ARTICLES

SOFT ADJUDICATION

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ABSTRACT

We are told we have entered a "post-truth" age characterized by "alternative facts." This Article explores the potential for legal culture to serve as a resource for countering this troubling development in political culture. It does so by identifying and exploring the phenomenon of soft adjudication: the practice of making formal, but non-binding, findings about past events. Soft adjudication is in some ways similar to ordinary adjudication. Like courts, soft adjudicators pass judgment on an event; they gather evidence and receive submissions from interested parties; and they serve as neutral arbiters. But the decisions of soft adjudicators differ in one crucial respect: they lack the power to create or enforce obligations. They cannot punish wrongdoers or force them to pay compensation. Instead, their decisions seek to tell the truth about the past, typically examining traumatic events like police killings, institutional abuses, political scandals, and mass atrocities. Examples of soft adjudicators include special inquiry commissions, administrative agencies, ombudsman systems and inspectors-general, and truth commissions.

The Article calls attention to soft adjudication's distinctive strengths. For critics, the inability to create or enforce obligations renders soft adjudication futile or, at best, a regrettable second-best response to wrongdoing and failures. In fact, soft adjudication is powerful precisely because it cannot tell people what to do. Because they do not purport to impose obligations, soft adjudicators can seek the truth about an event relatively unconstrained by the procedural restraints of civil and criminal litigation. In doing so, they help to achieve accountability for wrongdoing, affirm the dignity of victims, and aid societies

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in learning from past mistakes. Bringing together a wide range of examples, the Article examines choices and constraints in the design of soft adjudication institutions, and discovers fundamental insights into the nature of adjudication.

TABLE OF CONTENTS

INTRODUCTION

According to the Oxford Dictionaries, the Word of the Year for 2016 was "post-truth," defined as "relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief."[1] Might legal institutions help? At first glance, the signs are promising. More than other public bodies, courts present themselves as committed to norms of reasoned decisions, sober deliberations, and impartiality. We might hope, then, that courts would stand up for the truth about matters of social importance. But courts face an important

1. *Word of the Year 2016 is . . .*, OXFORD UNIVERSITY PRESS, https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016 (last visited Aug. 16, 2017).

limitation. Their core responsibility is not to discover the truth; their task, instead, is to decide whether to impose sanctions on those alleged to have violated their legal obligations.[2] While occasionally one hears claims that truth is the fundamental goal of litigation,[3] "it is generally recognized that several social needs and values exercise a constraining effect on attempts to achieve fact-finding precision."[4] Criminal and civil proceedings are thus far from being a pure search for truth.

Some litigation-like processes do, however, aim directly at the truth about a contested event. In this class of activity, a decisionmaker is authorized to consider a past event or series of events but lacks the power to impose an obligation or a sanction. Instead, having gathered information and received representations from interested parties, the decisionmaker concludes its work by rendering a verdict characterizing what happened. The verdict, unlike ordinary legal verdicts, does not purport to declare or alter anyone's duties, rights, powers, or liabilities. To illustrate, here are four recent examples:

- Following concerns over Hillary Clinton's use of a private email server for official business, while she was Secretary of State, the State Department's Office of the Inspector General initiated a review of past practices and policies.[5] The Inspector General interviewed dozens of current and former employees.[6] Clinton declined the opportunity to participate in the investigation,[7] but turned over 30,000 emails.[8] The Inspector General released his final Report in May 2016; the Report contradicted many of Clinton's public statements, finding that she had violated

2. Indeed, courts often dismiss lawsuits for lack of jurisdiction where there is no prospect that the court might impose a sanction or order the defendant to do something. In the federal courts system, for example, a court lacks jurisdiction unless the plaintiff is seeking "redress" for an injury caused by the defendant. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court . . . .").

3. *See, e.g.*, Tehan v. United States, 382 U.S. 406, 416 (1966) ("The basic purpose of a trial is the determination of truth . . . .").

4. Mirjan Damaska, *Truth in Adjudication*, 49 HASTINGS L.J. 289, 301 (1998). For a recent statement of the view that ordinary adjudication should pursue social welfare rather than the truth, see Louis Kaplow, *Information and the Aim of Adjudication: Truth of Consequences?*, 67 STAN. L. REV. 1303, 1307 (2015).

5. OFFICE OF THE INSPECTOR GEN., ESP-16-03, OFFICE OF THE SEC'Y: EVALUATION OF EMAIL RECORDS AND CYBERSECURITY REQUIREMENTS 1 (2016).

6. *Id.* at 2.

7. *Id.*

8. *Id.* at 4.

Department policies and federal records requirements by failing to preserve her emails.[9] The Report also identified a long history of laxness with electronic records and cybersecurity in the State Department,[10] and made a series of recommendations for the future.[11]

- After a series of troubling killings by police in Las Vegas, the Clark County Board of Commissioners produced an innovative institutional response that promised to provide an independent review of all future officer-involved deaths.[12] In consultation with the American Civil Liberties Union, the Commissioners passed an ordinance that revamped an ancient common law device, the coroner's inquest.[13] Under the ordinance, a justice of the peace would hold a public hearing when a person died at the hands of the police.[14] Representatives of the officers and the victims' families had the right to participate in the proceedings,[15] which would conclude with findings about the death.[16] Even though the findings were not binding in any subsequent criminal or civil litigation,[17] the inquest ordinance was fiercely opposed by police unions, and was struck down by the Supreme Court of Nevada on technical grounds.[18] The inquest ordinance was then replaced by a watered-down procedure called the Police Fatality Review Process.[19]
- On May 12, 2015, an Amtrak train went off the rails near Philadelphia, killing seven passengers in "the worst American rail disaster in decades."[20] The accident had no obvious cause: there

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9. *Id.* at 23.

10. *Id.* at 42.

11. *Id.* at 43–46.

12. *See* Paul MacMahon, *The Inquest and the Virtues of Soft Adjudication*, 33 YALE L. & POL'Y REV. 275, 305–08 (2014).

13. CLARK COUNTY, NEV., CODE § 2.12 (2016).

14. *Id.* § 2.12.010(c), (k).

15. CLARK COUNTY, NEV., CODE § 2.12.075(q) (2010) *repealed by* Ord. No. 4976.

16. CLARK COUNTY, NEV., CODE § 2.12.100 (2016).

17. *Id.* § 2.12.140(a).

18. The court ruled that Clark County did not have the power to confer jurisdiction on Justices of the Peace. *See* Hernandez v. Bennett-Haron, 287 P.3d 305 (Nev. 2012).

19. *See* Conor Shine, *Commission Shelves Coroner's Inquests for New "Police Fatality Review Process,"* LAS VEGAS SUN, Jan. 7, 2013, https://lasvegassun.com/news/2013/jan/07/commission-shelves-coroners-inquests-new-police-fa/.

20. Matthew Shaer, *The Wreck of Amtrak 188*, N.Y. TIMES, Jan. 26, 2016,

was no collision and no equipment failure. The National Transportation Safety Board (NTSB) immediately began an investigation. As is typical in such cases, the NTSB receives representations from interested parties; it has the power to subpoena witnesses, to hold public hearings, and to receive sworn testimony. But it lacks the power to impose sanctions against wrongdoers. Instead, the NTSB's work concluded with a report on the crash's probable causes.[21] The report blamed the accident on the driver, who accelerated to unsafe speeds "due to his loss of situational awareness likely because his attention was diverted to an emergency situation with another train."[22] Another contributing factor was the lack of a positive train control system.[23]

- In March 2003, the United Kingdom, led by Prime Minister Tony Blair, joined the United States in in its invasion of Iraq. The decision was deeply controversial, and was based in large part on the false claim that Iraq possessed weapons of mass destruction.[24] The war was far from the great success that Blair had hoped for. After years of political pressure, Blair's successor as Prime Minister, Gordon Brown, instituted an independent inquiry for "learning lessons" from the conflict, chaired by a retired civil servant.[25] The Inquiry heard from more than 150 witnesses, and its 2.6 million-word report was finally published on July 6th, 2016.[26] The verdict was scathing. The Inquiry revealed that Blair wrote to George W. Bush several months before the invasion: "I will be with you, whatever." Blair's decision to follow Bush's lead caused a catalogue of errors. The Report concluded, among other things, that Iraq did not pose an immediate threat, that the government relied on dubious intelligence and questionable legal

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https://www.nytimes.com/2016/01/31/magazine/the-wreck-of-amtrak-188.html?mcubz=0.

21. *See* NAT'L TRANSP. SAFETY BD., NTSB/RAR-16/02, DERAILMENT OF AMTRAK PASSENGER TRAIN 188, PHILADELPHIA, PA, MAY 12, 2015 (2016).

22. *Id.*

23. *Id.*

24. *See* Nicholas Watt, *Tony Blair Makes Qualified Apology for Iraq War ahead of Chilcot Report*, GUARDIAN, Oct. 25, 2015, https://www.theguardian.com/uk-news/2015/oct/25/tony-blair-sorry-iraq-war-mistakes-admits-conflict-role-in-rise-of-isis.

25. 494 Parl Deb HC (6th ser.) (2009) col. 23–24 (UK).

26. *See generally* COMMITTEE OF PRIVY COUNSELLORS, THE REPORT OF THE IRAQ INQUIRY, 2016, HC 264 (UK).

> advice to justify the decision to go to war, and that preparations for war were wholly inadequate.[27]

We do not seem to have a name for the category of activity to which these examples belong. I call it "soft adjudication."[28] Soft adjudication shares some key features of ordinary adjudication: the process culminates in a formal decision that resolves uncertainties about what happened in the past, for example, and affected parties can influence the decision by presenting evidence and reasoned argument. Like other kinds of adjudication, soft adjudication involves official judgments about the past.[29] These judgments go beyond mere fact-finding: they typically involve normative evaluation of previous events, decisions, and conduct. But soft adjudication is "soft" in that it does not provide a binding decision about what is to be done in response to the prior event.[30]

The distinguishing feature of soft adjudication is that it severs the act of understanding the past from the act of deciding what must be done in response. The verdicts of soft adjudicators draw their significance from what they *say* about past events; these verdicts aim to tell people what they should believe rather than what they should do. (In philosophical jargon, soft adjudicators are primarily "epistemic authorities," as opposed to "practical authorities.")[31] In claiming that soft adjudication has unique strengths, I aim to dissolve an apparent paradox. The practice's biggest weakness is obvious: to the extent we wish legal and political institutions to have practical effects on human behavior, soft adjudication is hampered by its inability to order anyone how to act. For some, this gives soft adjudication an "aura of futility."[32] However, this weakness of soft adjudication is also its strength.

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27. *See generally id.*

28. I identified the phenomenon in a prior article. MacMahon, *supra* note 12, at 315–20. The phrase "soft adjudication" is very rarely used, but see TURKI ALTHUNAYAN, DEALING WITH THE FRAGMENTED INTERNATIONAL ENVIRONMENT: WTO, INTERNATIONAL TAX AND INTERNAL TAX REGULATIONS 213 (2010) (proposing "soft adjudication" of breaches of international tax agreements).

29. *See infra* Part I.A.

30. By using the label "soft" adjudication, I allude to the large literature on "soft law" in international and public law. *See, e.g.*, Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 422–24 (2000); Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 573 (2008); *see also infra* Part I.A.

31. *See* Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1032–37 (2006) (describing the distinction between epistemic (or "theoretical") authority and practical authority).

32. Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65

Precisely because soft adjudicators do not purport to exercise practical authority over others, they can justifiably proceed without observing many of the procedural constraints that restrict ordinary judicial proceedings. Soft adjudicators naturally tend to use inquisitorial rather than adversarial modes of procedure. Disclaiming the power to tell people what to do enables soft adjudicators to provide the truth about the past better than the ordinary courts can.

The value of this institutional form, when it works, is that it gets at the truth and tells it in a public way.[33] Its decisions are most effective—if at all—when they convince others that they tell the truth. Soft adjudication's ability to provide accurate judgments about past events serves several purposes. It may help to bring about accountability for wrongdoing, either as a precursor to ordinary adjudication or because of its effect on a declared wrongdoer's reputation. Its value may also be cathartic; by finding and telling the truth about traumatic events, decisionmakers can help victims and society more broadly to process those events. And soft adjudication may serve as an opportunity to learn from past mistakes, by warning people of the need to guard against risks exemplified by the event under consideration.

Defining and exploring the broader category of soft adjudication will, I hope, help our understanding of its various individual instances. Many forms of soft adjudication are understudied; our understanding of them benefits from comparison with other similar activities. A prime example of soft adjudication is the investigatory commission. While these commissions are a "common feature of American government at all levels,"[34] "academic work studying them remains somewhat sparse."[35] On the other hand, some legal scholars in recent years, have been preoccupied with one form of soft adjudication: truth commissions following a transition from undemocratic to

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WASH. & LEE L. REV. 1239, 1241 (2008) (stating that advisory commissions are generally surrounded by an "aura of futility," though finding that the 9/11 Commission bucked the trend).

33. *See* Angela Hegarty, *The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland*, 26 FORDHAM INT'L L.J. 1148, 1148 (2003) (stating any legal institution can be misused; soft adjudication may be abused by people wishing to produce and reinforce an inaccurate version of the truth). More fundamentally, some commentators raise doubts about whether government should be in the business of producing truth at all. Asher Maoz, *Historical Adjudication in Courts of Law, Commissions of Inquiry, and "Historical Truth,"* 18 LAW & HIST. REV. 559, 565 (2000). For consideration of Maoz's argument, see *infra* Part II.C.

34. Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1430 (2005).

35. Michael Perino, *The Financial Crisis Inquiry Commission and the Politics of Governmental Investigations*, 80 UMKC L. REV. 1063, 1074 (2012).

democratic rule. Scholars of truth commissions tend to see "transitional justice" as a distinct field with its own special challenges and solutions. But societies often face similar questions about transitions without undergoing regime change.[36] Hence, one aim of this Article is to generalize lessons from transitional justice scholarship beyond its specific context.

One purpose of this Article is to suggest that soft adjudication is currently underused in the United States. Police killings provide a timely and significant example of its potential value. When a person dies at the hands of a police officer, an urgent demand arises to determine whether the officer acted wrongfully, and is accompanied by a tendency for people to view the incident through the lenses of their own prejudices. In these circumstances, legal and social institutions would ideally provide a dispassionate review of the contested event.[37] But police killings pose institutional challenges because they involve the very law-enforcement authorities on whom we usually rely to help us determine questions of wrongdoing. This conflict of interest, and the high degree of emotion that accompanies police killings, create a special need for an independent and rational input into the political and legal processes. As the Clark County Commissioners understood in their initial response to police killings in Las Vegas,[38] a well-designed system of soft adjudication can deliver this input.[39] Soft adjudicators can also help to communicate a message that the government cares about the victims, a message that has often seemed to be missing in the aftermath of police killings.

The Article begins, in Part I, by characterizing soft adjudication and providing a host of examples. Drawing on these examples, I show, in Part II, that soft adjudication's distinctive feature is its direct pursuit and public explanation of truth. Having analyzed soft adjudication's main features, I then provide, in Part III, an account of its purposes, focusing on accountability for wrongdoing, restoring the dignity of victims, and learning

36. *See* Sanford Levinson, *Trials, Commissions, and Investigating Committees: The Elusive Search for Norms of Due Process*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 211, 211–12 (Robert I. Rotberg & Dennis Thompson eds., 2000) (calling into question "An implicit assumption . . . that one can distinguish clearly between . . . transitional regimes and presumably 'mature' liberal regimes . . . ."); Eric Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 762–63 (2004) (contending that "theorists of transitional justice commonly err by treating regime transitions as a self-contained subject, thereby denying the relevance or utility of comparisons and analogies between regime transitions, on the one hand, and the wide variety of transitions that occur in consolidated democracies, on the other.").

37. *See* MacMahon, *supra* note 12, at 298–315.

38. *See supra* notes 12–17 and accompanying text.

39. *See* MacMahon, *supra* note 12, at 290, 298–315.

from the past. Finally, in Part IV, I explore several questions about the design of soft adjudication institutions, focusing on the roles of lawyers, courts, and judges.

