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Released, but Not Free: The Unexonerated

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RELEASED, BUT NOT FREE: THE UNEXONERATED

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TABLE OF CONTENTS

That evening, I sat on our balcony, staring at the rooftops of Sarajevo and the mountains in the background, and felt at home and at peace. This time, I thought, maybe it will last.[1]

—Lakhdar Boumediene, in the weeks before mistakenly being taken to Guantanamo Bay where he spent seven years without ever being charged with a crime.

I have come to America seeking three things… [a]n acknowledgement that the United States government is responsible for kidnapping, abusing and detaining me; an explanation as to why I was singled out for this treatment; and an apology because I am an innocent man who has never been charged with any crime.[2]

—Khaled El-Masri, abducted, tortured, and rendered to a CIA "black site" because he had a similar name to an al-Qaeda operative.

INTRODUCTION

I am sorry. Three simple words, but often so hard for individuals to say. And perhaps even harder for a nation. Sometimes, it can even be easier to defend the unjust act for which an apology is needed. But just as one would tell a child, the United States as a country needs to learn from its mistakes, especially when it has inflicted grievous harm—torture, incarceration, rendition, solitary confinement, and surveillance. An apology by the United States government should be the beginning. The apology gives the victim some sense of closure and vindication and it shows the United States' commitment to ensuring that it does not let the grievous harm happen again.

In the aftermath of 9/11, individuals, mostly young Muslim men, were abducted and held without charges in Guantanamo Bay Detention Camp (Guantanamo), and black sites around the globe, and tortured. Some, who have never been charged, are still being held in Guantanamo today. Others were incarcerated for up to twenty years, often held in solitary confinement, using material support laws based on little or no evidence of an actual terror connection. These men deserve an apology from the United States government—for instance, Khaled el-Masri, who was abducted and rendered to a black site simply because he had a name similar to an al-

1 LAKHDAR BOUMEDIENE & MUSTAFA AIT IDIR, WITNESSES OF THE UNSEEN: SEVEN YEARS IN GUANTANAMO 26 (2017).

2 Press Release, ACLU, El-Masri in U.S. to Hear ACLU Lawsuit Argued Before Federal Appeals Court (Nov. 28, 2006), https://www.aclu.org/press-releases/khaled-el-masri-victim-cia-kidnapping-and-abuse-seeks-acknowledgement-explanation-and.

Qaeda operative. Instead of apologizing, the United States government has blocked any avenue these individuals have for vindication using the 'national security' shield; for example, invoking the state secrets privilege[3] to block any litigation.

Unlike the United States, Canada apologized for their behavior, and it mattered.[4] The apology showed to the injured individual, the Muslim community, the Canadian population generally, and the world, that the Canadian government acknowledged what they did was wrong, and that they were committed to not repeating the wrong in the future. In some instances, they also provided compensation to those wronged.

International law is helping. Khaled El-Masri at least got some vindication when he won his case in the European Court of Human Rights and received compensation from Macedonia,[5] but it is not enough. Domestic courts are also playing a role. Italy's highest court upheld guilty verdicts for twenty-three Americans who abducted and rendered an Egyptian Muslim cleric to a black site.[6] However, it was a mostly symbolic victory, as none of those convicted will actually be extradited and imprisoned.[7]

While an apology matters, and has its own important value, it needs to be followed by concrete action. The United States needs to close Guantanamo and never again hold individuals without charges. The material support laws need to be amended for fairness, and as a way of beginning to make amends. People should not continue to be incarcerated for decades, often in solitary confinement, for little or no actions–especially as is the case in some attempted material support cases. The United States needs to delete its "reservations, declarations, and understandings"[8] and reaffirm its commitment to the Convention Against Torture[9] to tell the world and the impacted individuals: NEVER. AGAIN. This paper focuses on the necessity of national apologies to terror detainees, but apologies are also needed by other individuals who have been wrongly convicted for the color of their skin.

Additionally, these stories must be shared through every medium

3 *See* discussion *infra* Section II.A.

4 See Farida Deif, The Power of Canada's Apology to Omar Khadr, HUM. RTS. WATCH (July 7, 2017), https://www.hrw.org/news/2017/07/07/power-canadas-apology-omar-khadr.

5 *See El-Masri v. Macedonia*, App. No. 39630/09 Eur. Ct. H.R. (2012).

6 Naomi O'Leary, *Italy Court Upholds "Rendition" Convictions on Ex-CIA Agents*, REUTERS (Sept. 19, 2012), https://www.reuters.com/article/us-italy-usa-rendition-verdict-idUSBRE88I13320120919.

7 *See id.*

8 *See* 136 CONG. REC. 36,192 (1990).

9 G.A. Res. 39/46, (Dec. 10, 1984).

possible. These are real people who were incarcerated, often in solitary confinement, incorrectly. Some have lost more than a decade of their lives. Some were left there even after their innocence was revealed. They may be out of prison, but they have not been exonerated; they are not "free." The media needs to keep telling their stories. Movies can retell on the big screen and reach a broader audience, but as academics, our responsibility extends further than sharing stories. We need to teach national security law to not only explain the doctrine, but to include and focus on human rights abuses such as these. The real people behind the cases deserve to be a focus of our teaching.

In sum, by not apologizing to these individuals and exonerating them, the injustice continues. This article will be the first to specifically examine the need for an apology and exoneration by those wronged after 9/11. Section I examines the powerful need for an apology and exoneration for wronged individuals. This section also looks at how governments often avoid apologies, even though they can help the healing process. Section II presents the real people behind well-known national security law cases and their quest for an apology and vindication under United States law. Some individuals whose stories are shared were held without charges, and tortured, yet have never received an apology. Looking at the material support laws and their overreach, I posit that there may be some small ray of hope as some material support cases have recently been overturned or dismissed. However, the individuals have not received any vindication or apology from the government. In fact, the opposite has occurred. The government indicates they are not pursuing new trials due to inconvenience or lack of resources. Then, Section III shows how international law can be used as an alternative means to acquire some vindication for those wrongfully imprisoned, tortured, or both. Finally, the article discusses how the best apology is to take concrete action to ensure these abuses *never happen again*.

I. THE POWER OF AN APOLOGY AND THE NEED FOR EXONERATION

A. *The Power of Apologies*

Apologies are powerful. One needs to look no further than the daily news cycle to see the importance of apologies where "some person, group, corporation, or official is offering, demanding, or rejecting an apology."[10] In the words of Dr. Aaron Lazare, a psychiatrist and apology expert, an

10 Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1265 (2006).

"[a]pology is one of the most profound modes of healing and restoration we have. For the offending party, it can release them from guilt and shame. For the harmed person, it can restore their dignity."[11] However, apologies need to be done correctly to work. Merriam-Webster defines apology as "an admission of error or discourtesy accompanied by an expression of regret."[12] And, as Lazare has cautioned, bad apologies may only make things worse.[13]

Apologies can mitigate the need for litigation.[14] In fact, in order to encourage apologies, and therefore reduce litigation, many states have enacted legislation making apologies inadmissible in court–in civil litigation or in medical malpractice litigation.[15] Michael Woods, a physician and advocate for apologies, asserts that "the likelihood of a lawsuit falls by 50 percent when an apology is offered and the details of a medical error are disclosed immediately."[16] Justice Kennedy has pointed out that remorse can play a role in whether "the offender lives or dies" in a capital sentencing proceeding.[17] Additionally, an empirical study of apologies conducted by

11 Aaron Lazare, *What Makes an Apology Work*, Restore Justice, https://restorecal.org/wp-content/uploads/2020/08/What-makes-and-apology-work-.pdf (last visited Aug. 30, 2021).

12 *Apology*, Merriam-Webster, https://www.merriam-webster.com/dictionary/apology (last visited Aug. 30, 2021).

13 Lazare, *supra* note 11, at 1.

14 Nick Smith, *Just Apologies: An Overview of the Philosophical Issues*, 13 Pepp. Disp. Resol. L.J. 35, 38–39 (2013) ("[L]egal scholarship and legislation now reinforce the belief that strategically timed and worded apologies can prevent litigation altogether, reduce damage payments and jury awards by considerable amounts, or shave years from prison sentences.").

15 Thirty-eight states have adopted legislation which limit the admissibility of apologies in court. *See* Alaska Stat. §09.55.544; Ariz. Rev. Stat. Ann. § 12-2605; Cal. Evid. Code § 1160; Colo. Rev. Stat. § 13-25-135; Conn. Gen. Stat. § 52-184d; Del. Code. Ann. tit. 10, §4318; Fla. Stat. § 90.4026; Ga. Code § 24-4-416; Haw. Rev. Stat. § 626-1, Rule 409.5; Idaho Code §9-2-9-207; Ind. Code §34-43.5-1-1 et seq; Iowa Code §622.31; La. Rev. Stat. Ann. § 13:3715.5; Me. Rev. Stat. Ann. tit. 24, § 2907; Md. Cts. & Jud. Proc. Code Ann. § 10-920; Mass. Gen. Laws. Ann. Ch. 233, §79L; Mich. Comp. Laws § 600.2155; Mo. Rev. Stat. §538.299; Mont. Code. Ann. §26-1-814; Neb. Rev. Stat. §27-1201; N.H. Rev. Stat. Ann. § 507-E:4; N.C. Gen. Stat. § 8C-1, Rule 413; N.D. Cent. Code § 31-04-12; Ohio Rev. Code Ann. § 2317.43; Okla. Stat. tit. 63, §1-1708.1H; Or. Rev. Stat. §677.082; Pa. Stat. tit. 35, § 10228.1 et seq.; S.C. Code Ann. § 19-1-190; S.D. Codified Laws Ann. § 19-12-14; Tenn. Evid. §409.1; Tex. Civ. Prac. & Rem. § 18.061; Utah Code Ann. §78B-3-422; Vt. Stat. Ann. tit. 12, §1912; Va. Code § 8.01-52.1; RCW § 5.64.010; W. Va. Code § 55-7-11A; Wis. Stat. § 904.14; Wyo. Stat. § 1-1-130.

16 Smith, *supra* note 14, at 44 (quoting Michael S. Woods, Healing Words: The Power of Apology in Medicine 11 (Catherine Chopp Hinckley ed., 2d. ed. 2007)).

