

LEAD ARTICLE

POLICING AS INJUSTICE

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ABSTRACT

Courts have long shielded police violence from accountability, foreclosing remedies for victims and survivors, and stymying systemic change. Although scholars have examined the doctrinal barriers insulating police misconduct, this Article is the first to develop a comprehensive theory of how these doctrines operate within a unified system of injustice deflection. It posits that the legal system does not merely excuse or fail to remedy police violence; rather, it transforms that violence into a permissible and structurally entrenched practice. Police violence, this Article contends, is not an aberration but a deliberate failure of justice sustained by doctrines that shield the state from accountability and a legal architecture that deflects demands for structural transformation.

By constructing injustice deflection as a theory of legal legitimation, this Article builds on and transcends existing scholarship on injustice. It reconceives how law normalizes state violence, revealing the doctrinal and institutional mechanisms that insulate police misconduct from meaningful challenge. Scrutinizing civil rights jurisprudence, the Article demonstrates how courts, in invoking doctrines like qualified immunity and excessive force, recast police violence as an isolated misfortune rather than a constitutional failure or actionable injustice. More than a shield for individual officers, this injustice deflection reshapes the law's understanding of state-inflicted harm. By excluding the moral and legal claims of those most harmed, it limits whose suffering the law acknowledges and leaves unheard their demands for redress.

To dismantle injustice deflection, this Article calls for a victim-centered recalibration of legal doctrine and institutional design that addresses victims and survivors' harms on their own terms. Recognizing the limits of doctrinal reform, the Article advocates for community-centered initiatives grounded in transitional and restorative justice—truth commissions, reparative processes, and mechanisms for acknowledgment, apology, and redress—that foreground victims and survivors' voices and foster structural change. Reframing police violence as

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pervasive injustice is essential to vindicating constitutional rights and restoring public trust. Only by confronting, rather than deflecting, policing injustice can courts and communities dismantle entrenched systems of state-sanctioned violence and construct accountability structures responsive to the moral, political, and structural dimensions of state-inflicted harm.

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INTRODUCTION

In the law of policing, where the state's formal monopoly on force intersects with the judiciary's responsibility to define its limits, courts routinely confront harrowing accounts of police violence: a child or teenager fatally shot,¹ a person with mental illness subdued by lethal force,² or an unarmed bystander gravely injured

1. See, e.g., *Salim v. Proulx*, 93 F.3d 86 (2d Cir. 1996); *Winston v. City of Cleveland*, No. 14-CV-2670, 2016 WL 397972, at 3 (N.D. Ohio Feb. 2, 2016); CAL. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO THE DEATH OF ANTHONY AND SAVANNAH GRAZIANO ON SEPTEMBER 27, 2022 (2025), https://oag.ca.gov/system/files/ois/report/2025_03_Graziano_AB_1506_Report.pdf [<https://perma.cc/U4NA-AVNV>].

2. See, e.g., *La v. Hayducka*, 269 F. Supp. 2d 566 (D.N.J. 2003); *Est. of Bennett v. Wainwright*, 548 F.3d 155 (1st Cir. 2008); *Sheehan v. City and County of San Francisco*, 743 F.3d 1211 (9th Cir. 2014), *rev'd in part, cert. dismissed in part sub nom.*, *City and County of San Francisco v. Sheehan*, 575 U.S. 600 (2015); *Burns v. City of Redwood City*, 737 F. Supp. 2d 1047 (N.D. Cal. 2010).

after being mistaken for a suspect.³ Yet time and again, courts recast these encounters as mere misfortunes—tragedies deemed beyond the law’s reach rather than actionable injustices.⁴ Even when courts acknowledge the enormity of the harm caused, they frequently characterize acts of police violence as unfortunate events, shielded from further scrutiny by doctrinal barriers like qualified immunity⁵ and permissive excessive force standards.⁶ This recasting of policing harm into misfortune trivializes the lived experiences of victims of state violence, condones unrestrained force, and obscures systemic failures.⁷ It discounts the suffering of those who bear the brunt of police violence, compounding their alienation from the very institutions entrusted with their protection.⁸

This Article is the first to name and analyze this broad phenomenon, which it terms “injustice deflection.” Injustice deflection captures how judicial framing and legal doctrines converge to recast preventable, recurrent police violence as mere misfortune undeserving of redress.⁹ Confronted with evidence of state violence or misconduct, courts often eschew rigorous scrutiny of the conditions that enable and often reproduce this violence, simultaneously silencing those who endure policing not as an aberration, but as a relentless pattern of intimidation, profiling, and lethal force.¹⁰ In these circumstances, the rote judicial refrain—that events, while tragic, do not violate clearly established constitutional rights or give rise to liability—

3. See, e.g., *Hammett v. Paulding Cnty.*, 875 F.3d 1036 (11th Cir. 2017); *McLenagan v. Karnes*, 27 F.3d 1002, 1005 (4th Cir. 1994).

4. See *infra* Part I.B.

5. See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

6. See *Graham v. Connor*, 490 U.S. 386, 395 (1989).

7. See *infra* Part I.B.

8. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2081–83 (2017) (addressing the deep-seated legal estrangement felt by many communities of color); Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 161–64 (2016); Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305, 306–07 (2018); Dorothy E. Roberts, *Constructing A Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 277–79 (2007); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 803 (2021) (highlighting how the power lens approach aims to shift power from the police to the often-marginalized communities they police). See also KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS* 23–25, 30, 33–34, 55, 61–63 (2010) (examining the historical construction of Black criminality and its impact on social and legal policies).

9. See *infra* Part I.A.

10. See Alex Chohlas-Wood, Marissa Gerchick, Sharad Goel, Aziz Z. Huq, Amy Shoemaker, Ravi Shroff & Keniel Yao, *Identifying and Measuring Excessive and Discriminatory Policing*, 89 U. CHI. L. REV. 441, 441–42 (2022); Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 637–38 (2021); Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210, 1210–11 (2019); Cassandra Chaney & Ray V. Robertson, *Racism and Police Brutality in America*, 17 J. AFR. AM. STUD. 480, 482 (2013); Stephanie L. Kent & Jason T. Carmichael, *Racial Residential Segregation and Social Control: A Panel Study of the Variation in Police Strength Across U.S. Cities, 1980–2010*, 39 AM. J. CRIM. JUST. 228 (2014).

rings hollow, eliding a deeper concern that the law itself may be complicit in erasing realities of state-sanctioned violence.¹¹

This Article interrogates the doctrinal and institutional scaffolding that sustains injustice deflection and exposes its corrosive impact. While prior scholarship has widely assessed specific doctrines that shield officers from accountability, such as qualified immunity¹² and excessive force,¹³ this Article argues that the broader, more insidious phenomenon of injustice deflection operates across multiple levels of law and society.¹⁴ On a doctrinal level, courts commonly decline to examine novel allegations of police misconduct unless a controlling precedent has already declared the precise behavior unconstitutional.¹⁵ Rather than leveraging such cases to refine constitutional standards, courts sidestep the constitutional question and preclude recognition of plaintiffs' injuries as legally cognizable harms.¹⁶ This reflex arrests the development of constitutional jurisprudence and reduces the moral, political, and social complexities of police-civilian encounters to a formalistic inquiry.¹⁷ Because courts tether police accountability to clear-cut rule breaches and many instances of harm do not fit neatly within an established or narrowly defined rule, courts too often summarily dismiss plaintiffs' claims.¹⁸ Over time, the jurisprudential conflation of injustice with only the most explicit rule violations—especially in a doctrinal environment where rules are rarely clearly established—inevitably treats state-inflicted harms as mere misfortunes. Such formalism perpetuates the illusion that adherence to existing rules alone can thwart injustice, even when those rules are underinclusive or inattentive to many state-inflicted harms.¹⁹

11. See *Tennessee v. Garner*, 471 U.S. 1, 23 (1985) (O'Connor, J., dissenting); *Graham v. Connor*, 490 U.S. 386, 396–97 (1989); *Torchinsky v. Siwinski*, 942 F.2d 257, 264 (4th Cir. 1991); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973).

12. See *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021) (per curiam) (quoting *White v. Pauly*, 580 U.S. 73, 78–79 (2017) (per curiam)) (detailing when courts should provide officers with qualified immunity protections and delineating that an individual defendant official is entitled to qualified immunity, that is immunity in a civil rights suit, as long as their “conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

13. See *Graham*, 490 U.S. at 393–94.

14. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 949–51 (1995) (discussing constructivism and social meaning).

15. See *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)) (describing the conditions of an official receiving qualified immunity from civil liability).

16. *Pearson*, 555 U.S. at 236. See *Camreta v. Greene*, 563 U.S. 692, 705–06 (2011) (explaining that courts should not resolve constitutional questions unless necessary to the judgment and cautioning that doing so may lay the groundwork for future claims of injury).

17. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (explaining the Court was raising the pleading standards for plaintiffs bringing claims, thereby making it easier for courts to dismiss cases at earlier stages of litigation); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (setting a “clearly established” standard to survive dismissal).

18. See *Harlow*, 457 U.S. at 818 (establishing the qualified immunity standard). See Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1785–89 (2016); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010).

19. See JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 7, 15, 24 (1964).

Yet injustice, particularly that born of state violence and misconduct, often eludes rigid legal adjudication. Traditional frameworks focus on whether established rules were violated, rather than preventing or remedying deeper harms that lie beyond conventional doctrinal boundaries.²⁰ For those actually experiencing them though, these harms weave a web of betrayal and indignity.²¹ In turn, legal processes often neutralize victims' and survivors' accounts of state violence, shunting their voices to the margins and reinforcing the power imbalances that underlie injustice.²² By sanctioning violence that might otherwise be recognized as a moral and political crisis, injustice deflection erodes the legitimacy of both law enforcement and the judiciary, insulating state-inflicted harm from meaningful scrutiny and accountability.²³

These effects are especially pronounced in policing, where broad officer discretion, generous immunities, and deficiently established constitutional rules coalesce to create conditions of permissiveness.²⁴ Remedies for police misconduct often fail not necessarily because officers carefully complied with a clear rule, but because the rules themselves are inadequate, and the institutions charged with preventing or correcting violations remain inert.²⁵ Recognizing these passive dimensions of harm, alongside more overt misconduct, illuminates how the narrow preoccupation with rigid doctrinal categories neutralizes real injuries inflicted by the state. Reframing such injuries as injustice rather than misfortune injects moral and political urgency into legal discourse on policing, insisting that these incidents deserve accountability and redress, not simply judicial regret.

Beyond the doctrinal level, injustice deflection inflicts tangible social harm, compounding broader patterns of injustice.²⁶ Victims and survivors of state violence routinely witness the judicial system minimizing or disregarding their experiences.²⁷

20. See ROBERT ALEXY, *THE ARGUMENT FROM INJUSTICE: A REPLY TO LEGAL POSITIVISM* 34–35 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Oxford University Press ed. 2002) (2002); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–27 (1977); LON L. FULLER, *THE MORALITY OF LAW* 42–44 (rev. ed. 1969).

21. See JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 83 (1990); Melissa L. Barnes, *Collective Ongoing Betrayal Trauma: Gendered and Racialized Police Violence Toward the Black Community*, 6–9 (2022) (Ph.D. dissertation, University of Oregon) (on file with author).

22. SHKLAR, *supra* note 21, at 9.

23. See Nadia Banteka, *Unconstitutional Police Pretexts*, 2023 WIS. L. REV. 1871, 1875 (2023).

24. See *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (eschewing bright-line Fourth Amendment rules in favor of case-by-case adjudication, reinforcing a flexible and discretionary model of constitutional regulation); *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (affirming broad police authority to arrest without meaningful constitutional constraint); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (establishing qualified immunity based on violation of “clearly established” law, thus shielding officials from liability).

25. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 50 (2017); Bernard Yack, *Injustice and the Victim's Voice*, 89 MICH. L. REV. 1334, 1336–37 (1991).

26. MICHAEL SULLIVAN, *Introduction to THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE* 1 (Ian James Kidd, José Medina & Gaile Pohlhaus, Jr. eds. 2017) (defining epistemic injustice as “forms of unfair treatment that relate to issues of knowledge, understanding, and participation in communicative practices”).

27. See, e.g., REBECCA NEUSTETER & MEGAN O'TOOLE, *EVERY THREE SECONDS: UNLOCKING POLICE DATA ON ARRESTS* 8–9, VERA INST. OF JUST. (2019) (reporting that Black people make up twenty-eight percent of arrests despite comprising only twelve percent of the U.S. population), <https://www.vera.org/downloads/publications/every-three-seconds-full-report.pdf> [<https://perma.cc/R5BW-G3KN>]; Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1483–95 (2016). Cf. Sonja B.

No matter how compelling or severe the harm, their testimony often fails to move the legal needle when it does not conform to conventional doctrinal categories, allowing courts to dismiss their accounts as legally irrelevant.²⁸ This epistemic exclusion normalizes police violence and stifles collective memory, preventing the sustained reckoning necessary for transformative reform.²⁹ The result is a twofold injustice: individuals and communities endure the material consequences of state violence and are denied the conceptual and interpretive means to articulate that violence as an injustice the state must remedy.³⁰

Confronting injustice deflection in policing thus requires a recalibration of how we understand state-inflicted harm, accountability, and the role of legal institutions. This shift need not entail discarding extant legal frameworks wholesale, however, it does require a direct reckoning with their structural limitations.³¹ A purely rules-based police accountability framework may curb certain overt abuses but fail to address the wider and deeper grievances fueling entrenched police violence and misconduct. Recognizing injustice deflection compels acknowledgment that rigid legalism can displace more expansive conceptions of justice that probe systemic patterns, structural pathologies, and the aggregate nature of harm.³² Ultimately, the law must grapple with its own limitations to avoid perpetuating the very injustices it purports to remedy. This critical understanding underscores the urgency of complementing conventional legal frameworks with transformative community-based approaches that center the lived realities of those subjected to state violence.³³

This Article argues that correcting injustice deflection requires foregrounding the voices of victims and survivors, in both doctrine and institutional design. Treating legal frameworks as constructed, rather than neutral or static, opens the door to envisioning transformative approaches in which the moral dimension of policing harm is central rather than peripheral.³⁴ Doctrinally, courts should acknowledge how existing legal doctrines shield officers from accountability.³⁵ Reevaluating qualified immunity by deciding the constitutional merits of a claim before addressing whether a right was “clearly established,” or by returning the doctrine to its common-law roots, can both fortify constitutional norms and more fully recognize state-inflicted

Starr, *Testing Racial Profiling: Empirical Assessment of Disparate Treatment by Police*, 2016 U. CHI. LEGAL F. 485, 486 (2016) (describing the evidentiary barriers to proving race-based disparate treatment in policing).

28. See *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); Anne E. Ralph, *Qualified Immunity, Legal Narrative, and the Denial of Knowledge*, 64 B.C. L. REV. 1317, 1354–76 (2023).

29. SULLIVAN, *supra* note 26, at 1 (defining epistemic injustice as “forms of unfair treatment that relate to issues of knowledge, understanding, and participation in communicative practices”); Ralph, *supra* note 28, at 1340; Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCH. 117, 121 (2000) (demonstrating that increased voice in proceedings leads to a greater sense of fairness).

30. See MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER & THE ETHICS OF KNOWING 1* (2007).

31. See SHKLAR, *supra* note 21, at 12–13.

32. See H.L.A. HART, *THE CONCEPT OF LAW 207* (2d ed. 1994).

33. See SHKLAR, *supra* note 21.

34. See *infra* Sections II.D, II.E.

35. See *infra* Section I.B.

harms.³⁶ Institutionally, the Article advocates for measures drawn from transitional and restorative justice, such as truth commissions and community-driven reparative processes, to document patterns of police misconduct and to foster environments where survivors' accounts drive calls for accountability and reforms.³⁷ By placing victims at the center, these mechanisms can address structural failures while offering opportunities for collective truth-telling, apology, and reparation that conventional litigation rarely affords.³⁸

Reframing police violence as injustice carries significant normative and practical implications. Normatively, it foregrounds questions of collective responsibility: meaningfully vindicating victims' rights requires abandoning the fiction that each act of state violence is an unforeseeable tragedy. Instead, it demands a forthright acknowledgment that persistent violence reflects deeper structural pathologies requiring systemic responses. This lens underscores the imperative for courts, legislators, and civil society to engage with voices too long excluded, generating a legal order that no longer dismisses state violence as the unfortunate fate of an unlucky few. On a practical level, correcting injustice deflection affirms that state-inflicted harm is neither inevitable nor beyond scrutiny. Centering reform efforts on the lived realities of those most harmed restores their rights to constitutional protections and redress commensurate with the full gravity of police violence. Ultimately, recognizing and naming instances of state-sanctioned violence or misconduct as injustices vindicates the constitutional principles of accountability and dignity that undergird our legal system.³⁹

Towards these ends, the Article proceeds in three parts. Part I uncovers the phenomenon of injustice deflection, demonstrating how courts repeatedly recast police violence as un-redressable misfortune. Drawing on a comprehensive analysis of over one hundred federal court decisions, the Article identifies cases in which courts describe state-inflicted harm using terms like "unfortunate," "regrettable," or "tragic," while ultimately absolving officials of legal responsibility. This analysis reveals how judicial opinions invoking doctrines like qualified immunity and excessive force convert grievous harms into tragic yet legally insignificant events. Part II situates injustice deflection within a broader legal, political, and epistemic context, arguing that the doctrinal fixation on formal rule violations masks systemic failures and accentuates harm. It further exposes how courts discount passive dimensions of harm, such as failures to prevent or redress police violence, and perpetuate epistemic injustice by excluding the voices of those most affected. Part III proposes a blueprint for reform that places victims and survivors of state violence at the fore. First, it calls for doctrinal recalibration, urging courts to prioritize a substantive constitutional inquiry to fully acknowledge victims' and survivors' narratives and the injuries alleged. Second, it advocates for institutional mechanisms

36. See *infra* Section III.A.

37. See *infra* Sections III.C, III.D.

38. See Amna Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 467 (2018).

39. See Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200 (2012).

grounded in transitional and restorative justice to generate authoritative accounts of systemic abuse and enable transformative community-driven remedies. By centering those most affected, these processes cultivate a new orientation that does more than merely lament the inevitability of state violence and instead insists on meaningful accountability and redress.

