, May 5, 2001, at A19 (lamenting FBI’s suppression of evidence and refusal to prosecute that allowed recently-convicted church bomber Thomas Blanton to remain free for nearly forty
example, prosecutors tried the suspected murderer of civil rights leader Medgar Evers a third time after two mistrials, and despite the passage of many years.244 Similarly, efforts to find, expose, apprehend, prosecute, and punish Nazi war criminals have continued throughout the half-century since the end of World War II.245 Perhaps humans take these actions because of the widespread belief that, even decades after the offense, suspected perpetrators of grievous crimes should be prosecuted so that, ultimately, “justice, no matter how late, can and will be served.”246

In addition, truth commissions by definition investigate and document only past actions. Although it is true that, in most cases, truth commissions investigate more recent human rights abuses, that is not always the case. Australia’s Council for Aboriginal Reconciliation presents a ready example of the appropriate use of the truth commission model in facing the present problems stemming from the long-past invasion of a country by European settlers. Additionally, the 1993 Congressional apology to Native Hawaiians concerned actions that took place in 1893.247 Despite the passage of one hundred years, Congress apologized for its role and sought to “provide a proper foundation for reconciliation between the United States and the Native Hawaiian people.”248 The definition of “recent” in relation to past wrongs is subject to different interpretations. Victims of genocide and human rights abuses may consider their mistreatment to have occurred more recently than perpetrators, who, predictably, may be more eager to regard any offenses as having occurred in the remote, distant past. Even so, some of the previously described wrongs against Native Americans, such as forced sterilizations and forced attendance at Indian schools, have occurred in the years since World War II, which may qualify as the recent past by most people’s measure. However, the continuing effects of even long past human rights abuses against Native Americans could be more important than recent events. In all of these circumstances, a current investigation of past misdeeds would be justified. Therefore, it is unacceptably facile to simply dismiss the need for

244. Taylor, supra note 240.
245. See Suits Clog Route to Nazi Fund, DALLAS MORNING NEWS, May 11, 2001, at 14A (reporting on payouts from billion-dollar fund to compensate victims of Nazi-era slave laborers). Interestingly, even Adolf Hitler, notorious for his orchestration of widespread genocide in Europe, recognized and discussed efforts in the United States to segregate and exterminate indigenous peoples, and he applauded those efforts by admiring the “efficiency of America’s extermination – by starvation and uneven combat – of the red savages who could not be tamed by captivity.” JOHN TOLAND, ADOLF HITLER (1976). Hitler apparently viewed the inexorable removal and disenfranchisement of North America’s indigenous populations by white European invaders as an effective model to be followed by Germany in its conquest of Europe. See RICHARD L. RUBENSTEIN, MODERNIZATION AND THE POLITICS OF EXTERMINATION, A MOSAIC OF VOICES: NON-JEWS PERSECUTED AND MURDERED BY THE NAZIS 8 (Michael Berenbaum ed., 1990).
246. Taylor, supra note 240, at 379.
248. Id. § 1(4).
investigation, acknowledgements, and apologies by concluding that any misdeeds that could justify a truth commission occurred too long ago to be relevant today.

Another argument against convening a truth commission may rest on the belief that mistreatment of Native Americans is already commonly known and, therefore, need not be explored further. However, there is no basis for concluding that the comprehensive history of the mistreatment of Native Americans in the United States is common knowledge. A simple examination of the omissions and misinformation contained in school textbooks in the United States counters this argument. The absence of any official, published, comprehensive record of the history of Native Americans in the United States further belies this argument.

