ISLAMIC TRANSITIONAL JUSTICE: INTERNATIONAL LESSONS FOR AMERICAN RACISM

*Mohamed 'Arafa**

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* Professor of Law at Alexandria University Faculty of Law (Egypt) & Visiting Adjunct Professor of Law and the Clarke Initiative Visiting Scholar at Cornell Law School. In 2026, he served as Expert Witness in the Federal FCPA Trial in United States v. Charles Hobson (testimony was conducted as an Expert hired by the U.S. Department of Justice (DOJ), focusing on the legality of corruption and bribery under Egyptian Law). Author extends sincere gratitude to the Editorial Board of the *Cardozo Journal of Equal Rights and Social Justice* (ERSJ) for their thoughtful and substantive editorial contributions. The Author is particularly appreciative of the invaluable feedback and careful review provided by Serena Roche, Hannah Cohen, Sarah Weiner, and Daniel Krack.

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INTRODUCTION

Transitional Justice ("TJ"), which refers to the processes and mechanisms through which societies address the legacies of large-scale human rights abuses, mass atrocities, or systemic oppression, is a theory and practice that has maintained a decades-long focus on accountability for such harms. The term "TJ" has, in recent years, come to designate both an academic field and a political practice concerned with the aftermath of conflict and large-scale human rights abuses. Scholars have increasingly scrutinized the TJ process for privileging pardon over accountability, often documenting how amnesty arrangements dilute meaningful responsibility for mass atrocities.[1] They have also examined the friction between domestic and international liability, showing how states strategically navigate—or resist—external legal pressure to preserve political settlements. At the same time, critics have demonstrated that selectivity, elite deal-making, and the strategic concealment of harms frequently shape post-atrocity responses in predictable ways. Taken together, these critiques reveal significant shifts in the accountability dynamic that now define contemporary TJ discourse.[2]

It is crucial to (re)establish the rule of law after periods of conflict or totalitarianism to build sustainable peace and well-functioning states. Reflecting on the contemporary encounters and future directions of TJ theory and practice, it is important to address causality and political form in a triangulated valuation of nationalism's power in the present formulations of transitional resolutions.[3] Consociationalism is a system of governance typically found in deeply divided societies, based on power sharing among leaders (or elites) from different social groups.[4]

The responsibilities of promoting justice, compensation, and reconciliation after conflict are challenging and can take decades to fulfill. Systematic violations of human rights that are not sufficiently addressed

[1] Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 Va. J. Int'l L. 915, 940-943 (2009).

[2] Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J. L. & SOC'Y 411, 415-435 (2007).

[3] *See generally* CAROLINE A. HARTZELL & MATTHEW HODDIE, CRAFTING PEACE: POWER-SHARING INSTITUTIONS AND THE NEGOTIATED SETTLEMENT OF CIVIL WARS (2007).

[4] For a discussion underscoring how the identity politics of TJ brings us to evaluate the political systems that empower, define and consume transition with a specific hew to power-sharing and consociationalism-type arrangements in the aftermath of systematic brutality see HARTZEL & HODDIE, *supra* note 3. Consociationalism is a system of governance typically found in deeply divided societies, based on power sharing among leaders (or elites) from different social groups. ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 191–231 (2005). Two vital features of consociationalism are government by a magnificent coalition and segmental autonomy (cynical account of the victory as preferred transitional accommodation, mainly in conflict-sourced transitions), and the "dark side" of governance measures in post-conflict situations, with consequences for understanding cycles of violence and repeat conflict patterns. *Id.*

contribute to social unrest and often result in renewed violence.[5] It is significant to acknowledge that each post-conflict circumstance is unique, and necessitates various means to address past wrongs.[6] Irrespective of the violence that has occurred, universal questions arise in the wake of atrocities: How can an evolving democracy peacefully assimilate both the supporters and the victims of a former regime? How should it approach justice and reconciliation, war crimes, and the search for truth? Several countries face these problematic inquiries, and the answers can often have profound philosophical, political, legal, psychological, and economic consequences.[7]

The core goals of TJ are to ensure accountability, provide reparations, foster reconciliation, and create a reliable record of past violations, thereby preventing recurrence. TJ mechanisms include Truth and Reconciliation Commissions ("TRCs"), criminal prosecutions, reparations programs, and institutional reforms, often applied in combination to address both individual and societal dimensions of justice. Past experience demonstrates that these TJ mechanisms work best if they are combined in a comprehensive strategy with judicial measures like trials and legal reforms, as well as non-judicial measures like truth commissions and compensation schemes, all of which can and should complement one another.[8] In other words, it is important to identify the difficult choices that societies must make in their efforts to restructure their society and state while confronting the legacy of the past: whom to hold accountable, how victims may be compensated, and how security and justice sector institutions can be reformed.[9]

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[5] Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH L. REV. 1295 (2005) ("In sum, conspiracy as a basis for culpability has become less controversial than it initially was when boldly introduced at Nuremberg.").