I. WHAT IS SOFT ADJUDICATION?

A. Soft Adjudication Characterized

I begin by explaining more precisely what I mean by soft adjudication. We can model any given instance of soft adjudication as a four-stage process. First, a person or group of persons—the "adjudicator"—is authorized to answer a question about a contested past event. Second, the adjudicator acquires information about the event, typically receiving representations from interested parties. Third, the adjudicator reaches a determination about what happened. Fourth, the adjudicator shares and explains the determination. Soft adjudication shares these four stages with ordinary adjudication in the courts or adjudication before an administrative agency. What makes soft adjudication different from ordinary adjudication is a negative feature: the absence of any attempt to assert binding practical authority. Based on findings of what happened in the past, the soft adjudicator might provide *recommendations* about what should be done in future. But any such prescriptions—concerning what others should do in response to the soft adjudicator's findings—are advisory rather than authoritative. Soft adjudicators neither purport to create obligations, nor to impose sanctions or liabilities.

Soft adjudication is a theme with many variations, as the examples below show.[40] Adjudicators may have ongoing jurisdiction over a class of events, or (more usually) may be appointed solely to review a specific event. They may gather information via formal testimony under oath, via informal interviews with witnesses, or both. They may be able (or unable) to grant witnesses amnesty. Soft adjudicators may hold hearings in public or conduct their investigations in private. They may have (or may lack) the power to compel testimony, to demand the production of documentary evidence, or the ability to conduct searches of property and seize evidence. Though soft adjudicators characteristically give interested parties an opportunity to provide their views, the scope of the right of such parties to participate in the proceedings may be minimal or more extensive. Soft adjudicators come from different backgrounds: they may have legal training (or none), political stature (or none), or technical expertise (or none). They may be asked to resolve doubts about what happened, to pass judgment on a person or organization, to express a (non-binding) view as to whether a person violated

40. *See infra* Part I.B.

a legal prohibition, or to do all of these things. All soft adjudicators are called to understand the past; only some are asked to make policy recommendations for the future.

What is distinctive about soft adjudication, and what makes it different from criminal, civil, or agency litigation, is its "softness." By using this word, I mean to draw on the notion of "soft law," a term used in several different ways. As one typology explains, a norm may be counted as "soft law" where it lacks one or more of the following three attributes: (i) obligation, (ii) precision, or (iii) a third party adjudicator.[41] In applying the adjective "soft" to adjudication rather than to norms, I mean to invoke the first of these three senses: soft adjudication is soft because it does not culminate in a binding decision about obligation.[42] As I define the term, soft adjudication is distinct from "sanctionless adjudication."[43] In sanctionless adjudication, the adjudicator purports to create or recognize an obligation, but lacks the power to back the obligation with sanctions. In soft adjudication, by contrast, there is no possibility that the process will end with a binding determination that someone is under an obligation.

Having explained soft adjudication's softness, let me explain why it deserves to be called "adjudication." According to Marc Galanter, the "classical" model of adjudication can be described as "a kind of third-party processing of disputes, in which disputants or their representatives present proofs and arguments to an impartial authoritative decision-maker who gives a binding decision, conferring a remedy or award on the basis of a preexisting general rule."[44] But Galanter cautions against treating the classical model as a definition, and considers it fruitless to demarcate the boundaries of adjudication precisely; it is better to view adjudication as a family of phenomena.[45]

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41. *See* Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401–06 (2000); *see also* Abbott, *supra* note 30, at 421–22.

42. Additionally, the norms used by soft adjudication are often "soft" in the second sense of the term (imprecise); the activity generally does not involve the application of precise rules. Soft adjudication is, however, generally not "soft" in the third sense of the term (lack of a third-party adjudicator). Soft adjudication involves an independent adjudicator who makes a formal determination.

43. On sanctionless adjudication, see Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1103–06 (2005); *see also* RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS (2015).

44. *See* MARC GALANTER, *Adjudication, Litigation, and Related Phenomena*, *in* LAW AND THE SOCIAL SCIENCES 153 (L. Lipson & S. Wheeler eds., 1986).

45. *Id.* ("There is not a single discrete process which can be identified as adjudication. Instead we are addressing a family or cluster of processes that resemble one another.").

And soft adjudication seems to belong in the family of adjudication: it exhibits many (though not all) of the features that we tend to associate with adjudication.

What, then, do all these forms of adjudication share? All forms involve an institutionalized process for judging past conduct. Like other forms of adjudication, soft adjudication involves a decision by a third party independent of the involved parties. In addition, as Lon Fuller contended, one of adjudication's distinguishing features is that affected parties can influence the result by presenting reasoned arguments to the decisionmaker.[46] In ordinary adjudication, human behavior is classified as "legal" or "illegal." But soft adjudicators are typically asked to make a broader set of judgments—to determine whether past conduct was wrongful, improper, unethical, erroneous, and so forth.[47] Soft adjudication derives its significance from its focus on the task of evaluating or "judging" past behavior. As the examples below show, these judgments range from more prosaic matters of safety regulation to momentous events of national and international significance.

B. Examples

To illustrate the significance of soft adjudication, the following discussions consider a range of examples, divided into four categories: (1) special inquiry commissions; (2) truth commissions; (3) standing bodies charged with soft adjudication in a field of activity or for a class of event; and (4) legislative committees.

1. Special Inquiry Commissions

The federal government has long instituted special inquiry commissions in response to troubling events of major public concern. The word "commission" attaches to a wide variety of governmental institutions, and commissions may be created by the President, by an executive branch official, or by Congress.[48] Some government commissions are focused on advising policymakers in the executive or legislative branch who are considering adopting a particular policy, and are instituted specifically for

46. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364, 366 (1978).

47. See *infra* Part II.A for examples. Soft adjudicators do sometimes express *non-binding* opinions on whether conduct was legal or illegal.

48. *See* Federal Advisory Committee Act, 5 U.S.C. app. § 3(2) (2012); COLTON C. CAMPBELL, DISCHARGING CONGRESS 3 (2002).

that purpose without focusing on any particular past event.[49] For present purposes, however, our interest is in "investigatory commissions,"[50] those focused on "inquiry." An investigatory commission is tasked with inquiring into a specific event, and is asked to reach conclusions about what happened and why it happened. The commission then explains its conclusions both to the government body that commissioned it and to the public at large. Its purpose fulfilled, the commission disbands.

These "post-mortem"[51] inquiries exemplify soft adjudication. Some examples will illustrate the gravity of those events deemed worthy of soft adjudication at the national level. While the special inquiry commission in its modern form begins with Pearl Harbor,[52] the best known special inquiry commission is probably the Warren Commission.[53] Instituted by presidential executive order six days after President Kennedy's assassination and chaired by Chief Justice Warren, its members included senators and representatives from both parties, a former CIA Director, and a former Assistant Secretary of War.[54] The Warren Commission was given subpoena power by a congressional joint resolution.[55] Within months, the Warren Commission produced an 816-page report.[56] Its conclusion—that Lee Harvey Oswald acted alone[57]—still fails to command universal support.[58] Other examples of

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49. *See* Carl E. Singley, *The MOVE Commission: The Use of Public Inquiry Commissions to Investigate Government Misconduct and Other Matters of Vital Public Concern*, 59 TEMP. L.Q. 303, 304 (1986) (distinguishing "pre-policy, advisory commissions" from "specific event inquiry commissions"); *see* Simon, *supra* note 34, at 1435–36 (distinguishing investigatory commissions "focused on impending social problems" from those "focused on specific catastrophic events that have already taken place, [which] are intended mainly to determine the facts behind the catastrophes.").

50. *See* Simon, *supra* note 34, at 1427–36; *see also* Lance Cole, *Special National Investigative Commissions: Essential Powers and Procedures (Some Lessons from the Pearl Harbor, Warren Commission, and 9/11 Commission Investigations)*, 41 MCGEORGE L. REV. 1, 8 (2009).

51. R.E. WRAITH & G.B. LAMB, PUBLIC INQUIRIES AS AN INSTRUMENT OF GOVERNMENT 15 (1971).

52. S. Doc. No. 77-159 (1942).

53. *See* PRESIDENT'S COMM'N ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY, REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY (1964) [hereinafter WARREN COMMISSION REPORT].

54. *Id.* at 475–76.

55. S.J. Res. 137, 88th Cong. (1963).

56. WARREN COMMISSION REPORT, *supra* note 53.

57. *Id.* at 22.

58. *See, e.g.*, PHILIP SHENON, A CRUEL AND SHOCKING ACT: THE SECRET HISTORY OF THE KENNEDY ASSASSINATION (2013) (contending that the Warren Commission's investigation into allegations that Oswald conspired with others was deeply flawed).

national commissions that fit the model of soft adjudication include the Scranton Commission, which concluded that the killings of student protesters at Kent State University were unjustified,[59] and the Presidential Commission on the Space Shuttle Challenger, which blamed the disaster on design flaws and poor decisionmaking at the time of launch.[60] However consequential their reports, none of these commissions had the power to impose criminal or civil liability.

The 9/11 Commission seemed to breathe new life into the special inquiry commission form.[61] Congress created the Commission in November 2002 after President Bush initially refused to instigate an independent investigation by executive order.[62] The statute allowed the President to appoint the chairman, but guaranteed a balanced composition by allocating the power to appoint the other nine commissioners to various congressional leaders.[63] The Commission was required to hold public hearings, and was given the power to take testimony under oath, and to subpoena witnesses and documents.[64] This power was crucial because the Commission faced resistance from the Executive Branch over access to relevant documents and personnel.[65] In the end, it was able to force the disclosure of significant information. Though the Commission worked in a partisan atmosphere, it managed to maintain its credibility. Its work was closely followed in the press. Its Final Report

59. PRESIDENT'S COMM'N ON CAMPUS UNREST, CAMPUS UNREST (1970). As Singley notes, the Scranton Commission was created as pre-policy advisory commission, but took upon itself the role of affixing responsibility for the campus deaths. *See* Singley, *supra* note 49, at 312.

60. PRESIDENTIAL COMM'N ON THE SPACE SHUTTLE CHALLENGER ACCIDENT, REPORT TO THE PRESIDENT (1986).

61. *See* Simon, *supra* note 49, at 1421 (explaining how individual stories provided powerful truth-telling); Fenster, *supra* note 32, at 1243 (finding that the 9/11 Commission Report has likely had the most legislative impact of any special inquiry report to date). The relative success of the 9/11 Commission has spurred imitation. Congress has since created the Commission on Wartime Contracting in Iraq and Afghanistan, which was widely considered successful. Steven R. Ross et. al., *The Rise of Quasi-Legislative Independent Commissions*, 27 J. L. & POL. 415, 440 (2012). Another sequel to the 9/11 Commission, the Financial Crisis Inquiry Commission (FCIC), was less successful. *Id.* at 442. For more on the FCIC, see *infra* Part II.B.

62. KENNETH KITTS, PRESIDENTIAL COMMISSIONS AND NATIONAL SECURITY 138 (2006).

63. *See* Intelligence Authorization Act for Fiscal Year 2003 § 603, 6 U.S.C. § 101 (Supp. IV 2004).

64. *Id.* § 605, 6 U.S.C. § 101 (Supp. IV 2004)

65. Fenster, *supra* note 32, at 1283–84.

was an "immediate popular and critical success."[66] The Report consisted mostly of two narratives: one describing the attacks themselves, and another telling the story of administrative and intelligence failures.[67] The Commission drew policy lessons from this story of bureaucratic failure, recommending a series of organizational reforms for the defense and intelligence services. Congress and the executive branch adopted many of the Commission's proposals.[68]

Special commissions have also appeared at state and local government levels. Throughout the twentieth century, American cities rocked by race riots instituted "riot commissions" to examine the causes of unrest and to offer prescriptions for reform.[69] In 1969, the Illinois Supreme Court instituted a special commission to investigate allegations that two of the court's Justices had received bribes.[70] John Paul Stevens, then a relatively unknown Chicago lawyer, served as chief counsel to the commission. Its investigation took six weeks, and its final report concluded that the two justices had engaged in "positive acts of impropriety."[71] In addition to bringing Stevens to prominence (he was nominated to the Seventh Circuit Court of Appeals the next year),[72] its findings forced the resignation of both Justices.[73] As a further example: in 1972, the governor of New York instituted a special commission in the wake of the disastrous intervention by state law enforcement officials

66. *Id.* at 1285; *see also id.* at 1243 (stating the 9/11 Commission "appears to have provided the authoritative account of the 9/11 attacks").

67. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (authorized ed., 2004).

68. *See* Fenster, *supra* note 32, at 1290–92 (noting that the Commission's uncontroversial proposals were adopted quickly because national security issues were a primary topic of the presidential election at the time).

69. *See* LINDSEY LUPO, FLAK-CATCHERS: ONE HUNDRED YEARS OF RIOT COMMISSION POLITICS IN AMERICA (2010); ANTHONY PLATT, *The Politics of Riot Commissions, 1917–1970: An Overview*, *in* THE POLITICS OF RIOT COMMISSIONS, 1917–1970: A COLLECTION OF OFFICIAL REPORTS AND CRITICAL ESSAYS 3, 4–5 (Anthony Platt ed., 1971).

70. *See* KENNETH A. MANASTER, ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS (2001)

71. *See id.* at 225.

72. *See id.* at 264–66 (explaining that Stevens's work with the special commission drew a great deal of attention to him).

73. *Id.* at 238–41.

at Attica Correctional Facility.[74] Thirty-two prison inmates and eleven correctional officers died during an effort to regain control of the prison.[75] The special commission criticized the state police and the governor, and examined the underlying causes of the riots.[76] An additional example of local soft adjudication: in Philadelphia, the Mayor instituted a special commission in 1985 in the aftermath of a confrontation between the city's police and a radical group. Eleven people died after the police bombed the group's house; the resulting fire also destroyed sixty-one houses.[77] The special commission, informally known as the "MOVE Commission," was "born of the public's shock, confusion and incredulity that the government had malfunctioned with such devastating consequences."[78] The Commission's report found that several of the city's actions were "unconscionable."[79] It was followed by a public apology by the mayor,[80] and later, a judgment of liability in federal court.[81]

Elsewhere in the English-speaking world—in many Anglo-Commonwealth countries, in Ireland,[82] and in Israel[83]—special commissions are even more common. In the United Kingdom, for example, public scandals and disasters frequently provoke demands from advocacy groups, opposition politicians, and victims for the government to institute a "full public inquiry."[84]

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74. ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA xi (1972).

75. *Id.*

76. For a summary, see *id.* at xii–xvi.

77. *See* Singley, *supra* note 34, at 303.

78. *See id.* The MOVE Commission permitted its proceedings to be filmed; the resulting footage of witness testimony now forms the backbone of a riveting documentary. LET THE FIRE BURN (George Washington University 2013).

79. Phila. Special Investigation Comm'n, *The Findings, Conclusions and Recommendations of the Philadelphia Special Investigation Commission, reprinted in* 59 TEMP. L.Q. 339, 363, 366, 368 (1986).

80. Bob Secter, *Philadelphia's Mayor Goode Apologizes for Deaths, Fire in MOVE Confrontation*, L.A. TIMES, Mar. 10, 1986 ("When I think of the MOVE children I weep for them and their families. A part of me died with those children and to their families and to all of you I say I'm sorry.").

81. *See In re* City of Philadelphia Litig., 158 F.3d 711 (3d Cir. 1998) (upholding the trial court's decision that the Philadelphia police's actions violated the Fourth Amendment).

82. *See, e.g.*, Eunan O'Halpin, *"Ah, They've Given us a Good Bit of Stuff. . ." Tribunals and Irish Political Life at the Turn of the Century*, 15 IRISH POL. STUD. 183, 183–84 (2000) (describing the long-term presence of the Moriarty Commission and Flood Commission in Ireland).

83. *See* SHIMON SHETREET, JUSTICE IN ISRAEL ch. 22 (1994).