I. INJUSTICE DEFLECTION

The interaction between policing, harm, and the legal doctrines governing police accountability engenders a fundamental tension. Although law and legal doctrine profess clear, consistent criteria for identifying and addressing state wrongdoing, the legal system lacks a framework robust enough to recognize the experiences of injustice voiced by victims of state violence, their communities, and critical observers. In this vacuum, rather than treating the harmful outcomes of policing as genuine injustices that demand accountability, constitutional doctrine and the courts applying it commonly reclassify these injustices as “misfortunes”—unfortunate occurrences lamented but ultimately deemed beyond the law’s reach. This Part identifies this phenomenon, explores the doctrinal environment that has given it life, and critically examines this phenomenon at work in judicial opinions.

A. *The Doctrinal Mechanics of Injustice Deflection*

Critics have long scrutinized the doctrines of qualified immunity and excessive force, identifying them as major obstacles to police accountability and individual redress.⁴⁰ However, what remains overlooked is how these doctrines function to entrench the broader phenomenon that I term here “injustice deflection.” Rather than acknowledging police violence and misconduct as a legal failure and redressable constitutional wrong, courts routinely reclassify policing harms as isolated misfortunes.⁴¹ This classification shields law enforcement from accountability and systematically erodes the legitimacy of the legal system.⁴² This phenomenon is not just semantic; it reflects deeper structural and doctrinal commitments that prioritize the stability of existing legal frameworks and their deference to the state over justice for victims of state-sanctioned violence.

At first glance, police brutality appears to be an archetypal instance of injustice—a government official wielding state power against an often-vulnerable individual. Yet legal doctrine routinely neutralizes or excuses such conduct. Courts acknowledge that

40. See, e.g., Osagie K. Obasogie & Zachary Newman, *Constitutional Interpretation Without Judges: Police Violence, Excessive Force, and Remaking the Fourth Amendment*, 105 VA. L. REV. 425, 429–30 (2019); John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. ON C.L. & C.R. 155, 160–61 (2016); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800–05 (2018); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82 (2018).

41. See *infra* Section I.B.

42. See, e.g., *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (“As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”).

victims of police violence hold constitutional rights, but the legal doctrines governing these rights often convert police-inflicted harms into unfortunate, yet legally excusable, occurrences.⁴³ The widely criticized doctrine of qualified immunity exemplifies this injustice deflection.⁴⁴ First introduced in *Pierson v. Ray*,⁴⁵ and significantly expanded in *Harlow v. Fitzgerald*,⁴⁶ qualified immunity was originally justified as a balance between legal accountability and the concern that officers might be overly deterred by litigation if not provided sufficient notice about what conduct is impermissible.⁴⁷ However, as Professor Joanna Schwartz has demonstrated, the modern doctrine is historically unmoored, does little to advance its stated policy goals, and places a heavy thumb on the scale against plaintiffs seeking damages for police misconduct.⁴⁸ To prevail, victims of police misconduct must demonstrate that their constitutional rights were violated, and that the violation was “clearly established” at the

43. See *infra* Section I.B.

44. See Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1415–21 & nn. 66–127 (2019) (summarizing academic criticisms of qualified immunity); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 241 & n.121 (2013); Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 311–12 & nn. 6–8 (2020) (summarizing growing support among judges, critics, and advocates for reforming or abolishing qualified immunity); Baude, *supra* note 40, at 81–82 (arguing that the doctrine lacks grounding in statutory or common law principles and analyzing Supreme Court decisions on qualified immunity, finding that the Court rarely finds official conduct to violate clearly established law). See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 563 (2004) (holding that no reasonable officer could believe a warrant that clearly did not comply with the Fourth Amendment’s particularity requirement was valid); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (denying qualified immunity to prison guards who subjected a prisoner to cruel and unusual punishment); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 423 (S.D. Miss. 2020) (calling for the Court to do away with qualified immunity). *But see* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1341 (2021) (arguing that the legitimacy of qualified immunity depends on the common law as it existed in 1871). See also William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 STAN. L. REV. ONLINE 1 (2022) (responding to Keller and arguing that the common law recognized only quasi-judicial immunity, not qualified immunity); James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. L. REV. ONLINE 148, 150–51 (2021) (responding to Keller and arguing that his evidence reflects administrative discretion rather than immunity for unlawful acts).

45. 386 U.S. 547, 557 (1967) (permitting public officers to claim qualified immunity in lawsuits brought under Section 1983).

46. 457 U.S. 800, 818–19 (1982).

47. See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). See also *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (“Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.”); *Davis v. Scherer*, 468 U.S. 183, 195 (1984) (noting that clearly established law provides officials with fair notice of when their actions may lead to liability); *Hope*, 536 U.S. at 731 (ensuring that government officials have prior notice that their actions are unlawful before being held liable in a lawsuit). See also Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1939 (2018).

48. Schwartz, *supra* note 40, at 1800–05; Schwartz, *supra* note 25, at 8–12, 65. See also Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 74 (2015) (“the Court has rendered most difficult to remedy” constitutional injuries affecting “many of the least politically powerful communities in the United States”).

time of the officer's actions.⁴⁹ The insistence on nearly identical precedent has led courts to dismiss claims even when officers' actions were egregious and unconstitutional.⁵⁰ Many plausible claims of injustice reduce to an inquiry into whether prior caselaw prohibited the specific conduct and circumstances at issue.⁵¹ This doctrinal posture transforms concrete, lived experiences of harm into legal misfortunes. In treating victims' suffering as tragic but legally insignificant, it perpetuates a legal system that denies victims' accounts the authoritative recognition they deserve.⁵²

Similarly, the widely critiqued excessive force doctrine,⁵³ formulated in *Graham v. Connor*,⁵⁴ sustains injustice deflection. The objective reasonableness test instructs courts to evaluate the constitutionality of police use of force from the perspective of a "reasonable officer" on the scene,⁵⁵ a standard the Court has justified as necessary to account for the "split-second judgments" officers must make in "tense, uncertain, and rapidly evolving" situations.⁵⁶ But in practice, the doctrine systematically privileges officers' judgment over the experiences of those harmed and ignores evidence of pervasive problems in policing practices and patterns of abuse.⁵⁷ By narrowing judicial scrutiny to the circumstances surrounding the immediate decision of the officer, the

49. See *Harlow*, 457 U.S. 800 (1982) (establishing the qualified immunity standard); *Kisela v. Hughes*, 584 U.S. 100 (2018); Schwartz, *supra* note 25, at 2.

50. Schwartz, *supra* note 40, at 1798 ("[T]he Court's recent qualified immunity decisions make it seem nearly impossible to find clearly established law that would defeat the defense.").

51. See *id.* at 1815.

52. See PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* 40 (John B. Thompson, ed., Gino Raymond & Matthew Adamson, trans., 1991) (arguing that "neutralized language" is often used strategically to create consensus among those with differing interests, particularly in political discourse and everyday interactions).

53. See Nadia Banteka, *Police Vigilantism*, 110 VA L. REV. 1439, 1467–68 (2024); Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. L. REV. 1119, 1130–33 (2008) (arguing that the *Graham* formulation of excessive force analysis was "brief and inadequate" and that little has been done since to clarify it); Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 645–48 (noting problems created by *Graham's* embrace of an unclear "reasonableness"); Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481, 481–86 (1994) (critiquing the reasonable police officer standard as vague and challenging for courts to apply); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1206 (2017) (explaining how the objective reasonableness standard in *Graham v. Connor*, while seemingly neutral, can create a "safe harbor" for police actions motivated by unconstitutional factors); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1043–44 n.93 (1995) ("[O]ne searches in vain for any body of case law that gives the [use of force] standard some content.").

54. 490 U.S. 386, 394 (1989) (identifying relevant factors to the reasonableness inquiry, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight").

55. *Id.* at 396.

56. *Id.* at 396–97 (explaining that courts must make "allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving").

57. See Nadia Banteka, *Police Ignorance and (Un)Reasonable Fourth Amendment Exclusion*, 75 VAND. L. REV. 365, 375 (2022); Lindsey Webb, *Legal Consciousness as Race Consciousness: Expansion of the Fourth Amendment Seizure Analysis Through Objective Knowledge of Police Impunity*, 48 SETON HALL L. REV. 403, 408–09 (2018) (proposing that the reasonable person standard in Fourth Amendment cases should reflect awareness that communities of color experience disproportionate police misconduct); David B. Goode, *Law Enforcement Policies and the Reasonable Use of Force*, 54 WILLAMETTE L. REV. 371, 404 (2018) (contending

doctrine sidelines the broader contexts that shape officers' perceptions, further entrenching the disparity between legal doctrine and the lived experience of those on the other side of state violence.⁵⁸ The doctrine maintains what Professor Monica Bell has identified as a sense of alienation among marginalized groups, further entrenching injustice deflection.⁵⁹ By prioritizing the legal insulation of law enforcement over the lived realities of those harmed, these doctrines ensure that the very legal system meant to uphold individual rights instead functions to deflect the responsibility of the state.

B. The Role of Judicial Opinions in Injustice Deflection

Judicial opinions in civil rights cases against police often embody injustice deflection, framing alleged constitutional violations as inevitable or isolated consequences of policing rather than injustices.⁶⁰ This is not merely semantic—it shapes legal outcomes by influencing courts' evaluation of police violence claims and the credibility afforded to plaintiffs' narratives.⁶¹ The result is a jurisprudence that denies victims a legal framework capable of recognizing their harms as genuine injustice, while legitimizing these harms on a system level.⁶² So, through injustice deflection, courts recast moral, and often constitutional, wrongs as unavoidable misfortunes. This move shifts blame away from the state and deprives those harmed by state violence the legal and conceptual tools needed to articulate their suffering as injustice.⁶³

that courts should account for police department policies on force when assessing whether an officer's actions were reasonable).

58. See James J. Fyfe, *The Split-Second Syndrome and Other Determinants of Police Violence*, in CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 583, 592–96 (2001); Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 868–69 (2014) (arguing that “the Court’s description of ‘split-second judgments’ is simply wrong almost all the time”); Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1803–06 (2016) (arguing that the Court’s misguided conception of use of force decisions as “split-second judgements” unduly accommodates police aggression and racial biases).

59. Bell, *supra* note 8, at 2081–83 (addressing the deep-seated legal estrangement felt by many communities of color). See also MUHAMMAD, *supra* note 8, at 23–25, 33–34, 55, 61–63 (examining the historical construction of Black criminality and its impact on social and legal policies).

60. See *infra* Part I.B.1; Part I.B.2; Part I.B.3.

61. See generally ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 113, 118 (2000) (analyzing the role that narrative plays in law and arguing that narrative is the mechanism through which law develops and is expressed).

62. See Fred O. Smith, Jr., *Beyond Qualified Immunity*, 119 MICH. L. REV. ONLINE 121, 127–28 (2021).

63. See JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 188 (2020); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 984 (2010); Steven Schaus, *A Simple Model of Torts and Moral Wrongs*, 97 NOTRE DAME L. REV. 1029, 1032 (2022); John Gardner, *Breach Of Contract As A Special Case Of Tort*, in TORTS AND OTHER WRONGS, 103, 345 (2019); Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 HARV. L. REV. 1727, 1752 & n.70 (2012); Avihay Dorfman, *Can Tort Law Be Moral?*, 23 RATIO JURIS 205, 205 (2010); Jean Thomas, *Which Interests Should Tort Protect?*, 61 BUFF. L. REV. 1, 2, 7 (2013); Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1 (2017). But see, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE xvii, 21, 60 (2006); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 14 (1987); Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1878 (2011).

Injustice deflection manifests across various factual scenarios—fatal shootings in routine encounters, excessive force against individuals experiencing mental health crises, or wrongful arrests precipitated by flawed intelligence.⁶⁴ Courts frequently label these incidents as misfortunes, implying they are isolated events. However, many stem from a policing culture that tolerates reflexive uses of force, harbors entrenched biases, and eschews rigorous accountability measures, prioritizing officer safety and operational expediency over the protection of individual rights.⁶⁵ Indeed, the recurrent nature of these incidents across time and various jurisdictions underscores how they are not isolated mishaps, but instead recurrent manifestations of a flawed policing paradigm.⁶⁶

The judicial opinions analyzed in this section reveal how injustice deflection operates in judicial discourse and decision-making. By categorizing avoidable deaths, wrongful arrests, and excessive force as misfortunes—often while dismissing plaintiffs’ claims on qualified immunity grounds—courts depoliticize harm, neutralize blame, and marginalize victims’ voices, preventing systemic critique. This obscures institutional practices and policies, such as racially biased threat perceptions and inadequate mental health responses, that lead to violent encounters and disproportionately harm marginalized communities.⁶⁷ Injustice deflection thus does more than merely minimize individual grievances; it saps momentum for structural reform and recasts those wronged by the state as individuals who merely encountered bad luck. Judicial opinions, then, do not merely reflect doctrinal constraints but actively construct a narrative in which police violence appears as misfortunate, incidental, and ultimately excusable.⁶⁸ This reinforces barriers to recovery for victims of state violence and entrenches doctrinal standards that render accountability and redress elusive. The cycle stymies plaintiffs’ claims while normalizing and maintaining the structural conditions fostering police violence.

The subsequent analysis of judicial opinions along these lines demonstrates this injustice deflection. Drawing on a comprehensive review of over one hundred federal court decisions adjudicating constitutional claims under 42 U.S.C. § 1983,⁶⁹ I focus on cases involving allegations against officers in which the harm inflicted was described by the court using language of misfortune, regret, or inevitability.

64. *See infra* Section I.B.

65. *See infra* Section I.B.

66. *See infra* Section II.B.

67. *See* Huq, *supra* note 48, at 74 (“[T]he Court has rendered most difficult to remedy” constitutional injuries affecting “many of the least politically powerful communities in the United States.”).

68. *See id.* at 41; Lessig, *supra* note 14, at 1035; Susan A. Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *BUFF. L. REV.* 1275, 1275, 1317 (1999).

69. 42 U.S.C. § 1983 (2000). An action is taken “under color of law” if it implicates “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *United States v. Classic*, 313 U.S. 299, 326 (1941); *see also* *United States v. Price*, 383 U.S. 787, 794 n.7 (1966) (stating that “under color of law” has the same meaning under 18 U.S.C. § 242 and 42 U.S.C. § 1983); *see, e.g.*, *Scott v. Harris*, 550 U.S. 372, 375–76 (2007); *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Brower v. County of Inyo*, 489 U.S. 593 (1989).

These opinions span a range of fact patterns, including wrongful arrests, excessive force, and fatal encounters, yet converge in their tendency to acknowledge the harm while simultaneously insulating state actors from liability. The next subsections explore this pattern in detail, analyzing both the factual contexts and the doctrinal mechanisms through which courts resolve these claims in favor of government defendants.⁷⁰

1. Deflection through Crisis Exceptionalism

In cases of excessive force, judicial opinions often recognize that a plaintiff has suffered harm. Yet the court moves to evaluate the harm as a consequence of the particular circumstances of the case, often sidestepping the systemic issues that engendered the circumstances and the unconstitutionality of said harm. Consider the following cases involving police violence against individuals in mental or physical health crises.

In *La v. Hayducka*, the district court described a fatal police shooting during an on-site mental health screening as a single “incident of misfortune” in an otherwise “flawless” practice, deflecting scrutiny from plaintiffs’ allegations that inadequate training and the lack of written protocols precipitated the fatal outcome.⁷¹ Likewise, in *Estate of Bennett v. Wainwright*, officers fatally shot a man with mental illness despite his mother explicitly warning of his condition and requesting a mental health transport instead of a standard police response.⁷² Rather than scrutinizing law enforcement’s failure to deploy a specialized response and the assignment of an officer with a known history of lethal force in a mental health crisis, the First Circuit categorized the incident as an “unfortunate” necessity.⁷³ The Ninth Circuit adopted a similar framing in *Sheehan v. City and County of San Francisco*, where officers escalated force against a woman with mental illness instead of employing de-escalation tactics, ultimately shooting her multiple times.⁷⁴ The court concluded that “although unfortunate,” there was no clearly established law requiring police to accommodate her disability even when forcefully entering her room without a warrant.⁷⁵ In *Burns v. City of Redwood City*, officers used pepper spray, batons, and force against a

70. I selected these cases through a multi-step process designed to identify judicial treatment of state-inflicted harm within contemporary doctrinal and policing contexts. I began by surveying federal court opinions from the past several decades that reflect modern enforcement practices. From this pool, I identified cases that met three criteria: (1) they involved claims against municipal or state actors, typically police officers; (2) the court described the alleged harm using language such as “misfortune,” “unfortunate,” or “regrettable”; and (3) the primary legal issue was resolved in favor of the government defendant. I then coded the cases by factual context (e.g., wrongful arrest, excessive force, fatal shooting) and by the doctrinal grounds used to dispose of the claims.