17 Riggins v. Nevada, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring); *see also* William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten*

Jennifer Robbennolt, a scholar in the area of psychology and law, shows the favorable role apologies can play in leading to a settlement, while recognizing "that attention must be paid to the nature of the apologetic expression and the circumstances of the individual case."[18]

There is a critical difference between "expressions of sympathy and categorical apologies admitting wrongdoing" as apology expert Nick Smith has argued.[19] He utilized the example, "[w]hether spoken by a convict or a practicing physician, a sympathetic expression that 'I am sorry your daughter died' conveys a distinct moral substance from an admission that 'I deserve blame for killing your daughter.'"[20] Although "this distinction may seem rather obvious upon reflection, legislators, attorneys, and academics routinely describe such expressions of sympathy as 'apologies.' Even 'safe apology' legislation sends mixed messages, with some states protecting only expressions of sympathy . . . ."[21]

Australia has made its apology a national holiday. Australia marks a National Sorry Day each year on the 26th of May which "remembers and acknowledges the mistreatment of Aboriginal and Torres Strait Islander people who were forcibly removed from their families and communities, now known as 'The Stolen Generations.'"[22] Community groups declared the holiday in 1998, but it took the government another decade to actually apologize for the atrocities committed.[23] In 2008, then Prime Minister Kevin Rudd stated, "[w]e apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians. We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country."[24] The date chosen signifies when, on May 26, 1997, the landmark "Bringing Them Home" report was formally presented in the Australian federal parliament, which made public the fact that tens of thousands of Aboriginal children were removed from

Florida Death Penalty Cases, 15 AM. J. CRIM. L. 1, 51–53 (1987).

18 Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 462 (2003).

19 Smith, *supra* note 14, at 49.

20 *Id.*

21 *Id.*

22 *National Sorry Day 2020*, RECONCILIATION AUSTRALIA (May 25, 2020), https://www.reconciliation.org.au/national-sorry-day-2020/.

23 Jennifer Latson, *This Is Why Australia Has 'National Sorry Day,'* TIME (May 25, 2015), https://time.com/3890518/national-sorry-day/.

24 *National Apology*, NAT'L MUSEUM AUSTL., https://www.nma.gov.au/defining-moments/resources/national-apology (last updated July 21, 2021).

their parents during Australia's assimilation era.[25] On May 26, 1998, "the first National Sorry Day was held to commemorate the anniversary of the report and remember the grief, suffering and injustice experienced by the stolen generations."[26]

Restorative justice recognizes the importance of reconciliation. Restorative justice scholars, such as Marth Minnow, focus on three things: one, "the here and now and the future, rather than just the past;" two, "the concentric circles of causation that have led to this breach or violation of human trust;" and three, "coming up with a plan of action for the future, where conduct will change and people will take steps to repair, restore, and remedy the situation to make the world different."[27] In the United States, the criminal justice system centers on punishment. As Bryan Stevenson, the founder of the Equal Justice Initiative, the nonprofit organization behind The National Memorial for Peace and Justice, stated, "[p]eople do not want to admit wrongdoing in America . . . because they expect only punishment."[28]

In his book, *When Sorry Isn't Enough*, Roy L. Brooks details the harm victims endure when they do not receive an apology. Victims endure incredible fear that the harm may be committed again. Brooks emphasizes how an apology can assuage this fear, because "[h]eartfelt contrition . . . might signify a nation's capacity to suppress its next impulse to harm others."[29] Before working on his book, Brooks "was not conscious of the undercurrent of fear that exists among survivors of human injustices that the very same atrocity might be revisited upon them."[30] However, through his research, he found that Jewish people often fear another Holocaust could occur, while Japanese Americans reported that they "worry that relocation and internment could happen again even on American soil under the right

25 *Australia Marks Sixth Anniversary of National Sorry Day*, CULTURAL SURVIVAL, https://www.culturalsurvival.org/news/australia-marks-sixth-anniversary-national-sorry-day (last visited Aug. 30, 2021); *see also National Sorry Day*, AUSTL. HUM. RTS. COMM'N, https://humanrights.gov.au/about/get-involved/events/national-sorry-day (last visited Aug. 30, 2021).

26 AUSTL. HUM. RTS. COMM'N, *supra* note 25.

27 Karen Sloan, *Harvard Law's Martha Minow on How Law Can Encourage Forgiveness over Vengeance*, LAW.COM (Sept. 1, 2020), https://www.law.com/nationallawjournal/2020/09/01/harvard-laws-martha-minow-on-how-law-can-encourage-forgiveness-over-vengeance.

28 Campbell Robertson, *A Lynching Memorial Is Opening. The Country Has Never Seen Anything Like It.*, N.Y. TIMES (Apr. 25, 2018), https://www.nytimes.com/2018/04/25/us/lynching-memorial-alabama.html.

29 Roy L. Brooks, *The Age of Apology*, WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 3, 4 (Roy L. Brooks ed., 1999).

30 *Id.*

set of circumstances."[31] Apologies from German and American leaders have eased the survivors' concerns, and "without such apologies, there would be greater concern, perhaps not just among the survivors, that those shameful acts might be repeated."[32]

In addition to reconciliation or apologies, concrete action is needed. Pumla Gobodo-Madikizela, a former psychologist on the Truth and Reconciliation Commission in South Africa, and a leading authority on remorse and forgiveness, in an interview with the New York Times stated:

> The Truth and Reconciliation Commission did bring the country together. The point that I'm making is that we made it too easy. You tell your story, the other person is moved and we express a sense of forgiveness. Which is great. I'm not undermining that. There is suffering, but at the same time we needed to do something to mitigate the impacts of this pain. This is where addressing economic injustices comes in. That didn't happen at the right time, and now it's not happening. The language of reconciliation is limited when used in isolation from other critical issues of social justice. Some things *have* changed. I mean, I am a professor at a university. But the structural problems still do exist.[33]

While an apology is an important first step, it needs to be followed by structural changes. Such changes should work to rectify past injustices and ensure the injustice never happens again.

B. *Apologies by United States Government Figures*

Nations do not apologize often. Regarding the United States, Jennifer Lind, a professor of government, stated, "[w]e don't apologize, ever."[34] This is not unusual, as "[c]ountries in general do not apologize for violence against other countries."[35] However, there are a few outliers like Germany and Japan who have rendered apologies.[36] In 1985, Richard von Weizsacker, then the President of Germany, won global respect for a speech in which he called the day World War II ended a day of liberation for the

31 *Id.*

32 *Id.*

33 David Marchese, *What Can America Learn from South Africa About National Healing?*, N.Y. TIMES (Dec. 11, 2020), https://www.nytimes.com/interactive/2020/12/14/magazine/pumla-gobodo-madikizela-interview.html.

34 Adam Taylor, *It's Not Just Hiroshima: The Many Other Things America Hasn't Apologized for*, WASH. POST (May 26, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/05/26/the-things-america-hasnt-apologized-for/.

35 *Id.*

36 *Id.*

German people and stated, "[a]ll of us, whether guilty or not, whether young or old, must accept the past. We are all affected by it and liable for it. Anyone who closes his eyes to the past is blind to the present."[37] Additionally, after World War II, Germany ratified its Basic Law or Constitution, including Article 79(3), providing that Article I provisions protecting human dignity are unamendable.[38] When a nation apologizes, it "serves the same function as a personal apology, but on a different scale."[39] Like a personal apology, it "asserts changed values, condemns past behaviour, and commits to different, better actions in the future."[40] It can also lead to broad reconciliation between harmed parties and the nation responsible for the harm.[41]

The United States has not offered many official apologies.[42] Of the few times they have, only once—the formal apology to every Japanese-American interned during World War II documented in the Civil Liberties Act—involved any form of direct compensation or reparations.[43] Incredibly, it was not until 2008 that the House of Representatives formally apologized for slavery.[44] A year later, the United States Senate also issued a

37 *German Former President Richard von Weizsaecker Given State Funeral*, BBC (Feb. 11, 2015), https://www.bbc.com/news/world-europe-31407000.

38 *See* GRUNDGESETZ [GG] [Basic Law], translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html%20(Ger.) (Germany Article 79(3) reads, "Amendments to this Basic Law affecting . . . the principles laid down in Articles 1 and 20 shall be inadmissible." Article 1 is as follows:
"(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.").

39 Edwin Battistella, *When Nations Apologise*, AEON (Mar. 27, 2017), https://aeon.co/essays/a-national-apology-has-the-power-to-change-the-future.

40 *Id.*

41 *Id.*

42 Danny Lewis, *Five Times the United States Officially Apologized*, SMITHSONIAN MAG. (May 27, 2016), https://www.smithsonianmag.com/smart-news/five-times-united-states-officially-apologized-180959254/. Lewis describes the five instances as (1) protecting a Nazi officer accused of war crimes; (2) interning Japanese citizens during World War II – "Reagan signed the Civil Liberties Act which offered every Japanese-American interned in the camps during the war a formal apology and $20,000 in compensation;" (3) backing a coup against the Kingdom of Hawaii; (4) conducting the Tuskegee Experiment; and (5) perpetuating slavery and the Jim Crow laws (by House of Representatives). *Id. See also* Daniella Stoltz & Beth Van Schaack, *It's Never Too Late to Say "I'm Sorry": Sovereign Apologies over the Years*, JUST SEC. (Mar. 16, 2021), https://www.justsecurity.org/75340/its-never-too-late-to-say-im-sorry-sovereign-apologies-over-the-years/.

43 *See* Lewis, *supra* note 42.

44 H.R. Res. 194, 100th Cong. (2008).

formal apology.[45] However, unlike the House apology, the Senate apology contained additional language specifically stating that the apology does not "authorize[] or support[] any claim against the United States" and does not "serve[] as a settlement of any claim against the United States."[46] Critically, however, the legislation did:

> (A) acknowledge[] the fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow laws; (B) apologize[] to African-Americans on behalf of the people of the United States, for the wrongs committed against them and their ancestors who suffered under slavery and Jim Crow laws; and (C) express[] its recommitment to the principle that all people are created equal and endowed with inalienable rights to life, liberty, and the pursuit of happiness, and calls on all people of the United States to work toward eliminating racial prejudices, injustices, and discrimination from our society.[47]

Although criticized for not including the possibility of reparations,[48] the NAACP applauded the legislation, calling it a "historic resolution apologizing for the enslavement and racial segregation of African-Americans."[49]

United States officials have not apologized effectively during the "War on Terror," even on the rare occasion when they did try to apologize after the atrocities committed at Abu Ghraib prison (Abu Ghraib). In April 2004, photographs from Abu Ghraib showed American soldiers partaking in, and even enjoying, the abuse and torture of Iraqi prisoners who were being held in United States military custody.[50] Soon after, President Bush advised the American public that he had made an apology to King Abdullah II of Jordan:[51]

> "I was sorry for the humiliation suffered by the Iraqi prisoners and the humiliation suffered by their families," he said. "I told him I was as equally sorry that people seeing those pictures

45 S. Con. Res. 26, 111th Cong. (2009).

46 *Id.*

47 *Id.*

48 Deborah Miller, *Senate Apologizes for Slavery, but Disclaimer Draws Criticism*, CLEVELAND.COM (June 19, 2009) (updated Mar. 27, 2019), https://www.cleveland.com/nation/2009/06/senate_apologizes_for_slavery.html.