84. *See, e.g.*, Rob Evans & Paul Lewis, *Stephen Lawrence's Father Demands Judicial Inquiry into*

The public inquiry has become "Britain's favoured mechanism for ascertaining the facts after any major breakdown or controversy."[85] Such inquiries are usually chaired by a high-ranking judge; they conduct their business in public and have the power to compel witnesses to testify.[86] Inquiries are expressly prohibited from ruling on civil or criminal liability,[87] but their published reports often carry a high degree of political salience. Recent public inquiries have considered food contamination disasters, large-scale medical negligence, and child abuse.[88] In 2010, the "Bloody Sunday" inquiry provided an exhaustive account of the killings of civilians by the British Army in the city of Derry in Northern Ireland in 1972.[89] The report's publication reversed a decades-old official narrative that blamed the victims for their own deaths, and prompted a historic apology by the British Prime Minister.

Another striking example of soft adjudication is the inquiry into the death of Alexander Litvinenko, a former Russian intelligence officer living in exile in London, died from radioactive poisoning on November 23, 2006.[90] Litvinenko's family claimed that the Russian government arranged his assassination in response to his dissident activities. The Russian government refused to extradite two men suspected of the murder.[91] Under pressure from Litvinenko's family, the UK government ordered a public inquiry, presided over by a judge.[92] The inquiry heard sworn testimony from sixty-two witnesses, and held secret sessions so that it could hear the sensitive material.[93] The inquiry was not permitted to rule on civil or criminal liability,[94] but its task nevertheless was to ascertain "where responsibility for the death lies."[95]

Police Spying, GUARDIAN, June 24, 2013, https://www.theguardian.com/uk/2013/jun/24/stephen-lawrence-father-police-spy-inquiry .

85. Sheila Jasanoff, *Restoring Reason: Causal Narratives and Political Culture*, *in* ORGANIZATIONAL ENCOUNTERS WITH RISK 218 (2005).

86. The current framework for United Kingdom public inquiries is set out in the Inquiries Act 2005, c. 12, § 18 (UK) (stating general rule of public access); § 21 (granting the power to compel witness testimony and the production of documents or other physical evidence).

87. *Id.* § 2(1) ("An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability.").

88. *See* Iain Steele, *Judging Judicial Inquiries*, 2004 PUB. L. 738 (2004).

89. BLOODY SUNDAY INQUIRY REPORT, 2010, HC 29-I (UK).

90. LITVINENKO INQUIRY, REPORT INTO THE DEATH OF ALEXANDER LITVINENKO, 2016, HC 695, ¶ 3.129, (UK) [hereinafter LITVINENKO REPORT]

91. *Id.* at 113.

92. *Id.* at 7.

93. *Id.* at 260–61.

94. *See* Inquiries Act 2005, c. 12, § 2 (UK).

95. LITVINENKO REPORT, *supra* note 90, at 256.

On January 21, 2016, the Inquiry released a Report concluding that Litvinenko was killed by Russian agents and that the murder was "probably" personally approved by President Putin.[96] International institutions also make extensive use of soft adjudication via commissions of inquiry and fact-finding missions.[97] These tools have become particularly popular in the last decade or so, with the United Nations using them in Darfur (2004), Gaza/Israel (2009, 2010, 2014), Libya (2011), North Korea (2013), and Eritrea (ongoing).[98] Of these, the most notable is perhaps the Goldstone Report in 2009, which concluded that both Israel Defense Forces and Palestinian militants were guilty of war crimes.[99] Though "fact-finding has been largely neglected as an area for sustained exploration, critique, and refinement," the increasing use of commissions of inquiry is arguably as significant development in the practice of international law as the rise of international criminal tribunals.[100]

2. Truth Commissions

The form of soft adjudication that has received the most scholarly attention of late is the truth commission, which is now a relatively common mechanism in the circumstances of "transitional justice."[101] Truth commissions complement, and vie with, other devices that follow the transition from authoritarian rule to democracy: criminal trials for wrongdoers, reparations to victims, and purges of supporters of the prior regime from the government office.[102] According to Priscilla Hayner's useful

96. *Id.* at 245–46.

97. Philip Alston, *Introduction: Commissions of Inquiry as Human-Rights Fact Finding Tools*, 105 AM. SOC'Y INT'L L. PROC. 81 (2011); Agnieszka Jachec-Neale, *Human Rights Fact-Finding into Armed Conflict and Breaches of the Laws of War*, 105 AM. SOC'Y INT'L L. PROC. 85, 86 (2011) (noting "[w]e have seen an unprecedented proliferation of commissions of inquiry initiated in response to recent violent events . . . .").

98. *See International Commission of Inquiry, Fact-Finding Missions: Chronological List*, UNITED NATIONS LIBRARY AND ARCHIVES AT GENEVA, http://libraryresources.unog.ch/factfinding/chronolist (last visited Aug. 18, 2017).

99. UN HUMAN RIGHTS COUNCIL, REPORT OF THE UNITED NATIONS FACT FINDING MISSION ON THE GAZA CONFLICT (2009).

100. Alston, *supra* note 97, at 84.

101. *See* PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS 27–74 (2d ed. 2010) (detailing more than forty truth commissions since the 1980s); Nir Eisikovits, *Transitional Justice*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, https://plato.stanford.edu/archives/win2016/entries/justice-transitional/#HisBacB (last updated Apr. 4, 2014).

102. *See* Posner & Vermeule, *supra* note 36, 763–64.

definition, a truth commission

> (1) is focused on the past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorized or empowered by the state under review.[103]

Truth commissions respond to the impulse that it is better to remember and to examine the prior regime's atrocities than to forget them. While they lack the power to impose sanctions, to order reparations, or to direct any form of government action, "their mandate for investigating the broader pattern of abuses, and their tendency to put the victims at the center of their proceeding, gives these bodies a great degree of moral credibility and legitimacy"[104]—or, at least, the most successful truth commissions have these attributes.

The best-known truth commission is South Africa's Truth and Reconciliation Commission (TRC).[105] The TRC was charged with investigating abuses taking place between 1960 and 1994. The TRC's work is notable among truth commissions for several reasons. As well as being well funded and endowed with significant powers of search and seizure, the TRC was highly transparent to the public; its proceedings were not only public but televised.[106] Another significant feature of the TRC was the celebrity and moral authority of its chairman, Desmond Tutu. A further striking aspect of South Africa's TRC was that witnesses were granted amnesty from criminal prosecution for politically motivated crimes, a feature negotiated by the outgoing regime.[107] Amnesty was not granted automatically; those seeking amnesty were required to apply for it and to provide a full account of their activities.[108] The TRC's final report named specific individuals guilty of wrongdoing,[109] but, regardless of amnesty, such findings did not entail that any individual was liable to punishment.

All truth commissions share a stated aim: to uncover the truth about past

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103. HAYNER, *supra* note 101, at 11–12.

104. Eisikovits, *supra* note 101, at § 3.1.

105. South Africa's truth commission, however, was far from the first of its kind. It was preceded, for example, by Argentina's National Commission on the Disapperance of Persons, whose final 1984 Report, *Nunca Más* (Never Again), is one of the best-selling books in the country's history. Eisikovits, *supra* note 101, at § 3.1.

106. HAYNER, *supra* note 101, at 28.

107. ALEX BORAINE, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION, 11–46 (2000).

108. *See* HAYNER, *supra* note 101, at 100.

109. *Id.* at 101.

wrongdoing and, via the mechanism of the final report, to make that truth part of the new regime's official record. But the design of truth commissions is subject to wide variation, depending on local conditions and on the circumstances of transition. Many, though not all, have coercive investigative powers.[110] Many, again like South Africa's, conduct some of their proceedings in public, while others have worked in private until the release of their final reports.[111] Finally, the TRC's amnesty procedure is responsible for a strong, though mistaken, association between truth commissions and amnesties.[112] In fact, most truth commissions take place in the shadow of potential criminal prosecution; many have urged such prosecutions in their final report; and criminal prosecutions are sometimes a direct consequence of information uncovered by truth commissions.[113]

3. Standing Commissions and Agencies

The examples in the previous two sections all involve *ad hoc* special-purpose vehicles with a limited remit and a temporary existence. But soft adjudication can also be performed by permanent bodies with a standing power and responsibility to make determinations about a certain class of events.

In the federal government, the clearest example of a standing body whose function is soft adjudication is the NTSB.[114] The NTSB is an independent agency charged with investigating several classes of transportation accidents, including those it deems "catastrophic" or to involve "problems of a recurring character."[115] After an accident, the NTSB sends expert investigators to the scene to examine the physical evidence.[116] In contested accidents, the NTSB receives written representations from interested parties;[117] it has the

110. *Compare, e.g.*, *id.* at 28 (stating that South Africa's TRC had subpoena power), *and id.* at 40 (stating the Timor-Leste Commission had subpoena power), *with id.* at 43 (explaining that Morocco's Equity and Reconciliation Commission lacked subpoena power).

111. *Id.* at 218–20.

112. *See id.* at 104–05 (exposing the "amnesty confusion").

113. *Id.* at 92.

114. *See* John F. Easton & Walter Mayer, *The Rights of Parties and Civil Litigants in an NTSB Investigation*, 68 J. AIR L. & COM. 205 (2003).

115. The NTSB's jurisdiction includes every civil aviation accident in the United States; every railroad accident involving a passenger train, a fatality, or serious property damage; major marine accidents; and certain highway accidents. 49 U.S.C. § 1131 (2012).

116. *See id.* § 1134 (conferring inspection power on officers and employees of the NTSB).

117. *Id.* § 831.14(a) (2016) ("Any person, government agency, company, or association whose employees, functions, activities, or products were involved in an accident or incident

power to subpoena witnesses, to hold public hearings, and to receive sworn testimony.[118]

The NTSB, however, lacks the power to impose sanctions on wrongdoers or even to institute a suit against a party it deems to be at fault.[119] Its findings are inadmissible in any subsequent judicial proceedings, civil or criminal.[120] The culmination of the NTSB's investigation, instead, is a detailed report on the accident, making findings as to its cause or causes.[121] The Board may submit safety recommendations arising from its investigations to the Secretary of Transportation, who is obligated to respond formally stating the intention to adopt or reject the recommendation.[122] The NTSB's investigative work is entirely separate both from rulemaking and enforcement, which are carried out by other federal agencies.[123] While it lacks the power to impose obligations or sanctions, the NTSB is considered an important and successful agency.[124]

Bureaucracies often receive oversight from officials with the title "ombudsman" or "inspector general." An ombudsman is an official who stands apart

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under investigation may submit to the Board written proposed findings to be drawn from the evidence produced during the course of the investigation, a proposed probable cause, and/or proposed safety recommendations designed to prevent future accidents.").

118. NAT'L TRANSP. SAFETY BD., THE INVESTIGATIVE PROCESS, http://www.ntsb.gov/investigations/process/Pages/default.aspx (last visited Aug. 18, 2017).

119. *Id.* ("The Safety Board has no regulatory or enforcement powers."); *see* 49 C.F.R. § 831.4 (NTSB investigations "are not conducted for the purpose of determining the rights or liabilities of any person").

120. *See* 49 U.S.C. § 1154(b) (stating though the exclusionary rule clearly bars admission of the NTSB's findings, the admissibility of the factual portions of the Board's reports in subsequent litigation is a matter of disagreement among different courts); Easton & Mayer, *supra* note 114, at 218–19.

121. EASTON & MAYOR, *supra* note, 114; *see* 49 C.F.R. § 831.4 (NTSB investigations "result in Board conclusions issued in the form of a report or 'brief' of the incident or accident").

122. 49 U.S.C. § 1135.

123. In the field of aviation, the FAA fulfills the rulemaking and adjudication functions. On the relationship between the NTSB and FAA, see Lea Ann Carlisle, *The FAA v. the NTSB*, 66 J. AIR L. & COM. 741 (2001).

124. *See* 42 U.S.C. § 7412(r)(6) (2012). Based on the NTSB's success, Congress sought to replicate the model when it created the U.S. Chemical Safety and Hazard Investigation Board (CSB) to respond to accidental releases of dangerous chemicals. *See id.* Like the NTSB, the CSB is an independent agency. And like the NTSB, it produces accident reports that lack binding effect. *Id.* § 7412(r)(6)(G). Unlike the NTSB, however, the CSB has suffered from serious problems, and appears to be underfunded and overstretched. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-864R, CHEMICAL SAFETY BOARD: IMPROVEMENTS IN MANAGEMENT AND OVERSIGHT ARE NEEDED, 1, 2, 6, 16 (2008).

from the administrative hierarchy and who is empowered to respond to citizen complaints.[125] Typically, an ombudsman lacks the ability to make legally binding decisions. In the United States, the device has been implemented comprehensively in many of the states and in several departments and agencies at the federal level,[126] for example through the appointment of Inspectors-General to investigate fraud, waste, and abuse of government power.[127] Another example of the ombudsman concept is South Africa's Office of Public Protector, which has the power under the nation's constitution "to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice," and to report on that conduct.[128] The current incumbent has wielded the office's soft power to confront President Zuma by publishing reports detailing improprieties by him and his associates.[129]

Another example of an institution engaging in a regular practice of soft adjudication is the coroner's inquest. As I have written elsewhere,[130] in much of the Anglo-Commonwealth world, coroners maintain a consistent practice of ruling on suspicious and unexplained deaths, and have the power to convene inquests in the course of their work. Though inquest juries once had the power to indict a suspect on homicide, that power has generally been removed.[131] Instead, inquests use their subpoena powers in the service of soft adjudication; their verdicts seek to explain how the deceased met his or her end. In a striking recent example, an inquest in England re-visted a major disaster at a soccer stadium in 1989 in which ninety-six fans died; the police blamed the tragedy on the victims. After hearing evidence from more than 500 witnesses over a period of two years, the inquest jury instead blamed the

125. *See* Edward L. Rubin, *Bureaucratic Oppression: Its Causes and Cures*, 90 WASH. U. L. REV. 291, 327 (2012).

126. *Id.* at 328.

127. *See* PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 2, 6, 221 (1993).

128. *See* S. AFR. CONST., 1996 § 182. The Constitution states that the Public Protector has the power to take "appropriate remedial action," but, as the law is currently understood, her recommendations or directives are not binding on other government actors. *Id.* § 182(1)(c); *see* Alexis Okeowo, *Can Thulisile Madonsela Save South Africa from Itself?*, N.Y. TIMES, June 16, 2015, https://www.nytimes.com/2015/06/21/magazine/can-thulisile-madonsela-save-south-africa-from-itself.html?mcubz=0.

129. *See* Okeowo, *supra* note 128.

130. *See* MacMahon, *supra* note 12.

131. *Id.* at 293.

police for the deaths,[132] vindicating a decades-long struggle for the truth by the victims' families, and forcing the police chief out of his job.[133]

Whereas the Anglo-Commonwealth inquest is a highly significant institution, the inquest has been in decline in the United States since the nineteenth century.[134] It is now rare for a state or locality to maintain a regular practice of holding inquests;[135] the recent attempt by authorities in Las Vegas to require an inquest presided over by a judge for every death involving a police officer faltered on technical grounds.[136] On the relatively rare occasions where inquests are still held in the United States, the power to hold one is generally taken *ad hoc* to respond to a particularly controversial or troublesome death. For example, a recent inquest in Milwaukee investigated a police custody death, finding several officers to be at fault.[137]

4. Legislative Committees

Legislators, too, sometimes engage in forms of soft adjudication. Most obviously, they do so while scrutinizing the executive branch, a function arguably just as important as the lawmaking function.[138] The U.S. Supreme Court has held that Congress has the power to conduct investigations as "an essential and appropriate auxiliary to the legislative function."[139] Often, hearings do not culminate in any formal finding by the committee; rather, individual members are permitted to make up their own minds about what happened and to say what they wish. But where a legislative committee conducts hearings, hears from witnesses, receives representations, and issues a report that purports to provide the truth about what happened, its activities

132. *See* David Conn, *Hillsborough Verdict: Victims' Families' 27-Year Struggle for Truth Vindicated*, GUARDIAN, Apr. 27, 2016, https://www.theguardian.com/football/2016/apr/26/hillsborough-families-27-year-struggle-for-truth-vindicated .