71. *La v. Hayducka*, 269 F. Supp. 2d 566, 585–86 (D.N.J. 2003).

72. *Estate of Bennett v. Wainwright*, 548 F.3d 155, 160–61 (1st Cir. 2008).

73. *Id.* at 160–61, 176–77 (citing *City of Canton v. Harris*, 489 U.S. 378, 379 (1989)) (noting a failure to train claim can only result in liability on a showing of “deliberate indifference” that caused a violation of constitutional rights).

74. *Sheehan v. City and County of San Francisco*, 743 F.3d 1211, 1215–16 (9th Cir. 2014).

75. *Id.* at 1229–30.

diabetic man experiencing a medical emergency, misinterpreting his symptoms as noncompliance.⁷⁶ The district court characterized the plaintiff's situation as "the misfortune of suffering a diabetic emergency in a very public setting,"⁷⁷ glossing over training deficiencies and the rapid resort to force that transformed a medical crisis into an act of state violence.⁷⁸

Courts have adopted a similar approach in considering police use of deadly restraints. In *Cruz v. City of Laramie*, a man exhibiting erratic behavior died due to a prone restraint known to cause asphyxiation.⁷⁹ The Tenth Circuit ruled that the officers violated the Fourth Amendment but denied liability on the basis that no clearly established precedent prohibited the restraint, reducing a preventable death to a "tragic incident" rather than a systemic failure.⁸⁰ This language overlooked the long-documented hazards of these restraints, especially for people exhibiting erratic behavior or signs of medical distress.⁸¹ In *Fernandez v. City of Cooper City*, officers similarly restrained a man with paranoid schizophrenia using multiple handcuffs and leg restraints, leading to his death.⁸² The district court deemed the force used reasonable, labeling the death "of course an unfortunate occurrence" but one that did not amount to a constitutional violation.⁸³

Collectively, these cases demonstrate that police shootings and restraint-related fatalities of individuals in mental or medical distress are tragically common. By labeling such deaths as "misfortunes," or "unfortunate incidents," courts deflect attention from systemic accountability, treating preventable tragedies as isolated rather than recurring symptoms of institutional failures. This framing avoids scrutinizing alternative approaches—such as crisis intervention teams, mental health response units, de-escalation training, or policies against high-risk restraint techniques—that could mitigate harm. In doing so, courts reinforce a framework where vulnerable individuals are treated as threats rather than patients in crisis, ensuring that the structural conditions enabling these outcomes remain unaddressed.

76. *Burns v. City of Redwood City*, 737 F. Supp. 2d 1047, 1052 (N.D. Cal. 2010).

77. *Id.* at 1051–52.

78. *See id.* (granting qualified immunity to one of the officers who performed a control grip while Mr. Burns won the lawsuit against the other two officers and was awarded damages by the jury). *See Haddad & Sherwin, \$218,000 Jury Verdict for Diabetic Mr. Universe*, HADDAD & SHERWIN CIVIL RIGHTS BLOG (May 7, 2015), <https://www.haddadandsherwin.com/2015/05/07/218000-jury-verdict-for-diabetic-mr-universe/> [<https://perma.cc/4EYG-PVKP>].

79. *Cruz v. City of Laramie*, 239 F.3d 1183, 1186, 1189 (10th Cir. 2001).

80. *Id.* at 1189–90.

81. *See, e.g.,* NAT'L INST. JUST., POSITIONAL ASPHYXIA—SUDDEN DEATH 1 (1995), <https://www.ojp.gov/pdffiles/posasph.pdf> [<https://perma.cc/ATK3-PRPY>] (stating dangers of techniques that result in positional asphyxia and identifying various forms of erratic behavior as often resulting from various forms of intoxication and pre-existing medical conditions); T.C. Chan, G.M. Vilke, & T. Neuman, *Reexamination of Custody Restraint Position and Positional Asphyxia*, 19 AM. J. FORENSIC MED. & PATHOLOGY 201 (1998).

82. *Fernandez v. City of Cooper City*, 207 F. Supp. 2d 1371, 1373, 1375 (S.D. Fla. 2002).

83. *Id.* at 1379.

2. Deflection through Policing Errors

Judicial opinions frequently characterize deadly police violence against individuals who happened to be in the wrong place at the wrong time as regrettable yet legally permissible, reinforcing a pattern of deflecting accountability for state-sanctioned harm. In *Hammett v. Paulding County*, officers executing a search warrant for Hammett's wife fatally shot Hammett in his home.⁸⁴ The Eleventh Circuit dismissed the claim as "unfortunate" and a "misfortune."⁸⁵ Likewise, in *McLenagan v. Karnes*, an officer shot an unarmed suspect based on faulty intelligence but faced no liability as the Fourth Circuit deemed the event an "extremely unfortunate" but justified mistake.⁸⁶ The same reasoning appears in *Anderson v. Russell*, where an officer permanently injured an unarmed suspect but the Fourth Circuit considered the mistaken shooting "extremely unfortunate" yet constitutional.⁸⁷ Similarly, in *Greenidge v. Ruffin*, an officer mistook a wooden nightstick for a shotgun and shot the suspect.⁸⁸ The Fourth Circuit labeled the injury an "unfortunate permanent injury" but legally permissible, and affirmed the lower court's discretion to exclude evidence alleging the officer's prior noncompliance with police procedures.⁸⁹

Courts also frequently trivialize police mistakes in cases of misidentifications and wrongful arrests as mere misfortunes, glossing over the lapses that enable such errors. In *Smoak v. Hall*, officers wrongfully detained a family based on mistaken tips about a robbery, leading to injuries and a fatal shooting of their pet.⁹⁰ The Sixth Circuit found the force excessive and the chain of events "unfortunate" but still granted officers qualified immunity.⁹¹ In *Durham v. Horner*, a deputy sheriff mistakenly secured a drug-trafficking indictment against a man, leading to over three months of wrongful detention.⁹² Despite acknowledging the error, the court granted qualified immunity, treating the issue as a "highly regrettable" but isolated mistake.⁹³ In *Tangwall v. Stuckey*⁹⁴ and *Pasiewicz v. Lake County Forest Preserve District*,⁹⁵ the courts excused wrongful arrests resulting from mistaken identifications as reasonable police actions. The court in *Tangwall v. Stuckey* also acknowledged

84. *Hammett v. Paulding County*, 875 F.3d 1036, 1038–39 (11th Cir. 2017).

85. *Id.* at 1047, 1050 n.10.

86. *McLenagan v. Karnes*, 27 F.3d 1002, 1007–08 (4th Cir. 1994).

87. *Anderson v. Russell*, 247 F.3d 125, 132 (4th Cir. 2001). *See generally* Banteka, *supra* note 57, at 365, for a discussion on police mistakes of law.

88. *Greenidge v. Ruffin*, 927 F.2d 789, 790 (4th Cir. 1991).

89. *Id.* at 793.

90. *Smoak v. Hall*, 460 F.3d 768 (6th Cir. 2006).

91. *Id.* at 785–86 ("We wish to emphasize that, although we are granting qualified immunity to the THP troopers on most aspects of the Smoaks' claims, we do not condone the actions of law enforcement in this case.").

92. *Durham v. Horner*, 759 F. Supp. 2d 810 (W.D. Va. 2010).

93. *Id.* at 812, 814.

94. *Tangwall v. Stuckey*, 135 F.3d 510, 520 (7th Cir. 1998).

95. *Pasiewicz v. Lake County Forest Preserve District*, 270 F.3d 520, 526 (7th Cir. 2001) ("Such is the misfortune of even an innocent person mistakenly identified as a culprit.").

that it did “not minimize the misfortune that occurred,”⁹⁶ but emphasized that being misidentified, while unfortunate, does not itself establish a constitutional violation.⁹⁷

In *Diop v. City of New York*, the district court granted qualified immunity after the police mistook a crime victim for a perpetrator and arrested him when he sought police assistance, characterizing the wrongful arrest a “chain of misfortune.”⁹⁸ In *Maney v. Garrison*,⁹⁹ a police dog bit an unsheltered man mistakenly suspected of robbery. The Fourth Circuit noted that he “did not deserve the misfortune that befell him” but still granted qualified immunity to the officer.¹⁰⁰

These cases illustrate how courts often invoke misfortune to describe errors that are neither random nor devoid of broader institutional context. This invocation effectively absolves police departments of accountability for investigative lapses, biased assumptions, and aggressive tactics.¹⁰¹ In each instance, the courts acknowledge harm but swiftly deflect, categorizing it as a misfortune and an unavoidable byproduct of policing. While this approach may shield officers from liability on existing doctrinal grounds, it ignores deeper structural inquiry into why such errors recur and whether prevailing legal standards inadvertently enable them.¹⁰² Courts need not offer policy prescriptions or act as reform architects. But by declining to interrogate how doctrine interacts with entrenched practices, and by failing to articulate wrongs even when they cannot be remedied, courts reinforce a framework that insulates harms from scrutiny.

3. Deflection through Normalizing Preventable Police Killings

In the cases that follow, courts acknowledge inflicted harm but dismiss it as a misfortunate or regrettable consequence of policing contingencies, reinforcing the notion that such deaths are inevitable rather than preventable failures of discretion, training, or policy. This framing minimizes shortcomings—such as reckless pursuits, ineffective use of non-lethal force, and unnecessary uses of deadly force—by treating them as unavoidable byproducts of law enforcement.

Consider *Salim v. Proulx*, where an officer killed an unarmed fourteen-year-old minor who had escaped from a juvenile detention center a few weeks prior.¹⁰³ The

96. *Tangwall*, 135 F.3d at 520 (citing *Torchinsky v. Siwinski*, 942 F.2d 257, 264 (4th Cir. 1991)).

97. *Id.*

98. *Diop v. City of New York*, 50 F. Supp. 3d 411, 415 (S.D.N.Y. 2014).

99. *Maney v. Garrison*, 681 F. App'x 210, 214 (4th Cir. 2017).

100. *Id.* at 223 (“None of that, however, should be taken as minimizing the impact of these events on Appellant, who did not deserve the misfortune that befell him. Nor do I mean to imply that officer safety is more important than citizen safety. Both are important interests; when in tension they must be carefully balanced.”).

101. See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 660–61 (S.D.N.Y. 2013); Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 SOC. FORCES 1009, 1009–1030 (2005).

102. See Peter Brooks, “Inevitable Discovery”—Law, Narrative, Retrospectivity, 15 YALE J.L. & HUMAN. 71, 72–73 (2003) (arguing that courts reframe stories around contested evidence to make outcomes seem inevitable despite potential constitutional violations).

103. *Salim v. Proulx*, 93 F.3d 86 (2d Cir. 1996).

Second Circuit granted qualified immunity to the officer, even though it found the killing of the minor “regrettable.”¹⁰⁴ In *Acre v. Chambers*, officers fatally shot a man after deploying an ineffective taser.¹⁰⁵ The district court acknowledged that the death was “deeply distressing and regrettable,”¹⁰⁶ but the officers’ actions were shielded by qualified immunity.¹⁰⁷ A similar pattern appears in *Campbell v. White*, where a state trooper’s high-speed pursuit without required lights or sirens led to a fatal motorcycle collision.¹⁰⁸ The Seventh Circuit dismissed it as an “an unfortunate and regrettable accident” but not a seizure under the Fourth Amendment, avoiding scrutiny of deficient pursuit policies.¹⁰⁹

An instructive counterpoint appears in *Tennessee v. Garner*, illustrating how courts can frame police encounters without deflecting injustice.¹¹⁰ In this case, the Court held that Tennessee’s statute was unconstitutional insofar as it authorized the use of deadly force against an apparently unarmed, nondangerous fleeing suspect, rejecting the notion that a suspect’s escape alone justifies lethal measures.¹¹¹ While acknowledging that “it is no doubt unfortunate when a suspect who is in sight escapes,” the Court concluded that “the harm resulting from failing to apprehend him does not justify the use of deadly force to do so” and that “a police officer may not seize an unarmed, nondangerous suspect by shooting him dead.”¹¹² Rather than treating the killing as an inevitable misfortune, the Court required that police use of deadly force be justified by a concrete threat of serious harm, not by generalized law enforcement objectives.¹¹³ The Court affirmed the Sixth Circuit’s judgment and remanded for further proceedings on the possible § 1983 liability of the Memphis Police Department and the City of Memphis under *Monell*.¹¹⁴ Although *Garner* established an important constitutional limit on deadly force, its practical deterrent effect has been mixed. Subsequent decisions have made it harder for plaintiffs to translate *Garner*’s rule into damages remedies, and police shootings of fleeing suspects continue despite its formal constraints.¹¹⁵

104. *Id.* at 87.

105. *Acre v. Chambers*, 129 F. Supp. 3d 1295 (M.D. Ala. 2015).

106. *Id.* at 1315.

107. *Id.* (“[T]he qualified immunity defense ‘recognizes the problems that government officials like police officers face in performing their jobs in dynamic and sometimes perilous situations.’” (quoting *Merricks v. Adkisson*, 785 F.3d 553, 558 (11th Cir. 2015))).

108. *Campbell v. White*, 916 F.2d 421 (7th Cir. 1990).

109. *Id.* at 423.

110. *Tennessee v. Garner*, 471 U.S. 1 (1985).

111. *Id.* at 11.

112. *Id.* at 10–11.

113. *Id.*

114. *Id.* at 21–22.

115. See, e.g., Harmon, *supra* note 53, 1140–43; Schwartz, *supra* note 25, 51–53, 56–58.

C. Implications of Injustice Deflection

The practice of injustice deflection reflects the broader sociolegal reluctance to confront the systemic dimensions of police misconduct and violence.¹¹⁶ Through injustice deflection, courts perpetuate a jurisprudence that minimizes harms and obstructs meaningful reform. Through the application of qualified immunity or excessive force doctrines, judicial opinions shield law enforcement from accountability by portraying police-inflicted harm as regrettable but unavoidable. This deflection forecloses broader inquiries into the structural conditions that enable excessive force, wrongful arrests, and deadly police encounters. In doing so, courts contribute to a feedback loop in which deficiencies go unaddressed, precedent remains underdeveloped, and future misconduct becomes harder to remedy. Victims of state violence are left without meaningful avenues for justice, and the law becomes an obstacle to structural reform.

The following Part argues that, by adopting an injustice-centered lens, courts and policymakers can begin to dislodge the legal and cultural norms that perpetuate injustice deflection. Recognizing police misconduct as injustice becomes a necessary step toward building more equitable legal frameworks that prioritize accountability, systemic change, and the restoration of individual rights.

II. FROM MISFORTUNE TO INJUSTICE

If we genuinely aspire to transform policing and its attendant systems of accountability, we must abandon injustice deflection.¹¹⁷ Policing failures are often better understood as fundamental injustices—embedded in law, policy, and social norms, rather than as mere byproducts of bad luck or individual miscalculation. This Part lays the normative groundwork for understanding these failures as injustices rather than misfortunes. By elucidating why certain police practices, and the legal frameworks that sustain them, merit this reframing, we move beyond descriptive accounts of wrongdoing and instead grapple with deeper normative implications. This recasting reorients our moral and legal baselines, compelling us to interrogate the broader dimensions of police violence and the institutional structures that shield it from scrutiny. Through this interrogation, we can begin to construct legal and institutional frameworks that reduce state violence while also ensuring meaningful accountability and redress for state-inflicted harm.

A. Centering Injustice

“Justice” occupies an exalted position in Western political and legal discourse;¹¹⁸ “injustice,” by contrast, often receives only secondary attention and is

116. See Banteka, *supra* note 57, at 390.

117. See *supra* Part I.

118. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 11–12 (1971); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150–53 (1974); MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 9–10, 19–21, 27–30

often collapsed into the mere absence of justice.¹¹⁹ Under what Professor Judith Shklar terms the “normal model” of justice, legal systems begin from presumptively just principles that turn into rules, and then define injustice as the breach of those recognized rules.¹²⁰ While this formalist approach promotes clarity and predictability,¹²¹ it can conflate injustice with illegality alone, relegating the consequences of conduct that may be ethically, morally, or politically problematic but technically lawful to the domain of misfortune.¹²² In doing so, it overlooks a wide range of profound harms that do not map neatly onto any lawful/unlawful dichotomy and thus obscures the pervasiveness and complexity of injustice.¹²³

This normal model of justice can thus be morally, politically, and epistemically restrictive. Tying injustice exclusively to rule violations ignores the possibility that the governing rules themselves may be rooted in problematic histories, social, economic, and racial hierarchies, structural biases, or entrenched institutional customs.¹²⁴ This challenge is especially salient in the realm of state violence and policing, where legal rules on official conduct are often unclear, incomplete, or both.¹²⁵ Assessments of what an officer “would have” or “should have” done frequently hinge on unclear standards coupled with interpretative judgments riddled

(2009); AMARTYA SEN, *THE IDEA OF JUSTICE* 85–86 (2009); HART, *supra* note 32, at 202–03; RONALD DWORKIN, *LAW’S EMPIRE* 176–80 (1986); MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 90–94 (2006); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 112–15 (1997).

119. See JOHN STUART MILL, *UTILITARIANISM* 79 (1874); SHKLAR, *supra* note 21, at 12–16; IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 39–45 (1990); ERIC HEINZE, *THE CONCEPT OF INJUSTICE* 30–36 (2013).

120. SHKLAR, *supra* note 21, at 11–13, 17.

121. See BRIAN TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE* 1–3 (2010); Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 539 (1988).