49 Press Release, NAACP, NAACP Applauds U.S. Senate for Passing Bipartisan Resolution Apologizing for the Enslavement and Racial Segregation of African-Americans; Urges U.S. House to Pass Concurrent Resolution Swiftly (June 19, 2009), https://www.commondreams.org/newswire/2009/06/19/naacp-applauds-us-senate-passing-bipartisan-resolution-apologizing-enslavement.

50 Aaron Lazare, *Making Peace Through Apology*, GREATER GOOD MAG. (Sept. 1, 2004), https://greatergood.berkeley.edu/article/item/making_peace_through_apology.

51 *Id.*

> didn't understand the true nature and heart of America . . . I am sickened that people got the wrong impression."[52]

Donald Rumsfeld went further in his apology, saying that the alleged abuse of Iraqi prisoners "occurred on my watch, and as secretary of defense I am accountable for them, and I take full responsibility."[53] He offered his "deepest apology" to "those Iraqis that were mistreated by members of our armed forces."[54] He further dubbed the abuse "inconsistent with the values of our nation, inconsistent with the teachings of the military, and . . . fundamentally un-American."[55]

Theses apologies failed to elicit forgiveness from the Iraqi people or more generally from the Arab world because they were deficient.[56] Dr. Lazare believes there are typically four parts to an effective apology: "acknowledgment of the offense; explanation; expressions of remorse, shame, and humility; and reparation."[57] He notes that "[n]ot every apology requires all four parts," but nevertheless, the United States' apologies were deficient in several crucial aspects.[58] An apology of this magnitude needs to come from the President.[59] President Bush never directly apologized to the Iraqi people, but rather to the King of Jordan who then reported secondhand to the Iraqi people.[60] He never took responsibility for the offense, only repeating that he felt sorry.[61] However, "[f]eeling sorry does not communicate acceptance of responsibility."[62] He used the passive voice and said that "[m]istakes will be investigated."[63] He also sidestepped the enormity of the abuses, which was likely a "pervasive and systematic pattern of prisoner abuse occurring over an extended period of time, as reported by the International Red Cross."[64] He offered "no restoration of dignity, no assurance of future safety for the prisoners, no reparative justice, no reparations, and no suggestion for dialogue with the Iraqis."[65] Therefore,

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52 *Id.*
53 *Rumsfeld Accepts Responsibility for Abu Ghraib*, American Forces Information Service News Articles, May 7, 2004, at 1, WLNR 24573013.
54 *Id.*
55 *Id.*
56 Lazare, *supra* note 50.
57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.*

it was not surprising that the Iraqi people and the rest of the world did not forgive the United States.[66]

In January 2009, just before taking office, President Barack Obama spoke of the alleged wrongdoing of the Bush administration, including torture: "we need to look forward as opposed to looking backwards."[67] Yet, for many victims that can be an impossible task. And the United States, as a country, needs to understand the wrongs committed and ensure they do not happen again.

President Obama's apology in a formal letter to the then Afghan President Karzai for U.S. military involvement in the burning of copies of the Quran highlights the delicate balance of official apologies. President Obama called the burning of the Quran by NATO troops an "error," but said "[w]e will take the appropriate steps to avoid any recurrence, including holding accountable those responsible."[68] He was both praised and vilified. Newt Gingrich called the apology an "outrage . . . on the same day two American troops were murdered."[69] Ultimately, the Taliban refused the apology, claiming "the invading infidel authorities" only offered "so-called show(s) of apologies" while "in reality they let their inhuman soldiers insult our holy book."[70]

Some see apologies as a sort of weakness. During his campaign, presidential hopeful Mitt Romney touted that President Obama "went around the world and apologized for America."[71] He even entitled his book *No Apology: The Case for American Greatness*.[72] However, scholars have argued that apologies are a critical tool in the toolbox of international dispute resolution techniques.[73] Although Richard Bilder, legal scholar and

66 *Id.*

67 David Johnston & Charlie Savage, *Obama Reluctant to Look into Bush Programs*, N.Y. TIMES (Jan. 11, 2009), http://www.nytimes.com/2009/01/12/us/politics/12inquire.html?pagewanted=all&_r=0.

68 Masoud Popalzai & Nick Paton Walsh, *Obama Apologizes to Afghanistan for Quran Burning*, CNN (Feb. 23, 2012), https://www.cnn.com/2012/02/23/world/asia/afghanistan-burned-qurans/index.html.

69 Matt Spetalnick & Laura MacInnis, *Obama Apologizes for Koran Burning in Afghanistan*, REUTERS (Feb. 23, 2012), https://www.reuters.com/article/us-afghanistan-korans-obama/obama-apologizes-for-koran-burning-in-afghanistan-idUSTRE81M13W20120223.

70 Popalzai & Walsh, *supra* note 68.

71 Scott Wilson, *Obama Apology Resonates in Kabul, on Campaign Trail*, WASH. POST (Feb. 24, 2012), https://www.washingtonpost.com/the-art-of-the-presidential-apology/2010/07/28/gIQARVtnYR_story.html.

72 MITT ROMNEY, NO APOLOGY: THE CASE FOR AMERICAN GREATNESS (2010).

73 Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT'L L. 433, 472–73 (2006).

researcher on the role of apologies in international law and diplomacy, recognizes that countries may be reluctant to apologize out of concern for potential liability,[74] liability can deter bad behavior. That is why liability exists in other contexts.

C. *The Incredible Need for an Apology to Those Wrongfully Convicted*

Because the injury to those wrongfully and unjustly convicted of a crime is so incredibly great—the deprivation of one's liberty and damage to reputation and sense of self—the need for an apology seems obvious as a first step. As the Witness to Innocence organization has stated, "[t]he government's public recognition of the harm inflicted upon a wrongfully convicted person helps to foster the healing process, while assuring the public that the government – regardless of fault – is willing to take ownership of its wrongs or errors."[75] Two recent studies "suggest that issuing an apology may be more effective than compensation at improving peoples' perceptions of exonerees. Exonerees themselves have expressed a desire to receive an apology from the system that wronged them, viewing apologies as symbolic of the mistakes made by the responsible party: the government."[76]

Nothing may completely repair the injustice done, but an apology and compensation at least give the individual the exoneration they deserve. In the words of John Wilson, a psychology professor:

> I believe that the injuries from a wrongful conviction and incarceration are permanent. I think they're permanent scars. And even though counseling and psychotherapy and treatments are helpful, I don't think you can undo the permanent damage to the soul of the person, to their sense of self, to their sense of dignity. There is no way that money or even being exonerated gives a person back what they lost. . . . And one of the real existential dilemmas every day for a person is, they know that when they go to their grave, this experience is going to be right here, in the forefront of their mind, even though they try to push it away and get on with their normal life afterwards.[77]

74 *Id.*

75 *Justice After Exoneration*, Witness to Innocence, https://www.witnesstoinnocence.org/justice-after-exoneration (last visited July 28, 2021).

76 Alyx A. Ivany, Examining the Effects of Apology and Compensation on Participants' Perceptions of Exonerees, 37 (Aug. 2014) (M.A. thesis, University of Ontario Institute of Technology) (https://ir.library.dc-uoit.ca/xmlui/bitstream/handle/10155/489/Ivany_Alyx.pdf?sequence=1).

77 *Burden of Innocence Interview: John Wilson*, PBS: Frontline (May 1, 2003), https://www.pbs.org/wgbh/pages/frontline/shows/burden/interviews/wilson.html; *see also* Leslie

Research has generally shown that compensating and apologizing to wrongly convicted individuals is supported by the public.[78] A small study showed that publicly apologizing to the wrongly convicted may also restore the public's faith in the criminal justice system.[79]

The exonerees own words most effectively demonstrate the need for an apology. One exoneree, Alan Newton, commented on the Bronx County District Attorney's Office's apology stating that, "[i]t means somebody actually cares on the other side."[80] He reflected that after spending twenty years wrongfully incarcerated, "anger will eat you up inside, but apology restores my faith in individuals."[81] One exoneree, Jeffrey Deskovic, received $5.4 million in compensation, but no apology.[82] His words are striking regarding the refusal of the city of Peekskill, New York or its police officers to apologize, as he explained, "[t]here is much more at stake than a personal apology; Peekskill's silence suggests that they have not learned any lessons from my case and I remain concerned about wrongful convictions and criminal justice in Peekskill going forward."[83] Money is important, but people wrongfully convicted yearn for an apology, and the message that comes with it that society is learning from these wrongs and actual change to the criminal justice system is occurring.

Unfortunately, some prisoners never receive the exoneration or compensation they deserve. Under federal law, a person who was unjustly sentenced to death may be awarded up to $100,000 for each 12-month period of incarceration; a person not sentenced to death may receive up to $50,000 for each 12-month period of incarceration.[84] However, the law requires that the person suing allege and prove that: "[h]is conviction has

Scott, *"It Never, Ever Ends": The Psychological Impact of Wrongful Conviction*, 5 AM. U. CRIM. L. BRIEF, no. 2, 2010 (discussing the extremely damaging psychological impact of wrongful conviction on the exonerated).

78 Kimberley A. Clow et al., *Public Perception of Wrongful Conviction: Support for Compensation and Apologies*, 75 ALB. L. REV. 1415, 1421–22, 1425–26 (2012).

79 *Id.* at 1438. ("If this is the case, perhaps greater efforts can be made to convince governments to offer apologies and financial compensation more frequently—perhaps as legislative requirements immediately following exoneration—as public apologies appear to have benefits for all and compensation is necessary to assist with reintegration and healing for exonerees.").

80 Abigail Penzell, Note, *Apology in the Context of Wrongful Conviction: Why the System Should Say It's Sorry*, 9 CARDOZO J. OF CONFLICT RESOL. 145, 158 (2007).

81 *Id.*

82 *No Apology, but $5.4 Million from City of Peekskill to Exoneree*, THE INNOCENCE PROJECT (Sept. 5, 2013), https://innocenceproject.org/no-apology-but-5-4-million-from-city-of-peekskill-to-exoneree/.

83 *Id.*

84 28 U.S.C. § 2513.

been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense" and "[h]e did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution."[85] Thirty-six states and the District of Columbia also have some form of compensation statutes.[86] Although outside the scope of this paper, the fact that some states do not have compensation statutes for those wrongfully convicted is appalling. Additionally, although there is valid criticism that exonerated prisoners need more than simply monetary aid,[87] such as help finding employment and housing or social and emotional support services, at least these compensation statutes give those wrongfully convicted prisoners the exoneration they desperately need and some compensation to move forward with their lives.