[6] Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civics in Rwanda*, 75 N.Y.U. L. Rev. 1221, 1250 (2000); *see*, *e.g.*, Eric Reeves, *Genocide in Sudan*, IN THESE TIMES (May 6, 2004), https://inthesetimes.com/article/genocide-in-sudan [https://perma.cc/E7ZB-NJDT] ("[U.N. Secretary-General] Annan has yet to make concrete proposals for either the resources or the mandate that would guide an intervention. The U.N.'s failure to act ensures that hundreds of thousands of Darfurians will die in the corning months.").

[7] Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539 (2005).

[8] Carol D. Leonnig & Julie Tate, *Detainee Hearings Bring New Details and Disputes*, Wash. Post, Dec. 11, 2004, at Al. 93. *See*, *e.g.*, Rasul v. Bush, 542 U.S. 466, 484 (2004) (holding that U.S. courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay).

[9] Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 Harv. L. Rev. 762, 769 (2004) (arguing that transitional justice is not qualitatively different from domestic justice because the latter includes its own series of transitions). *See*, *e.g.*, Scott Higham, *Bin Laden Aide Is Charged at First Tribunal*, WASH. POST, Aug. 25, 2004, at Al. The military commission proceedings have been mired in controversy and delay. Neil A. Lewis, *Guantanamo Tribunal Process in Turmoil*, N.Y. Times, Sep. 26, 2004, at A31. They, too, face challenge in federal court. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004); *see*, *e.g.*, Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 348 (2003).

TJ is often characterized as a Western normative project grounded in secular legalism, liberal democratic theory, and individualized criminal accountability; and, at times, portrayed as externally imposed on non-Western societies. This framing has fueled critiques that TJ mechanisms insufficiently reflect local moral frameworks or culturally embedded conceptions of justice. Yet the core concerns that animate TJ—accountability, reconciliation, restoration of social order, and protection of human dignity—are not uniquely Western. Comparable principles appear consistently within Islamic legal and ethical traditions. Circumstances necessitating TJ typically involve war, occupation, authoritarian or totalitarian regimes, or systemic structural injustice—situations in which conventional legal and institutional frameworks fail to uphold accountability or safeguard human rights. Much of the existing scholarship on TJ approaches these mechanisms from a Western perspective, emphasizing secular legalism, individual accountability, and liberal democratic principles. While these frameworks have contributed significantly to accountability and reconciliation, they often fall short in addressing communal, moral, and culturally contextualized dimensions of justice. This article argues that some of these gaps may be addressed by integrating principles derived from *Sharie'a* (Islamic) law, which emphasizes communal welfare, ethical accountability, and *sulh* (reconciliation) alongside procedural fairness.

Another element often overlooked in the transitional context is how it may be applicable to countries historically viewed as "stable," who nonetheless suffer from persistent internal turmoil. Despite not currently transitioning politically from war to peace or from subnational dictatorship to democracy, the United States nonetheless finds itself everlastingly trapped in a transitional conundrum: How can the United States reckon with its history of racial violence, and how can it be remedied? Revisiting race jurisprudence in light of universal TJ theory places American perspectives in dialogue with global standards and discourses.[10]

By examining comparative perspectives on the means employed to these ends, this Article will provide a framework for proposing, designing, and implementing an operational TJ policy. Section I examines the historical and philosophical foundations of transitional justice, analyzing the tension between peace and justice and the architecture of TJ mechanisms. This section introduces the main goals of TJ (accountability, reparations, reconciliation, and institutional reform) and explores the circumstances that necessitate TJ, such as war, authoritarian regimes, systemic oppression, and occupation. It also outlines the functioning of truth commissions, criminal

[10] *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L.J. 1935, 1947 (2002).

prosecutions, and complementary mechanisms, highlighting the limitations of Western approaches, which often emphasize procedural justice while underemphasizing communal and ethical dimensions.

Section II introduces Islamic legal principles as a complementary framework for TJ, emphasizing *sulh* (reconciliation), communal welfare, and ethical accountability. This section examines how these principles can address persistent inequalities, systemic racism, and the specific challenges posed by Islamophobia in Western contexts, offering tools to supplement gaps left by traditional TJ methodologies.