122. See ALEXY, *supra* note 20 (arguing that strict legal positivism allows for the legitimacy of unjust laws by excluding moral validity from legal analysis); DWORKIN, *supra* note 20 (asserting that positivism inadequately addresses morally problematic but technically legal conduct, advocating for a principles-based legal interpretation); FULLER, *supra* note 20 (criticizing legal positivism for failing to recognize that legal systems require internal morality to prevent injustice).

123. See SHKLAR, *supra* note 21, at 14–18 (criticizing traditional legal theories for focusing on justice while overlooking how legal systems fail to redress real experiences of injustice).

124. See Mark Tushnet, *Critical Legal Studies and the Rule of Law*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW* 328, 329, 339 (Jens Meierhenrich & Martin Loughlin eds., 2021) (arguing that the rule of law is not a neutral or objective framework but an ideological project that can reinforce existing power structures and legal hierarchies); Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707, 1713–16 (1993) (arguing that the law has historically entrenched racial hierarchy by treating whiteness as a form of property, granting legal privileges to white identity); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331, 1347–52 (1988) (analyzing how legal reforms ostensibly aimed at racial justice can reinforce existing racial hierarchies by legitimizing systemic inequalities under the guise of neutrality).

125. See, e.g., Chuck Wexler, *Why We Need To Challenge Conventional Thinking On Police Use Of Force*, in *GUIDING PRINCIPLES ON USE OF FORCE* 15–16 (2016), <https://www.policeforum.org/assets/guidingprinciples1.pdf> [<https://perma.cc/M8US-RTF5>].

with these histories and structures rather than incontrovertible factual proof.¹²⁶ In many contested instances of police violence or misconduct, debates—for instance, over threat or necessity of police force or action—rarely turn on a single, clear evidentiary record.¹²⁷

Additionally, injustice is difficult to articulate in large part because social and legal institutions shape which harms we acknowledge as actionable injustices and which we dismiss as inevitable misfortunes. These determinations are historically and socially contingent. What one era or community regards as an unavoidable misfortune may later be recognized as an egregious injustice.¹²⁸ Child labor, for instance, was once viewed as an unfortunate but necessary response to poverty and industrialization, but over the twentieth century it was increasingly reframed as exploitative of children’s vulnerability and incompatible with their basic rights to development and education.¹²⁹ Similarly, women’s exclusion from the franchise was once considered a permanent condition of civic life, whereas now we view it as an injustice deeply rooted in gender discrimination.¹³⁰ Likewise, forced removal of indigenous peoples was rationalized as an unfortunate yet necessary historical fact, but modern perspectives regard it as a grave injustice involving dispossession, cultural erasure, and enduring harm.¹³¹ These shifts underscore that our conceptions of injustice are not fixed or self-evident; they evolve in response to changing social, moral, and political judgments.¹³²

The stakes of these conceptual boundaries are especially high in policing, where practices such as invasive stops and searches, profiling, and lethal force frequently remain permissible—or at least not explicitly prohibited—under current doctrine.¹³³ The very legal doctrines that govern police behavior and accountability, from excessive use of force standards to qualified immunity, often facilitate

126. See Alpert & Smith, *supra* note 53, at 486; Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 223–224 (2017); Lee, *supra* note 53, at 645–48.

127. See Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 2031–35 (2017) (tracing how structural features of trials and suppression hearings, including the routine qualification of officers as “experts” produce evidentiary records that systematically privilege police accounts of contested encounters); James Stone, *Past-Acts Evidence in Excessive Force Litigation*, 100 WASH. U. L. REV. 569, 572–74 (2022) (discussing the evidentiary imbalances in excessive force cases, where plaintiffs’ pasts are scrutinized while officers’ prior misconduct is often excluded, leading to contested narratives in police violence incidents).

128. SHKLAR, *supra* note 21, at 2, 5, 55; see also J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (2003) (arguing that people, as agents rather than “puppets” of cultural evolution, do not need to accept injustice as necessary for achieving proper social functioning).

129. See, e.g., Leticia M. Saucedo & Andrea Senteno, *Children, Labor, and Child Labor*, 57 U.C. DAVIS L. REV. 2967, 2971–76, 2978–80 (2024); James J. Silk & Meron Makonnen, *Ending Child Labor: A Role for International Human Rights Law?*, 22 ST. LOUIS U. PUB. L. REV. 359, 360–67 (2003).

130. See, e.g., Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 951–54 (2002).

131. See, e.g., W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533, 1536–39 (2023); Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 720–25 (1986).

132. SHKLAR, *supra* note 21, at 5, 66.

133. See Banteka, *supra* note 23.

recasting serious harms as misfortunes rather than legally cognizable wrongs.¹³⁴ This doctrinal reality positions injuries caused by state action at the periphery of moral and legal culpability. By centering injustice in our analysis of policing failures, its various manifestations, and the deep impact on those who suffer it,¹³⁵ we can restore the moral and political salience of these harms and call attention to the normative frameworks that permit or excuse state violence rather than neutrally regulate it.

B. Active and Passive Injustice

Injustice may be active or passive.¹³⁶ Active injustice occurs through explicit violations of established rules—for example, when an officer intentionally uses excessive force in clear defiance of a bright line constitutional rule.¹³⁷ These deliberate acts of wrongdoing align most closely with the normal model of justice, in which existing laws can theoretically be applied to determine harm, blame, and redress.¹³⁸ Yet, this represents only one aspect of a broader spectrum of injustice that permeates social relations and institutional structures.¹³⁹

Passive injustice, by contrast, unfolds through failures to prevent or remedy harm despite having the capacity and responsibility to do so.¹⁴⁰ This form of injustice is particularly insidious, because it typically occurs through negligence, complacency, or indifference to patterns of misconduct rather than overt malfeasance.¹⁴¹ While it may not violate clearly delineated legal rules, passive injustice can inflict immense harm and engender profound distrust and disillusionment among those who suffer it.¹⁴² The normal model of justice exacerbates this problem by glossing over such harms, assuming that strict enforcement of existing rules is sufficient to identify and address wrongdoing. In doing so, it ignores the deeper structural forces that disenfranchise entire communities. In policing, it is precisely within this gap between the extensive reach of state power and the limited remedies available to individuals that accountability too often dissolves.

This shortcoming of the normal model of justice has far-reaching consequences. Passive injustice frequently eludes rigid legal adjudication, which mostly centers on enforcing established rules rather than preventing or redressing harm that lies

134. See *supra* Part I.

135. See, e.g., Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 79–91, 94 (2007) (suggesting that the suspect’s subjective perspective may deserve more weight).

136. SHKLAR, *supra* note 21, at 5–7, 40, 55.

137. *Id.* at 19.

138. *Id.* at 17, 21, 41.

139. *Id.* at 22, 41, 52, 57.

140. Cf. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 707 (2005) (arguing that the doing/allowing distinction is incoherent or unwise as applied to the state because “[w]hatever its value as a moral concept where individuals are concerned, the act/omission distinction misfires in the general setting of government regulation”).

141. SHKLAR, *supra* note 21, at 64–65, 67–71.

142. *Id.* at 52, 57.

outside conventional legal categories.¹⁴³ Individuals who suffer a harm that does not fit neatly into a recognized cause of action risk having their experiences dismissed as mere misfortune—even when those injuries stem from patterns of disempowerment or official impunity.¹⁴⁴ This neutralizes the experiences of victims of state violence, marginalizing their voices and cementing the power disparities that perpetuate passive injustice.¹⁴⁵

This form of injustice is particularly acute in the policing context, where institutional structures systematically fail to prevent or remedy harm. Broad discretion, robust legal immunities, and minimal oversight create conditions conducive to permissiveness.¹⁴⁶ Remedies often fail not because individual officers have flawlessly complied with every explicit rule, but because the rules themselves are inadequate, and the institutions responsible for prevention and accountability remain ineffective. For instance, courts may grant qualified immunity even where officers use fatal force in contested encounters, on the ground that no prior case with sufficiently similar facts clearly established the unlawfulness of their conduct.¹⁴⁷ Similarly, internal review boards and civilian oversight agencies often lack enforcement power or independence, allowing departments to excuse recurring misconduct as policy-compliant rather than structurally harmful.¹⁴⁸ Civilian complaints about police violence thus reflect not only frustration with specific officers, but also disillusionment with the broader legal and institutional structures that appear to shirk their responsibilities.¹⁴⁹

Recognizing these passive dimensions of injustice alongside more active instances of misconduct illuminates harms that remain hidden when we focus too narrowly on formal legal violations. Recasting these harms as injustices rather than misfortunes reintroduces moral and political urgency into legal discourse on

143. *Id.* at 7, 17.

144. *Id.* at 7.

145. *Id.* at 5–6, 9, 37.

146. *See* *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

147. *See, e.g.,* *Kisela v. Hughes*, 584 U.S. 100, 104–05 (2018) (per curiam) (granting qualified immunity to an officer who shot a woman holding a kitchen knife near her roommate, emphasizing that courts must not define clearly established law at a high level of generality and faulting the Ninth Circuit for failing to identify precedent that “squarely” governed the specific facts at issue); *City of Tahlequah v. Bond*, 595 U.S. 9, 11–12 (2021) (per curiam) (granting qualified immunity to officers who fatally shot a man wielding a hammer during a domestic-disturbance call, stressing that none of the decisions on which the Court of Appeals relied established that the officers’ conduct was unlawful and that neither the panel nor the plaintiff had identified “a single precedent finding a Fourth Amendment violation under similar circumstances”).

148. *See* U.S. COMM’N ON C.R., POLICE USE OF FORCE: AN EXAMINATION OF MODERN POLICING PRACTICES 76–78 (2018).

149. *See* Bell, *supra* note 8, at 2081–83; Smith, *supra* note 62, at 129 (“[a]ddressing the[] causes [of police violence against Black communities] requires more than accountability for individual police officers” because “[i]ndividual officers did not invent segregation, stereotyping, and racially inflected dehumanization”; because “[i]ndividual officers do not decide to disproportionately patrol, frisk, or question people of color”; because “[i]ndividual officers do not decide the rules of engagement for physical contact with the citizenry: when officers may legally stop people, or what they may do when they stop them”; and because “[i]ndividual officers do not decide what we label ‘crime’ and when we as a society decide to invoke the most violent arm of the state to solve social ills”).

policing. It recognizes that injustice, both active and passive, demands more than regret—it demands accountability, redress, and substantive transformation of the very structures that wield and legitimize unchecked state force.

C. Epistemic Injustice

The persistent failure of courts to legally recognize and remedy the harms of policing also perpetuates an epistemic injustice, that is the systemic discounting of the knowledge and interpretive perspectives of state violence victims. While courts may at times acknowledge the existence of injustice in policing, the doctrines they apply often prevent that recognition from translating into legal redress or institutional accountability. Where active injustice refers to deliberate, overt misconduct, and passive injustice to failures to prevent or remedy harm, epistemic injustice erases victims' perspectives from legal discourse and public consciousness, operating at a deeper level that makes it difficult to name and address such harms.¹⁵⁰

Epistemic injustice involves “how knowledge production is damaged by excluding or discrediting the speech of certain social groups.”¹⁵¹ Professor Miranda Fricker identifies two main forms of epistemic injustice.¹⁵² Testimonial injustice arises where biases embedded in institutional practices or cultural assumptions unfairly diminish a speaker's credibility.¹⁵³ In such cases, the hearer's prejudice causes them to “miss out on a piece of knowledge.”¹⁵⁴ Hermeneutical injustice, in turn, is the harm inflicted when a “significant area of one's social experience” is rendered unintelligible to the wider community due to structural inequalities and marginalization.¹⁵⁵ These forms of epistemic injustice are intertwined: those who attempt to articulate a marginalized position suffer a credibility deficit based on identity prejudice, inhibiting their attempts to frame their experiences as injustice and thereby excluding negatively stereotyped groups from mainstream discourse and record.¹⁵⁶

150. See FRICKER, *supra* note 30, at 17; SULLIVAN, *supra* note 26.

151. M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1214 (2020).

152. FRICKER, *supra* note 30.

153. *Id.* at 17.

154. *Id.*

155. See *id.* at 158 (describing harms that arise when an individual's credibility is discounted due to their identity); see, e.g., S. Lisa Washington, *Survived and Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1106–07, 1109 (2022) (arguing that the family regulation system distorts knowledge production by imposing misleading narratives of victimhood and dismissing alternative perspectives, particularly those of marginalized women of color); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3, 57 (2017) (asserting that the legal system's response to sexual violence is shaped by “credibility discounting,” a phenomenon rooted in bias, and suggesting that framing these credibility deficits as instances of epistemic injustice highlights the full extent of harm suffered by disbelieved complainants); Hanan, *supra* note 151, at 1191 (noting that prisoners, often stigmatized and excluded, are generally not seen as credible sources of information, which results in a limited societal understanding of incarceration and renders prison conditions largely irrelevant in sentencing decisions, with epistemic injustice offering a useful lens to address these gaps).

156. FRICKER, *supra* note 30, at 159; see also Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1104 (2008) (arguing that “outsiders” experience discrimination in a “fundamentally different framework than insiders”).

In cases of police violence or misconduct, these two forms of epistemic injustice converge to sideline the stories of individuals harmed by the state, reducing victims from subjects of injustice into mere objects of pity. Repeated forms of violence, when waved aside as misfortunes, signal more than just moral abdication. They also reveal mechanisms to discount victims' credibility and deprive them of tools to name their experiences as injustice.¹⁵⁷ For example, courts often require that a victim's experiences of a constitutional violation match a nearly identical precedential case to survive dismissal.¹⁵⁸ This requirement relegates many credible first-person accounts legally irrelevant simply because no exact precedent exists.¹⁵⁹ Procedural doctrines further entrench this epistemic exclusion. Under *Pearson v. Callahan*,¹⁶⁰ courts can dismiss cases without ever determining whether the alleged misconduct was unconstitutional, effectively bypassing merits review.¹⁶¹ This maneuver sidelines plaintiffs' narratives, rendering their experiences legally irrelevant even when they detail severe harm or egregious rights deprivations, reinforcing testimonial injustice.¹⁶² As a result, victims of state violence often face a system that treats their claims as morally grievous yet legally insufficient simply because no court has previously ruled on an identical factual scenario.

This exclusion perpetuates a feedback loop of doctrinal stagnation.¹⁶³ Courts' reluctance to adjudicate new constitutional claims prevents the law from evolving to address generalized harms, and future plaintiffs find themselves similarly constrained from establishing that certain governmental conduct violates constitutional rights and deserves redress.¹⁶⁴ Because no decision has recognized these harms as unconstitutional, they remain shielded indefinitely.¹⁶⁵ Ultimately, victims'

157. See Tuerkheimer, *supra* note 155, at 3 (defining "credibility discounting" as "an unwarranted failure to credit an assertion where this failure stems from prejudice").

158. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam).

159. *Harlow*, 547, U.S. at 818 (noting that the Court's exact phrasing of clearly established law differs depending on the case). Compare *Plumhoff v. Rickard*, 572 U.S. 765, 778 (2014) (requiring "a statutory or constitutional right that was 'clearly established' at the time of the challenged conduct" (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011))), with *Ziglar v. Abbasi*, 582 U.S. 120, 151 (2017) (requiring "legal rules that were clearly established at the time [the action] was taken" (alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987))).

160. See *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding that courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first," in part to avoid unnecessary constitutional decisions and reduce burdens on courts and government officials).

161. *Id.*

162. *Id.* (permitting courts to skip the "constitutional violation" question); Ralph, *supra* note 28, at 1354–76; Anne Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 607–08 (2018).

163. See Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 6 (2015) (identifying that "concerns about constitutional stagnation [after *Pearson*] . . . appear to have at least some empirical foundation" and "because of *Pearson*, when courts are confronted with claims that may constitute violations of not yet clearly established constitutional rights, they sometimes decline to clarify constitutional doctrine").

164. See Ralph, *supra* note 28, at 1377.

165. See generally Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 140–42, 175–77 (warning that skipping the merits in qualified immunity cases risks constitutional stagnation by preventing courts from articulating new constitutional rules); Sarah L. Lochner, Note, *Qualified*

experiences become unrecognized by the law, compounding the structural inequities at the root of the harm.¹⁶⁶ In failing to identify these instances of misconduct as manifestations of broader injustice, courts reinforce the very power imbalances that engender injustice.¹⁶⁷ The legal system forecloses victims from the hermeneutical tools to describe their suffering in generalized or systemic terms, and stymies efforts to reform. Because allegations of police misconduct often arise in contexts where structural factors shape one's interactions with the state, the legal system disproportionately subjects certain individuals and communities to this hermeneutical injustice.¹⁶⁸ And by failing to credit their testimony, the law reproduces social hierarchies of credibility.¹⁶⁹

When courts decline to acknowledge these harms as actionable, they deflect injustice. If no controlling precedent directly prohibits the officer's conduct, no injustice formally occurs under the normal model of justice. In this way, the law fails to cultivate any conceptual vocabulary to recognize patterns of harm. Instead, it perpetuates the official narrative that such harms are tragic anomalies. Victims' narratives are left unverified or legally peripheral.¹⁷⁰ The gap between the state's professed duties and its refusal to recognize moral or constitutional failings fosters a sense of betrayal among victims of state-sanctioned violence.¹⁷¹ The sense of being wronged extends beyond the specific officer's actions in a discrete case to the entire ecosystem that consistently disregards the knowledge that victims bring about being policed.