Exoneration itself is important, but so too is telling the stories of those wrongfully convicted. We can then learn from them and hopefully inspire actual change so that those wrongfully convicted can feel that they at least helped ensure meaningful change. The young men who had been known as the "Central Park Five," after being falsely accused and convicted of committing the brutal attack on a woman in Central Park in 1989, now call themselves the "Exonerated Five."[88] They credit Ava DuVernay's television series, "When They See Us," for publicizing their story and the abuses they endured.[89] However, they write powerfully about the fact that false confessions still happen today and advocate for a bill proposed by New York State Senator Zellnor Myrie that would "ban the use of deception in interrogations and ensure that confessions are assessed for reliability" before being used in the courtroom.[90] They want their wrongful convictions to help prevent future wrongful convictions and to ensure that "no one else is ever

85 28 U.S.C. § 2513(a). *See* Daniel S. Kahn, *Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J.L. REFORM 123, 123 (2010) (arguing state compensation statutes should shift the burden of proof to the state on the issue of innocence as "too many meritorious claims are dismissed, settled for far too little, or never brought in the first place.").

86 *Compensating the Wrongly Convicted*, THE INNOCENCE PROJECT, https://www.innocenceproject.org/compensating-wrongly-convicted/ (last visited July 28, 2021).

87 *See* Fernanda Santos & Janet Roberts, *Putting a Price on a Wrongful Conviction*, N.Y. TIMES (Dec. 2, 2007), https://www.nytimes.com/2007/12/02/weekinreview/02santos.html.

88 Yusef Salaam, Kevin Richardson & Raymond Santana, *We Are the 'Exonerated 5.' What Happened to Us Isn't Past, It's Present*, N.Y. TIMES (Jan. 4, 2021), https://www.nytimes.com/2021/01/04/opinion/exonerated-five-false-confessions.html.

89 *Id.*

90 *Id.*

robbed of their youth or freedom."[91]

For terror detainees, the stigma and harm are so great, and yet they have no exoneration and would be unable to use the wrongful conviction statutes described above. In the case of many of those who had been detained in Guantanamo or in black sites, they were never actually ever charged with a crime; therefore, there is no "unjust conviction." Many were also tortured, and still they were never exonerated or given an apology. In fact, the government uses the state secrets privilege and other avenues to block any possible vindication or exoneration.[92] In the case of the material support cases detailed in the next section, the government went out of their way to not exonerate those who have had their convictions overturned so most likely the unjust conviction statutes would be unavailable to them as well.

II. THE LACK OF AN APOLOGY OR EVEN EXONERATION

A. *Khaled El-Masri: Wrongfully Detained*

The El-Masri case highlights both the powerful need for an apology and how devastating not receiving one can be. El-Masri is a case of mistaken identity that led to an extraordinary rendition that reads like a movie script. Khaled El-Masri was abducted in Macedonia because he had a similar name to an Al Qaeda operative, and was transferred to a U.S. detention center in Afghanistan.[93] He was held there and tortured for five months, even after the United States government realized they had the wrong individual.[94] He was then released, finally, in Albania and put on a plane to Germany.[95] When he tried to sue the United States for his illegal detention and torture, his case was dismissed because the government asserted the State Secrets Privilege.[96] With the State Secrets Privilege, a judicially created evidentiary privilege, the United States may prevent the disclosure of information in a judicial proceeding if "there is a reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not

91 *Id.*

92 *See* discussion *infra* Section II.A.

93 Allison Frankel, *European Court: U.S. Extraordinary Rendition "Amounted to Torture,"* ACLU (Dec. 13, 2012), https://www.aclu.org/blog/national-security/torture/european-court-us-extraordinary-rendition-amounted-torture.

94 *Khaled El-Masri v. United States*, ACLU, https://www.aclu.org/cases/khaled-el-masri-v-united-states (Nov. 6, 2018).

95 *Id.*

96 El-Masri v. Tenet, 437 F. Supp. 2d 530, 540–41 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007).

be divulged."[97] After 9/11, the government has used the privilege widely[98] to dismiss litigation alleging a myriad constitutional and human rights abuses, by either refusing to disclose information during discovery or requesting complete dismissal on national security grounds.[99] Judges all too often defer to the Executive when "national security" or "state secrets" defenses have been asserted.[100]

The district court in the El-Masri case indicated that El-Masri did deserve a remedy, but that the courts were not the appropriate venue for him to receive one.[101] The court stated, "the state secrets privilege is absolute and therefore once a court is satisfied that the claim is validly asserted, the privilege is not subject to a judicial balancing of the various interests at stake."[102] The court did not find it convincing that almost all of the details of El-Masri's case had already been in the public domain in various news stories and government reports about the rendition program.[103] However, the judge did understand the grievous harm El-Masri suffered and the need for a remedy, stating:

> [I]f El-Masri's allegations are true or essentially true, then all fair-minded people, including those who believe that state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy. Yet, it is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch.[104]

The Fourth Circuit affirmed, and although it did not go as far, it did acknowledge "the gravity of our conclusion that El-Masri must be denied a judicial forum for his Complaint."[105] However, they reiterated "that dismissal on state secrets grounds is appropriate only in a narrow category of disputes" and that "the matter before us falls squarely within that narrow class, and we

97 United States v. Reynolds, 345 U.S. 1, 10 (1953).

98 *See* Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 87 (2010) (using docket searches to estimate that the government invoked the privilege in more than 100 cases from January 2001 to January 2009).

99 *Id.* at 78.

100 *See* Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 Calif. L. Rev. 991, 1001–03 (2018); *see also* Heidi Gilchrist, *Security Clearance Conundrum: The Need for Reform and Judicial Review*, 51 U. Rich. L. Rev. 953, 957, 967 (2017).

101 *El-Masri*, 437 F. Supp. 2d at 541.

102 *Id.* at 537.

103 *Id.* at 538.

104 *Id.* at 541.

105 El-Masri v. United States, 479 F.3d 296, 313 (4th Cir. 2007).

are unable to find merit in El-Masri's assertion to the contrary."[106]

Instead of having access to legal recourse for the wrongs that were committed, El-Masri was left with nothing, not even an apology, from the United States. Indeed, even worse than the fact that he received no apology from the United States, is the fact that the United States litigated extensively to ensure he received no remedy. In his own words, El-Masri stated that he sued the United States government because he wanted "an explanation, an apology, and reassurance" that what he had endured would never happen to anyone else.[107] When a party, like the United States government, does not admit the terrible wrongs that were committed, the injustice continues for the injured party.

Therefore, as United States law did not get him any recourse, El-Masri turned to international law. He had a victory against Macedonia in the European Court of Human Rights (ECHR), and eventually received an apology from Macedonia, but not from the United States. Increasingly, international courts are used as a vehicle for those who suffer human rights abuses to get some degree of vindication. In 2012, the ECHR held that "respondent State [Macedonia] is to be held responsible for the inhuman and degrading treatment to which the applicant [El-Masri] was subjected while in the hotel, for his torture at Skopje Airport and for having transferred the applicant into the custody of the US authorities, thus exposing him to the risk of further treatment contrary to Article 3 of the Convention."[108] He was awarded 60,000 Euros in compensation.[109] Although not an apology from the United States or a reassurance that what happened to him would not happen to anyone else ever again, the ECHR judgment is at least a step in the right direction.

Then, in 2014, the Senate Intelligence Committee study of the CIA's Detention and Interrogation Program affirmatively found that El-Masri had been wrongfully detained.[110] They detailed that the Inspector General of the CIA found that his "prolonged detention" was "unjustified."[111] But, El-

106 *Id.*

107 *Statement: Khaled El-Masri*, ACLU, https://www.aclu.org/other/statement-khaled-el-masri (last visited Aug. 30, 2021).

108 El-Masri v. Former Yugoslav Republic of Maced., 2012-VI Eur. Ct. H.R. 263, para. 223 (2012).

109 *Id.* at para. 270.

110 S. REP. NO. 113–288, at 128–129 (2014).

111 *Id.* at 15, 128 ("The rendition was based on the determination by officers in the CIA's ALEC Station that 'al-Masri knows key information that could assist in the capture of other al-Qa'ida operatives that pose a serious threat of violence or death to U.S. persons and interests and who may be planning terrorist activities.' The cable did not state that Khalid al-Masri himself posed a serious threat of violence or death,

Masri was still left without an apology, explanation, or exoneration. In an interview he talked about the anguish he feels about the fact that there have been no consequences for those responsible, saying "[p]eople in the West are the last ones in the world that should talk about human rights. Look what they have done to me and others. There have been no consequences for those responsible."[112] He continued, "[o]n one hand they are great in pointing at others and criticize them, but then they don't want to look inside and have accountability for human rights crimes."[113] And the terror label looms large. As El-Masri explained, "I never received any help, nor did my family. The only thing we received from the Germans [while we lived in Germany] was pressure and humiliation, no help or support. It was as if people had no empathy for us."[114]

Macedonia formally apologized to El-Masri in 2018.[115] In a letter to El-Masri that year, Macedonia's minister of foreign affairs offered his "sincere apologies and unreserved regrets" for the "improper conduct of [Macedonia's] authorities" in 2004.[116] He also acknowledged "the immeasurable and painful experiences and grave physical and psychological wounds [El-Masri] suffered."[117] Although not nearly enough, it is at least a start.

B. *Wrongful Detention at Guantanamo Bay*

In two important national security law cases studied by students around the world, *Hamdi v. Rumsfeld* and *Boumidiene v. Bush*, the United States government went all the way to the Supreme Court arguing that the two men should be held indefinitely in Guantanamo as "enemy combatants"

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the standard required for detention under the September 17, 2001, Memorandum of Notification (MON) . . . Despite doubts from CIA officers in Country [redacted] about Khalid al-Masri's links to terrorists, and RDG's concurrence with those doubts, different components within the CIA disagreed on the process for his release.").

112 Souad Mekhennet, *A German Man Held Captive in CIA's Secret Prisons Gives First Interview in 8 Years*, WASH. POST (Sept. 16, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/09/16/a-german-man-held-captive-in-the-cias-secret-prisons-gives-first-interview-in-8-years/.

113 *Id.*

114 *Id.*

115 Konstantin Testorides, *Macedonia Apologizes to German Snatched for CIA*, AP NEWS (Apr. 4, 2018), https://apnews.com/2e1582889d49443a97a4c5578ae7630f.

116 Press Release, ACLU, Macedonia Issues Apology for Involvement in Torture by CIA (Apr. 3, 2018), https://www.aclu.org/press-releases/macedonia-issues-apology-involvement-torture-cia.