Section III applies these insights to the U.S. context, including racial injustice, policing, and constitutional protections. Subsections such as "When the Badge Meets the Law" and "Amendments Betrayed" illustrate how Islamic-informed concepts of justice, accountability, and reparative remedies can inform legal and institutional reforms that are both ethical and practically effective. In other words, this Article argues that some of these gaps may be addressed by engaging principles derived from Islamic law, which foreground *maslahah* (communal welfare), ethical accountability before both community and God, and *sulh* (reconciliation) alongside procedural fairness. Rather than displacing existing TJ models, this approach situates Islamic legal thought as a complementary normative framework capable of enriching TJ discourse.

Similarly, the sections "Unmasking Inequality" and "Racism's Legacy" address systemic racism and demonstrate how Islamic ethical frameworks, with their focus on social equity and communal responsibility, can complement American approaches to structural injustices. These section also explore Islamophobia, showing how a TJ-Islamic lens can provide culturally grounded mechanisms for recognition, protection, and reconciliation. Section IV integrates these theoretical and practical insights to propose a holistic framework for TJ in the United States. By combining Western legal methodologies with Islamic principles, the Article demonstrates how TJ can move beyond punitive measures to foster restorative, equitable, and community-centered justice, addressing both historical and ongoing systemic inequities.

By following this roadmap, the reader will gain a clear understanding of TJ's potential to bridge legal traditions, combat structural discrimination, and cultivate inclusive approaches to justice, while highlighting the moral and ethical imperatives shared across cultures.

I. TRANSITIONAL JUSTICE: JUSTICE AFTER ATROCITY

Philosophers, practitioners, and legal scholars of TJ focus on the most active and genuine ways of addressing past wrongs and move towards the

(re)establishment of a decent civil order.[11] In making the transition from a violent past into settled and legitimate governance, officials classically pursue multiple goals, while some of these are commonly reinforcing, others come into conflict with each other.

The elementary challenges of TJ strategy are to (1) successfully respond to past abuse, (2) find the truth about what ensued and why the harms occurred, (3) acknowledge victims' suffering, (4) hold perpetrators accountable, (5) compensate for past wrongs, (6) prevent future abuses, and (7) promote social healing.[12] It is a difficult task, but numerous techniques have been developed in nations transitioning from war to peace that address each of these challenges.[13] This process includes four core pillars: (1) criminal prosecutions for perpetrators; (2) truth commissions (or seeking); (3) reparations and compensation programs for victims (politics of memory); and (4) the creation of systems for vetting abusive officials from public positions (institutional reforms).[14] Societies emerging from violent conflicts or tyrannical regimes often find it hard to recover, build a better future, and avoid falling back into conflict.[15] They are faced with a massive dilemma: on the one hand, the victims and survivors feel the strong urge for justice to be condensed, and on the other hand, the society at large wishes to move away from the harms of the past, even if this means clemency for perpetrators.[16] Ultimately, the country needs peace and stability, and to create that peace, a balance must be found between justice and amnesty.[17]

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[11] Levinson, *supra* note 9. Hence, it is perplexing to fully pursue all transitional goals at the same time. THEORIZING TRANSITIONAL JUSTICE 59-68 (Claudio Corradetti, Nir Eisikovits & Jack Volpe Rotondi eds., 2015); GIADA GIRELLI, UNDERSTANDING TRANSITIONAL JUSTICE: A STRUGGLE FOR PEACE, RECONCILIATION, AND REBUILDING 43-64 & 65-85 (2017).

[12] *See generally* Neil J. Kritz, *Progress and Humility*: *The Ongoing Search for Post-Conflict Justice*, *in* POST-CONFLICT JUSTICE (M. Cherif Bassiouni ed., 2002).

[13] *See generally* Neil J. Kritz, *Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation*, *in* THE LEGACY OF ABUSE: CONFRONTING THE PAST, FACING THE FUTURE **(**Alice H. Henkin ed., 2002).

[14] Mihaela Mihai, *Transitional Justice and the Quest for Democracy: A Contribution to a Political Theory of Democratic Transformations*, 23 Ratio Juris. 183, 183 (2010) (discussing the transitional justice literature by overcoming the Democracy vs. Justice debate) ("This debate is normatively implausible and prudentially self-defeating. Normatively, transitional justice will be conceptualised as an imperative of democratic equal concern. Prudentially, it can prevent further violence and provide an opportunity for initiating processes of democratic emotional socialisation. The resentment and indignation animating transitions should be acknowledged as markers of a sense of justice. As such, they can help the reproduction of democracy. However, their public expression must be institutionally filtered through democratic norms. The consistent institutional instantiation of equal respect can educate and recuperate negative emotions for democracy.").