133. *See* Vikram Dodd & Heather Stewart, *South Yorkshire Police Chief Suspended after Hillsborough Verdict*, GUARDIAN, Apr. 27, 2016, https://www.theguardian.com/football/2016/apr/27/south-yorkshire-police-chief-suspended-over-hillsborough-verdict .

134. *See* MACMAHON, *supra* note 12, at 281–84.

135. One exception is Montana's rule requiring an inquest in any case of death at the hands of a police officer or prison guard. MONT. CODE ANN. § 46-4-201 (2014).

136. *See supra* notes 12–19 and accompanying text. For more on the Las Vegas proposal, see MacMahon, *supra* note 12, at 306–14.

137. *See* MacMahon, *supra* note 12, at 302–03.

138. *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 303 (1885) (Congress's "informing function . . . should be preferred even to its legislative function").

139. McGrain v. Daugherty, 273 U.S. 135, 174 (1927); *see also* Watkins v. United States, 354 U.S. 178, 187 (1957).

approximate the model of soft adjudication.

One particularly famous example is the U.S. Senate's Committee on Presidential Campaign Activities, a Committee set up to investigate President Nixon's involvement in the Watergate break-in and other questionable campaign practices. The Committee's investigation culminated in a seven-volume, 1,250-page report, which it issued on June 27, 1974.[140] The Report commenced with an accessible narrative of the events leading to the break-in, the break-in itself, and the post-break-in "cover-up."[141] The revelations uncovered in the committee's hearings and outlined in its report helped lead to President Nixon's resignation.[142] The Committee also made a series of policy recommendations, including the creation of the "Office of Public Attorney,"[143] a recommendation later followed with the creation of the Office of the Special Prosecutor.[144]

More recent examples of congressional soft adjudication include the report by a select committee of the House of Representatives into the government's response to Hurricane Katrina (entitled "A Failure of Initiative"),[145] and the report by the Senate Select Committee on Intelligence on the CIA's use of torture between 2001 and 2006. That Committee formally began investigating allegations of torture in 2009, and in 2012 produced its findings in a 6,700-page report. The full report remains classified, but its Findings and Conclusions and its Executive Summary were declassified and published in 2014.[146] The Report found that the CIA's use of "brutal" enhanced interrogation techniques was unjustified, that these techniques failed to produce accurate information, that the CIA repeatedly misled legislators, other executive branch departments, and journalists about its treatment of detainees,[147] and that its conduct had damaged the United States' standing in the world.

Legislative committees should perhaps not have been seen as a central case of soft adjudication because their status as neutral, independent arbiters

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140. THE FINAL REPORT OF THE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, S. REP. NO. 93-981, at 96–100 (1974) [hereinafter WATERGATE COMMITTEE REPORT].

141. *Id.* at ch. 1.

142. A couple of weeks later, the U.S. Supreme Court ordered the President to turn over the unedited White House audio tapes to the special prosecutor. *See* United States v. Nixon, 418 U.S. 683 (1974). The Senate Committee and special prosecutor worked in parallel.

143. WATERGATE COMMITTEE REPORT, *supra* note 140, at 96.

144. Ethics in Government Act of 1978, Pub. L. No. 95-52, 92 Stat. 1824 (1978).

145. H.R. REP. NO. 109-377 (2006).

146. S. REP. NO. 113-288 (2014).

147. The Committee, following 9/11 Commission's example, published the declassified portion of its final report as a paperback in January 2015. *See id.*

is often dubious. Very often, reports issued by legislative committees are so evidently motivated by a political gain that they seem more like partisan advocacy than an independent determination.[148] A recent example is the attempt by congressional Republicans to harm the presidential chances of Hillary Clinton by undertaking seemingly redundant investigations into the 2012 attack on the diplomatic compound in Benghazi, Libya. Despite multiple prior official investigations, including by several congressional committees, congressional Republicans voted in 2014 to institute a Select Committee. The Committee released its report in June 2016;[149] though it appeared to uncover little that was new,[150] the Chairman claiming that its findings should "fundamentally change the way you view Benghazi."[151] Undoubtedly, however, the attack on Benghazi is exactly the kind of event that typically provokes soft adjudication. An independent State Department Accountability Review Board (ARB), statutorily required to be convened in a case of loss of life at U.S. missions abroad,[152] had long since issued its Report on this incident.[153] The ARB's report—commencing with the epigraph: "Those who cannot remember the past are condemned to repeat it"[154]—found that "[s]ystemic failures and leadership and management deficiencies at senior levels" led to inadequate security at the compound.[155]

148. H. Lew Wallace, *The McCarthy Era 1954*, in 5 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792–1974, 3746 (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975) (stating while, "[i]n theory, congressional investigations proceed in an atmosphere of calm, reason, detachment, and impartiality, . . . [t]oo often they are clearly vulnerable to partisan exploitation" in practice).

149. H.R. REP. NO. 114-848 (2016).

150. David M. Herszenhorn, *House Benghazi Report Finds No New Evidence of Wrongdoing by Hillary Clinton*, N.Y. TIMES, June 28, 2016, https://www.nytimes.com/2016/06/29/us/politics/hillary-clinton-benghazi.html.

151. *GOP Delivers Speech Regarding Findings of the Benghazi Committee*, CNN, June 28, 2016, http://www.cnn.com/TRANSCRIPTS/1606/28/cnr.04.html. Clinton's presidential hopes were, however, somewhat hampered by another instance of soft adjudication that is an offshoot of the Benghazi investigations—the report by the Inspector General of the State Department into her use of a private email account while she was Secretary of State. Amy Chozick, *Hillary Clinton Blames F.B.I. Director for Election Loss*, N.Y. TIMES, Nov. 12, 2016, https://www.nytimes.com/2016/11/13/us/politics/hillary-clinton-james-comey.html.

152. 28 U.S.C. § 4831(a)(1) (2012).

153. *See* U.S. DEP'T OF STATE, ACCOUNTABILITY REVIEW BOARD REPORT (2012) [hereinafter ARB Report].

154. *Id.* at 1 (quoting GEORGE SANTAYANA, REASON IN COMMON SENSE (1905)).

155. *Id.* at 29.

II. SOFT ADJUDICATION AS A SEARCH FOR TRUTH

Soft adjudication tends to emerge in response to serious ruptures in the ordinary fabric of political and social life. As Part I.B's catalog of examples attests, we often see soft adjudication in response to deaths, major accidents, political scandals, and massive institutional failures. But what does soft adjudication contribute in the aftermath of these events? A purely descriptive answer to the question: "Why soft adjudication?" may point to the self-interested motives of the actors who institute it.[156] For politicians, turning the matter over to a soft adjudicator, whose work will generally take a substantial period of time, is sometimes enough to take the "heat" out of a scandal or to mislead the public that government is "doing something" about a problem.[157] This cynical line of thought has some support in the political science literature on special commissions.[158] Even worse, those who commission soft adjudication may seek to rig the result by conferring inadequate powers or by choosing friendly adjudicators.[159] Moreover, in transitional societies, the institution of truth commissions—combined with amnesty, as in the case of South Africa—might be negotiated by the outgoing regime as a means of insulating themselves and their colleagues from the genuine punishment they deserve. In this way, soft adjudication instituted by political actors for self-interested motives might even be worse than useless, deflecting energy and attention from more fruitful forms of political and legal activity.

Still, the self-interest of politicians does not provide anything like a full explanation for why soft adjudication institutions arise and persist under democratic conditions. If soft adjudication were *always* just a ploy, it would

156. A similar suspicion plagues other categories of soft law activity. *See, e.g.*, Gersen & Posner, *supra* note 30, at 626 ("When lawmaking authorities create laws that by their own terms or common understanding have no effect, one immediately suspects a cynical public-relations ploy.").

157. *See, e.g.*, Amitai Etzioni, Op-Ed, *Why Task Force Studies Go Wrong*, WALL ST. J., July 9, 1968, at 18 (contending that the appointment of an investigatory commission "gets the national leadership off the hook"); Alston, *supra* note 97, at 83 ("[C]ommissions can be used very effectively by governments for the wrong purposes: to defuse a crisis, to purport to be upholding notions of accountability, and to promote impunity.").

158. *See, e.g.*, Ranaan Sulitzeanu-Kenan, *Reflection in the Shadow of Blame: When Do Politicians Appoint Commissions of Inquiry?*, 40 BRIT. J. OF POL. SCI. 613, 613 (2010) (contending that the appointment of commissions of inquiry by politicians in the UK is motivated by a desire to avoid blame).

159. *See, e.g.*, Hegarty, *supra* note 33, at 1151 ("States institute such processes to give legal cover to governments and justify or minimize their actions, while constructing an official version or 'memory' that denies the original abuse.").

surely be ineffective; voters, aided by political opponents, would often see through it. For such a ploy to be effective, soft adjudication must have at least *some* potential value to actors other than the office-holders who authorize it. Relatedly, if soft adjudication had no real effect apart from serving politicians' public relations interests, why would non-political actors—the families of victims, for example—seek to pressure politicians into instituting soft adjudication? In fact, political actors typically prefer not to cede any degree of political control to a soft adjudicator if they can help it.[160] Many examples of soft adjudication have been prompted by political[161] and even judicial[162] pressure rather than by a free decision on the part of the political actors who commissioned them.

I suggest that soft adjudication, whatever its weaknesses, has unique advantages over other forms of adjudication.[163] These advantages lie in soft adjudication's special relationship with the truth, a relationship I explore in this Part. Unlike other forms of adjudication, soft adjudication is directly concerned with discovering the truth (§ A); however, soft adjudication is not just about finding the truth. As I explain below (§ B), soft adjudicators also *communicate* the truths they find to the public. This conception of soft adjudication has the potential to provoke skepticism about "official" versions of the truth, an objection I consider below (§ C).

A. Discovering the Truth

To understand what soft adjudication is useful for, we will start with what, from the perspective of the adjudicator, it aims to do. The primary aim of

160. Adam Burgess, *The Changing Character of Public Inquiries in the (Risk) Regulatory State*, 6 BRITISH POLS. 3, 12 (2011) ("Public inquiries involve giving up direct political control of the response to major events, and in a way that is self-consciously open to close public scrutiny. . . . When public inquiries are granted, it suggests the perception of considerable pressure around a matter deemed, today, to be of considerable public, rather than one of internal concern to the political class.").

161. In Israel, "in most instances . . . governments are dragged into establishing commissions of inquiry by public outcry." Asher Maoz, *Law and History: A Need for Demarcation*, 18 L. & HIST. REV. 619, 620 (2000).

162. The UK government, for example, initially refused to institute a public inquiry into the death of Russian dissident Alexander Litvinenko, but its refusal to do so was successfully challenged in the courts. R(Litvinenko) v. Secretary of State for the Home Department, [2014] EWHC 194 (Admin).

163. My argument is analogous to the claim by scholars of soft law that "soft law offers many of the advantages of hard law, avoids some of the costs of hard law, and has certain independent advantages of its own." Abbott & Sindall, *supra* note 41, at 423.

any particular instance of soft adjudication is to provide a truthful account of the events in question. The final product of soft adjudication is not a judgment of liability or conviction, but a final report that explains the truth of the matter. Truth commissions, as their name suggests, are most obviously instituted to discover the truth about past conflict or oppression. And other soft adjudicators are explicitly given the same task. Most vividly, the Mayor of Philadelphia instituted the MOVE Commission after a disastrous police operation against a cult by telling the Commissioners that "the public wants the *truth*! They want to know what happened, how it happened and why it happened. I ask only that they be told the truth."[164] Less vividly, the Roberts Commission was asked to "ascertain and report the facts relating to the attack" on Pearl Harbor;[165] the Warren Commission was asked to "evaluate all the facts and circumstances surrounding" President Kennedy's assassination;[166] and Congress asked the 9/11 Commission to "conduct an investigation that investigates relevant facts and circumstances" relating to the 9/11 attacks.[167] The NTSB's duty is to "determine facts, conditions, and circumstances relating to an accident or incident and the probable cause(s) thereof."[168]

The task of a soft adjudicator, then, is to determine what happened, how it happened, and why it happened. But it would be misleading to characterize soft adjudication as fact-finding or as the mere pursuit of "information." To provide an account of past events, soft adjudicators also evaluate conduct, providing normative conclusions. When asked to explain an accident, for example, soft adjudicators decide whether and to whom they should assign responsibility. Such judgments of responsibility are distinct from a finding that someone violated the law. Decisions about the law are typically left to the courts. Soft adjudicators focus instead on making the kinds of judgments forbidden to courts, whose judgments are supposed to be based on previously-announced rules of conduct—that is, in law. As applied in the courts, legal duties are expected in liberal societies to satisfy desiderata of prospectiveness, precision, and clarity.[169] Soft adjudicators are not bound by these rule-of-law constraints. They can, therefore, address purely

164. Letter from W. Wilson Goode, Mayor, City of Philadelphia, to William H. Brown, Chairman, MOVE Commission (May 28, 1985), quoted in Singley, *supra* note 49, at 319 n.100.

165. Exec. Order No. 8983, 6 Fed. Reg. 6,569 (1941) (Roberts Commission Order).

166. Exec. Order No. 11,130, 28 Fed. Reg. 12,789 (1963) (Warren Commission Order).

167. *See* Intelligence Authorization Act for Fiscal Year 2003 § 604, 6 U.S.C. § 101 (2012).

168. 49 C.F.R. § 831.4 (2016).

169. *See, e.g.*, Joseph Raz, *The Rule of Law and its Virtue,* THE AUTHORITY OF LAW (1979).

evaluative questions concerning whether a person, group, or institution acted improperly[170] or unethically,[171] whether the person was guilty of "derelictions of duty,"[172] or made "errors of judgment."[173] Soft adjudicators, then, are free to find *moral* truths.

In its direct pursuit of truth, both factual and moral, soft adjudication differs from ordinary adjudication.[174] Ideally, courts act on good information about what happened in the past. But, in ordinary adjudication, the ultimate question for the court is whether punishment or liability is appropriate.[175] As a result, criminal and civil proceedings are very far from being a pure search for truth.[176] A court's ultimate task gives a different shape to its decisionmaking. Most obviously, a court's inquiry is limited to resolving questions relevant to legal liabilities: whether the defendant committed the relevant act with the requisite *mens rea*, whether the defendant breached a legal duty of care, and so forth. Or, if the defendant possesses immunity from suit, the court will dismiss the action without further inquiry into what happened. More generally, the public's interest in the truth may extend far beyond those questions germane to liability. An account of an event that tells only those truths relevant to the imposition of liability will often be radically incomplete.[177]

Even in its quest to answer questions relevant to legal liability, ordinary adjudication is often constrained in its truth-seeking function by its rules of

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170. S. Res. 60, 93d Cong. (1973) (creating Watergate Commission Order).

171. *Id.*

172. Exec. Order No. 8983, 6 Fed. Reg. 6,569 (1941).

173. *Id.*

174. *See, e.g.*, WARREN COMMISSION REPORT, *supra* note 53, at xiv (noting that the Warren Commission was not functioning as a court of law "but as a fact-finding agency committed to the ascertainment of the truth").

175. ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 34 (2005) ("Adjudicative fact-finding instantiates practical reasoning. This goal-oriented reasoning aims at producing the best decision available, not at finding the truth for its own sake.").

176. I do not mean to suggest that litigation does not also produce valuable truths. Discussing the value of litigation, Judith Resnik refers to the "social good of producing a stated narrative (documented through transcripts, proceedings, and exhibits) about a particular event." *See* Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes are at Risk*, 81 CHI.-KENT L. REV. 521, 535–36 (2006). Resnik notes, however, that courts are not the only way to provide this social good, noting that Truth and Reconciliation Commissions and "blue-ribbon" commissions, like the 9/11 Commission, can also do so.