117 *Id.*

without charges, as a danger to national security.[118] When the government lost in the Supreme Court, however, rather than actually prosecute the two men, they were both released. They were suddenly no longer dangerous terrorists. Yaser Hamdi now lives in Saudi Arabia and was released after an agreement with the government to give up his U.S. citizenship, report possible terrorist activity, and abide by certain travel restrictions, including a ten-year ban on returning to the United States.[119] Lakhdar Boumediene now lives in France with his family under an undisclosed agreement between the French and American governments.[120]

Once again, the government in no way apologized or made any acknowledgement of the suffering the men endured. The Department of Justice's press release stated perfunctorily, "Lakhdar Boumediene, an Algerian national who had been held at the Guantanamo Bay detention facility since 2002, has been transferred to France."[121] He lives in public housing in Nice with his family, but is not a French citizen and has not been granted asylum or permanent residence.[122] As the United States never returned his Algerian and Bosnian passports, he is effectively stateless.[123] The need for exoneration and an apology is real. Boumediene told the Washington Post that he would like to sue the United States government, stating, "I don't know whether it will be possible… but even if it takes 100 years, I am determined to bring suit."[124] It is impossible to move forward completely when a wrong such as torture has been committed without consequences.

Those still languishing in Guantanamo with no charges have no voice to get their stories out. Hundreds held in Guantanamo for years were never

118 Hamdi v. Rumsfeld, 542 U.S. 507, 512–513 (2004); Boumediene v. Bush, 553 U.S. 723, 797 (2008).

119 Press Release, Mark Corallo, Dir. of Pub. Affs., U.S. Dep't of Just., Regarding Yaser Hamdi (Sept. 22, 2004), https://www.justice.gov/archive/opa/pr/2004/September/04_opa_640.htm [hereinafter Corallo Press Release]; Eric Lichtblau, *U.S., Bowing to Court, to Free 'Enemy Combatant,'* N.Y. TIMES (Sept. 23, 2004), https://www.nytimes.com/2004/09/23/politics/us-bowing-to-court-to-free-enemy-combatant.html.

120 Press Release, U.S. Dep't of Just., United States Transfers Lakhdar Boumediene to France (May 15, 2009), https://www.justice.gov/opa/pr/united-states-transfers-lakhdar-boumediene-france; Scott Sayare, *After Guantánamo, Starting Anew, in Quiet Anger*, N.Y. TIMES (May 25, 2012), https://www.nytimes.com/2012/05/26/world/europe/lakhdar-boumediene-starts-anew-in-france-after-years-at-guantanamo.html.

121 U.S. Dep't of Just., *supra* note 120.

122 Sayare, *supra* note 120.

123 *Id.*

124 Edward Cody, *Ex-Detainee Describes Struggle for Exoneration*, WASH. POST (May 26, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/05/25/AR2009052502263_pf.html.

charged and have now been repatriated,[125] but the United States has never apologized or admitted wrong-doing. One scholar has proposed legislation entitled the "Civil Redress and Historical Memory Act of 2029," based on the Civil Liberties Act of 1988, to "establish a commission of inquiry to investigate cases of arbitrary detention and mistreatment perpetrated by the U.S. during the 'War on Terror'" and "offer an apology and provide restitution to individuals who were wrongfully detained and mistreated by the United States."[126]

Those wrongfully convicted, or wrongfully held and tortured in the case of Guantanamo, deserve an apology, compensation, and true exoneration. About three quarters of the forty prisoners still at Guantanamo, even twenty years after the events of 9/11, have never been charged with a crime.[127] An apology is needed in order for the healing process to begin, but also in the real sense of rebuilding one's life. Looking for employment is difficult enough without having Guantanamo on your record, as is the case with Boumediene, or any conviction, especially a terror-related charge. In a small sign of hope, the Guantanamo Military Commission ruled that, "as a matter of law, th[is] Military Judge has legal authority to grant administrative credit as a remedy for illegal pretrial punishment."[128] One detainee, Majid Khan, is "seek[ing] 'administrative credit equivalent to no less than half of his approved sentence as a comprehensive, prophylactic remedy' for the torture and other cruel, inhuman, and degrading treatment he suffered in Government custody for the offenses for which he was subsequently charged and pleaded guilty."[129] Additionally, the judge allowed use of the word "torture" to describe what the inmates endured stating, "[t]aken as true, this mistreatment rises to the level of torture."[130] However, Boumediene urges that concrete action is also needed, writing in a recent letter, written along with other former prisons, for President Biden to "[j]ust close Guantanamo – this is my message."[131]

125 *See The Guantánamo Docket*, N.Y. Times, https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html (last updated Sept. 1, 2021); *see also Guantanamo by the Numbers*, Human Rights First (Oct. 10, 2018), https://www.humanrightsfirst.org/resource/guantanamo-numbers.

126 William J. Aceves, *The Civil Redress and Historical Memory Act of 2029: A Legislative Proposal*, 51 U. Mich. J.L. Reform 163, 163 (2017) (examining the mistreatment of Khaled El-Masri, and others, and the lack of recourse they were given).

127 *The Guantánamo Docket*, *supra* note 125.

128 United States v. Khan, No. 033K, Ruling on Defense Motion for Pretrial Punishment Credit and Other Related Relief, 42 (Mil. Comm'ns Trial Judiciary June 4, 2020), https://www.mc.mil/Portals/0/pdfs/Khan/Khan%20(AE033K).pdf.

129 *Id.* at 1.

130 *Id.* at 34.

131 *Ex-Gitmo Detainee Subjected to Years of Torture Urges Washington to Shut Down Notorious Facility*,

C. *Material Support Cases for Supposed Terrorist Activity*

Many defendants in material support to terrorism cases, especially attempted material support cases, are prosecuted without having done anything that actually constitutes terrorism, or even a crime.[132] Recently, there have been a few reversals of sentences in these cases, and a hung jury in one other case,[133] but the defendant is still left without truly being exonerated. The problems with and overreach of the material support law has been long studied by academics and others advocating for change.[134] The material support laws are so broad[135] that intent to engage in terrorism is not a required element so someone can be prosecuted for minor actions, or even simply speech, often prodded on by a government informant.[136] The material support laws are preventative, trying to catch a "terrorist" before they act—a noble aim but, as seen, extraordinarily difficult, if not impossible, in practice.

1. Hamid Hayat: Fourteen Years Later, Released in the Interest of Justice

One example of finally being freed, but not completely exonerated, is Hamid Hayat who was prosecuted under the material support laws. Hamid Hayat's conviction and sentence were vacated on July 30, 2019, after he had spent fourteen years behind bars, when a judge found he had constitutionally defective representation by his attorney in violation of his Sixth Amendment

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GLOBAL TIMES (Apr. 27, 2021), https://www.globaltimes.cn/page/202104/1222237.shtml.

132 *See* Heidi R. Gilchrist, *The Vast Gulf Between Attempted Mass Shooting and Attempted Material Support*, 81 U. PITT. L. REV. 63, 100–01 (2019).

133 *See* discussion *infra* Section II.C.iii.

134 *See* THE CONSTITUTION PROJECT, REFORMING THE MATERIAL SUPPORT LAWS: CONSTITUTIONAL CONCERNS PRESENTED BY PROHIBITIONS ON MATERIAL SUPPORT TO "TERRORIST ORGANIZATIONS" 1–2 (2009); Robert Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 1–2 (2005); Tom Stacy, *The "Material Support" Offense: The Use of Strict Liability in the War Against Terror*, 14 KAN. J.L. & PUB. POL'Y 461, 477 (2005).

135 18 U.S.C. § 2339B. Under this statute, the only intent requirement is that the person "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so." The statute defines "knowingly" as "[having] knowledge that the organization is a designated terrorist organization" or "that the organization has engaged or engages in terrorist activity" or "that the organization has engaged or engages in terrorism." *Id.*

136 *See* Gilchrist, *supra* note 132, at 64, 66.

right to effective assistance of counsel.[137] In February 2020, the government submitted an unopposed motion to dismiss arguing that, although the Ninth Circuit had affirmed Hayat's conviction, his trial representation had been deemed deficient by the district court.[138] The prosecution explained that, "[d]ue to the passage of time . . . the government now moves this Court to dismiss, in the interest of justice, the indictments in this case."[139] The court subsequently granted the motion.[140] This dismissal "in the interest of justice" is the closest to an apology that Hayat was able to get.

It is an incredibly high standard to find constitutionally deficient counsel, as a defendant must prove that the outcome of the trial would have been different; however, the judge in Hayat's case was able to reach this conclusion. A defendant must show (1) that their trial attorney's performance "fell below an objective standard of reasonableness;" and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[141] The court found the representation of Hayat deficient and adopted the magistrate judge's findings on two issues: failure to investigate six potential alibi witnesses and to present an alibi defense, and failure to procure and present an Arabic language defense expert on the meaning of the supplication found in Hayat's wallet.[142] The court found that these errors were prejudicial and that there was a "'reasonable probability' that Hayat's jury, or a juror would have reached a different decision" if the jurors had been presented the evidence that was not presented due to the attorney's errors.[143]

The judge found that an attorney should have presented alibi witnesses to show that Hayat's confession that he attended a terror training camp was coerced.[144] And without his confession, there would have been no act in material support of terrorism. The magistrate judge held that all six alibi witnesses were "sufficiently credible, explaining that notwithstanding Hayat's confession that he attended a terror training camp for three to six months, the witnesses' testimony 'directly contradicted' the confession...."[145]

137 United States v. Hayat, No. 2:05-cr-240-GEB, 2019 WL 3423538, at *1, *2, *18 (E.D. Cal. July 30, 2019).

138 *Id.*

139 *Id.*

140 Ken Otterbourg, *Hamid Hayat*, The Nat'l Registry of Exonerations (Mar. 3, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5683 (last updated Feb. 9, 2021).

141 Strickland v. Washington, 466 U.S. 668, 687–688, 694 (1984).

142 *Hayat*, 2019 WL 3423538 at *15, *16.

143 *Id.* at *17.

144 *See id.* at *10, *11, *16.

145 *Id.* at *15.

The alibi testimony was consistent and showed that Hayat, at most, was absent from his family's village for a week.[146]

Another key piece of evidence against Hayat was a prayer card found in his wallet. In Hayat's hearing for ineffective assistance of counsel, his attorney presented Dr. Bernard Haykel, a renowned professor of Near Eastern Studies at Princeton University, to testify that the prayer found in Hayat's wallet was a "supplication… used by many Muslims, not just jihadis."[147] The court therefore found that Hayat's attorney's "failure to present an Arabic language expert on the meaning of the supplication during trial contributed to the prejudice Hayat suffered."[148] At trial, the prosecution's expert, Khaleel Mohammed, had testified that "a person carrying this supplication would be '[a] person engaged in jihad'" and that "there is no other way that it could be used."[149] He further explained that a person carrying this supplication, "'*has* to be involved in jihad'; *must* 'perceive[] himself to be carrying out one of the obligations of jihad, that he was involved in what he deemed to be jihad'; and was completely ready. The person was in the act of being a warrior."[150] Hayat's attorney did not object. Although the Ninth Circuit did not find this to be a "plain error," as the dissent pointed out: "the district court plainly erred in allowing [the expert] to testify broadly about Hayat's supposed 'jihadi intent' which usurped the jury's role as the ultimate trier of fact."[151]

Hayat's case also highlights the importance of telling the stories of unfair prosecutions and raises issues of coerced confessions, the use of government informants, and how after the events of 9/11 anything in Arabic or relating to Islam could be misinterpreted as terror-related. The family of Hamid Hayat heralded the Netflix documentary series *The Confession Tapes*, and the work of other journalists, for highlighting his case to the public.[152] The government paid the informant in Hayat's case, who had previously earned $7 per hour as a fast food worker, $230,000 over a three-year period.[153] Hayat's admissions came after he had been awake and interrogated until 3

146 *Id.*

147 *Id.* at *16.