Moreover, the courts' refusal to adjudicate new constitutional claims filters out the very stories that could expand legal understanding.¹⁷² Plaintiffs' experiences remain beyond the official record, precluding potential doctrinal development. Insisting that no recognized rule was violated stifles the creation of a broader moral consciousness that might expose policing practices as unjust. Epistemically, this

Immunity, Constitutional Stagnation, and the Global War on Terror, 105 NW. U. L. REV. 829, 830–32, 859–64 (2011) (arguing that post-*Pearson* qualified immunity courts avoid deciding constitutional questions, leaving future plaintiffs unable to show clearly established rights); *Zadeh v. Robinson*, 902 F.3d 483, 499 (5th Cir. 2018) (Willett, J., concurring) (describing qualified immunity as an “Escherian Stairwell” because “[p]laintiffs must produce precedent even as fewer courts are producing precedent,” so “[n]o precedent = no clearly established law = no liability”).

166. Ralph, *supra* note 28, at 1344–46 (explaining doctrinal feedback loop and the effect on civil rights plaintiffs).

167. See Washington, *supra* note 155, at 1108.

168. See Robinson, *supra* note 156, at 1104.

169. See Julia Simon-Kerr, *Law's Credibility Problem*, 98 WASH. L. REV. 179, 183–84, 199 (2023) (arguing that credibility assessments “reinforce[] social norms,” as decisionmakers focus on whether a witness “is conforming with social expectation,” making credibility “a site of fixed racial bias” shaped by the assessor’s “subjective lived experience, beliefs, or position in the world”).

170. See ALEXANDRA LAHAV, IN PRAISE OF LITIGATION (2017) (discussing the damaging effects of excluding certain narratives from the law).

171. See Barnes, *supra* note 21, at 93 (finding that subjects felt institutional betrayal after reading vignettes about police abuse); Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCH. 575, 577, 579 (2014).

172. See Ralph, *supra* note 28, at 1342–44.

amounts to a collective interpretive gap, wherein those most directly harmed by the state are barred from contributing to the evolution of legal knowledge.¹⁷³ The upshot is a double injustice: victims of state violence suffer the material harm of excessive or discriminatory policing, and then an epistemic injustice that silences their interpretation of their own suffering and refuses to see a broader injustice in it.

Reframing these harms as injustice is essential to achieving epistemic justice: the process of restoring credibility to victims and developing interpretive frameworks that recognize individual and systemic harm in police abuses.¹⁷⁴ True remediation requires crediting victims' accounts and acknowledging the structural dimension of repeated police abuses, a shift that can transform the law's consciousness. Epistemic justice reframes police-inflicted harms not just as physical or constitutional violations but as critical sites of knowledge production.¹⁷⁵ A legal system that actively values victims' testimony against the state and develops tools to expose police violence can disrupt the cycle of exclusion sustaining existing doctrine. By integrating victims' accounts into the body of recognized legal knowledge,¹⁷⁶ the law can move beyond deflection and passive complicity to actively confront the conditions that enable injustice, fostering legal doctrines that address victims' experiences and a more robust vision of justice.¹⁷⁷

D. Challenging the Legalist Model of Injustice

Legalism purports that legitimate conduct is defined by a set of rights and duties set by rules,¹⁷⁸ often codified in law and administered through formal procedures.¹⁷⁹ The approach of the normal model of justice to encompass all forms of injustice within a framework of clear and articulated rules and standards of justice represents a form of legalism.¹⁸⁰ Legalism's proponents often celebrate its capacity for neutrality: when everyone is bound by the same set of rules, justice appears guaranteed by the objectivity of rule application, thereby avoiding the biases of judges or officials.¹⁸¹ Yet this veneer of fairness can be deceptive. Sustaining this

173. See John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, SUP. CT. REV. 115, 117 (2009) ("Going directly to qualified immunity will not only inhibit the development of constitutional doctrine, but will also degrade existing rights to a least-common-denominator understanding of their meaning.").

174. SULLIVAN, *supra* note 26, at 293–94.

175. See FRICKER, *supra* note 30, at 17; Hanan, *supra* note 151, at 1214.

176. Cf. Washington, *supra* note 155, at 1107–09 (explaining that "the family regulation system facilitates damaged knowledge production by requiring false or inauthentic victimhood narratives and excluding alternate knowledge," especially that of poor women of color).

177. SULLIVAN, *supra* note 26, at 296–99.

178. SHKLAR, *supra* note 21, at 17.

179. See *id.* at 1–28.

180. *Id.* at 17.

181. See FULLER, *supra* note 20, at 33–44; Lon L. Fuller, *The Forms and Limits of Adjudication*, in THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 101 (Kenneth Winston ed., 2001); HART, *supra* note 32, at 205; see also, e.g., Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641, 641–42 (2012) (observing that certain judges view their role as applying established law to facts, noting "John Roberts has been

legalist perspective requires the assumption that clear and identifiable rules and principles exist to determine when any injustice has taken place.¹⁸² But though legalism can serve as a bulwark against arbitrary power, it also tends to exclude vital moral, political, and ultimately legal questions that do not fit neatly into its established rules or doctrinal categories.¹⁸³ In these matters, as is often true of instances reflecting passive injustice, focusing on the enforcement of existing rules or standards can obscure injustice.¹⁸⁴

In policing contexts that often intersect with the absence of pervasive, clearly established rules or standards, this problem is especially acute.¹⁸⁵ In modern § 1983 damages suits against police officers, accountability frequently turns on qualified immunity, that is, on whether officials violated “clearly established” statutory or constitutional rights.¹⁸⁶ This tends to reduce the moral and social complexity of police-civilian encounters to a technical inquiry: Did the officer’s actions transgress a specific standard set forth in prior case law?¹⁸⁷ Or did the victim’s harm arise from a novel factual situation, unaddressed by existing legal precedent, rendering the misconduct effectively invisible to courts? When the law is unsettled or facts do not map neatly onto established precedent, even serious harm falls outside doctrinal categories, and victims are denied legal redress.¹⁸⁸

Victims who challenge these barriers that block otherwise meritorious claims are often recast as seeking judicial activism, and their claims are recast as demands for courts to overstep interpretive constraints.¹⁸⁹ Courts explain away these harms as unfortunate occurrences beyond the law’s reach and often within the outer bounds of officers’ legitimate discretion.¹⁹⁰ Viewed in isolation, each incident may appear legally ambiguous or factually complex. Yet, for those who endure them, these incidents form a larger web of betrayal, indignity, and fear—an interlocking

both praised and scorned for the metaphor he presented to the Senate Judiciary Committee at the hearing on his confirmation to be Chief Justice of the United States: “[I]t’s my job to call balls and strikes” (quoting *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J., D.C. Circuit)).

182. See Yack, *supra* note 25.

183. See generally MARION SMILEY, *MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY: POWER AND ACCOUNTABILITY FROM A PRAGMATIC POINT OF VIEW* 1 (1992) (identifying the ways in which political considerations, such as ascriptions of communal membership and the distribution of power in society, shape judgments about individual responsibility).

184. See Yack, *supra* note 25, at 1343–44.

185. See Schwartz, *supra* note 25, at 25–46.

186. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); Seth W. Stoughton, Kyle McLean, Justin Nix & Geoffrey Alpert, *Policing Suspicion: Qualified Immunity and “Clearly Established” Standards of Proof*, 112 J. CRIM. L. & CRIMINOLOGY 37, 61 (2022); Emily S. Fleischer, *Departmental Policies as Clearly Established Law*, 90 U. CHI. L. REV. 1435, 1435 (2023).

187. *Harlow*, 457 U.S. at 818.

188. Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1722 (1988).

189. See Joan Biskupic, *Hill Republicans Target ‘Judicial Activism’: Conservatives Block Nominees, Threaten Impeachment and Term Limits*, WASH. POST, Sept. 13, 1997, at A8.

190. See *supra* Part I.

tapestry of suffering that remains obscured when justice is equated only with rule-following in a doctrinal landscape where rules are rarely clearly established.¹⁹¹

This dynamic perpetuates epistemic silencing by dismissing the experiences of victims who fail to meet the formal thresholds for legally cognizable harm.¹⁹² A framework that grounds injustice solely in legal regularity overlooks the insights that emerge only from the partial, embodied perspectives of those most affected.¹⁹³ A strictly legalist approach to policing harms is bound to marginalize those whose experiences fall outside the narrow channels of constitutional doctrine. But if we affirm the equal moral worth of all individuals, then justice requires amplifying voices of all, especially those historically unheard, and confronting the systemic character of harm that law, as currently structured, struggles to name.

After all, the claim that legalism is neutral and objective conceals its own ideological origins.¹⁹⁴ The very separation of law from morals that largely permeates our legal system and informs legalism is itself a product of liberal political commitments.¹⁹⁵ Liberal legalism is aimed, in part, to constrain government power and protect individual rights by subjecting the government to formal legal checks.¹⁹⁶ While this produced many benefits, such as due process guarantees, it also entrenched an approach to justice that often obscures correcting broader, systemic forms of harm.¹⁹⁷ This limitation is not merely theoretical; it directly shapes legal doctrines that routinely shield state actors from accountability.

In policing, for example, the typical defenses of qualified immunity—such as claims that officers would face financial ruin or that more accountability would chill lawful policing—illustrate how legal formalism can convert ideological preferences into ostensibly neutral, technical rules.¹⁹⁸ Yet empirical studies suggest that law enforcement officers almost never bear personal financial loss due to widespread indemnification practices, and there is scant evidence that eliminating qualified immunity would hinder lawful policing.¹⁹⁹ Still, the doctrine persists, less

191. See Yack, *supra* note 25, at 1336–37.

192. See Ralph, *supra* note 28, at 1352–53.

193. Compare RAWLS, *supra* note 118, at 136–42, with SKHLAR, *supra* note 21, at 1–28.

194. SKHLAR, *supra* note 21, at 8.

195. See *id.* at 7–8; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 603 (1958); JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 194, 199, 210, 213–14, 219–23 (1983); HART, *supra* note 32, at 211.

196. See JUDITH N. SHKLAR, POLITICAL THOUGHT AND POLITICAL THINKERS 3, 21–22 (1998); Brian Z. Tamanaha, *A Concise Guide to the Rule of Law*, in RELOCATING THE RULE OF LAW 3, 3–4 (Gianluigi Palombella & Neil Walker eds., 2009).

197. See SKHLAR, *supra* note 21, at 24–28; Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 3–4 (1979).

198. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 887–90, 938–39 (2014).

199. See Schwartz, *supra* note 198, at 885, 890, 915 (finding that state and local governments “virtually always” indemnify police officers in constitutional-tort cases, with officers personally contributing in only .41% of cases and covering just .02% of total payouts, including none of the punitive damages, and that law enforcement officers are almost always provided with free legal representation); James E. Pfander, Alexander

because of necessity than because of enduring beliefs about state authority and official discretion. Its survival underscores that legalism's purported neutrality often masks deep ideological commitments, often ones that tilt in favor of the state and render accountability more elusive.²⁰⁰

Legalism's emphasis on rule fidelity can also critically inhibit inquiry into the origins, function, and consequences of those rules themselves.²⁰¹ Take, for instance, the objective reasonableness standard for excessive force. Articulated by the Court in *Graham v. Connor*, it centers analysis on the perspective of a "reasonable officer on the scene,"²⁰² prioritizing the officer's judgment while minimizing after-the-fact scrutiny and effectively marginalizing the victim's experience. This standard constricts the scope of legal analysis, excluding consideration of institutional culture, biases, and the broader social context of policing that shape an officer's perception of the circumstances.²⁰³ Yet, when justice is defined exclusively by adherence to existing legal standards, those standards are legitimized by default, even if they emerged from a process steeped in passive injustice. As a result, courts rarely interrogate the adequacy or moral soundness of the rule itself and focus instead on whether official conduct fits the rule's accepted bounds.²⁰⁴ In this way, legalism sustains the illusion that justice lies in formal compliance to established norms, even when those norms fail to confront their own limitations and shortcomings.

Against this backdrop, legalism in policing often functions as a legitimating mechanism for state violence or misconduct that might otherwise be recognized as a moral or political crisis.²⁰⁵ As discussed in Part I, judicial opinions in officer-involved violence cases frequently reduce complex, often tragic events to narrow legal questions—for instance, whether the split-second use of force was technically

A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561, 561 (2020) (demonstrating that lawsuits against federal officials exhibit the same pattern).

200. Consider for instance that many constitutional-tort plaintiffs proceed *pro se*. See Emery G. Lee III, *Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services*, 69 U. MIA. L. REV. 499, 506 (2015) ("Non-prisoner *pro se* litigants appear in around 10% of federal cases. Not surprisingly, slightly more than half of the *pro se* filings were in the civil rights category (e.g., Section 1983 lawsuits, *Bivens* actions, employment discrimination, and Americans with Disabilities Act cases).") (footnotes omitted); Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 676 (2023) (noting that "[b]etween 2000 and 2019, 1,017,043 *pro se* prisoner petitions and 204,661 *pro se* non-prisoner civil rights suits were filed in federal district courts" and that "[t]here are more *pro se* prisoner petitions and civil rights actions than all other types of *pro se* filings combined in federal court"—but also emphasizing that "the access to justice crisis is much more acute in state courts where millions of people each year go to court in civil matters without the assistance of counsel").

201. See Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 61 (1941) (discussing what Kelsen considered the biggest mistake in Hart's tradition that it "regards law as a system of rules complete and ready for application, without regard to the process of their creation"); Ronald Dworkin, *Comments on the Unity of Law Doctrine (A Response)*, in ETHICS AND SOCIAL JUSTICE 200–01 (Howard E. Kiefer & Milton K. Munitz eds., 1968) (defending Kelsen against Hart).

202. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

203. See Banteka, *supra* note 23, at 1874–75.

204. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

205. See Bell, *supra* note 8, at 2141–43.

reasonable, or whether a prior court had reviewed an identical case.²⁰⁶ Courts often justify this narrow focus by appealing to their limited constitutional role, duty to resolve only concrete “cases or controversies,”²⁰⁷ the value of judicial restraint,²⁰⁸ and the perceived danger of overstepping into policymaking. But these institutional justifications do not eliminate the consequences of such choices. By excluding structural dimensions from scrutiny, legalism sustains a legal regime in which recurrent patterns of injustice remain obscured. Victims of state violence come to realize that their experiences fall short of the formal thresholds required for redress or even serious legal consideration.

To be sure, legalism is not without value. Victims have relied on legal frameworks to vindicate rights, expose abuse, and demand accountability.²⁰⁹ The structure and predictability of legal rules can constrain arbitrary state power and offer justice movements important rhetorical and procedural footholds.²¹⁰ Past civil rights litigation has used legalism’s own vocabulary to hold the state to account. But these partial victories do not negate the ways in which legalism can also entrench injustice, especially where new claims fall outside the bounds of doctrinally accepted categories.²¹¹ A more self-critical approach to legalism in policing would interrogate not just whether rules exist, but how they came to be, and whose interests they continue to serve. It would reject the pretense that law operates in a political vacuum and recognize that strict adherence to formal rules does not alone determine policing’s legitimacy.²¹² Instead, we must ask normative questions about state power, violence, and the scope of public accountability. Uncovering this normative architecture requires moving beyond doctrinal analysis to incorporate broader community-centered perspectives on harm, responsibility, and redress.²¹³

Critically engaging with legalism in policing thus requires recognizing the political and interpretive labor that sustains it, understanding how this labor normalizes patterns of harm, and rejecting the notion that fidelity to existing rules and precedent fully eliminates injustice. In concrete terms, this means interrogating the origins of police accountability doctrines like qualified immunity and excessive force, challenging their underlying assumptions, and acknowledging how they

206. See *supra* Part I.

207. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

208. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring); *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997).

209. *Monroe v. Pape*, 365 U.S. 167, 180–87 (1961) (holding that § 1983 provides a federal remedy against deprivations of constitutional rights by state actors, enabling victims to vindicate their rights and challenge abusive state action). See Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1545–48 (2020) (using a dataset of nearly 1,200 police misconduct cases to show that § 1983 filings help expose patterns of police abuse, inform policy, and give voice to victim experiences).

210. See, e.g., Banteka, *supra* note 53, at 1451–52.

211. See HART, *supra* note 32, at 207 (noting that legality can be “compatible with very great iniquity”).

212. See RAZ, *supra* note 195, at 221; H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 207, 342 (1983).

213. See Akbar, *supra* note 38, at 467.

recast police violence as mere misfortune rather than injustice.²¹⁴ It also requires institutional spaces where victims can articulate their experiences on their own terms without having to conform to legal categories that narrow, distort, or exclude their accounts. A critical stance toward legalism in policing does not demand its wholesale rejection. It requires instead an honest reckoning with its limits and its complicity in sustaining systemic harm. This reckoning calls for two shifts. First, it requires reimagining the legal rules themselves: recognizing that they are constructed, not inevitable, and redesigning them to center the moral and structural dimensions of policing harm, rather than deflecting or minimizing it.²¹⁵ Second, it calls for building frameworks beyond law, including institutional, political, and community-based mechanisms, to ensure accountability where courts fall short. In doing so, we move beyond injustice deflection toward a model that treats state violence as a collective wrong deserving of meaningful redress both within and beyond the legal system.²¹⁶

E. Confronting Injustice Deflection

While legalist frameworks may tame certain overt injustices in policing, they fail to address the deeper, systemic grievances that shape everyday experiences of harm. As this Part has shown, injustice deflection masks the structural nature of police violence, obscuring the cumulative toll of aggressive enforcement and shielding officers from accountability.²¹⁷ When policing manifests as a persistent pattern of intimidation and intrusion, the problem is not a series of isolated missteps but the predictable outcome of legal doctrines, institutional practices, and cultural narratives that legitimize or excuse state violence.²¹⁸ Legal doctrines that deflect accountability thus play a constitutive role in this structure: they reframe victims' experiences as unactionable and reinforce cycles of impunity.