177. *See* HAYNER, *supra* note 101, at 108–09 (noting the limited truth value of criminal trials that took place in South Africa prior to the TRC).

proof and evidence. Some rules of evidence aim at improving the court's ability to reach the truth, but others reflect moral and political values distinct from the goal of truth-finding.[178] The criminal standard of "proof beyond a reasonable doubt" is an obvious example; a verdict of "not guilty" may be the appropriate result even though the fact finder believes the defendant is guilty. Criminal procedure allocates much of the risk of error to the prosecution on the assumption that the consequences of wrongful conviction are generally worse than the consequences of a wrongful acquittal.[179] In civil litigation, too, the pursuit of truth is constrained; in defamation suits in the United States brought by public figures, for example, a plaintiff must prove actual malice by clear and convincing evidence. That rule is based on the desire to insulate free speech from the threat of lawsuits rather, than on fact-finding accuracy.[180] And various evidentiary prohibitions in criminal cases—like restrictions on the introduction of character evidence, prior crime evidence, and the Sixth Amendment's restriction on testimonial hearsay—seem to be motivated by a desire to allocate the risk of error to the prosecution rather than to the defendant.[181] Most strikingly, evidentiary bars on the introduction of evidence obtained by unlawful searches and seizures deliberately obstruct the court in its task of reaching an accurate determination of the facts.[182] They do so in an effort to provide incentives to law enforcement officers to respect suspects' entitlements to privacy and

178. Though it is not always easy to apply, the distinction between rules of evidence based on non-epistemic values and rules of evidence whose purpose is to improve fact-finding is well established in evidence-law scholarship. *See* Damaska, *supra* note 4, at 306 ("doctrines and institutions that promote fact-finding accuracy and those that serve other goals should be clearly distinguished"); STEIN, *supra* note 175, at 1 (defending the "fundamental distinction between the fact-finding objectives of the law and objectives extraneous to fact-finding that the law promotes through rulings on evidence.").

179. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 352 (1765) (". . . better that ten guilty persons escape, than that one innocent suffer"). For a recent criticism of the "Blackstone principle," see Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 Harv. L. Rev. 1065 (2015).

180. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964) (stating the First Amendment requires "convincing clarity" in proof of actual malice by public figures claiming defamation).

181. For an example of this approach to evidentiary restrictions in criminal cases, see STEIN, *supra* note 175, at ch. 1.

182. The American criminal process is especially affected by restrictions on the ability of courts to determine innocence or guilt directly. For the argument that the liberal focus on procedural rights for defendants has backfired by creating a backlash, see William J. Stuntz, *The Collapse of American Criminal Justice*, 125 HARV. L. R. 1425 (2011).

property.

These constraints on truth-seeking in ordinary adjudication—or something like them—may well be justifiable.[183] But they do hinder the courts in one social function we might consider useful, namely, the ability to reach and transmit accurate conclusions about what happened in the past. As Alex Stein has recently explained, because of these various moral and political constraints, courts lack the ability to serve as epistemic authorities.[184] To serve as epistemic authorities, Stein contends, "a factfinder must be both cognitively competent *and* be able to give a systemic and generally dependable assurance with respect to her accuracy and impartiality."[185] Courts cannot give this assurance, Stein says, because their decisions are motivated partly by "non-epistemic considerations"—reasons that have nothing to do with the truth of what happened.[186] These non-epistemic reasons, in turn, stem from the fact that courts are in the business of determining obligations and licensing coercion.

Enter soft adjudication. Freed from the constraints properly imposed on ordinary litigation, soft adjudicators are unencumbered by the evidentiary restrictions—the rule against hearsay, for example, or rules restricting opinion testimony and character evidence.[187] Soft adjudicators will naturally be circumspect about these kinds of evidence, but will give each piece of evidence the weight it deserves. Moreover, soft adjudicators conduct inquisitorial proceedings, whether or not they grant formal "party" status to interested persons or organizations. The ability for the decisionmaker, rather than the parties, to control the investigation arguably makes soft adjudication more conducive to finding the truth (as opposed to more party-driven adjudication, which may be better at achieving a just allocation of

183. For criticism, see LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY (2006); *see also* Epps, *supra* note 178.

184. Alex Stein, *On the Epistemic Authority of Courts*, 5 EPISTEME 402 (2008).

185. *Id.* at 402 (emphasis added).

186. *Id.* at 407.

187. *See* Singley, *supra* note 49, at 328 (advising those setting up public inquiry commissions "should make it clear that the rules of evidence applicable in a court of law do not apply to the commission's proceedings"); Eisikovits, *supra* note 101, at § 3.2.1 (stating South Africa's TRC was "exempt from standard rules of legal procedure and evidence"); Richard Scott, *Procedure at Inquiries: The Duty to be Fair*, 111 L. Q. REV. 596, 610 (1995) (stating in UK public inquiries, hearsay evidence and opinion testimony may be sought); Arthur L. Goodhart, *The Warren Commission from the Procedural Standpoint*, 40 N.Y.U. L. REV. 404, 405 (1965) (noting the role of hearsay evidence in the Warren Commission); Easton & Mayer, *supra* note 114, at 208 (noting that the NTSB considers evidence that would be excluded in civil litigation).

resources).[188] That soft adjudication aims directly at finding the truth does not mean that it is always the best way to do so, but this central aim marks a fundamental difference between soft and ordinary adjudication.

B. Transmitting the Truth

Soft adjudication aims not only to discover but also to explain and to transmit the truth. While there might be some purpose in a secret criminal or civil trial, followed by the secret imposition of punishment or liability, soft adjudication would be pointless unless its determinations were published. The audience might include, for example, actors in a position to take "hard" action, such as prosecutors for example. It might include prospective wrongdoers, to whom soft adjudicators may signal that certain kinds of conduct are likely to incur disapproval in future. The audience might be the broader public, who may be able to influence both political actors and potential wrongdoers, and to alter their future conduct in other ways. Typically, a soft adjudicator addresses its conclusions to the public at large, even where political etiquette demands that it must formally present its final report to the political body that commissioned it. The 9/11 Commission Report was addressed, for example, "to the President of the United States, the United States Congress, and the American people for their consideration."[189]

Because it does not rely on coercion, the force of soft adjudication, if any, depends on its conclusions being believed. Soft adjudicators thus need credibility, and they often seek to gain it by adopting features we associate with courts, most notably by being staffed by independent and impartial decisionmakers who maintain a neutral stance until they have heard the evidence. Soft adjudicators frame their conclusions in terms acceptable to listeners holding a wide variety of opinions. A soft adjudicator's credibility is also likely to be enhanced by openness to critical scrutiny. Where feasible, then, soft adjudicators are advised to hold at least some of their proceedings in public.[190] The 9/11 Commission (which held some public sessions) and South Africa's TRC (which held hundreds of televised public hearings, often

188. For discussion of the debates concerning the strengths and weaknesses of "adversarial" and "inquisitorial" forms, see David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634 (2009).

189. 9/11 COMMISSION REPORT, *supra* note 67, at 1.

190. Public hearings may not always be feasible where, for example, soft adjudicators need to receive secret information. On the use of public and private hearings in truth commissions, see HAYNER, *supra* note 101, at 218.

dominating South Africa's evening news),[191] for example, appeared to gain power from such acts of transparency. The Warren Commission, which held all of its hearings in private, is an instructive counterexample.[192] The stated rationale for private hearings was to enhance the Commission's truth-*finding* capacities, by encouraging frank and honest testimony on the part of witnesses who might be afraid to testify freely in public. But the private proceedings affected the Commission's truth-*transmitting* abilities. "By its decision to sit in private, whether right or wrong, the Commission necessarily gave hostages to its potential critics."[193]

Credibility is also enhanced where the speaker has a prior reputation for telling the truth.[194] Successful soft adjudicators, then, often have a pre-existing commitment to impartiality and independence.[195] To this extent, professional experts and judges have an advantage in soft adjudication, as they are already invested in a reputation for objectivity. Politicians, by contrast, stake their reputations less on making objective judgments than on their efficacy in advancing the causes of their constituents and other backers. Consequently, legislative committees driven by one political faction—like, for example, the endless congressional inquiries into the attack at Benghazi[196]—are unlikely to be effective as soft adjudicators (however

191. *Id.*

192. Goodhart, *supra* note 187, at 405.

193. Patrick Devlin, *Death of a President: The Established Facts*, ATL. MONTHLY, Mar. 1965, at 112.

194. *See* ALAN BARTH, GOVERNMENT BY INVESTIGATION 211–15 (1955).

195. My view, then, is to be contrasted with Jonathan Simon's application of the notion of "parrhesiastic truth-telling" to the 9/11 Commission's work. Simon, drawing on Michel Foucault's interpretation of the Ancient Greek concept of *parrhesia*, says that "[a] parrhesiastic speaker produces a truth that comes uniquely from her self and her experience and is directed critically at a listener whose power places the speaker in potential danger." Simon, *supra* note 34, at 1422. Like Foucault, Simon contrasts parrhesia with the "analytics of truth," which depend on objectivity. Simon contends that the Commissioners engaged in parrhesiastic truth-telling. But the power of the Commissioner's Report was not that the content of their speech was unique to the Commissioners, nor that they were at risk as a result of their (truthful) speech. The Commissioners did not particularly risk opprobrium by providing a critique of a dysfunctional system. In the wake of a disaster like 9/11, the appetite for rethinking the architecture among the public and even among many in the defense establishment was strong. In the short term, a decision that said nothing could have been done to stop the attack would have been riskier for the Commissioners. In the long term, instead, what makes the speech of soft adjudicators credible is that they would be at risk of losing their reputations if they *failed* to tell the truth.

196. *See supra* Part I.B.4

successful they may be at pursuing their political ends). Still, professional politicians have strengths that may be useful for soft adjudication, including knowledge of the inner workings of government and high public profile. One way to harness the strength of politicians while ameliorating their weaknesses is to appoint a bipartisan commission, whose legitimacy derives from its representativeness rather than its independence from party politics.[197] To the extent that a bipartisan commission speaks with one voice, it has the capacity to make an especially powerful statement. The 9/11 Commission provides a successful example, and the Commissioners worked hard to produce a unanimous report.[198]

In addition, because their effectiveness depends solely on their ability to convince, soft adjudicators have a special reason to focus on how they present their decisions. Here, again, the 9/11 Commission stands out. The Commission's Report was written in a deliberately accessible style, far removed from the bureaucratic prose that characterizes most judicial opinions and other official documents. Its use of narrative techniques helped to make the Report an "immediate popular and critical success."[199] The Commission, moreover, worked with the commercial publisher W.W. Norton to produce an affordable paperback edition that was widely available in bookstores on the day the Report was released.[200] The Report was nominated for a National Book Award and has been described as "an improbable literary triumph."[201] This practice of collaborating with a commercial publisher has been widely followed by subsequent national-level soft adjudicators.[202] After

197. See Fenster, *supra* note 32, at 1277 (distinguishing bipartisan from nonpartisan commissions).

198. ALVIN S. FELZENBERG, GOVERNOR TOM KEAN: FROM THE NEW JERSEY STATEHOUSE TO THE 9/11 COMMISSION 410 (2006) (citing the Chairman of the 9/11 Commission as stating that "from the outset of his tenure that he hoped and expected that the commission would be unanimous in its findings and in its recommendations").

199. *See* Fenster, *supra* note 32, at 1285.

200. *See* THOMAS H. KEAN & LEE H. HAMILTON, WITHOUT PRECEDENT: THE INSIDE STORY OF THE 9/11 COMMISSION 271 (2006).

201. RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 3 (2005) ("The report itself is a lucid, even riveting, narrative of the attacks, the events leading up to them, and the immediate response to them. The prose is free from bureaucratese, and though there could not have been a single author, the style is uniform.").

202. For example, the Senate Committee on CIA Torture and the Financial Crisis Inquiry Commission both published their reports via commercial publishers. The 9/11 Commission's decision to use a commercial publisher was far from unprecedented, however. The Attica Prison Commission, for example, published its report via Bantam Books, and various

the Commission had published its Report, the Commissioners created a non-governmental organization called "The Public Discourse Project," whose functions included educating the public about the Commission's Report, which helped to secure broad dissemination and acceptance of the Commission's conclusions.[203]

A soft adjudicator may instead fail to secure acceptance of the narrative it produces. As a case study, consider the Financial Crisis Inquiry Commission (FCIC), set up months after the global financial crash of 2008. The FCIC was in large part an attempt to replicate the 9/11 Commission. Authorized by statute, the FCIC's remit was "to examine the causes, domestic and global, of the current financial and economic crisis in the United States."[204] The ten members of the FCIC were appointed by congressional leaders, and were given subpoena power.[205] The Commission interviewed more than 700 witnesses and held nineteen days of public hearings in New York, Washington, D.C., and in other parts of the country that suffered most during the crisis.[206] It produced a 410-page report joined by the six Commissioners nominated by Democrats. The Report concluded that the financial crisis was "avoidable," attributing it to "widespread failures in financial regulation and supervision,"[207] and blaming large financial institutions for "dramatic failures of corporate governance and risk management."[208] The Commission's majority also found that the government was "ill prepared" for the crisis, and that the government added to the uncertainty and panic in the financial markets by acting inconsistently.[209] Most sweepingly, the Commission found that there was a "systemic breakdown in accountability and ethics" in the financial markets.[210] Like the 9/11 Commission's Report, the Financial Crisis Report was published in paperback and made it on to some best-seller lists.[211]

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official reports on Watergate were published commercially. *See* Eliot Fremont-Smith, *The Watergate Publishing Company*, N.Y. MAG., Aug. 12, 1974, at 58.

203. *See* Fenster, *supra* note 32, at 1291.

204. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 5 (2009).

205. *See id.* § 5(d)(1)(B).

206. FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT xi-xii (authorized ed., 2011).

207. *Id.* at xvii–xviii. A dissent joined by three Commissioners contended that the majority report failed adequately to stress the global nature of the financial crisis. Another Commissioner's dissent attributed the crisis to U.S. government housing policy.

208. *Id.* at xviii.

209. *Id.* at xxi.

210. *Id.* at xxii.

211. Dale Kasler, *"Financial Crisis Inquiry Report" Book is a Best-seller*, SACRAMENTO BEE,

By comparison with the 9/11 Commission, however, the FCIC is not generally considered successful—none of its proposals have been enacted and the narrative it produced has not gained widespread agreement.[212] Why not? Whatever the actual merits of the FCIC's Final Report, its practical effectiveness was undercut by internal dissent. The FCIC did not achieve a consensus even among its members—all the Commissioners nominated by Republicans dissented from the Commission's Report. In part, this was because the FCIC's leaders were poorly chosen; they had a track record of the uncompromising pursuit of partisan interest.[213] Consequently, rather than producing an accepted narrative that could form the basis of future discussion, the Report and dissenting opinions appeared to replicate pre-existing debates. What the FCIC shows is that dissent severely weakens the force of a purportedly authoritative statement of the truth; the 9/11 Commissioners, by contrast, recognized that their status as truth-tellers depended on unanimity, and compromised their individual views accordingly.[214]

C. Skepticism About "Official" Truth

The idea of public institutions charged with determining and transmitting the truth might be regarded as troublesome in a liberal democracy.[215] Particularly, government-sponsored soft adjudication often tends to support the government rather than pursue the truth.[216] Providing the truth, the objection goes, is the function of public debate rather than of public institutions. The role of government is to set minimal ground-rules for the game, rather than intervene on one side or the other.

This concern is well illustrated by Asher Maoz's thought-provoking commentary on state Commissions of Inquiry in Israel. One of Maoz's targets is a Commission created in 1982 to investigate the assassination of a Zionist Socialist Party member in 1933, fifteen years before the establishment of the

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Feb. 16, 2011, http://www.mcclatchydc.com/news/nation-world/national/economy /article24612379.html.

212. *See* Perino, *supra* note 35, at 1065 ("The FCIC investigation had no discernable influence over the shape of and prospects for financial reform.").

213. *See id.* at 1083–84.

214. *See* Simon, *supra* note 34, at 1433.