148 *Id.*

149 United States v. Hayat, 710 F.3d 875, 910–11 (9th Cir. 2013) (emphasis omitted).

150 *Id.* at 911.

151 *Id.*

152 ABC10, *Hamid Hayat's family says Netflix documentary helped overturn terrorism conviction*, YOUTUBE (July 31, 2019), https://www.youtube.com/watch?v=WcB-gv_zQUA.

153 Trevor Aaronson, *For Years, Reporters Questioned the Terror Prosecution of Hamid Hayat. Now He's Been Freed*, THE INTERCEPT (Aug. 16, 2019), https://theintercept.com/2019/08/16/terrorism-september-11-prosecution/.

a.m.[154] Journalist Lowell Bergman worked with PBS Frontline and the New York Times and detailed his case in a 2006 film "The Enemy Within" that documented the problems with Hayat's case and the FBI's counterterrorism program.[155] After seeing Bergman's work, Syeda Amna Hassan, a Pakistani graduate student in journalism at Berkeley, researched the case for her master's thesis.[156] She located people in Pakistan who spent time with Hayat when he was supposedly in the training camp, who instead "described how Hayat had spent his entire time in Pakistan playing soccer and video games, supporting the claim that Hayat's confession had been coerced by FBI agents."[157] She then gave the evidence to Hayat's lawyers to use in order to show his confession was false. Additionally, journalist Abbie Van Sickle, who previously worked with Bergmann, used Hassan's reporting and thesis to further scrutinize Hayat's case and its myriad problems and published the story in the Intercept.[158]

Hamid Hayat's own words show he had doubted that justice would ever be served. "I can't believe this day came," said Hayat, now 36-years-old, at a news conference after his release.[159] "I still think this is a dream. I wake up and I still think I'm in prison."[160] He continued, "I'll never be able to pay back none of my brothers and sisters, none of my supporters.... I'm your guys' servant until the day of judgment."[161]

For some, the problems with this case were obvious from the beginning. After being convicted of providing material support to terrorists, Hayat's motion for a new trial was denied, as well as his motion to vacate, set aside, or correct his sentence.[162] When he appealed, the dissenting judge in the Ninth Circuit, Judge Tashima, pointed out the vagueness of Hayat's prosecution, as well as the material support laws more generally:

> To paraphrase a famous line, in this case, the government has concluded that it is not for it to say *what* offense Hamid Hayat has

154 *Id.*
155 *Id.*
156 *Id.*
157 *Id.*
158 Abbie VanSickle, *Judge in Infamous "Sleeper Cell" Case Agrees to Hear New Evidence that Could Help Convicted Terrorist*, The Intercept (June 12, 2017), https://theintercept.com/2017/06/12/judge-in-infamous-sleeper-cell-case-agrees-to-hear-new-evidence-that-could-help-convicted-terrorist/.
159 Demian Bulwa, Bob Egelko & Tatiana Sanchez, *Hamid Hayat, Freed After 14 Years in Terror Case: 'I Can't Believe This Day Came'* S.F. Chron. (Aug. 11, 2019), https://www.sfchronicle.com/bayarea/article/Lodi-s-Hamid-Hayat-speaks-after-release-in-14295994.php.
160 *Id.*
161 *Id.*
162 United States v. Hayat, 710 F.3d 875, 885 (9th Cir. 2013).

> committed, but it is satisfied that he committed *some* offense, for which he should be punished. This case is a stark demonstration of the unsettling and untoward consequences of the government's use of anticipatory prosecution as a weapon in the "war on terrorism."... [T]he government asks a jury to deprive a man of his liberty largely based on dire, but vague, predictions that he *might* commit unspecified crimes in the future.[163]

Hayat is free, but not exonerated. Although the reporter who investigated the Hayat case for years said he was glad to see the courts "share some of the concerns he had long had about Hayat's prosecution," he thought they could have gone further, stating that "[n]obody in the judiciary has challenged the government's behavior in these terrorism cases."[164] And to some it was not enough because, as Basim Elkarra, the executive director of the Sacramento Valley office of the Council on American-Islamic Relations, said, "[a]n entire community was left traumatized due to prosecution taking advantage of anti-Muslim, post-9/11 hysteria."[165]

2. Uzair Paracha: Sixteen Years Later, Nolle Prosequi as Justice

In another recent reversal, Uzair Paracha did not get an apology or true exoneration. In March 2020, two years after the court's decision ordering a new trial, federal prosecutors filed a motion for nolle prosequi.[166] The government wrote:

> Because Uzair Paracha, the defendant, has served approximately sixteen years of his sentence; because the schedule in this matter precludes the Government from taking necessary steps to protect national-security equities without diverting substantial resources from other important national-security and law-enforcement functions; and because Paracha has agreed to renounce his status as a lawful permanent resident in the United States and has consented to voluntary and immediate repatriation from the United States to Pakistan, the Government believes that dismissing the Indictment under the circumstances presented is the best available option to protect the public and preserve national-security equities.[167]

163 *Id.* at 904 (Tashima, J., dissenting) (citations omitted).

164 Aaronson, *supra* note 153.

165 Don Thompson, *US Prosecutors End Old Terror Case Against California Man*, AP NEWS (Feb. 14, 2020), https://apnews.com/article/0cfc91b078cb4e0ea2217aeb7d95fa4e.

166 Motion for Nolle Prosequi at 3, United States v. Paracha, No. 1:03-CR-01197(SHS), 2006 WL 12768, (S.D.N.Y. Mar. 16, 2020).

167 *Id.* at 5.

Instead of an apology, or any hint of vindication, Paracha was released, according to the government, because of a lack of resources to retry him. This made his release the "best available option."[168]

The very filing of a nolle prosequi showed how unwilling prosecutors were to exonerate Paracha and drove home the notion that he was not exonerated because the filing of nolle prosequi leaves open the possibility of a new prosecution. The order granting a new trial vacated Paracha's conviction and placed him in the same position "as if no trial had ever taken place."[169] Nolle prosequi is a Latin phrase that translates to "we shall no longer prosecute."[170] Nolle prosequi does not vacate a judgment; it means that the government dropped all charges against a petitioner.[171] Although nolle prosequi terminates prosecution, "the prosecuting authority is permitted to initiate a new action against the defendant within the statute of limitations."[172] Therefore, unlike an exoneration, the nolle prosequi does nothing to clear an individual's name and leaves them open to future prosecution if the government is so inclined.

Unlike the prosecutors, the judge in Paracha's case indicated that "allowing [the] defendant's conviction to stand would be a manifest injustice."[173] He granted Paracha's motion for a new trial, ten years after the initial filing.[174] He waited, inexplicably, nearly ten years for justice. In deciding the motion, the court had to consider, among other factors, whether the new evidence "would likely result in an acquittal."[175] The court decided that the evidence would likely create the required reasonable doubt in favor of Paracha's theory of the case—"that he knew Majid Khan but remained ignorant of Khan's al Qaeda affiliations, and that his contrary pretrial statements to the government were lies told out of fear and a misguided hope of cooperation"—over the government's theory of the case.[176] Meanwhile, Paracha, as well as other successful material support cases based on flimsy evidence, were heralded as successes in the "War on Terror."[177]

168 *Id.*

169 United States v. Recio, 371 F.3d 1093, 1105 n.11 (9th Cir. 2004).

170 Blue v. Medeiros, 913 F.3d 1, 5 n.6 (1st Cir. 2019).

171 *See id.*

172 *See, e.g.*, Roberts v. Babkiewicz, 582 F.3d 418, 420 (2d Cir. 2009).

173 United States v. Paracha, No. 03-CR-1197(SHS), 2018 WL 3238824, at *1 (S.D.N.Y. July 3, 2018).

174 *Id.* at *1, *9.

175 *Id.* at *10.

176 *Id.* at *17.

177 *See, e.g.*, Press Release, Dep't of Just., Att'y Gen. Alberto R. Gonzales Highlights Success in the War on Terror at the Council on Foreign Rels. (Dec. 1, 2005), https://www.justice.gov/archive/opa/pr/2005/December/05_opa_641.html; *List of Foiled Terror Attack Plots in NYC Since 9/11*, ABC7NY (Oct. 18, 2012), https://abc7ny.com/

Paracha was in prison for well over a decade while technically innocent before his trial and then during an incredibly lengthy, inexplicable appeals process. Initially, after Paracha declined to take a plea deal, he was placed under Special Administrative Measures (SAMs), leading commentators to question whether SAMs were imposed as punishment.[178] SAMs are measures that "let the government restrict the contact that dangerous prisoners may have with the outside world in order to prevent further harm to society. SAMs can result in extremely harsh conditions on top of lengthy solitary confinement–practices that many groups, including the United Nations, believe may constitute torture."[179] Paracha was held in isolation for two and a half years before his trial and described it by saying, "I faced the harshest part of the SAMs while I was innocent in the eyes of American law."[180]

Both Paracha[181] and Hayat[182] are listed as exonerated on the National Registry of Exonerations even though neither were truly exonerated by the Government. The Registry offers a comprehensive description of "every known exoneration in the United States since 1989 – cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence."[183] Their mission is to "prevent future false

archive/8850846/.

178 *See* Katherine Erickson, *This Is Still a Profession: Special Administrative Measures, the Sixth Amendment, and the Practice of Law*, 50 COLUM. HUM. RTS. L. REV. 283, 289 (2018).

179 *Id.* at 283.

180 *Id.* at 307–08. Pursuant to federal regulations effective since May 17, 1996, the Attorney General may authorize prison officials:

> [T]o implement special administrative measures… [when the Attorney General notifies them that] there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons. These special administrative measures ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism.

28 C.F.R. § 501.3(a) (2021).

181 Ken Otterbourg, *Uzair Paracha*, NAT'L REGISTRY OF EXONERATIONS (Apr. 2, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5706.