Still another argument against convening a truth commission concerns worries that the United States will ultimately have to make reparations to Native Americans. Just as debate over reparations for African-American slavery has increased in recent years, it seems likely that discussion and debate over reparations for Native Americans will increase as well. Although objecting to a truth commission on this basis may seem facially plausible, this objection breaks down upon further analysis. First, it is simply unreasonable and unjust to oppose a truth-finding investigation because a popular or powerful perpetrator might ultimately be required to make amends to victims. By analogy, this would be akin to objecting to a proposed investigation of political corruption because the outcome might implicate powerful people and result in losses of revenue to the district. This kind of reasoning is patently unacceptable in a lawful nation. We cannot forego the pursuit of justice merely because the result might be costly. Second, a justifiable truth commission should not be constrained just because reparations are unlikely or impossible. In other circumstances, the United States has demonstrated the ability to acknowledge responsibility and convey regret to indigenous peoples without simultaneously promising reparations or any other settlement. In fact, when Congress formally apologized on behalf of the United States to native Hawaiians for the abuse of authority by American citizens and government officials that resulted in the “illegal overthrow” of “the indigenous and lawful Government of Hawaii,” the Resolution included a specific disclaimer that “[n]othing in this Joint Resolution is intended to


250. “After all,” says a common aphorism in the United States, “we can’t give back Manhattan.”
serve as a settlement of any claims against the United States.” Therefore, the United States government can convey an apology without regard for the separate issue of reparations. Truth commissions can have positive and constructive effects in a society regardless of the possibility of reparations. Therefore, when circumstances warrant a truth commission, it should not be delayed or thwarted because of fears about potential reparations.

Some observers might argue that convening a truth commission in the United States would be a distraction from the need to address current problems with far more serious human rights abuses in other parts of the world. This argument contains three fatal flaws. First, efforts to establish and acknowledge the truth about past crimes is never a distraction. Indeed, the search for truth and justice is exactly what the justice system seeks to do in every case, no matter how many more serious criminal prosecutions may exist simultaneously. Second, although different people might come to different conclusions about the “seriousness” of certain human rights abuses, projecting one’s own judgment on the suffering of others and on the merits of justice in a particular area of abuses is problematical and should be done cautiously. Just as it is risky to “rush to judgment” without a proper investigation, it may be equally risky to “rush to non-judgment” without comprehensive investigation. Third, such protests do not take into account the unfortunate and painful legacy that continues to surface after centuries of mistreatment.

Others might protest that convening the proposed truth commission in the United States would simply be too large an undertaking. These observers would presumably argue that the effort would simply require too much time and money and command far too many resources. This argument, however, cannot be squared with the historic orientation to crime in the United States, where the resources are allocated in whatever amounts are necessary in order to achieve a form of justice. Typically, if the criminal acts in question are particularly extensive and involve a multitude of perpetrators and victims, there is even more reason to put forth the necessary resources to achieve justice in the situation. No matter how big a task, many might consider it worth the effort to take action that may bring about a measure of resolution and reconciliation among the cultures that coexist in the United States.

C. Convening a United States Truth Commission

Every state in the world has competence to prosecute international crimes under customary international law. There is universal jurisdiction, and the nationality of the perpetrator does not matter.

251. S.J. Res. 19, supra note 6, § 1(1) & § 3.
252. An illustrative example is the United States’ long and expensive “war on drugs,” which consumes massive amounts of money and resources at all levels of law enforcement from police departments to courts to prisons in an apparently ineffectual effort to apprehend and bring to justice the perpetrators of the drug trade.
nor does the place of the perpetration; this is an ongoing international, national responsibility.\textsuperscript{253}

Professor Jordan Paust, University of Houston Law Center

If we want justice as an international community, we have an obligation to make it work.\textsuperscript{254}

Former Professor Paul Hoffman, Southwestern University School of Law

For the United States, two broad avenues exist that could lead to convening a truth commission to investigate the treatment of Native Americans. First, the United States government itself could convene an authoritative commission to investigate and document historic and recent abuses against Native Americans. Alternatively, an international body could assume the responsibility of sponsoring an official truth commission, although given the United States’ history regarding its sovereign immunity, this seems unlikely.

In the United States, the president has the authority to appoint a special commission that could function as a truth commission, investigating and reporting on the truth of the alleged mistreatment and the current status of the treatment of Native Americans. Congress also has the authority to commence an official investigation via congressional hearings, a special commission, or a constitutional convention.\textsuperscript{255} While either avenue is preferable to no action, special considerations are necessary when a government seeks to investigate itself. The first consideration is that extreme caution is needed in order to prevent bias and capture of the truth commission process. A lack of objectivity or the absence of a fair-minded approach would inevitably distort the record and skew the results, resulting in outcomes that could potentially defeat the purpose of convening a truth commission.