215. The idea has totalitarian overtones: the infamous official newspaper of the Communist Party of the Soviet Union was called *Pravda* ("Truth"). *See, e.g.*, Michael Specter, *Russia's Purveyor of Truth Dies after 84 Years*, N.Y. TIMES, July 31, 1996, http://www.nytimes.com/1996/07/31/world/russia-s-purveyor-of-truth-pravda-dies-after-84-years.html.

216. *See, e.g.*, Hegarty, *supra* note 33, at 1190 (criticizing the use of official truth mechanisms by the British government in Northern Ireland during the "Troubles").

State of Israel.[217] The Commission was set up in response to the publication of a book about the assassination, and ended up lending the authority of the state and the presiding judge's prestige to one side of the historical debate. More specifically, in its report, the Commission, presided over by a judge, exonerated two accused murderers (who had been acquitted on technical grounds many decades ago), but declared itself unable to say who the murderers were or to say whether they were politically motivated.[218] For Maoz, past events like the 1933 assassination should be dealt with by professional historians rather than by judges and lawyers.[219] "In a country where history is not rewritten or dictated by the regime, no foothold should be given to the law to determine historical questions and a judge—the person interpreting and implementing the law—should not be permitted to do so."[220]

Worries about official truth, I suggest, should give rise to circumspection about the use of soft adjudication, rather than its abandonment. And Maoz himself does not contend that the pursuit of an official version of the truth through commissions of inquiry or other mechanisms is never a worthwhile aim. Rather, he suggested that it should be limited to matters of major *contemporary* public concern.[221] Soft adjudication does not raise the kind of concerns provoked by criminal punishment or civil liability for the expression of an opinion. While soft adjudicators may benefit from the official imprimatur of state authority, they can only persuade; they cannot coerce belief. As we have seen, the decisions of soft adjudicators are amenable to scrutiny and public criticism, and may fail to secure acceptance.

Moreover, soft adjudication may be necessary to displace an existing official version of the truth, deriving from previous government pronouncements. Where the official version of truth has gone awry, historical events may be fit subjects for soft adjudication. The Report of the Bloody Sunday Tribunal of Inquiry, for example, examined the killing of civilians by British Army soldiers that took place almost forty years earlier.[222] But the matter was not solely of historical interest; the official version of the truth still mattered for people living in the city of Derry decades later. It mattered in large

217. Maoz, *supra* note 33; *see also* Maoz, *supra* note 161.

218. Maoz, *supra* note 33, at 576.

219. *Id.* at 577, 601–02.

220. *Id.* at 602.

221. *Id.* at 625 ("[O]nly disputes, which are in need of an 'official version,' should be submitted to judicial and quasi-judicial forums. Philosophy and history are not among these issues.").

222. *See supra* Part I.B.1.

part because a previous instance of soft adjudication—the Widgery Tribunal—had exonerated the soldiers and smeared the victims.[223] Soft adjudication can play an important role by repudiating the old official version of the truth and replacing it with a new version, a task that historians are unable to perform by writing books.

The contrast between historians and soft adjudicators is nevertheless a useful one. In addition to changing the official story, what can soft adjudication do that professional historians and investigative journalists cannot? As a practical matter, soft adjudicators may be granted the power to compel testimony. Even in the absence of formal subpoena power, the social pressure to appear and contribute to a public enterprise is likely to be stronger than the pressure to speak to historians or journalists. Moreover, soft adjudicators typically have a greater capacity to draw attention to their conclusions than do historians, as the conclusions of soft adjudication institutions typically provoke extensive media attention. As a social institution dedicated to truth-finding, soft adjudication has a built-in capacity to convince the public that they have reached the correct decision (whether or not the adjudicators make full use of that capacity).[224]

III. WHY SOFT ADJUDICATION?

I turn next to the ulterior purposes of soft adjudication. The practice needs justification because it is not always necessary or desirable for social institutions to discover and disseminate the truth. One reason to be skeptical is that soft adjudication may compromise legitimate individual interests in privacy.[225] In addition, reopening and examining a traumatic past event may tend to perpetuate social conflict rather than helping to resolve it. Moreover, soft adjudication is expensive. A full inquiry into a complex issue requires personnel: one or more adjudicators, as well as supporting staff. Witnesses and interested parties often need or want to hire lawyers; whether these lawyers are paid for by their clients or provided by the state, they are typically costly. Moreover, soft adjudicators are typically officials or experts who might instead be contributing to public life in other ways. For example, if a

223. Hegarty, *supra* note 33, at 1165–68.

224. Stein, *supra* note 184, at 403 ("The required systemic and generally dependable impartiality and accuracy is a feature that only social institutions can develop.").

225. For example, coroners' inquests often examine acutely sensitive matters that the families of the deceased would like to keep out of the newspapers. For an example, see Re LM (Reporting Restrictions; Coroner's Inquest) [2007] EWHC 1902 (Fam) (Eng.) (rejecting a request by the guardian of a child alleged to have killed her sibling to restrict reporting of the inquest).

judge is chosen for extrajudicial service, that service may diminish the capacity of the judiciary to deal with other cases. For all these reasons, soft adjudication should be used sparingly, and should respond to an urgent need for its services.

To be justified, then, the decision to appoint a soft adjudicator to find and explain the truth must further some purpose that justifies incurring these costs. Without attempting to provide a comprehensive list, I provide a brief overview here of three main purposes for soft adjudication: accountability for wrongdoing, restoring the dignity of victims, and learning from the past.

A. Accountability for Wrongdoing

The relationship between soft adjudication and accountability is intricate, partly because accountability itself is a "protean concept."[226] In the basic meaning of the term, to be accountable is to be answerable (liable to account) for what one does or fails to do. But there are many forms of accounting,[227] and it is a common mistake to view civil or criminal adjudication as the paradigm for accountability. Political institutions are accountable in part via elections, appointments, and appropriations mechanisms.[228] Soft adjudication can contribute to these varied forms of accountability in several ways.[229] First, by calling alleged wrongdoers to testify before them, soft adjudicators can require alleged wrongdoers to give an account of their actions. Second, by delivering a finding that a person is guilty of wrongdoing, or otherwise calling attention to past failings, soft adjudicators can harness and assist social or political accountability, by providing an accurate basis for the infliction of reputational sanctions. Third, soft adjudication can serve as a precursor to the imposition to criminal or civil liability.[230]

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226. Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115 (Michael Dowdle ed., 2006).

227. *See id.* at 118 (providing a taxonomy of accountability mechanisms based on the following issues: "*who* is liable or accountable to *whom*; *what* they are liable to account for; *through what processes* accountability is to be assured; *by what standards* the putatively accountable behavior is to be judged; and what the potential *effects* are of finding that those standards have been breached").

228. *See id.* at 120–21.

229. Simon, *supra* note 34, at 1421 (investigating commissions can be an effective check on executive behavior); Fenster, *supra* note 32 at 1245 (suggesting that Congress or the President should consider establishing investigatory commissions "when information held by the Executive Branch can help the public to hold the state accountable for past actions").

230. HEGARTY, *supra* note 33, at 1149 ("The inquiry mode is sometimes a substitute for,

Soft adjudication sometimes serves as a second-best form of accountability, where "hard" adjudication is appropriate but is practically impossible. For example, the outgoing members of an abusive government regime sometimes negotiate an amnesty as a condition of peaceful transition to democratic rule. In such cases, the kind of accountability soft adjudication provides might be valuable because it is the closest available method to (deserved) criminal punishment.[231] Another circumstance that sometimes thwarts criminal adjudication is the wrongdoer's death. Arguably, wrongdoers should still be held accountable even after their deaths;[232] soft adjudication provides a mechanism where criminal punishment is no longer possible.

Soft adjudication may also emerge as a tool for accountability for bodies lacking any coercive means to hold a wrongdoer answerable. In such cases, one of soft adjudication's functions is to encourage bodies with coercive powers to exercise those powers. UN committees, for example, presumably use International Commissions of Inquiry not because they believe soft adjudication is superior but because they lack the power to impose stronger sanctions directly. These committees engage in soft adjudication in the hope of publicizing wrongdoing and encouraging nation-states to act against the perpetrators. Also, soft adjudication leads to further institutional responses. Even though it lacks preclusive effect in criminal or civil litigation,[233] soft adjudication may mobilize necessary political support for prosecution, and may uncover evidence essential for criminal or civil liability. The Senate Committee on Organized Crime in Interstate Commerce (the Kefauver Committee), for example, named thirty-three individuals as major figures in organized crime; several of these people were subsequently indicted by

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and sometimes a precursor to, criminal charges.").

231. In the South African case, for example, those applying for amnesty were required to acknowledge their need for amnesty, to describe the relevant acts, and to submit to questioning by the TRC and by the victims' families. In this way, those granted amnesty were subject to a form of accountability. *See* Ronald C. Slye, *Amnesty, Truth, and Reconciliation: Reflections on the South African Amnesty Process*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, 180–81 (Robert I. Rotberg & Dennis Thompson eds., 2000).

232. *See* Emmanuel Melissaris, *Posthumous "Punishment": What May Be Done About Criminal Wrongs After the Wrongdoer's Death?*, 11 CRIM. L. & PHIL. 313, 313 (2017) (contending that "posthumous responses to wrongs are possible and in some cases necessary for the maintenance of the stability of the political community").

233. *See, e.g.*, 49 U.S.C. § 1154(b) (2012) ("No part of a report of [NTSB], related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report"); Inquiries Act 2005, c. 12, § 2(1) (UK) (stating UK public inquiry is "not to rule on, and has no power to determine, any person's civil or criminal liability").

federal prosecutors, and many were convicted.[234] Parties to tort litigation in the aftermath of transportation accidents often seek to rely on NTSB findings or the testimony of the Board's employees,[235] and the Board's findings also provide a (nonbinding) starting-point for actions to revoke the licenses of pilots and transportation companies.[236] Sometimes, then, the main value of soft adjudication is to spur or to assist "hard" adjudication.

In other cases, soft adjudication is normatively preferable as an accountability mechanism to criminal punishment or to civil liability. In such cases, soft adjudication does more than serve as an assistant or "nudge" to court-based procedures; it has its own distinctive contributions to make to accountability. To determine this, it helps to consider the distinctive features of criminal and civil litigation and their drawbacks. First, as explained above,[237] court-based adjudication does not aim directly at the truth in the way soft adjudication does. Because it potentially culminates in state coercion, ordinary adjudication focuses on whether coercion is appropriate. Moreover, legal punishment and liability are rightly constrained by rule-of-law values, so they should be premised on violations of relatively clear and prospective rules. Some form of accountability, however, may be appropriate even where no such clear and pre-established rule has been promulgated. Additionally, we may wish to seek a form of accountability for the kinds of erroneous or foolish misjudgments for which punishment or liability may be inappropriate (a concern reflected, for example, in legal doctrines granting public officials immunities from suit). Furthermore, criminal and civil litigation often end in agreed dispositions (plea bargains in criminal cases, settlements in civil cases); such deals may serve the parties' interests better than the public's interest in accountability. Finally, where social healing is of paramount importance, soft adjudication, combined with amnesty and immunity for past wrongdoing, might be better understood as an appropriately less vengeful form of accountability.[238]

Soft adjudication is often a particularly suitable mechanism to deal with secondary wrongdoing: enabling others to commit wrongs or failing to stop them from doing so. Many of the examples canvassed in Part I.B involve

234. *See* WILLIAM HOWARD MOORE, THE KEFAUVER COMMITTEE AND THE POLITICS OF CRIME 1950–52 (1974).

235. Easton & Mayer, *supra* note 114, at 218–28 (recounting extensive litigation on the admissibility of these forms of evidence in subsequent civil litigation).

236. *Id.*

237. *Supra* Part II.A.

238. *See generally* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998).

undoubted "primary" wrongdoers who died while committing their crimes, or who were convicted of them. In such cases, an official report confirming or reiterating the perpetrator's guilt would serve little purpose, but other questions may remain. Soft adjudicators in cases of this sort focus instead on other actors who might have prevented the primary wrongdoing. The 9/11 Commission's purpose, for example, was not to fix blame on the hijackers; rather, to the extent the Commission pursued accountability, it considered actors in government and in the intelligence services who might have done more to discover the planned attacks in advance.[239] Another setting where soft adjudication plays an accountability role concerns abuse in institutions like schools, churches, and care homes. Again, the guilt and punishment of the abuser does not exhaust the need for accountability. We also want to bring to account those who turned a blind eye to abuse, and to consider the responsibility of the institution as a whole. In particularly clear and egregious cases, criminal punishment (via principles of conspiracy, accessory liability, and liability for omissions) and—more often—civil liability (via vicarious liability and liability for omissions) provide at least part of the appropriate response. But soft adjudication can be particularly effective in harnessing social accountability, as illustrated by a series of official inquiries into historical child abuse by Catholic priests in Ireland. The detailed and authoritative revelations of abuse and concealment contributed to a process of institutional blame, speeding the Church's decline from its once all-powerful position in Ireland.[240]

The case of historical abuse illustrates another point about soft adjudication. In some sense, accountability for institutions and individuals who turned a blind eye to child abuse might be considered "retroactive." However disturbing it might be to admit it, previously-prevailing social norms and legal norms may have encouraged the belief that it was permissible to ignore child abuse. Soft adjudication, it seems, often appears as an accountability mechanism in settings like this, where social norms are in transition. In this way, the use of soft adjudication shows that the mechanisms of "transitional justice" have a role to play in the circumstances beyond full-scale regime change.[241] Soft adjudication is one way to announce a dramatic repudiation of abhorrent past practices and social norms, while avoiding the special rule-

239. *See* Fenster, *supra* note 32, at 1286–88.

240. *See, e.g.*, Catriona Crowe, *The Ferns Report: Vindicating the Abused Child*, 43 ÉIRE IR. 50 (2008); DIARMAID FERRITER, OCCASIONS OF SIN: SEX AND SOCIETY IN MODERN IRELAND (2009).

241. *See* Posner & Vermeule, *supra* note 36, at 762–63 (insisting on "the relevance or utility of comparisons and analogies between regime transitions, on the one hand, and the wide variety of transitions that occur in consolidated democracies").

of-law concerns entailed by retroactive punishment. Soft adjudication is also a way to give notice that future instances of the repudiated conduct will be met with harsh treatment.

B. Restoring Victim Dignity

Soft adjudication often serves a distinct function of helping societies pay due heed the interests of victims. This purpose of soft adjudication is often intertwined with accountability for wrongdoing; one of the things that victims legitimately claim is for those who have wronged them to be brought to account. A similar combination of attributes characterizes tort law (including constitutional tort law), which seeks accountability while empowering the victim and making the victim the potential beneficiary of a damages award.[242] These purposes, however, are distinct. It is possible for an institution—criminal law, for example—to be adequate to the task of holding wrongdoers accountable while also being insufficient to meet victims' interests.[243] Conversely, some legal institutions pursue victims' interests separately without also seeking accountability. Workers' compensation schemes eschew a concern for the harm-doer's responsibility in favor of ensuring that victims receive some form of monetary award. Claims for reparations for historical wrongdoing may restore justice between current groups and individuals, but their purpose is not to hold historical wrongdoers to account. Victims, then, have legitimate interests that are separable from accountability for wrongdoing.

Some soft adjudication processes are more victim-centric than others. The NTSB, for example, provides periodic briefings to victims and their family members during its investigations, but does not give them the ability to participate in its proceedings.[244] South Africa's TRC is at the other end of the spectrum, affording a high degree of participation for victims in its public hearings, and extensive support, including counseling. The TRC's statutory purposes included "affording victims an opportunity to relate the violations they suffered . . . the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity

242. John C.P. Goldberg & Benjamin C. Zipursky, *Torts As Wrongs*, 88 TEX. L. REV. 917, 946–47 (2010) ("Tort law is . . . about empowering private parties to initiate proceedings designed to hold tortfeasors accountable.").

243. For criticism of criminal law's failure to serve victim needs adequately see Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329 (2007).