In this sense, injustice deflection fosters legal estrangement, by sustaining conditions that communicate to victims of state violence and their communities their perpetual exclusion from the protection of the law.²¹⁹ Over time, years of aggressive patrol tactics, targeted enforcement, and judicial deference create an enduring sense of alienation from the legal system.²²⁰ Although reform efforts have aimed to

214. See *supra* Part I.

215. See SKHLAR, *supra* note 21, at 7, 12–13; Bell, *supra* note 8, at 2067, 2115–17, 2143–45 (2017); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 761–64 (2012); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 806–08 (1999).

216. See *infra* Part III.

217. See Bandes, *supra* note 68, at 1276–77 (1999) (1999) (describing how the public often conceptualizes police brutality as episodic); Carbado, *supra* note 27, at 1493–95 (2016) (arguing that certain policing models systematically target marginalized communities).

218. See Bell, *supra* note 8, at 2061–62 (noting the disproportionate policing of African American and low-income communities).

219. *Id.*

220. *Id.* at 2084.

improve police-community relations through procedural justice and legitimacy-enhancing measures,²²¹ legal estrangement underscores the broader political economy of policing in which law functions less as a protective shield than as a system of control and indifference.²²² Much like in injustice deflection, legal estrangement emphasizes that it is not the formal authority of the law that drives legitimacy, but the perceived willingness of the legal system to recognize and redress harm.²²³ For instance, when courts refuse to rule on the constitutionality of alleged misconduct, they reinforce the perception that the legal system condones the very practices it ought to constrain.²²⁴ This perceived complicity deepens the sense of exclusion: those most affected come to see both courts and law enforcement not as separate actors, but as co-participants in a shared regime of subordination.²²⁵ Epistemic injustice compounds this estrangement. By filtering, discounting, or outright ignoring the testimonies of those most affected, courts delegitimize the knowledge and insight that victims of state violence offer. In so doing, the legal system not only fails to recognize harm—it actively distorts it.²²⁶

Doctrinal protections for police officers, alongside judicial practices that dismiss lived experiences of victims of abuse, reinforce a status quo where certain communities

221. See, e.g., Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003) (exploring the relationship between procedural fairness, police legitimacy, and public support of the police); DANIELA GILBERT, STEWART WAKELING & VAUGHN CRANDALL, PROCEDURAL JUSTICE AND POLICE LEGITIMACY: USING TRAINING AS A FOUNDATION FOR STRENGTHENING COMMUNITY-POLICE RELATIONSHIPS 8–10 (Julia Reynolds ed., 2015), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/procedural-justice-and-police-legitimacy-paper-cpsc-feb-2015.pdf> [<https://perma.cc/6J8D-VSNM>] (describing the adoption of procedural justice training in the cities of Oakland, Salinas, and Stockton); POLICE EXEC. RSCH. F., LEGITIMACY AND PROCEDURAL JUSTICE: A NEW ELEMENT OF POLICE LEADERSHIP 2 (Craig Fischer ed., 2014), https://www.policeforum.org/assets/docs/Free_Online_Documents/Leadership/Legitimacy%20and%20procedural%20justice%20-%20a%20new%20element%20of%20police%20leadership.pdf [<https://perma.cc/HSR6-P75S>] (“As today’s police executives strive to maintain the progress in reducing crime while serving as effective agents of change, many are taking on a new challenge: applying the concepts of ‘legitimacy’ and ‘procedural justice’ as they apply to policing.”); Ronal W. Serpas & Remi A. Braden, *Reply to Community Policing Revisited: Implementing the Principles of Procedural Justice and Police Legitimacy*, POLICE CHIEF (Mar. 2016), <http://www.policechiefmagazine.org/ideas-insights-reply-to-community-policing-revisited-implementing-the-principles-of-procedural-justice-and-police-legitimacy> [<https://perma.cc/RX57-JX5B>] (“Integrating the principles of procedural justice and police legitimacy throughout policing is the answer to [community policing] problems. They form the basis for the core service delivery model that must be used in every citizen encounter to build the support and cooperation necessary to implement community policing more completely throughout the United States.”).

222. Bell, *supra* note 8, at 2061, 2071, 2082.

223. See DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY* 2 (2010).

224. See Brie McLemore, *Procedural Justice, Legal Estrangement, and the Black People’s Grand Jury*, 105 VA. L. REV. 371, 380–81 (2019).

225. *Id.*

226. See, e.g., Washington, *supra* note 155, at 1107, 1109 (“[T]he family regulation system facilitates damaged knowledge production by requiring false and inauthentic victimhood narratives and excluding alternate knowledge.”); Hanan, *supra* note 151, at 1191 (“[P]risoners, as an excluded and often reviled group, are not viewed as having trustworthy and relevant information.”); Tuerkheimer, *supra* note 155, at 3, 57 (“[C]redibility discounting’ is the dominant feature of our legal response to rape [t]heorizing credibility discounts as epistemically unjust.”).

remain outside the law's protective reach.²²⁷ This exclusion is not an anomaly but rather a feature of contemporary policing.²²⁸ That reality underscores the urgency of supplementing legalistic frameworks with approaches that center victims' voices, trace patterns across time and space, and reject the fiction that harm can only exist where a clearly defined rule has been breached.²²⁹ Confronting injustice deflection in policing thus requires a fundamental shift in how we conceptualize harm, accountability, and the role of legal institutions. If legalism is essential to justice but insufficient to redress injustice, then correcting policing injustice requires more than doctrinal tinkering.²³⁰ It requires a broader reckoning with past and present harms, an honest appraisal of the law's limits, and a commitment to structural transformation. Only then can legal institutions become instruments of accountability rather than mechanisms of deflection.

III. TOWARDS VICTIM-CENTERED JUSTICE FOR STATE-SANCTIONED VIOLENCE

The foregoing inquiry prompts the fundamental question of whether existing legal frameworks alone can remedy the deeply entrenched injustices that characterize state violence. If the absence or narrowness of legal redress is a symptom of broader patterns of injustice, then forging more responsive pathways for accountability requires more than incremental doctrinal adjustment. It demands a reorientation from the limitations of existing rules and frameworks toward the structural forces shaping their creation, scope, and enforcement.²³¹ Such a shift, in turn, gestures toward a victim-centered framework for addressing state-sanctioned violence that eschews injustice deflection and foregrounds the lived experiences and moral claims of victims.

A victim-centered approach challenges the presumption that injustice must take the form of a clear legal violation to merit recognition and redress.²³² Rather than interpreting the absence of rules or precedent as foreclosing relief, that void should

227. See Bell, *supra* note 8, at 2114–15, 2054–57.

228. See John Hagan & Celesta Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88 AM. J. SOC. 329, 343 (1982); Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1228–29 (2000); Bell, *supra* note 8, at 2066–68, 2085–88.

229. See *infra* Part III.

230. SHKLAR, *supra* note 21, at 22, 26–27.

231. There is a generally rich debate on how to institutionally reform policing. See, e.g., Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2057–65 (2016) (critiquing the “administrativist turn” in scholarship on police regulation and arguing for a robust role for local criminal courts); Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 437 (introducing a framework for thinking about which actors are best suited to pursue police reform); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1359–63 (2015); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1417–18 (2000); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2182 (2014).

232. See, e.g., Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1538 (1991); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1697 (1976).

indicate enduring wrongs the law has yet to confront and trigger scrutiny into systemic neglect. This model envisions institutions capable of engaging victims' accounts in more expansive, contextualized ways without limiting inquiry to whether an officer's actions breached a clearly established rule.²³³ It allows narratives that speak to the fact of harm and to the reasonable expectations of fairness, dignity, and security that state actors may have violated.

Drawing from transitional justice frameworks that emphasize truth-telling, public acknowledgment, and reparative measures, this Part proposes an expanded vision of accountability that can operate alongside traditional civil and criminal litigation to redress state-sanctioned violence.²³⁴ Doctrinal reforms, such as restoring the constitutional merits-first approach to qualified immunity, could modestly expand the scope of legally cognizable claims.²³⁵ But more significantly, extralegal processes, including local truth commissions, public apologies, and community-directed reparations, can reintroduce the moral and political dimensions of state violence that doctrine often flattens.²³⁶ These additional channels do not sideline the role of the state altogether. Rather, they acknowledge that state institutions alone may be structurally unequipped to hold themselves accountable. By centering the victim, honoring collective memory, and embracing a pluralistic institutional design, a victim-focused paradigm for addressing police violence and misconduct offers both doctrinal and extralegal pathways for confronting state abuse and restoring democratic legitimacy to the institutions that wield coercive power in the public's name.

A. Victim-Centered Justice

In policing, harm often arises from discretionary decisions, entrenched in organizational and structural cultures.²³⁷ For many victims, these harms are not random

233. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); Rachel A. Harmon, *Legal Remedies for Police Misconduct*, in *REFORMING CRIMINAL JUSTICE: POLICING* 27, 27–29 (Erik Luna ed., 2017); Bell, *supra* note 8, at 2115–17, 2143–45.

234. See, e.g., RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 3 (2000) (discussing the core components of transitional justice); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 12–18 (1998) (exploring the need for both legal accountability and broader societal processes of healing and reconciliation in the aftermath of mass violence); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 *HUM. RTS. Q.* 573, 601–05 (2002) (advocating for a comprehensive approach to addressing state-sanctioned violence that combines legal accountability with social and psychological healing); Pablo de Greiff, *Justice and Reparations*, in *THE HANDBOOK OF REPARATIONS* 458, 462–65 (Pablo de Greiff ed., 2006) (emphasizing the importance of reparations as a form of acknowledgment and redress for victims of state-sanctioned violence).

235. *Camreta v. Greene*, 563 U.S. 692, 707 (2011); see, e.g., James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 *COLUM. L. REV.* 1601, 1619 (2011) (proposing a solution to qualified immunity where courts would not have the opportunity to focus on whether the law was previously clearly established); Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 *CALIF. L. REV.* 933, 976 (2019).

236. See sources cited *supra* note 234 and accompanying text.

237. See, e.g., Katherine Beckett, *The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 *HARV. L. & POL'Y REV.* 77, 77–87 (2016); Phillip Atiba Goff & Kimberly Barsamian Kahn, *Racial Bias in Policing: Why We Know Less Than We Should*, 6 *SOC. ISSUES & POL'Y REV.* 177, 177–210 (2012).

misfortunes but rather betrayals of the state's fundamental commitment to fairness and protection.²³⁸ Indeed, injustice reflects “the special kind of anger we feel when we are denied promised benefits and when we do not get what we believe to be our due.”²³⁹ It is precisely this sense of betrayed expectation that highlights the gap between what the law promises and what it actually delivers.²⁴⁰ Framing state-inflicted harms as misfortunes obscures their moral and political dimensions, alienating victims from legal processes designed with an objective vantage point that prioritizes the state and rarely captures their lived experiences.

Consider how the excessive force doctrine that anchors the question of force used by the state in the perspective of a hypothetical reasonable officer²⁴¹ narrows a harrowing, often traumatic interaction to a question of split-second officer reasonableness.²⁴² This ostensibly objective inquiry sidelines the victim's subjective sense of intrusion, reducing experiences of profound harm to a technical assessment of the state's perception of threat.²⁴³ Or consider how qualified immunity doctrine dismisses claims, however compellingly they account state wrongs, because an officer's conduct did not violate clearly established law.²⁴⁴ Over time, individuals and communities that possess vital insights into policing harm find themselves effectively silenced by doctrines that treat their narratives as too subjective. Their experience is “embodied, emotional, narrative, context-bound and idiosyncratic,”²⁴⁵ but this subjectivity is precisely what the legal system often devalues in its pursuit of purported objectivity, impartiality, and due notice to the state.²⁴⁶

However, centering victims' perspectives need not diminish these goals. Rather, it offers a more nuanced view of policing as a public function whose failings warrant not just individual blame but institutional reconsideration. The moral weight

238. SHKLAR, *supra* note 21, at 83; *see* Barnes, *supra* note 21, at 34, 44, 69 (finding that Black participants who read vignettes describing police violence reported heightened feelings of institutional betrayal by law enforcement).

239. SHKLAR, *supra* note 21, at 83.

240. *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW, 3–15 (6th ed. 2008).

241. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

242. *Id.* at 396–97.

243. *See* Part I; Bernard Yack, *The Problem with Kantian Liberalism*, in KANT AND POLITICAL PHILOSOPHY: THE CONTEMPORARY LEGACY 224 (Ronald Beiner & William James Booth eds., 1993).

244. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). For more on circuit splits regarding proof for dismissing claims based on qualified immunity, *see* Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. UNIV. L.J. 135, 145 (2012) (finding a circuit split on the burden of proof for qualified immunity, with five circuits placing the burden on the defendant, five circuits placing the burden on the plaintiff, and two circuits splitting the burden of persuasion by step). *See also* Aisha Green, *Comparing Dadd v. Anoka County with Corbitt v. Vickers: Why Defendants Should Bear the Burden of Establishing Qualified Immunity in a Motion to Dismiss*, 70 AM. UNIV. L. REV. 2091, 2108–13 (2021) (describing a circuit split between the Eighth Circuit and the Eleventh Circuit with regard to allocating the burden of establishing qualified immunity); Leo Yu, *Piercing the Procedural Veil of Qualified Immunity: From the Guardians of Civil Rights to the Guardians of States' Rights*, 81 WASH. & LEE L. REV. 775, 781–83 (2024).

245. Antony Pemberton, *A World of Struggle Meets the Faces of Injustice (Judith Shklar and Current Affairs)*, 23 TILBURG L. REV. 125, 127 (2018).

246. SHKLAR, *supra* note 21, at 36–37.

of these failures requires moving beyond the fiction that every injustice must be captured by existing precedent to be actionable, or that justice can be reduced to the vantage point of the reasonable officer.²⁴⁷ A more complex model of justice, rather than a rigid, legalist one, recognizes that questions of state-inflicted harm are inherently contested and value-laden. By centering victims, embracing a plurality of perspectives, and grappling with the moral reality of state-inflicted harm, we can begin to reconcile legal doctrine with the actual demands of justice.²⁴⁸

Pursuing victim-centered justice for state violence thus requires interconnected strategies. One strategy involves rethinking existing legal doctrines, such as reversing the order in which courts address qualified immunity,²⁴⁹ or altogether reframing qualified immunity to reflect the common law when § 1983 was enacted.²⁵⁰ Legal scholars and judges have urged courts in qualified immunity cases to address the constitutionality of alleged misconduct before deciding whether the law was clearly established. Although *Pearson v. Callahan*²⁵¹ permits courts to bypass constitutional merits analysis and rule solely on “clearly established” law, it does not require that approach. Indeed, the Court in *Camreta v. Greene*²⁵² affirmed that courts remain free to declare whether a constitutional violation has occurred before determining immunity, giving plaintiffs judicial recognition of the constitutional harms they allege and laying groundwork for the future development of constitutional standards.²⁵³ Restoring this “merits-first” approach would begin to address the precedent-starvation loop that stifles doctrinal growth in precisely the cases where the stakes for accountability are highest.²⁵⁴

More fundamentally, confronting state-inflicted injustice requires rejecting the premise that redress must always trace a clear line to a previously articulated rule. The prevailing legalist model systematically obscures the ways that law itself, through its doctrinal omissions and formal constraints, helps constitute and legitimate the harms it purports to regulate.²⁵⁵ It conflates the absence of precedent with the absence of injustice, denying redress not only in practice but in principle. A more candid approach would recognize that constitutional harm often emerges not from isolated misconduct but from the cumulative effect of policy choices, training failures, and institutional tolerance of foreseeable risk.²⁵⁶ Policing harms are

247. See *supra* Part I.A.

248. See SHKLAR, *supra* note 21, at 90.

249. See Paul W. Hughes, *Not a Failed Experiment: Wilson–Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 418–22 (2009); Jeffries, Jr., *supra* note 173, at 115–17, 133–36.

250. See Baude, *supra* note 40, at 51–61; Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 501–07 (2009); Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2100 (2018).

251. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

252. *Camreta v. Greene*, 563 U.S. 692, 706 (2011).

253. See LAHAV, *supra* note 170, at 81; Jeffries, Jr., *supra* note 173, at 117.

254. See Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 343–50 (2020).

255. See Carbado, *supra* note 27, at 1505–08, 1517–22.

256. See Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 12–13 (2009) (describing institutional failures as root causes of constitutional violations).

frequently products of systems, not solely individuals, and the law must be capable of recognizing that structure.