182 Otterbourg, *supra* note 140.

183 The registry is a project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law. *See id.* It was formed in collaboration with the Center on Wrongful Convictions at Northwestern University School of Law in 2012. *Id.*

convictions by learning from past errors."[184]

3. Adam Shafi: Forty Months of Imprisonment and a Hung Jury

I have detailed in another article how charges of attempted material support ensnared a young man, Adam Shafi,[185] another individual who has not received true exoneration, but at least is now out of prison.[186] A jury did not find him guilty of attempted material support—a rare occurrence when there are terror charges, and his case ended with a hung jury.[187] But, he was only released after he had already spent forty months in prison—some of that time in solitary confinement.[188] Forty months in prison for not actually doing anything but perhaps the equivalent of the Spanish crime of "glorifying terrorism."[189]

Adam Shafi's long ordeal began when his father lost track of him during a family trip to Cairo, Egypt.[190] Having lost contact with his son, Mr. Shafi's father filed a report with the American Embassy in Cairo in an attempt to track him down.[191] Ultimately, Mr. Shafi returned to his family in Cairo and returned to the United States with them.[192] However, his father's report had piqued the FBI's interest and they obtained a warrant to surveil Mr. Shafi.[193]

Back in America, Mr. Shafi researched routes to get to Syria by way of Turkey and exchanged emails about potentially traveling to Turkey.[194] Mr.

184 *Our Mission*, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/mission.aspx.

185 *See* Gilchrist, *supra* note 132, at 75–77 (2019).

186 Darwin BondGraham, *Accused of Terrorism and Jailed for Three Years, Adam Shafi Is Released Following a Mistrial*, E. Bay Express (Oct. 8, 2018), https://eastbayexpress.com/accused-of-terrorism-and-jailed-for-three-years-adam-shafi-is-released-following-a-mistrial-2-1/.

187 *Id.*

188 *Id.*

189 *See Spain: Counter-Terror Law Used to Crush Satire and Creative Expression Online*, Amnesty Int'l (Mar. 13, 2018), https://www.amnesty.ie/spain-counter-terror-law-used-crush-satire-creative-expression-online/. ("Under Article 578 of the Spanish Criminal Code those deemed to have 'glorified terrorism' or 'humiliated the victims of terrorism or their relatives'… face fines, bans from jobs in the public sector and even prison sentences. The number of people charged under this Article increased from three in 2011 to 39 in 2017 and nearly 70 people were convicted in the last two years alone."). *Id.*

190 United States v. Shafi, 252 F. Supp. 3d 787, 790 (2017).

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.*

Shafi also led "his two younger brothers in . . . training exercises, including calisthenics, running through the neighborhood, and 'crawling through the mud at a park near the family's home in Fremont, California.'"[195] The government's complaint characterizes these activities as "paramilitary training."[196]

In addition to researching travel and exercising with his younger brothers, Mr. Shafi also made comments in telephone conversations that he would be "completely fine with dying with [an unspecified terrorist organization]."[197] Mr. Shafi also expressed contempt for America and discussed plans of living in part of Syria which was controlled by a foreign terrorist organization.[198]

On June 30, 2015, Mr. Shafi was intercepted by federal agents at an airport on his way to board a one-way flight to Turkey.[199] When questioned, Mr. Shafi denied that he was traveling to Turkey with the intention of joining a terrorist organization.[200] Instead, Mr. Shafi noted that there are many refugees in Turkey who he would help if he could.[201] Mr. Shafi explained that some people "helped by building a house, while others picked up a gun."[202] When agents asked Mr. Shafi if he planned on helping by arming himself, he said that he had no such plans.[203]

Agents then performed a consensual search of the backpack Mr. Shafi was traveling with.[204] This search turned up "personal items along with a copy of the Quran and a 'small paper-back book of Islamic prayers,' among other things."[205] After this search, agents released Mr. Shafi to return to his family's home in Freemont.[206] While on his way home, Mr. Shafi placed calls which were intercepted by the government. On these calls, Mr. Shafi detailed his experience at the airport and remarked that only an "idiot" would have told agents they had intentions to take up arms.[207] Sometime later, Mr. Shafi was arrested and charged with attempted material support, charges that could result in up to twenty years in prison.[208] Mr. Shafi was

195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.*
203 *Id.*
204 *Id.*
205 *Id.*
206 *Id.*
207 *Id.*
208 *Id.*

held in solitary confinement while awaiting his trial.[209]

The jury declared that after deliberation, they were "hopelessly deadlocked."[210] The note from the jury read, "[w]e've reached a deadlock. We've reviewed all the evidence, discussed everything multiple times and in great detail, and don't think we'll be able to reach a unanimous decision."[211] There was an 8-4 split in favor of acquittal.[212] After the deadlocked jury, the judge rejected the prosecutor's request to keep Shafi imprisoned and instead released him to his parents.[213] Following Shafi's plea to bank fraud in January, the judge found prosecutors "had failed to prove Shafi had acted out of terrorist motives and limited his sentence to the 40 months he had already served, plus six months of house arrest that ended that month."[214]

Interestingly, it was Adam Shafi and his parents who kept apologizing, not the government that had locked him up. In court, when it became obvious that the judge was going to order his son's release, his father Sal began crying and said "I'm sorry" as he wiped away his tears.[215] "There is nothing to be sorry about," the judge replied.[216] Adam Shafi had previously sent his own letter to the judge apologizing for "my disturbing comments and actions leading up to my arrest."[217] He continued, "[b]eing away from my family allowed me to see the irresponsible, immature, and reckless manner with which I dealt with problems at home and in the world. I now see the flaws of my past hopelessness and will now strive to use the life and opportunities given to me to make the world a better place."[218]

4. The Need for True Exoneration

Although they have been freed, these individuals have not received true exoneration. Under federal law,[219] a person who was unjustly convicted

209 BondGraham, *supra* note 186.

210 Criminal Minutes at 1, United States v. Shafi, 252 F. Supp. 3d 787 (N.D. Cal. 2017) (No. 15-cr-00582-1), https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Shafi%20Criminal%20Minutes.pdf.

211 *Id.*

212 Bob Egelko, *Prosecution of Fremont Man Shows Why Terrorism Cases Can Come Up Short*, S.F. Chron. (Apr. 19, 2019), https://www.sfchronicle.com/bayarea/article/Prosecution-of-Fremont-man-shows-why-terrorism-13781811.php.

213 *Id.*

214 *Id.*

215 BondGraham, *supra* note 186.

216 *Id.*

217 Egelko, *supra* note 212.

218 *Id.*

219 Thirty-six states and the District of Columbia also have compensation statutes of some form. *Compensating the Wrongly Convicted*, *supra* note 86.

of a non-death penalty offense may be awarded up to $50,000 for each 12-month period of incarceration.[220] However, the law requires that the person suing must allege and prove that: "[h]is conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense" and "[h]e did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution."[221] Therefore, this would not apply to any of the terror cases detailed because they did not receive true exoneration. Hayat's conviction was vacated after fourteen years in prison, but not on the grounds that he was not guilty of the offense, and he never had a new trial. Paracha was released after seventeen years in prison due to an agreement with the government; but they specifically filed a motion nolle prosequi which means only that the government is no longer pursuing charges, not that the person is innocent. And Shafi was in prison for three years pending and during trial, but only released after a mistrial so he was never actually convicted or found innocent.

By examining these cases, we can learn what went wrong and what we can do to make sure people are not unjustly prosecuted under the material support laws in the future. As Innocence Project Co-Director Barry Scheck commented, "[t]he exonerees [are] the greatest human resource our criminal justice system has had, ever. Because what we can learn from them and their cases can help us create a more just society and fix this system and move it forward in a way that it hasn't been within memory."[222] Professor Brent T. White has proposed that "civil rights plaintiffs pursuing cases against governmental defendants should be entitled to receive court-ordered apologies as an equitable remedy."[223] He argues that "traditional forms of compensation fail to provide adequate relief to civil rights victims because they neglect psychological, emotional, and symbolic injuries."[224] He proposes court-ordered apologies as an effective means of "healing psychological wounds, reinforcing norms, restoring social equilibriums, confirming the justice of plaintiffs' causes, and compelling governmental reform."[225]

220 A person sentenced to death may receive up to $100,000 for each 12-month period of incarceration. 28 U.S.C. § 2513(e).

221 28 U.S.C. § 2513.

222 AFTER INNOCENCE (Showtime Networks Inc. 2005).

223 White, *supra* note 10, at 1261.

224 *Id.*

225 *Id.* at 1265.

The list of "unexonerated" people deserving an apology in the aftermath of the events of 9/11 is truly astounding. They deserve apologies for: Guantanamo, black sites, material support laws, being rounded up and deported. The use of the no-fly list as a means of black-mail by the FBI is yet another example.[226] Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari are Muslim men who claimed that "Federal Bureau of Investigation agents placed them on the no-fly list because they refused to act as informants against their religious communities."[227] Under the Religious Freedom Restoration Act of 1993 (RFRA), they "sued various agents in their official capacities, seeking removal from the No Fly List" and "[t]hey also sued the agents in their individual capacities for money damages."[228] The respondents claim that the retaliation caused them significant financial harm: "airline tickets wasted and income from job opportunities lost."[229] Once the respondents sued, the Department of Homeland Security then informed them that they would be able to fly, therefore mooting the claims for injunctive relief.[230] However, the RFRA prohibits the federal government from imposing substantial burdens on religious exercise, absent a compelling interest pursued through the least restrictive means.[231] It also gives a person whose religious exercise has been unlawfully burdened the right to seek "appropriate relief."[232] Tanvir, Algibah, and Shinwari achieved victory at last when the Supreme Court ruled unanimously that "appropriate relief" includes "money damages against Government officials in their individual capacities."[233] The Supreme Court decision is a rare victory in receiving some amount of vindication for those individuals wronged by the United States government or its officers after 9/11.

III. International and Human Rights Law as the Only Path for Exoneration

Even when United States law does not allow for the victims of the "War on Terror" to recover and have their rights vindicated, international

226 *See* Adam Liptak, *Supreme Court Hears Case of Muslims on No-Fly List*, N.Y. Times (Oct. 6, 2020) (updated Dec. 10, 2020), https://www.nytimes.com/2020/10/06/us/politics/supreme-court-muslims-no-fly-list.html.

227 Tanzin v. Tanvir, 141 S.Ct. 486, 489 (2020).

228 *Id.* at 489.