244. Easton & Mayer, *supra* note 114, at 213 ("while air carriers and manufacturers are often granted party status in a major air disaster, the victims and the victims' representatives will typically not be designated as parties" to an NTSB investigation).

of, victims of violations of human rights."[245] The TRC was part of a rising concern for the dignity of victims, a trend that continues in many of the forms of soft adjudication canvassed in Part I.B. Tunisia's truth commission, for example, is called the Truth and Dignity Commission.[246]

Soft adjudication can help restore the dignity of victims, first, by discovering the truth about what has been done to them and, second, by publicly affirming that truth. As in the case of accountability for wrongdoing, soft adjudication is sometimes a step towards other institutional responses that help victims. The truth revealed by soft adjudication can help victims make a case for compensation either in the courts or in the court of public opinion.[247] But victims justifiably find it objectionable when wrongdoers seem to believe they can "buy off" claims of wrongdoing without providing a full explanation of what happened. Victims often claim an interest in the truth itself. Where a person dies in uncertain circumstances, for example, her friends and family often want, above all things, to know how the death occurred. This interest in knowing the truth is receiving growing recognition leading to international human rights lawyers speak of an emerging "right to truth" about past atrocities.[248]

Sometimes, victims know exactly what happened to them but soft adjudication can nevertheless help to restore their dignity by providing official affirmation of truths long denied. Juan Mendez, a prominent human rights lawyer and now the UN's Special Rapporteur on Torture, has written that "[k]nowledge that is officially sanctioned, and thereby made 'part of the public cognitive scene' . . . acquires a mysterious quality that is not there when it is merely 'truth.'"[249] Official acknowledgment can also form a crucial part of the process of official apology. The release of the Bloody Sunday Inquiry's Report, for example, was followed immediately by an apology from the British Prime Minister, relayed to the victims' families by video link. Sometimes, governmental apologies to once-marginalized groups are dismissed as mere cheap talk.[250] The Bloody Sunday apology, however, was generally well received by its target audience. In this regard, the high economic costs of soft

245. Promotion of National Unity and Reconciliation Act, 34 of 1995, Preamble.

246. *See* Rim El Gantri, *Tunisia in Transition: One Year After the Creation of the Truth and Dignity Commission*, ICTJ BRIEFING (Sept. 2015).

247. *See* HAYNER, *supra* note 101, at 145 ("Most truth commissions recommend reparations").

248. *See* Sam Szoke-Burke, *Searching for the Right to Truth: The Impact of Human Rights Law on National Transitional Justice Policies*, 33 BERKELEY J. INT'L L. 526 (2015).

249. *See* HAYNER, *supra* note 101, at 21.

250. *See* MELISSA NOBLES, THE POLITICS OF OFFICIAL APOLOGIES 139 (2008) ("when compared with material reparations, apologies are often judged 'cheap talk.").

adjudication may, counterintuitively, be an asset. When the state is willing to expend substantial resources on uncovering and publicizing the truth, soft adjudication can serve as a credible signal that the community takes the victims' stories seriously. Thus, soft adjudication can be used to affirm or restore the dignity of particular persons or groups, conveying that they are equal members of society deserving of social respect and concern.[251]

Soft adjudication may serve other victim interests. In some contexts, the distinct interests of victims are expressed in terms of a need for "catharsis." Many truth commissions are premised on the assumption that telling one's story in a safe, public environment helps victims heal.[252] And truth commissions hope to promote social healing; South Africa's truth commission explicitly sought truth and reconciliation.[253] All the same, claims that examining and airing the truth will be cathartic for individual victims or for society at large must be treated with care. Psychological research suggests that victims who testify at truth commissions sometimes feel worse rather than better for having done so because the experience of telling one's story and of discovering the truth requires one to relive the experience and may induce post-traumatic stress disorder.[254] Soft adjudication may also heighten instead of allaying public concern if they focus on events that might recur. We are only beginning to understand the consequences and pitfalls of soft adjudication for victims and for societies at large, but these consequences clearly depend on how soft adjudication is conducted and on the surrounding political context.

C. Learning from the Past

Soft adjudication also helps societies to learn from the past. It provides a remedy for our natural tendency to bury and forget traumatic events.[255] The rise of truth commissions, for example, is based on the assumption that memorializing past government atrocities helps to make repetition less likely:

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251. For a fuller discussion of this point in the context of truth commissions, see Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice,* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000).

252. *See* HAYNER, *supra* note 101, at 145–47.

253. *Id.* at 152–55.

254. *Id.* at 152.

255. *See Elie E. Wiesel—Nobel Lecture: Hope, Despair and Memory*, NOBELPRIZE.ORG, (Dec. 11, 1986), http://www.nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-lecture.html ("Of course we could try to forget the past. Why not? Is it not natural for a human being to repress what causes him pain, what causes him shame?").

"'Never again' is a central rallying cry of truth commissions."[256] More prosaically, the NTSB's role is "to promote safety in transportation" by examining past disasters to avoid recurrence of the same mistakes.[257] Similarly, the 9/11 Commission described its own task as "looking back in order to look forward."[258]

Simply by providing a truthful account of past events, soft adjudication can help others to draw conclusions about what should be done in the future. By examining emotionally charged events in a spirit of forensic detachment and impartiality, soft adjudication, at its best, can contribute more accuracy and rationality to democratic deliberation over difficult social problems. Soft adjudicators need not seek to prescribe precise responses to wrongdoing for their judgments to have practical implications. When it works, a formal pronouncement by an officially-empowered body can help to mark a general societal rejection of past errors. As Jeremy Waldron explains in another context, when a person says that "*E* was unjust," she is "not so much prescribing the avoidance of *E* itself (a prescription that makes no sense if *E* is in the past), but prescribing the avoidance of *E*-type events."[259] By marking and bringing about a shared understanding that a certain kind of behavior is unacceptable, soft adjudication can prevent subsequent wrongdoers from claiming ignorance that their conduct is considered wrongful. As well as warning potential wrongdoers, soft adjudication can warn regulators and potential victims by calling attention to dangers.[260]

More explicitly, soft adjudicators sometimes produce specific policy recommendations based on their review of the facts. The NTSB regulations require the Board to use its investigations as a springboard "to ascertain measures that would best tend to prevent similar accidents or incidents in the future."[261] In this role, the NTSB has been extremely successful, in large part because it possesses a high degree of technical knowledge. Arguably, more specific expertise is necessary to plan the future than to understand the past.

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256. Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 3 (Robert I. Rotberg & Dennis Thompson eds., 2000).

257. 49 C.F.R § 800.3(a) (2016).

258. 9/11 COMMISSION REPORT, *supra* note 67, at xvi.

259. Jeremy Waldron, *Superseding Historical Injustice*, 103 ETHICS 1, 5 (1992). Similarly, under the meta-ethical theory known as "prescriptivism," moral judgments are not simply descriptive statements about the world but also entail commands as to how people should act. *See* R.M. HARE, THE LANGUAGE OF MORALS 55 (1952).

260. For an argument that public inquiries in the UK contribute to a heightened sense of risk, see generally Burgess, *supra* note 160.

261. 49 C.F.R. § 831.4(a) (2016).

In fields where adjudicators lack such an overwhelming degree of technical expertise, commentators have suggested that soft adjudicators are less effective in making policy recommendations than in providing a credible account of a past event.[262] The 9/11 Commission, for example, has been subjected to criticism for being *too* influential. Its proposal to reorganize the American intelligence services, some say, was adopted without sufficient congressional deliberation.[263] Hence, Mark Fenster suggests that investigatory commissions might refrain from making policy recommendations, or could instead, present multiple reform options while enumerating the advantages and disadvantages of each.[264] He also suggests that those commissioning official reports should bind themselves to a "cooling-off period" before adopting any policy recommendations.[265]

Caution about policy proposals emanating from soft adjudicators is appropriate, but these worries may be overblown. A recommendation is just a recommendation; it still permits others to make an independent judgment about the wisdom of a proposed change, and to justify its rejection by pointing out its flaws. More worrying, perhaps, is a concern Richard Posner raised in the aftermath of the 9/11 Commission Report.[266] Like others, Posner contends that special investigatory commissions are better equipped to provide an accurate account of what happened in the past than they are to recommend policy changes. However, he also worried that the latter function would skew the former function: that commissions will tailor their factual conclusions so that they support their ultimate policy recommendations. In the language of behavioral psychology, the suggestion is that requiring fact-finders to make policy recommendations could exacerbate "confirmation bias": the tendency to seek information that confirms one's hypotheses and beliefs.[267] If this concern is well founded, it provides a reason for soft adjudicators to focus on their core competence—providing an accurate account of what happened in the past—and to leave it to other political actors and the public at large to decide how to respond.

IV. DESIGN CHOICES: SOFT ADJUDICATION, PROCEDURE, AND COURTS

As the array of examples in Part I shows, soft adjudication can take many

262. Singley, *supra* note 49, at 311 (stating, of public inquiry commissions, that "their fact-finding function is thought to be more critical than their advisory function.").

263. Posner, *supra* note 201, at 1–8.

264. Fenster, *supra* note 32, at 1318–19.

265. *Id.*

266. Posner, *supra* note 201, at 6.

267. *See, e.g.*, Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295, 1310 (2003) (discussing confirmation bias).

forms, providing a range of design choices. I focus on three questions with particular relevance to lawyers and courts. First, what kinds of procedural protections should alleged wrongdoers be afforded? Second, should the courts have the power to review the decisions of soft adjudicators? Third, should judges serve as soft adjudicators?

A. Procedural Protections for Alleged Wrongdoers

Soft adjudication is decidedly distinct from ordinary adjudication—it is unrestricted by the sorts of procedural rules that are typical of judicial proceedings. The proceedings are inquisitorial, interested parties usually lack formal party status, and parties have limited rights to cross-examine witnesses or otherwise challenge evidence they find unpalatable. Moreover, as noted above,[268] soft adjudicators are typically exempt from exclusionary rules of evidence or from heightened burdens of proof. Thus, soft adjudicators may rely freely on hearsay evidence where they find it credible, and reach their decisions on the balance of probabilities. Soft adjudicators can be given the freedom to pursue truth because they lack the authority to impose obligations or sanctions.

Still, attempting to uncover the truth about past errors and wrongdoing will often tend to harm the reputations of individuals. How should soft adjudication deal with the risk of unjustified reputational harms? Where the purpose of soft adjudication is to learn lessons from past mistakes, soft adjudicators may be able to avoid potential complaints by framing their investigations and conclusions artfully. For example, they may anonymize individuals found to have acted wrongfully, thereby foregoing the opportunity to impose public accountability on individuals. The Bloody Sunday Inquiry was prevented by judicial decision from naming the soldiers involved.[269] Alternatively, a soft adjudicator may choose to attribute blame to institutions without focusing too closely on individual office-holders. The 9/11 Commission, for example, eschewed any attempt to assign individual blame to government officials,[270] referring instead to systemic failings and bureaucratic inertia. The detailed and authoritative story the Report told facilitated the imposition of the blame on individuals by others,[271] but the Commission's own goal was to learn lessons from the past.

As we have seen, however, the purpose of soft adjudication may be to

268. *See supra* note 187 and accompanying text.

269. *See infra* note 293 and accompanying text.

270. 9/11 COMMISSION REPORT, *supra* note 67, at xvi.

271. Simon, *supra* note 34, at 1444.

impose a form of accountability on wrongdoers.[272] Accordingly, soft adjudication is sometimes analogized to trials.[273] A finding of wrongdoing by a soft adjudicator may have the effect of hurting a person's reputation; indeed, that may be part of the point. And even where the purpose is to serve victim interests or to learn from the past, reputational harm to individuals may be the inevitable side effect of finding the truth. The more that soft adjudication aims towards individual accountability, the greater the pressure will be to incorporate court-like procedural protections. This gives rise to a problem, noted in the literature on UK inquiries, "with reconciling the *inquisitorial*, fact finding function of inquiries with a potentially *accusatorial* blame attribution that follows from their cathartic function for victims and the public at large."[274] Those under suspicion of wrongdoing may assert rights to prior notice of any allegations against them, rights to be heard, rights to legal representation, and rights to cross-examine witnesses.

In the United States, procedural challenges to soft adjudication are generally founded on the due process clauses. These challenges fail because harm to reputation does not constitute a deprivation of "life, liberty, or property" needed to get a due process claim off the ground.[275] Thus, in *Hannah v. Larche*, the Supreme Court rejected a due process challenge to the procedural rules of the United States Commission on Civil Rights.[276] In that case, people suspected of denying the right to vote contended that they could not be compelled to testify, complaining that the Commission's rules protected the identity of complainants and denied suspected wrongdoers the right to cross-examine them. The Court accepted that Commission's proceedings might cause reputational harm, loss of employment, and might lead ultimately to criminal prosecution. But such "collateral consequences . . . would not be the result of any affirmative determinations by the Commission."[277] The Commission's function was "purely investigative and fact-finding" because "[i]t does not hold trials or determine anyone's civil or criminal liability . . . . Nor does it indict, punish, or impose any legal sanctions . . . . It does not make determinations depriving anyone of his life, liberty, or property."[278] The Court concluded that "The only purpose of the Commission's existence is to find facts which may subsequently be used as the basis for legislative or

272. *Supra* Part III.A.

273. *See* Posner & Vermeule, *supra* note 36, at 805.

274. Burgess, *supra* note 160, at 21–22.

275. Paul v. Davis, 424 U.S. 693, 693 (1976).

276. Hannah v. Larche, 363 U.S. 420, 451 (1960).

277. *Id.* at 443.

278. *Id.* at 441.

executive action."[279] The Commission was thus not required to allow cross-examination of witnesses. More recently, the First Circuit found that a Blue Ribbon Commission set up to investigate corruption in Puerto Rico was exempt from due process requirements,[280] and the Supreme Court of Nevada found that due process did not apply to the Las Vegas inquest procedure.[281] Except where the investigation is, in reality, the first step of the criminal process,[282] the due process clause does not apply to soft adjudication.

Still, even if not required to do so by Supreme Court's due process jurisprudence, it is often both fair and wise for those designing and conducting the soft adjudication to afford a person at risk of reputational harm some procedural entitlements. At a minimum, a person at risk of being found to have engaged in wrongdoing can present their side of the argument. For this right to be meaningful, it must be accompanied by some entitlement to be appraised of the allegations against them. Some soft adjudicators even share pre-publication drafts of their reports with those who might object to the conclusions. Unlike evidentiary restrictions and standard of proof rules, affording the ability for alleged wrongdoers to contribute to the proceedings should enhance rather than hinder the soft adjudicator's ability to get at the truth.

Still, it is possible to engage in an excessive devotion to the opportunity to be heard. The experience of tribunals of inquiry in Ireland is a sobering example.[283] In the wake of successful judge-led inquiries in the early 1990s, the Irish government set up a series of large-scale tribunals to investigate political corruption. These Irish tribunals became very much like courts.[284] As a result, these "supertribunals" cost vast sums of public money, conferring enormous wealth on many lawyers who appeared before them. The Mahon Tribunal into planning corruption, for example, involved more than 900 days of public sittings and 400 witnesses.[285] The final report was eventually released fourteen years after the Tribunal was created. By that time, many

279. *Id.*

280. Aponte v. Calderon, 284 F.3d 184, 195–96 (1st Cir. 2002).

281. Hernandez v. Bennett-Haron, 287 P.3d 305, 317 (Nev. 2012); *see* MacMahon, *supra* note 12, at 310–13.

282. *See* Jenkins v. McKeithen, 395 U.S. 411, 431 (1969).

283. *See* Frank Barry & John O'Dowd, *The Age of Tribunals*, 90 STUDIES 58, 58 (2001) ("[W]hile tribunals would in an ideal world be inquisitorial, they have become adversarial, i.e., taken over by the lawyers.").

284. For a review of Irish Tribunals, see LAW REPORT COMM'N, REPORT ON PUBLIC INQUIRIES INCLUDING TRIBUNALS OF INQUIRY (2005).