Constitutional doctrine can evolve accordingly. Fourth Amendment excessive force jurisprudence, for example, could begin to reflect the kinds of systemic accountability familiar in Eighth Amendment prison conditions cases. Just as courts applying *Estelle* use professional standards of medical care as a yardstick to evaluate Eighth Amendment claims,²⁵⁷ so too might Fourth Amendment doctrine incorporate contemporary standards for de-escalation, intervention, or tactical planning, such as those developed by the Police Executive Research Forum (PERF).²⁵⁸ This broader approach recognizes that institutional policies, training curricula, and supervisory choices may constitute constitutionally relevant factors, not merely background conditions.²⁵⁹ Likewise, passive state harms such as failure to supervise, train, or intervene could be treated as constitutionally significant. Courts have already acknowledged the government's affirmative obligations in the context of the state-created danger doctrine under substantive due process.²⁶⁰ That logic can also inform excessive force jurisprudence, bringing constitutional law closer to the structural and policy-based realities of modern policing.²⁶¹

Equally important, beyond doctrine, is institutional design: establishing truth-telling processes that document, validate, and publicize victims' experiences of policing, and propose reform. Rather than forcing victims to shoehorn their accounts into an officer-centric framework, this approach would foreground the moral and political dimensions of state-inflicted harm and introduce processes where victim accounts take precedence. These can foster robust victim participation, acknowledge wrongdoing in public forums, and provide a broader array of remedial pathways than conventional legal channels permit. Such processes can take the form of community-led investigations, public acknowledgment of wrongdoing, and the creation of remedial measures beyond standard civil suits such as restorative or reparative programs to confront injuries and prevent their recurrence.²⁶² The following sections unpack the specifics of this proposal, including the range of potential concrete mechanisms and the state's role in these processes. I begin with the latter.

257. See *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976).

258. Wexler, *supra* note 125, at 4–6 (offering de-escalation and tactical planning standards).

259. *Barnes v. Felix*, 605 U.S. 73, 80–81 (2025) (establishing reasonableness cannot be cabined to the instant a trigger is pulled but requires courts to consider facts and events leading up to the climactic moment and does not foreclose consideration of their risk-creating tactics).

260. See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989); *Kneipp v. Tedder*, 95 F.3d 1199, 1208–09 (3d Cir. 1996) (articulating four-factor state-created-danger test); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063–64 (9th Cir. 2006) (finding potential liability where police assurances increased victim's exposure to risk).

261. See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1883–86 (2015) (arguing for a broader conception of constitutional policing responsibilities).

262. See *infra* Sections III.C–D.

B. Public Versus Private Justice for State-Sanctioned Violence

Civil and criminal litigation aim to provide redress for harm. Yet when the state itself is the litigant, the victim's perspective is often sidelined.²⁶³ In such cases, the state operates as both gatekeeper and adjudicator, claiming neutrality while being structurally and doctrinally predisposed to defend its own actors.²⁶⁴ This is not merely a procedural misalignment—it is a deeper epistemic imbalance in which the state's narrative is treated as presumptively authoritative, and the victim's account is filtered through doctrines that privilege official reasonableness and immunity. Critics have long warned against relying exclusively on the very institutions that commit state violence or are steeped in deference doctrines and state-dominated approaches to deliver justice.²⁶⁵ This helps explain why even high-profile cases of police violence often yield, at most, procedural reforms that fail to address the root injustices or meaningfully validate the victim's experience.²⁶⁶ The result is skepticism toward state-centered approaches to policing reform and victims' distrust of institutions that are structurally resistant to accountability.²⁶⁷

This tension underscores the need for accountability mechanisms that are not exclusively under state control, and that recognize and validate victims' experiences in ways that purely state-centered frameworks often fail to do. The goal is not the wholesale abandonment of state institutions, but rather the construction of hybrid spaces where survivors and communities can narrate the full dimension of the harm, its historical lineage, its emotional and psychological depth, and its collective impact. A victim-centered approach builds on this vision by creating institutional forms that foreground victims' perspectives. These venues enable victims and communities to articulate their experiences of policing harm free from rigid doctrinal constraints and the state's narrow definitions of justice.²⁶⁸ They restore a moral vocabulary that names injuries and harms as injustices rather than misfortunes. Transformative justice and abolitionist theories support the development of more complex and community-centered justice models for victims of state-sanctioned violence, highlighting the deep historical and structural bases that favor police accounts

263. See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 83–88 (2012); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 *STAN. L. REV.* 937, 949 (1985); Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 *UTAH L. REV.* 289, 296–98 (1999).

264. It is worth noting however that most such cases implicate a state/local officer and federal judges but can also implicate federal officers and federal judges.

265. See Harmon, *supra* note 233, at 46–49; Kate Levine, *Police Suspects*, 116 *COLUM. L. REV.* 1197, 1200–01 (2016).

266. See Ashley Southall, *Daniel Pantaleo, Officer Who Held Eric Garner in Chokehold, Is Fired*, *N.Y. TIMES* (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/nyregion/daniel-pantaleo-fired.html> [<https://perma.cc/4P4K-VPS9>] (reporting that the officer involved in Garner's death was fired five years later, with no criminal charges filed, and that the incident led only to limited policy reforms within the NYPD).

267. See Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 *HARV. L. REV.* 1613, 1643–44 (2019).

268. See ZOE MENTEL, *U.S. DEP'T JUST., RACIAL RECONCILIATION, TRUTH-TELLING, AND POLICE LEGITIMACY 20* (2012), <https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-p241-pub.pdf> [<https://perma.cc/P3SH-KDMH>].

over those of civilians.²⁶⁹ By encouraging the creation of alternative institutions not wholly controlled by state power, these commitments align in crucial ways with the victim-centered model of justice this Article proposes.

Transitional justice frameworks offer instructive institutional mechanisms towards the victim-centered justice model this Article envisions. Typically deployed in post-conflict contexts, these combine judicial and non-judicial mechanisms—truth commissions, reparations programs, and institutional reforms—to confront large-scale human rights abuses.²⁷⁰ Critical to these is the centrality of victims and an explicit insistence on incorporating victims’ perspectives, needs, and voices as part of building genuine accountability and repairing broken relationships between individuals and governing institutions.²⁷¹ Public hearings, official documentation of abuses, and meaningful reporting can offer recognition and validation that conventional courts often fail to provide, circumventing many of the evidentiary and procedural hurdles of traditional litigation. Victims may also be more forthcoming in these forums that eschew the high costs and stakes of civil lawsuits.

While the United States is not a post-conflict society in the traditional sense, the repeated patterns of aggressive law enforcement underscore the salience of such mechanisms for domestic policing harms.²⁷² And although transitional justice mechanisms are not the most common at the local level on which most policing operates, advocates have already proposed and even begun to implement analogous structures in cities like Minneapolis, Chicago, Boston, and Philadelphia, where longstanding dysfunction within police departments has demanded a more expansive process of public reckoning.²⁷³ As Professor Judith Shklar reminds us,

269. See ANGELA Y. DAVIS, *ABOLITION DEMOCRACY* (2005); KATHERINE FRANKE, *REPAIR: REDEEMING THE PROMISE OF ABOLITION* (2019); ALEX VITALE, *THE END OF POLICING* (2017); Akbar, *supra* note 38, at 467; Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 *UCLA L. REV.* 200, 202 (2020); Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 *COLUM. L. REV.* 249 (2019); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 *HARV. L. REV.* 1, 43–48 (2019); Akbar, *supra* note 38, at 467.

270. See U.N. SEC’Y GEN., *GUIDANCE NOTE OF THE SECRETARY GENERAL UNITED NATIONS APPROACH TO TRANSITIONAL JUSTICE 2* (2010); Ruti G. Teitel, *Transitional Justice Genealogy*, 16 *HARV. HUM. RTS. J.* 69 (2003).

271. U.N. SEC’Y GEN., *supra* note 270, at 6; Teitel, *supra* note 270, at 80–81.

272. See Eric Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 *HARV. L. REV.* 762, 768 (2003) (arguing that “elements of transitional justice reflect ideals that remain unrealized even in a consolidated liberal democracy such as the United States”); Jennifer Reddock, *Truth, Justice, and Reconciliation in Response to Police Shootings of African Americans in the United States*, 13 *J. RACE & POL’Y* 42, 43–44 (2017).

273. See Molly Bolan, *How One US City is Beginning a Truth and Reconciliation Program*, ROUTE FIFTY, (Jan. 25, 2023), <https://www.route-fifty.com/management/2023/01/what-truth-and-reconciliation-looks-minneapolis/382216/> [<https://perma.cc/8GD8-69CE>]; Robert Reed, *Glitter and Glue: A truth and reconciliation commission worked in South Africa. Could it in Chicago — or would it be purely performance?*, *CHI. MAG.*, (Aug. 14, 2020), <https://www.chicagomag.com/chicago-magazine/september-2020/truth-and-reconciliation-commission-chicago-police/> [<https://perma.cc/SB29-9TWJ>]; Dustin Slaughter, ‘Truth And Reconciliation’ Through Police Transparency In The Black Lives Matter Era, *WHYY*, (Oct. 5, 2016), <https://whyy.org/articles/op-ed-truth-and-reconciliation-through-police-transparency-in-the-black-lives-matter-era/> [<https://perma.cc/FD9R-X232>]; Deborah Becker, *Boston Creates Truth, Justice and Reconciliation Commission*, *WBUR*

“the real realm of injustice . . . does not stand outside of the gate of even the best of known states. Most injustices occur continuously within the framework of an established polity with an operative system of law, in normal times.”²⁷⁴

C. Truth & Reconciliation

Truth commissions occupy a central position in transitional justice.²⁷⁵ Unlike judicial processes, which generally focus on isolated incidents or individual liability, truth commissions assemble a broad record of state violence.²⁷⁶ They do so through interviews, public hearings, and extensive community outreach, often revealing the social, political, economic, or other conditions that enable repeated harm.²⁷⁷ Though truth commissions often operate in conjunction with traditional legal processes, their core missions are distinct: to expose state wrongdoing, confront the institutional cultures that permit it, and enable collective reflection on the power structures that perpetuate it.²⁷⁸

For victims of state-sanctioned violence, an official forum that publicly affirms their experience and a forthright examination of its structural roots can be integral to affirm their sense of injustice.²⁷⁹ Centering victims’ psychosocial needs can draw out the moral, political, and historical character of institutional harms, shifting attention from an isolated dispute between an officer and a plaintiff to the wider backdrop of state-sanctioned harm.²⁸⁰ To ensure inclusivity, these initiatives rely on grassroots or community-based methods, for instance, learning centers, truth-telling circles, or peer-support networks, that accommodate survivors’ diverse ways of communicating harm.²⁸¹ Techniques such as body mapping, photo storytelling, memory boxes, and others have thus emerged to accommodate victims’ experiences in ways that conventional court processes rarely permit.²⁸² These approaches validate survivors’ perspectives and form the foundation for broader reforms aimed at both accountability and healing.

In policing contexts, domestic truth-seeking processes could investigate recurrent abuses, document community narratives of police intimidation and brutality,

News (June 30, 2020), <https://www.wbur.org/news/2020/06/30/boston-truth-justice-reconciliation-commission> [<https://perma.cc/TAX5-USS6>].

274. SHKLAR, *supra* note 21, at 19.

275. See *supra* note 234; PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* 14–22 (2d ed. 2011).

276. See Ruti Teitel, *Preface*, in *TRUTH AND JUSTICE: THE DELICATE BALANCE: THE DOCUMENTATION OF PRIOR REGIMES AND INDIVIDUAL RIGHTS* 5, 6–7 (1993).

277. See MARK FREEMAN, *TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS* 222–67 (2006).

278. See Inga N. Laurent, *From Retribution to Restoration: Implementing Nationwide Restorative Justice Initiatives - Lessons from Jamaica*, 42 *FORDHAM INT’L L.J.* 1095, 1106–11, 1116–23 (2019).

279. HAYNER, *supra* note 275, at 26.

280. *Id.* at 110–12 (discussing complementary roles of truth commissions and courts).

281. ASIA JUST. & RTS., *ENDURING IMPUNITY: WOMEN SURVIVING ATROCITIES IN THE ABSENCE OF JUSTICE* 10–11 (Dodi Yuniar & Matt Easton eds., 2015), <https://asia-ajar.org/resources/books-research/enduring-impunity-women-surviving-atrocities-in-the-absence-of-justice/> [<https://perma.cc/95EW-MEUC>].

282. *Id.* at 13–14 (discussing body mapping, photo storytelling, and memory boxes as participatory methods).

and illuminate structural failings that facilitate state violence.²⁸³ Rather than limiting the inquiry to whether a particular officer's behavior meets a technical liability threshold, a truth-seeking entity focused on policing practices could illuminate the institutional structures and accountability gaps that entrench potentially recurrent abuses.²⁸⁴ In this vein, jurisdictions can consider establishing statutory "policing truth commissions" at the municipal level, building on emerging proposals for local truth and reconciliation processes in cities like San Francisco, Chicago, Boston, and Philadelphia.²⁸⁵ These bodies could be empowered with subpoena authority, mandated to produce public reports, and tasked with archiving narratives of abuse, retaliation, and structural misconduct. Like transitional justice commissions abroad, they would not supplant the courts but supplement them, restoring civic memory and helping break the cycle in which structural abuse continues because the law lacks the narrative record to confront it.²⁸⁶

Uncovering truth requires an expansive focus on historical, social, and political practices that have enabled police violence and misconduct across time. Absent such mechanisms, even successful civil litigation rarely disrupts the institutional norms that gave rise to it,²⁸⁷ and procedural tweaks alone seldom mitigate the profound alienation that individuals and groups feel when state authority and the law become complicit in their harm.²⁸⁸ Transitional justice models instead view

283. See Joel Day, *Establish a Truth & Reconciliation Commission to Change Policing*, USC CTR. ON PUB. DIPL. (Aug. 7, 2020), <https://uscpublicdiplomacy.org/blog/establish-truth-reconciliation-commission-change-policing> [<https://perma.cc/SY2T-J595>]; Colleen Murphy, *Transitional Justice in the United States*, JUST SEC. (July 16, 2020), <https://www.justsecurity.org/71236/transitional-justice-in-the-united-states/> [<https://perma.cc/R7YD-2FQT>]; Fernando Travesí-Sanz, *Repairing the Past: What the United States Can Learn from the Global Transitional Justice Movement*, INT'L CTR. FOR TRANSITIONAL JUST. (July 15, 2021), <https://www.ictj.org/news/repairing-past-what-united-states-can-learn-global-transitional-justice-movement> [<https://perma.cc/3Q24-669A>].

284. See sources cited *supra* note 283.

285. See sources cited *supra* note 273.

286. See ALISON BISSET, TRUTH COMMISSIONS AND CRIMINAL COURTS, 36–38 (2012).

287. There is another narrow way of examining whether there is a pattern or practice of unlawful conduct in a law enforcement agency. Following the brutal law enforcement attack on Rodney King in March 1991, Congress authorized the U.S. Attorney General to conduct pattern or practice investigations, which were placed under the purview of the Department of Justice (DOJ)'s Civil Rights Division. Although there are 18,000 law enforcement agencies throughout the country, between 1994 and 2017, DOJ had 69 ongoing or completed investigations of state or local law enforcement agencies out of which it closed 26 without a formal finding of misconduct. Presidential interest in police accountability reform has also affected the quantity of pattern or practice investigations. See Ellen A. Donnelly & Nicole J. Salvatore, *Emerging Patterns in Federal Responses to Police Misconduct: A Review of "Pattern or Practice" Agreements over Time*, 20 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 23, 24–26 (2019). Notably, certain state legislatures have accorded power to state attorneys general to conduct pattern or practice investigations of their own, such as in California and Illinois.

288. Bell, *supra* note 8 at 2054. To be sure, Monica Bell argues that the problem of police misconduct leading to legal estrangement may be broader than traditional truth and reconciliation methods are designed to achieve. *Id.* at 2146 ("[G]overnments usually use truth and reconciliation processes to address injustices that occurred over a cognizable, bounded time period and involved a fairly identifiable set of wrongdoers" whereas the causes of legal estrangement are "more dispersed and broadly influential."). This is a fair concern under transitional justice orthodoxy; however, it is possible to rethink the scope and bounds of transitional justice both normatively and practically. See Rosemary L. Nagy, *The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission*, 7 INT'L J. TRANSITIONAL JUST. 52, 53 (2013).

systemic harm as a communal and ongoing phenomenon, placing victims and communities at the center, and highlighting the moral dimension of police violence. They emphasize that mere procedural reforms often fail to remedy deeper roots of alienation and harm and offer instead a means to name harm in the language of injustice rather than accidental misfortune.²⁸⁹

The operational independence of these mechanisms is critical to resist built-in deference to law enforcement, while formal backing from the state can still confer added legitimacy. Indeed, experience from truth and reconciliation commissions in Canada, South Africa, Guatemala, Timor-Leste, and others suggests that the most successful truth processes strike a delicate balance between government support and community self-determination.²⁹⁰ This can be achieved through centering the victims and survivors in all processes: for example, shaping the commission's mandate, defining how the commission will gather testimony, and receiving meaningful support throughout the commission's works.²⁹¹ The resulting findings can then serve as catalysts for holistic remedies aimed at individuals and communities rather than isolated instances of misconduct.

Reconciliation, often invoked alongside truth-seeking as the goal of these processes, should nonetheless never be imposed.²⁹² When approached with respect for survivors' agency and a commitment to substantive structural change, reconciliation strategies, such as dialogues between government officials, police officers, and community members, or collective acknowledgments of culpability, can foster communal repair. These processes can, however, risk trivializing severe harm if pursued without robust safeguards or if they implicitly compel victims into forgiveness.²⁹³ If grounded in genuine accountability, though, reconciliation can strengthen community cohesion and help rebuild trust in public institutions.²⁹⁴

289. See, e.g., MENTEL, *supra* note 268; *Reconciliation*, NAT'L INITIATIVE FOR BLDG. CMTY. TR. & JUST., <http://trustandjustice.org/resources/intervention/reconciliation> [<https://perma.cc/45PY-RR5B>] (last visited Oct. 21, 2025).