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*

233 *Id.*

law and human rights law offer some ability to redress these violations.[234] Khaled El-Masri, whose story is detailed in Section II.A, received vindication and compensation in the European Court of Human Rights. In 2018, the ACLU presented the American Commission on Human Rights with its Final Observations on the Merits of Khaled El-Masri's case.[235] Therefore, he may have another court vindicate him. Additionally, rendition victims gained a symbolic victory in 2009 when a judge in Italy convicted, in absentia, a Central Intelligence Agency base chief and 22 others, mostly CIA operatives, for the kidnapping of a Muslim cleric in 2003.[236] Egyptian Imam Abu Omar was seized from the streets of Milan and taken to Egypt, where he claims he was interrogated and tortured for seven months.[237] It is doubtful that the CIA agents will serve the criminal sentences imposed, as Italy has not requested their extradition; however, the agents can no longer travel in Europe without the risk of arrest.[238] Italy's Court of Cassation, the highest appeals court, also held "five senior Italian secret service agents could be tried for the abduction," overturning the ruling of a lower court that had "barr[ed] a trial on the grounds that it would reveal state secrets."[239]

Just four countries have compensated extraordinary rendition victims—Canada, Sweden, Australia, and the United Kingdom.[240] However, Australia and the United Kingdom conducted confidential settlements in order to elude any litigation related to human rights violations.[241] Italy is the sole country to have criminally convicted officials for participating in extraordinary rendition operations.[242]

234 *See* Kent Roach, *Substitute Justice? Challenges to American Counterterrorism Activities in Non-American Courts*, 82 MISS. L.J. 907, 974 (2012) ("The unwillingness of American courts to review much counterterrorism activities on the merits means that, in many cases, substitute justice will be the only chance of justice for those adversely affected by American military detention, renditions, and targeted killings. Substitute justice is not ideal. It is, however, better than no justice at all."); *see also* Juan E. Méndez, *How International Law Can Eradicate Torture: A Response to Cynics*, 22 SW. J. INT'L L. 247 (2016) (arguing the international legal framework is key to eliminating and preventing torture in our time).

235 *Khaled El-Masri v. United States*, *supra* note 94.

236 Rachel Donadio, *Italy Convicts 23 Americans for C.I.A. Renditions*, N.Y. TIMES (Nov. 4, 2009), https://www.nytimes.com/2009/11/05/world/europe/05italy.html.

237 O'Leary, *supra* note 6.

238 *Id.*

239 *Id.*

240 AMRIT SINGH, OPEN SOC'Y. JUST. INITIATIVE, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 62 (2013), https://www.justiceinitiative.org/uploads/655bbd41-082b-4df3-940c-18a3bd9ed956/globalizing-torture-20120205.pdf.

241 *Id.*

242 *Id.*

Apologies are not required under international law, but they matter. In 2017, the Canadian government issued a formal apology and paid compensation to Omar Khadr, the only Canadian national held at Guantanamo.[243] Farida Deif, the Canada Director of Human Rights Watch, applauded the government for its apology stating:

> While international law requires compensation but not apologies for serious human rights violations, an apology yields tremendous significance for victims nonetheless. They represent a formal attempt by the government to acknowledge the serious harm inflicted on an individual, their family, or an entire community. They send a strong message that the government acted unlawfully.[244]

She added, "[w]hile an apology doesn't guarantee that these abuses will never happen to anyone again, today many Canadian Muslims are breathing a small sigh of relief knowing that the country is moving to redress the wrongs committed."[245] In 2007, Canada also issued a formal apology and compensation to Maher Arar for its role in his deportation and detention in Syria.[246]

International law does mandate, in addition to the substantive rights of victims not to be tortured for example, the right to truth or the right to anti-impunity or accountability.[247] The right to truth may not give the individual the apology they deserve, but it at least provides some exoneration and the knowledge that those responsible are being held accountable. The ECHR in the El-Masri case addressed the need for truth:

> [T]he Court also wishes to address another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case. In this connection it underlines the great importance of the present case not only for the applicant

243 Ian Austen, *Canada Apologizes and Pays Millions to Citizen Held at Guantánamo Bay*, N.Y. Times (July 7, 2017), https://www.nytimes.com/2017/07/07/world/canada/omar-khadr-apology-guantanamo-bay.html.

244 Farida Deif, *The Power of Canada's Apology to Omar Khadr*, Hum. Rts. Watch (July 7, 2017), https://www.hrw.org/news/2017/07/07/power-canadas-apology-omar-khadr.

245 *Id.*

246 Ian Austen, *Canada Reaches Settlement with Torture Victim*, N.Y. Times (Jan. 26, 2007), https://www.nytimes.com/2007/01/26/world/americas/26cnd-canada.html.

247 *See* Ruti Teitel, *Transitional Justice and Judicial Activism—A Right to Accountability?* 48 Cornell Int'l L.J. 385, 385, 409 (2015) ("Victims of systemic rights abuses, their families, and non-governmental organizations are turning to international and regional human rights tribunals to address the failure of states to investigate, prosecute, and remedy past human rights violations.").

> and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened.[248]

In their concurring opinion, Judges Tulkens, Spielmann, Sicilianos and Keller addressed the fact that they would have liked the Court to "acknowledge[] that in the absence of any effective remedies – as conceded by the Government – the applicant was denied the 'right to the truth', that is, the right to an accurate account of the suffering endured and the role of those responsible for that ordeal."[249] They emphasized the importance of truth for society in general, noting, "the desire to ascertain the truth plays a part in strengthening confidence in public institutions and hence the rule of law."[250] Additionally, for the victims' friends and family, "establishing the true facts and securing an acknowledgment of serious breaches of human rights and humanitarian law constitute forms of redress that are just as important as compensation, and sometimes even more so."[251] They concluded that the lack of right to truth prevents victims from being able to move on because "the wall of silence and the cloak of secrecy prevent these people from making any sense of what they have experienced and are the greatest obstacles to their recovery."[252]

The right to a remedy, as articulated under the United Nations Basic Principles, is not aspirational but already exists under preexisting treaty and customary law.[253] Governments have a duty to give individuals an adequate and effective remedy, including reparations.[254] The right to truth is a "key component of the legal architecture built around victims' rights."[255] At least some progress has been made surrounding the CIA's rendition program in discovering the truth, but those abused deserve, as a beginning, an apology. Although criticized for being a bit boring,[256] movies like *The Report* at least try to get the message about what the American government did to a larger audience. *The Report* chronicled the investigation by a Senate staffer into the CIA's detention and torture of suspected terrorists during the George

248 El-Masri v. Former Yugoslav Republic of Maced., 2012-VI Eur. Ct. H.R. 263, para. 191 (2012).

249 *Id.* at para. 1 (Tulkens, Spielmann, Sicilianos, & Keller, JJ., concurring).

250 *Id.* at para 6.

251 *Id.*

252 *Id.*

253 G.A. Res. 60/147, (Dec. 16, 2005) [hereinafter Basic Principles]. *See also* Lisa J. LaPlante, *Just Repair*, 48 CORNELL INT'L L.J. 513, 524–25 (2015).

254 Basic Principles, *supra* note 253.

255 Kathleen Cavanaugh, *Unspoken Truths: Accessing Rights for Victims of Extraordinary Rendition*, 47 COLUM. HUM. RTS. L. REV., Winter 2015, at 1, 1.

256 Jeannette Catsoulis, *'The Report' Review: Inconvenient Truths*, N.Y. TIMES (Nov. 14, 2019), https://www.nytimes.com/2019/11/14/movies/the-report-review.html.

W. Bush administration, and the "subsequent struggle with the Obama administration to release [the information] uncovered."[257] Journalists, movies, courts, and academics all play a role in sharing the stories of terrible wrongs committed to ensure they never happen again.

Professor Kathleen Cavanaugh argues that the Senate report on the CIA's rendition program, the 2014 Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program (SSCI), at least "partially satisfies the right to truth."[258] She argues this even though the full report "is 6,700 pages, has not been released and the executive summary is heavily redacted," since at least "the release of this information in the public domain partially satisfies the right to truth."[259] The report has a value as a historical record of events, and can be used by victims pursuing legal claims:

> The report serves as a type of "truth dump." It names those who were subject to extraordinary rendition and acknowledges their victimization. Numerous victims have used the information from the report to support their legal claims of forced disappearance and torture by the United States and other states that are similarly situated. The report also serves as a historical record of events, providing civil society a public disclosure of events and offering detailed accounts of flawed information and decision-making. In providing this truth, this report exposed the use of flawed intelligence and illegal procedures that resulted in severe human rights violations and is a "vital safeguard against the recurrence of violations."[260]

The United States government should apologize as what is just for the violations of basic human rights. However, these apologies are additionally important because the unfair treatment of Muslims, for example at Guantanamo, is used as recruiting tactic by terror groups. The group that abducted, and then beheaded Daniel Pearl, demanded better treatment for detainees held by American forces at Guantanamo and the return of all Pakistani men being held there in return for his release.[261]

There is a consistent theme in the statements of the men highlighted and their attorneys that they do not want what happened to them to happen to anyone else ever again. Perhaps the best apology is ensuring that it does

257 Madeleine Carlisle, *The True Story Behind the Movie The Report*, TIME (Nov. 15, 2019), https://time.com/5725001/the-report-movie-true-story/.

258 Cavanaugh, *supra* note 255, at 46–47.

259 *Id.*

260 *Id.*

261 Secunder Kermani, *Daniel Pearl: Pakistan Court Acquits Men Accused of Murder*, BBC NEWS (Jan. 28, 2021), https://www.bbc.com/news/world-asia-55735869.

not. Those wrongfully detained or tortured are using international law as the only way to exoneration and to hopefully ensure the same wrongs are not committed in the future.

CONCLUSION

"Perhaps the best advice to ordinary people and government leaders is: [a]pologize and do it as effusively as conditions permit."[262] However, the best apology additionally ensures the wrong conduct never happens again. The voices of those who were wrongfully detained or tortured are emphatically clear on this.

> "While we are grateful for the dismissal, the 14 years Hamid spent behind bars on charges of which he was innocent remain a grave miscarriage of justice," Hayat's family and attorney said in a joint statement. "Hamid's exoneration is a cause for celebration, but the story of his case is tragedy that must not be repeated."[263]

All Khaled El-Masri really wanted was an explanation and an apology, even after all the abuse he endured based on a mistake.[264] By failing to apologize to or exonerate these men, the United States is still implying, or outright saying, they are "terrorists," but for some reason, the government is going to let them be freed. This is not an apology, and does not remedy the incredible wrongs. Those wrongfully detained are still living with the "terror" stigma and the horror of the abuses they endured. Their stories need to be shared.

262 Craig W. Blatz, et al. *Government Apologies for Historical Injustices*, 30 POL. PSYCH. 219, 237 (2009) (finding that apologies for historical injustice can be effective, even without financial compensation, unless the victims were demanding financial compensation).

263 Thompson, *supra* note 165.

264 Armen Keteyian & Phil Hirschkorn, *Muslim Says He Was Abducted by U.S.*, CBS NEWS (Nov. 28, 2006), https://www.cbsnews.com/news/muslim-says-he-was-abducted-by-us/.