285. Chris Parkin & Aiden Corkery, *Closing Time for Mahon, After Almost 11 Years and 60,000 Pages of Testimony, Tribunal Finally Reaches End*, DAILY MAIL, Oct. 30, 2008.

of the actors whose conduct was under scrutiny had long since retired from political life. When soft adjudication takes this long, it is unlikely to function as an effective accountability mechanism. As a result, more recent Irish instances of soft adjudication have eschewed the full tribunal model, relying on private testimony and producing much swifter reports.[286] The Irish story should serve as a cautionary tale for future designers of soft adjudication.

B. Judicial Review of Soft Adjudication

Soft adjudicators stand apart from the courts, but, as with other bodies exercising public power, their decisions may be reviewed by the judiciary. The most obvious occasion for judicial review is where a soft adjudicator purports to impose a legal obligation to testify or to produce documents. The power to issue subpoenas is typically conferred by statute or by the constitution; courts can then rule on whether the demand for information exceeds the scope of legislative or constitutional authorization. Thus, for example, the United States Supreme Court has limited the subpoena power in congressional investigations, which are "justified solely as an adjunct to the legislative process."[287] Courts reviewing challenges to subpoenas also have the power to ensure that soft adjudicators observe the privilege against self-incrimination,[288] protections against unreasonable searches and seizures,[289] and executive privilege.[290]

Even where a soft adjudicator is not attempting to force someone to testify, courts may require soft adjudicators to observe procedural requirements. The South African TRC, for example, was required by judicial decision to observe stringent notice requirements where alleged perpetrators had not been granted amnesty.[291] The Supreme Court of Ireland, we have seen,

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286. *See* Commissions of Investigation Act 2004 (Act. No. 23/2004) (Ir.), http://www.irishstatutebook.ie/eli/2004/act/23/enacted/en/pdf.

287. Watkins v. United States, 354 U.S. 178, 197 (1956). For criticism of this line of cases, see Martin Shapiro, *Judicial Review: Political Reality and Legislative Purpose: The Supreme Court's Supervision of Congressional Investigations*, 15 VAND. L. REV. 535, 536 (1962) (arguing that Congress's purposes include non-lawmaking activities).

288. *See* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (stating privilege against self-incrimination applies "in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings"); Quinn v. United States, 349 U.S. 155, 161 (1955) (stating privilege applies to congressional investigations).

289. For the application of the Fourth Amendment to congressional investigations, see McPhaul v. United States, 364 U.S. 372, 382–83 (1960).

290. United States v. Nixon, 418 U.S. 683, 697 (1974).

291. Du Preez v. Truth & Reconciliation Commission 1997 (3) SA 204 (SCA) (S. Afr.).

placed severe procedural restrictions on Tribunals of Inquiry. Federal courts will review procedural decisions of the NTSB, for example, a decision not to include the owner of a crashed plane in the accident investigation.[292] The UK's Bloody Sunday inquiry was required by the courts to grant anonymity to soldiers it called to testify before it.[293]

How about the merits of soft adjudication decisions? For the most part, courts decline to subject them to judicial review, even under a deferential standard of review. The findings in an NTSB Report, for example, are not subject to judicial review, even if the plaintiff can establish "reputational harm, financial harm, emotional harm, and informational harm" from the Report's publication.[294] In a recent case, the D.C. Circuit ruled that it lacked jurisdiction because "no legal consequences of any kind result from the NTSB's factual report or probable cause determinations."[295] This conclusion may be sound as a matter of statutory interpretation and administrative law precedent, but it does not flow as a matter of analytical truth about soft adjudication. Whether courts should be given the power to review the merits of soft adjudication decisions depends on familiar considerations: the value of finality, the relative skill and expertise of the court and the soft adjudicator, and independence of the soft adjudicator, and so forth.

C. Judges as Soft Adjudicators

Soft adjudication is most credible when conducted by someone impartial and independent of the interested parties. Independence, however, is hard to come by. For this reason, soft adjudication by legislative committee is often unsuccessful. Even at its best, a congressional investigation is "a delicate balancing act between a search for the truth and the exercise of political power for policy and partisan advantage."[296] For this reason, American special commissions often consist of a mixture of politicians and experts appointed by political figures from each major political party. These

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292. Thomas Brooks Chartered v. Burnett, 920 F.2d 634 (10th Cir. 1990). The court, however, rejected the challenge on the merits, finding that the decision to exclude the plane's owner was not arbitrary or capricious.

293. R (A) v. Lord Saville of Newdigate, [1999] EWCA (Civ) 3012 [6] (Eng.).

294. Joshi v. Nat'l Transp. Safety Bd., 791 F.3d 8, 11–12 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 994 (2016); *see also* Gibson v. Nat'l Transp. Safety Bd., 118 F.3d 1312, 1315 (9th Cir. 1997) (stating NTSB reports "do not entail the 'determinate consequences' required of a final order that can invoke our jurisdiction").

295. Joshi, 791 F.3d at 11.

296. Richard J. Leon, *Congressional Investigations: Are Partisan Politics Undermining our Vital Institutions?*, 31 SUFFOLK U. L. REV. 825, 827 (1998).

commissions are bipartisan rather than nonpartisan; sometimes (as in the case of the 9/11 Commission) they manage to transcend party politics, but often (as in the case of the FCIC) they fail to do so.

A potentially significant source of independent decision-making ability is the judiciary. Jurisdictions outside the United States rely heavily on judges to conduct soft adjudication. In the Anglo-Commonwealth legal world and in Ireland, for example, high-ranking judges are frequently called upon to chair tribunals of inquiry. International commissions of inquiry have often relied on retired judges to do their work.[297] Indeed, Israeli law provides that Commissions of Inquiry *must* be, chaired by a judge holding high office.[298] Judges may be prized for their forensic skills; where soft adjudication depends largely on contested testimony, judges with experience resolving conflicts of evidence may have some special competence.[299] What is most valuable about judges, however, is their independence from politics. In the Anglo-Commonwealth literature on tribunals, the concept of "borrowed authority" has emerged to explain why politicians call on judges to conduct major public inquiries.[300] The judicial reputation for impartiality, according to one commentator, is ". . . the main explanation for the frequent choice of senior judges . . . to chair major inquiries into political scandals, major public calamities and crises of regime legitimacy."[301]

With some conspicuous counterexamples—the Roberts Commission and the Warren Commission—American judges have been little used as soft adjudicators. The Justices of the U.S. Supreme Court will rarely be good candidates, for at least three reasons. First, soft adjudication is a full-time job.[302]

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297. For example, Michael Kirby, a retired Australian judge, chaired the UN Commission of Inquiry on Human Rights in North Korea. *See Biography of Michael Donald Kirby,* U.N. HUMAN RIGHTS: OFF. OF THE HIGH COMM'R, http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/MichaelDKirby.aspx (last visited Aug. 19, 2017).

298. LEGISLATION REGULATION, *Israel: Commissions of Inquiry Law, and Amendments,* 28 INT'L LEGAL MATERIALS 658, 658 (1989); Robert A. Burt, *Inventing Judicial Review: Israel and America,* 10 CARDOZO L. REV. 2035 (1989) (stating that this rule "reflects both mistrust of the capacity of ordinary political processes to address matters of 'vital public importance' and a belief that judges can be trusted to transcend political conflict in such matters").

299. *See* Jack Beatson, *Should Judges Conduct Public Inquiries?,* 121 L. Q.R. 221, 230 (2005) (stating the argument based on judicial skills "is strongest where the task of the inquiry is solely to find facts").

300. Gavin Drewry, *Judicial Inquiries and Public Assurance,* 1996 PUB. L. 368 (1996).

301. *Id.* at 368.

302. Or, at least, it should be: one criticism of the Warren Commission is that the Chief Justice delegated too much. The crucial "single-bullet theory" was developed almost solely

The Supreme Court sits en banc,[303] so substantial extrajudicial commitments hinder its normal workings. Second, unlike many of their counterparts in other countries, high-ranking judges in the United States often lack any significant fact-finding experience (of the current Supreme Court justices, only one has presided over a trial).[304] Third—and this point applies far beyond the Supreme Court—American judges are less detached from partisan politics than their counterparts in many Anglo-Commonwealth jurisdictions. Federal judges are understood to be "Democratic" and "Republican," depending on who installed them in office; at the state level, many judges run for election on a party platform.

Still, many American judges, particularly those with life tenure, do possess a large degree of independence from politics. To the extent they answer to norms of judicial conduct, including accuracy and impartiality, American judges may be useful as soft adjudicators. I suggest that American jurisdictions should make greater use of judges for soft adjudication, particularly in cases of government wrongdoing, such as police killings and political corruption. At the federal level, Court of Appeals or District Court judges, who could be temporarily relieved of some of their duties, seem a better bet than Supreme Court justices.

Assigning soft adjudication to judges may, however, draw constitutional objections. Many state constitutions include separation-of-powers provisions that might be thought to prohibit judicial service in ad hoc soft adjudication.[305] In the federal system, soft adjudication of almost any kind is likely to be found to fall outside the "judicial power" vested in the judiciary under Article III. Soft adjudication would appear to be "advisory" rather than a

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by a young staff lawyer, Arlen Specter. *See* Cole, *supra* note 50, at 24. Meanwhile, "90 per cent of the work" to search for evidence of a foreign conspiracy was done by David Slawson, a thirty-three-year-old lawyer who had "no background in foreign affairs or law enforcement." Philip Shenon, *What the Warren Commission Didn't Know*, POLITICO, Feb. 2, 2015, http://www.politico.com/magazine/story/2015/02/warren-commission-jfk-investigators-114812.

303. The UK Supreme Court generally sits in panels of five judges. *See Panel Numbers Criteria*, SUP. CT., https://www.supremecourt.uk/procedures/panel-numbers-criteria.html (last visited Aug. 19, 2017).

304. Justice Sotomayor was a United States District Court Judge for the Southern District of New York between 1992 and 1998. *See Biographies of Current Justices of the Supreme Court*, SUP. CT. OF THE U.S., http://www.supremecourt.gov/about/biographies.aspx (last visited Aug. 19, 2017).

305. *See, e.g.*, N.Y. CONST. art. VI, § 20(b)(1); In re Richardson, 247 N.Y. 401, 413 (1928) ("We deny the power of the Legislature to charge a justice of the Supreme Court with the duties of a prosecutor in aid of the Executive.").

resolution of a "case or controversy" as those terms have been understood.[306] The Supreme Court has expressed the need for "vigilance against two dangers: first, that the [j]udicial [b]ranch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,'"[307] "and, second, that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch.'"[308] For that reason, it might well violate Article III of the Constitution for Congress or the President to *require* a federal judge to participate in soft adjudication.

What about voluntary service by judges? No one brought a constitutional challenge to the participation of Justice Roberts or Chief Justice Warren in soft adjudication. A similar issue, however, reached the courts in connection with the President's Commission on Organized Crime. The witnesses objected to the participation in the Commission of Judge Irving Kaufman (a sitting federal judge) and Justice Potter Stewart (a retired Supreme Court Justice). The issue created a circuit split. The Eleventh Circuit ruled that the appointment of the two judges violated the separation of powers.[309] The court reasoned that service on the government's organized crime commission required the adoption of a "pro-government perspective" inconsistent with judicial office and damaging to the perception of impartiality.[310] The Third Circuit, however, upheld the constitutionality of judicial service on the Commission.[311] The court accepted, for the sake of argument, that "under some circumstances judges may violate the principle of separation of powers by voluntarily undertaking non-judicial activity which intrudes substantially in the domain of another branch or so weakens their ability to function as Article III judges that the courts are substantially hindered, in the proper performance of their duties."[312] But it was not willing to find a violation in the case

306. The federal courts lack jurisdiction unless the plaintiff is seeking "redress" for an injury caused by the defendant. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court"); Oil Workers v. Missouri, 361 U.S. 363, 367 (1960) (noting the duty of federal courts "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions . . . .").

307. Mistretta v. United States, 488 U.S. 361, 383 (1989) (quoting Morrison v. Olson, 487 U.S. 654, 680–81 (1988)).

308. *Id.* (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).

309. In re Application of the President's Comm'n on Organized Crime, 763 F.2d 1191, 1206 (11th Cir. 1985).

310. *Id.* at 1197.

311. In re President's Comm'n on Org. Crime, 783 F.2d 370, 381 (3d Cir. 1986).

312. *Id.* at 379.

before it. While the service of a sitting federal judge might raise concerns of bias in future criminal cases, related to the Commission's work, the court found that recusal motions in those individual cases could handle that concern.[313]

Based on this precedent, extra-judicial service in soft adjudication, I suggest, is likely to pass constitutional muster. The Supreme Court has generally taken a functional approach to separation of powers cases involving the allocation of powers to judges. In applying that approach, the outcome will depend on the subject matter of any given instance of soft adjudication. The Organized Crime Commission was less a soft adjudication institution and more an explicit policy-advisory commission, tasked not just with understanding the past but with "advis[ing] the President and the Attorney General with respect to its findings and actions which can be undertaken to improve law enforcement efforts directed against organized crime."[314] But soft adjudication that is focused on discerning what happened in the past would seem to be less vulnerable to the charge that judges were helping out with executive functions. As I have suggested by classifying it as adjudication, soft adjudication shares a great deal with what courts do in the ordinary course of their business. If this activity is to be undertaken at all, judges are often particularly well-placed to preside over it, and the separation of powers should not stand in their way.[315]

CONCLUSION

Soft adjudication sits at the boundaries of "law." Even apart from its intrinsic significance, legal scholars should be interested in it for at least three reasons. First, soft adjudication is at least similar to ordinary adjudication, in that it typically involves the presentation of reasoned argument about past events by interested parties before a decisionmaker, who then renders a formal decision and provides reasons for it. These modes, are regarded in our culture as typical of legal proceedings. Not surprisingly, soft adjudication often involves lawyers and judges as advocates and adjudicators. To the extent that legal scholars should be concerned with the activities of the legal profession and its distinctive contributions to political life, soft adjudication falls within our purview.

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313. *Id.* at 381.

314. Exec. Order No. 12,435, 48 Fed. Reg. 34,723 (July 28, 1983).

315. *See* Jonathan Lippmann, *The Judge and Extrajudicial Conduct: Challenges, Lessons Learned, and a Proposed Framework for Assessing the Propriety of Pursuing Activities Beyond the Bench*, 33 CARDOZO L. REV. 1341, 1369 (2012) ("[I]t is in society's interest to encourage extrajudicial engagements that allow judges to apply their unique knowledge and skills to advance the common good and meet the great challenges of the day.").

Second, soft adjudication frequently interacts with ordinary adjudication. Soft adjudication may assist ordinary adjudication; for example, soft adjudication may uncover evidence that is used in a subsequent lawsuit or prosecution. But soft adjudication may hinder ordinary adjudication, too. For example, where a public inquiry into a death reaches and publicizes its conclusion, that conclusion might prejudice the jury pool in a subsequent criminal prosecution. Conversely, ordinary adjudication may hinder soft adjudication; where the aim is to seek full disclosure by alleged wrongdoers, the lurking threat of criminal prosecution or civil suits may lead those wrongdoers to refuse to testify or do so dishonestly. If soft adjudication is considered sufficiently important, soft adjudicators may be accorded the power to provide immunity from prosecution.

A third reason I suggest legal scholars should be interested in soft adjudication is that examining it helps us to understand the limits and advantages of ordinary adjudication. Many of the values that soft adjudication serves more directly are also served indirectly by ordinary adjudication. Ordinary adjudication, too, can provide catharsis, communicate a symbolic sense that the community cares about a particular problem, educate the public about risks, and affect the reputation of those held to be wrongdoers. Our understandable focus on law's practical authority sometimes obscures these aspects of litigation's significance. By focusing on soft adjudication, we can isolate consequences of adjudication that do not depend on practical authority or on coercion. One of the most important things that legal institutions do is contribute to the discussion about social problems and their proper resolutions. Sustained attention to soft adjudication serves as a useful antidote to overly narrow conceptions of law's roles and function.