290. For a comprehensive discussion of truth commissions, see generally HAYNER, *supra* note 275. For example, the South African Truth and Reconciliation Commission (TRC), established by the Promotion of National Unity and Reconciliation Act 34 of 1995, is often cited as a prominent illustration of a state-backed body with extensive victim participation. For more critical approaches to transitional justice processes, see Simon Robins, *Challenging the Therapeutic Ethic: A Victim-Centered Evaluation of Transitional Justice Process in Timor-Leste*, 6 INT'L J. TRANSITIONAL JUST. 83, 83–105 (2012); Susan Thomson & Rosemary Nagy, *Law, Power, and Justice: What Legalism Fails to Address in the Functioning of Rwanda's Gacaca Courts*, 5 INT'L J. TRANSITIONAL JUST. 11, 11–30 (2011); Gearoid Millar, *Local Evaluations of Justice Through Truth Telling in Sierra Leone: Postwar Needs and Transitional Justice*, 12 HUM. RTS. REV. 515, 515–35 (2011).

291. U.N. SEC'Y GEN., *supra* note 270, at 6; see Inga N. Laurent, *Addressing the Toll of Truth Telling*, 88 BROOK. L. REV. 1073, 1114, 1122 (2023).

292. See Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751, 761 (2000).

293. See MARTHA MINOW, *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR* 18 (Nancy L. Rosenblum ed., 2002); JEFFRIE G. MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* 19 (2003).

294. See COLLEEN MURPHY, *THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE* 27–28 (2017).

D. Reparations & Apology

Truth without repair risks becoming another form of symbolic recognition devoid of material consequence. Just as victim-centered justice must elevate the lived experience of state-sanctioned harm, it must also address the structural deprivation and loss that it entails. Reparations are essential not merely to compensate victims but to recognize, name, and repair the wrongs inflicted. In the context of state violence, they represent a moral and tangible acknowledgment that legal doctrine alone cannot offer.

Community-based reparations and restorative processes can then serve as a potent mechanism for addressing the far-reaching consequences of policing harm.²⁹⁵ When a local police department has a history of engaging in excessive force, for instance, a reparations program might include youth initiatives, education grants, or mental-health services for the affected communities. Crucially, such initiatives go beyond individualized compensation, recognizing that state violence fractures the social fabric of entire communities. By redressing collective injuries, collective reparations mitigate the sense that judicial remedies are reserved for a limited set of plaintiffs who prevail only after surmounting onerous doctrinal barriers.²⁹⁶ In so doing, they enable harmed communities to see state conduct not as beyond scrutiny or inevitable, but as subject to redress that carries meaningful community impact.²⁹⁷

These reparations need not follow a tort-based or litigation-driven model. A compelling analogy is the September 11th Victim Compensation Fund, which awarded over \$7 billion to more than 22,500 claimants in its initial phase.²⁹⁸ Designed to avoid protracted litigation and publicly acknowledge loss, the Fund relied on administrative procedures that emphasized speed, accessibility, and recognition of harm rather than adversarial contestation. Like transitional justice mechanisms, it centered collective suffering and structured compensation outside the courtroom. Municipalities could adopt similar models to address police violence or systemic misconduct, using locally controlled risk pools or forfeiture proceeds to fund programs that prioritize acknowledgment and reparative outcomes over formal adjudication.

295. See TEITEL, *supra* note 234, at 27–29 (on reparations as an integral aspect of transitional justice). For a philosophical justification of restorative justice, see Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 68, 93 (Robert I. Rotberg & Dennis Thompson eds., 2000); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 26 (1999).

296. See Alina Balta & Nadia Banteka, *The Al-Mahdi Reparations Order at the ICC: A Step towards Justice for Victims of Crimes against Cultural Heritage*, OPINIOJURIS (Aug. 25, 2017), <https://opiniojuris.org/2017/08/25/the-al-mahdi-reparations-order-at-the-icc-a-step-towards-justice-for-victims-of-crimes-against-cultural-heritage/> [<https://perma.cc/RU2M-64D4>].

297. *Id.*

298. September 11th Victim Compensation Fund: Compensation of Claims, 83 Fed. Reg. 49946, 49947 (Oct. 3, 2018) (stating that the Fund had appropriated \$7.375 billion in compensation and administration costs).

These public funds could be directed toward community-level reparations shaped through participatory processes, especially in neighborhoods disproportionately harmed by police violence. Drawing on proposals that invite direct victim participation to foster genuine remorse and repair, harmed community members could likewise shape the form and scope of these collective reparations in the policing context.²⁹⁹ In determining which measures best address community needs, community voices reclaim a stake in their collective well-being. When reparations reflect locally defined priorities, they not only respond to harm but also contribute to civic reconstruction and self-determination.

Reparations alone, however, do not exhaust the range of possible remedies in this victim-centered model of justice for state-sanctioned violence. Just as an individual offender in the criminal legal system harms both a particular victim and the broader community, police violence and misconduct ripple across individual and communal lines. Although early criminal legal systems once placed victims at the forefront, the modern pendulum has swung toward a state-centric model emphasizing prosecutorial discretion and broad public interests in deterrence.³⁰⁰ More recent restorative-justice endeavors, such as victim-offender mediation and formal apologies, have sought to reconcile state objectives with victims' need for empowerment and agency.³⁰¹ These principles likewise guide responses to state-sanctioned violence, where meaningful community participation in designing reparations can foster trust and legitimacy. These approaches are not meant to replace legal doctrine but to supplement it. They reframe justice not as narrow legal vindication but as a process of acknowledgment, empowerment, and repair. And by generating a public record of harm, they can help feed information back into legal processes, disrupting the precedent-starvation loop that so often impedes doctrinal development.

Conceptualizing harm as interpretive and communal expands the possibility of remedies that address both private wounds and public needs. In this vein, apology can be a transformative remedy, offering acknowledgment of harm and a conduit for grappling with broader social and moral demands.³⁰² Lessons from criminal law, where an offender's remorse may factor into sentencing,³⁰³ shed light on how a public apology by a police department or a city can validate communal trauma

299. See Erin Ann O'Hara & Maria Mayo Robbins, *Using Criminal Punishment to Serve Both Victim and Social Needs*, 72 LAW & CONTEMP. PROBS. 199 (2009) (arguing that giving victims greater influence over portions of an offender's sentence will foster sincere remorse and facilitate emotional healing).

300. See Paul G. Cassell, *The Crime Victims' Rights Movement: Historical Foundations, Modern Ascendancy, and Future Aspirations*, 56 U. PAC. L. REV. 1, 387, 393–421 (2025).

301. See, e.g., Braithwaite, *supra* note 295. *But see* Delgado, *supra* note 292, at 760–61.

302. For the philosophical and sociological implications of apology and reconciliation, see NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION*, at vii–viii (1993); JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 15 (1988).

303. See Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 745 (2012); Stephanos Bibas & Richard Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 141 (2004).

and catalyze genuine reform.³⁰⁴ A meaningful apology goes beyond perfunctory gestures: it entails accepting institutional responsibility, explaining how entrenched practices contributed to the harm, and recognizing the legitimacy of communities' grievances.³⁰⁵ Equally important, it should encompass enforceable commitments to procedural and structural change.³⁰⁶ When offered within a structured, facilitated dialogue, an apology can resonate more deeply. This could involve forums in which state officials, local officials, and law enforcement representatives admit fault and actively invite input on reforms from community members. Such exchanges can restore a measure of dignity to those harmed, while obliging institutions to undertake publicly-shaped reforms.

Crucially, an effective apology aims not to restore the status quo, but to reshape norms around accountability and responsiveness. Because harm inflicted by the state reverberates across a community, the scope of apology can be communal as well as individual, implicating both individual officers and the institutions authorizing their conduct.³⁰⁷ There are models for various kinds of institutional apology. In 1998, Congress enacted the Civil Liberties Act, a formal apology statute acknowledging that the mass internment of Japanese Americans during World War II was unjustified and rooted in racial prejudice rather than military necessity.³⁰⁸ Similarly, in 2015, Chicago issued an ordinance apologizing for police torture under former Commander Jon Burge, accompanied by reparations, public education, and a community center.³⁰⁹ Although no single apology can guarantee systemic change, it can serve as a moral and legal fulcrum, prompting police departments and localities to adopt more legitimate, equitable practices and guiding communities toward lasting redress.

E. Anticipating Objections

The claim that police-sanctioned harm, so often dismissed as mere misfortune, constitutes injustice inevitably faces objections. Critics might argue that not every instance of police violence equates to misconduct,³¹⁰ that existing doctrines are vital to preserve officers' decisiveness since they often make urgent, complex decisions,³¹¹

304. See Thema Bryant-Davis, Tyonna Adams, Adriana Alejandre & Anthea A. Gray, *The Trauma Lens of Police Violence Against Racial and Ethnic Minorities*, 73 J. SOC. ISSUES 852, 861 (2017); Robert T. Carter, *Racism and Psychological and Emotional Injury: Recognizing and Assessing Race-Based Traumatic Stress*, 35 COUNSELING PSYCH. 13, 88 (2007).

305. See John Braithwaite & Philip Pettit, Comment, *Republican Criminology and Victim Advocacy*, 28 LAW & SOC'Y REV. 765, 772 (1994).

306. See Joram Tarusarira, *The Anatomy of Apology and Forgiveness: Towards Transformative Apology and Forgiveness*, 13 INT'L J. TRANSITIONAL JUST. 206, 213–14 (2019).

307. See Jeff Comtassel & Cindy Holder, *Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru*, 9 HUM. RTS. REV. 465, 479 (2008).

308. Civil Liberties Act of 1988, Pub. L. No. 100-383, § 2(a), 102 Stat. 903, 904 (1988).

309. CHI., ILL., *Reparations for Burge Torture Victims Ordinance* (May 6, 2015) (apologizing for police torture by Commander Jon Burge and establishing a \$5.5 million reparations fund).

310. See cases cited *supra* note 11.

311. See sources cited *supra* note 47.

or that focusing on systemic critique obscures individual accountability.³¹² Others may find the concept of epistemic injustice too tenuous for reform,³¹³ doubt the appropriateness of transitional justice frameworks in a democracy,³¹⁴ or worry that the victim-centered framework this Article sets forth politicizes the ostensibly neutral administration of law.³¹⁵ Redefining what counts as injustice inevitably raises questions about how claims are assessed, how competing interests are balanced, and whether empowering victims of state-sanctioned violence might produce unintended consequences.³¹⁶

These concerns warrant careful consideration, but they do not negate the need for new analytical and remedial frameworks to address injustice deflection. This Article does not contend that all policing is blameworthy and injurious. Rather, it emphasizes entrenched structures—doctrines, policies, and prejudices—that recast preventable harms as unfortunate anomalies, shielding them from meaningful review. At the same time, a systemic lens does not displace individual accountability. If recurring abuses arise from entrenched practices or doctrinal loopholes, exposing that pattern can strengthen efforts to sanction egregious conduct.³¹⁷ The call to take victims' accounts seriously need not collapse into credulity. To confront epistemic injustice requires resisting reflexive skepticism toward credible testimonies, particularly those from communities that historically have been discredited or ignored.³¹⁸ Acknowledging epistemic injustice does not signal blind acceptance of every claim but counsels the design of fair institutional practices that correct systematic credibility deficits.³¹⁹

Treating transitional justice mechanisms as too foreign for domestic policing overlooks how these mechanisms are already being adapted and piloted to probe state-inflicted harm and entrenched injustices in national and local contexts.³²⁰ These instances have revealed the utility of transitional mechanisms in documenting patterns, encouraging public acknowledgment, and furnishing remedies that exceed the narrow scope of adversarial litigation.³²¹ Despite these examples, some

312. See Nadia Banteka, *Police Brutality as Torture*, 70 UCLA L. REV. 470, 476–83 (2023).

313. See Roberts, *supra* note 269, at 43–48; Amna Akbar, Response, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 97, 100–01 (2020).

314. See Nagy, *supra* note 288, at 53 (“Although the use of a truth commission in a stable democracy is in many ways at odds with transitional justice orthodoxy, the Canadian TRC provides an opportunity for thinking normatively about the scope and bounds of transitional justice.”).

315. See Cary Coglianese & Daniel E. Walters, *Antipolitics and the Administrative State*, 29 COMMON KNOWLEDGE 367, 369 (2023).

316. See Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the 21st Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 298 (2005).

317. See Donnelly & Salvatore, *supra* note 287, at 23.

318. FRICKER, *supra* note 30, at 148.

319. See *id.* at 159.

320. See sources cited *supra* note 273.

321. See Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1764–65 (2000); Jonathan Allen, *Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 315, 319 (1999) (“Truth commissions are thought to play the symbolic role of making a decisive break with the official sponsorship of human rights violations that characterized the past.”).

might still worry that transitional justice frameworks could compromise traditional legal proceedings and due process.³²² Victims can err or harbor biases, and not all claims are equally meritorious nor is there a simple metric to sort them. However, this complexity is precisely why continuing to rely exclusively on legal doctrine riddled with blanket immunities or officer-centric standards is untenable. By facilitating more inclusive processes, we provide opportunities to evaluate more dimensions of claims regarding state-inflicted harm rather than dismiss them as inevitable byproducts of policing. Instead of supplanting legal proceedings, these frameworks aim to supplement them and integrate moral and communal dimensions, ensuring that neither officer perspectives nor rigid doctrinal boundaries entirely overshadow the lived experiences of those most harmed by the state.

Finally, the contention that naming police harm as injustice compromises the law's neutrality overlooks how doctrines already reflect ideological commitments. Law is not devoid of normative underpinnings; it arises from foundational judgments about state authority, public safety, and individual rights.³²³ Reconsidering how courts routinely frame avoidable police violence as misfortune is not a departure from neutrality but a willingness to expose and address the normative commitment driving these doctrines and consequent judicial outcomes. Though critics may fear that recognizing systemic injustice enmeshes courts in policymaking,³²⁴ the deeper risks lie with courts remaining confined to narrow doctrinal inquiries that inadvertently lament harms demanding broader scrutiny. Helpfully, the victim-centered approach advanced here offers to complement rather than displace these processes to amplify voices of victims, promote accountability, and forestall the recurrence of wrongful harm dismissed as mere chance.

None of these concerns invalidate the core normative claim this Article advances: patterns of avoidable, state-sanctioned harm warrant recognition as injustices rather than regrettable misfortunes. Still, identifying and naming police-inflicted harm as injustice does not by itself resolve all police violence and misconduct and is no panacea for the moral, legal, and institutional challenges facing policing and its reform. Nonetheless, these difficulties should not preserve a status quo that normalizes state-sanctioned violence and misconduct as inevitable. By acknowledging and confronting potential objections, we see how realigning legal, epistemic, and structural perspectives can reinforce, rather than weaken, the rule of law. Confronting and eliminating injustice deflection by naming certain police-inflicted

322. See Delgado, *supra* note 292, at 760–61.

323. See, e.g., Tuerkheimer, *supra* note 155, at 21 (demonstrating that “legal rules were de-signed to protect against this lying, inviting, exaggerating complainant”); Jasmine B. Gonzales Rose, *Race, Evidence, and Epistemic Injustice*, in *PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW* 380, 380 (Christian Dahlman, Alex Stein & Giovanni Tuzet eds., 2021) (arguing that in evidence law, “[r]ace-based witness competency laws allowed white people to testify against anyone but restricted the testimony of witnesses of color”).

324. See MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 17–19 (1998); Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 617–19 (2003).

harm as injustice is thus a critical step in rendering policing more accountable. Empowering courts, communities, and victims to tackle systemic failures forthrightly does not solve every problem but opens new possibilities for redress, reform, and, ultimately, the democratic legitimacy of policing itself.

CONCLUSION

Courts frequently recast police violence as misfortune lying beyond the reach of legal redress, a move this Article has termed injustice deflection. Judicial opinions often express sympathy for grievous injuries yet conclude that no constitutional violation or remedy exists. Injustice deflection, underwritten by doctrines such as qualified immunity and excessive force, frames and normalizes preventable harms as unavoidable byproducts of policing. This shift is not merely semantic: it erases institutional and social contexts in which these harms recur, stifles recognition of systemic state abuse, and deepens the sense of betrayal and estrangement felt by those subjected to state-sanctioned harm.

But the status quo is not inevitable. This Article proposes realigning doctrine and institutional practices to confront repeated police violence as a cognizable harm. At the doctrinal level, courts should address the merits of constitutional questions before resorting to qualified immunity, thereby generating new clearly established legal standards and refuting the impression that serious harms evade any rights-based protection. Equally important is the development of institutional frameworks beyond adversarial litigation, based on transitional justice mechanisms. These include community-driven truth and reconciliation commissions, as well as remedial restorative justice programs such as reparations and apology, that can complement courts' limited capacity to tackle structural recurring state-inflicted harms. Centering victims' experiences, illuminating patterns of abuse, and creating detailed records, these approaches furnish public acknowledgment of persistent police violence and foster broader reforms through public recognition and formal acknowledgment.

Ultimately, curtailing injustice deflection is necessary to restore faith in both law enforcement and the rule of law. Naming state-inflicted violence and misconduct as injustice underscores that these harms are neither inescapable nor legally neutral, but profoundly corrosive to constitutional guarantees and human dignity. Recognizing preventable state-sanctioned harm as both wrongful and remediable opens the door to concrete accountability measures and systemic change. When law stops deflecting injustice and instead confronts it, the gap between legal ideals and the lived experiences of policing victims can begin to close.