The second essential consideration is the attention necessary to support the participation of oppressed groups. When a society, through its government, enacts arrangements to address the past, such as the Council for Aboriginal Reconciliation in Australia or the Truth and Reconciliation Commission in South Africa, participation by the affected minority groups is imperative. Lack of support from Native Americans for an internal government investigative process could result in further distrust and antagonism, and might conclude in added divisions between the cultures.\textsuperscript{256}

Although an internal United States government-sponsored investigative body presents some problems and cautions, a different set of equally thorny complications

\textsuperscript{253} Symposium, supra note 181, at 625.

\textsuperscript{254} Id. at 612. Professor Hoffman also served for ten years as the Legal Director of the American Civil Liberties Union Foundation of Southern California.

\textsuperscript{255} Osiel, supra note 7, at 599 (asserting that an investigative body such as a constitutional convention is unnecessary when conventional prosecution is possible).

\textsuperscript{256} Id.
may arise when an international body representing the world community investigates an unwilling and powerful government. For example, some commentators posit that the United States’ withdrawal of support for ratification of the Rome Statute forming the International Criminal Court may be related to its reluctance to cede jurisdiction over its citizens.257 Even though it seems extremely unlikely to come about, an internationally sponsored truth commission bestows upon a proceeding the highly desirable degree of impartiality.

Regardless of whether a truth commission is convened by the government of the United States or is sponsored by an international body such as the United Nations, the purpose of the commission would be the same: to seek the truth, settle the past, and seek justice for the future. Additionally, a truth commission in the United States would create opportunities for dialogue that could educate the populace, expose ongoing problems, generate understanding and compassion, and, perhaps, gradually begin to facilitate reconciliation among the nation’s cultures. No matter who sponsors a truth commission, perhaps no better purpose could emerge than that expressed many years ago in a presidential recommendation to Congress: “the goal of any new national policy toward the Indian people [must be] to strengthen the Indian’s sense of autonomy without threatening his sense of community.”258

V. CONCLUSION

[H]istory, despite its wrenching pain,
Cannot be unlived, but if faced
With courage, need not be lived again . . . .
Maya Angelou, American Poet

An officially sanctioned truth commission in the United States could play a powerful role in efforts to acknowledge the grave injustices and enduring problems created by the displacement of Native American tribes during the settlement of the North American continent. A truth commission offers a suitable alternative for seeking truth and justice and for promoting acknowledgment of past atrocities by agents of the United States government and its citizens under circumstances when

257. See Bartram S. Brown, The Evolving Concept of Universal Jurisdiction, 35 New Eng. L. Rev. 383, 391 (2001) (arguing that “the attempt to shield U.S. nationals from ICC jurisdiction at all costs seems woefully inappropriate” because “no state has a legitimate interest [in] shielding its nationals from criminal responsibility for genocide . . . . Suggestions to the contrary evoke a colonialist concept of exclusive extraterritorial rights, which has little relevance to modern practice”).


individual prosecutions are impossible. Thus, even after hundreds of years of
difficult relations, a truth commission could produce an officially acknowledged,
authoritative record that could help to facilitate a measure of closure on the past and
allow the creation of a more positive and harmonious future.

A truth commission would thoroughly and authoritatively investigate,
document, and acknowledge the facts surrounding allegations of oppression, violence,
genocide, and mistreatment of Native Americans in the United States. Full
participation by the government of the United States would be an important step
toward accepting its own history and reconciling its relations with Native American
peoples. Thus, by facing the past honestly and courageously, and facing the future
squarely, the United States may eventually be able to achieve its fundamental goal of
assuring all citizens a future “with liberty and justice for all.” 260

States). Originally, the Pledge read as follows: “I pledge allegiance to the Flag of the United
States of America, and to the Republic from which it stands, one Nation, indivisible, with
liberty and justice for all.” In 1954, Congress amended the Pledge by mandating that the
words “under God” be inserted after the word “nation,” thus excluding those of different
religious faiths. See ANSON PHELPS LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES,
570-71 (1964).