[15] Drumbl, *supra* note 7, at 565.

[16] Laurel E. Fletcher et al., *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163, 163-220 (2009).

[17] It should be noted that critical decisions must be made to limit the victims' frustration and despair while uncovering the truth of past events, as TJ is a field that handles these sensitive issues.

Reconciliation, matters of gender, and memory, cut across all four pillars. To achieve their goal, TJ mechanisms need to be established to address these concerns effectively. When a society wants to repair relationships damaged at an earlier period of national history, TJ instruments can address massive human rights abuses, extensive violence, gross structural discriminations, authoritarianism, and civil wars.[18] These mechanisms can be used to create a just society and help develop a robust system of democratic participation. TJ mechanisms aim to both remedy past human rights breaches, as well as resolve ongoing conflicts that pose challenges to sustainable peace and development. It should be noted that TRCs are a non-judicial mechanisms that have played a significant part in revealing past human rights violations in post-conflict societies.[19] In this respect, TRCs are valuable only if (1) they stipulate and officially recognize a comprehensive and discussed version of the "truth;" (2) extensive consultations are conducted with civil society, organizations, the victims, and witnesses; (3) reparations are accessible (and offered); (4) individual and institutional tasks for past violations are determined/defined; (5) forms of peaceful conflict resolution are stimulated at the grassroots level; and (6) deep-rooted causes of conflict are analyzed, and specific preventive measures are endorsed.[20]

A primary goal of TJ is the establishment of a credible and comprehensive record of past human rights violations. Such a record is clearly significant in its own right as part of the fundamentally human project preserving history as accurately as possible.[21] Also, this record is supportive

[18] *See generally* Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, 29 THIRD WORLD Q. 275, 282 (2008) (arguing that TJ has become a globalized project with increasingly standardized assumptions and practices; criticizing narrow conceptions of TJ that exclude structural violence and external actors, and warning against the depoliticization and narrowing of TJ frameworks).

[19] Charles Villa-Vicencio of the Institute for Justice and Reconciliation, South Africa, suggests that, "a TRC, as the name suggests is concerned with the restoration of truth. Through TRCs, the commissions try to document and analyse structures and methods used in perpetuating out illegal repression, while taking into account the socio-political and economic conditions in which these violations have been held." *See* PIECES OF THE PUZZLE: KEYWORDS ON RECONCILIATION AND TRANSITIONAL JUSTICE 78 (Charles Villa-Vicencio & Erik Doxtader eds. 2007).

[20] David Mendeloff, *Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?,* 6 INT'L STUD. REV. 355, 368 (2004). *See* Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?,* 60 ALB. L. REV. 579, 585 (1997) (arguing that serious human rights violations implicate both criminal accountability and civil remedies, and that tort actions can complement criminal prosecution); *see also* George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 THEORETICAL INQUIRIES L. 163, 168-74 (2004) (positing that collective guilt is a "plausible . . . and sometimes healthy response to collective wrongdoing").

[21] *See Brazil Creates Truth Commission to Probe Rights Abuses*, BBC (Oct. 27, 2011), https://www.bbc.com/news/world-latin-america-15473622 [https://perma.cc/X6ZX-3AD8] ("Brazil's Senate has voted to set up a truth commission to investigate rights abuses, including those committed during military rule from 1964 to 1985. The amnesty law, passed in 1979 and upheld . . . by the Supreme Court, means neither military officials accused of torture nor left-wing guerrillas accused of violence can

in refuting spurious revisionist claims (e.g., the record created by the Nuremberg trials has been helpful in contradicting the allegations of various Holocaust deniers) and, more generally, in ending the displays of impunity so typical of totalitarian administrations.[22] Once such a record is established, it becomes impossible for those who colluded with an oppressive regime to deny responsibility and involvement in past crimes.[23] What is conceivably most significant is the creation of an accurate, inclusive, and public historical record to promote the psychological healing of victims with an official and public acknowledgement of their suffering.[24]

Secondly, a key goal involves setting up a practical, professional bureaucracy and civil service to properly serve the needs of the population. As with reinforcing the rule of law, this helps establish (or reestablish) citizens' trust in their government. When basic services are rendered in a reliable, non-arbitrary fashion, ordinary people may gain (or regain) the belief that the government exists to serve rather than oppress them.[25]

Thirdly, the government along with non-governmental organizations (NGOs) must directly assist victims in reforming and repairing their lives (civil society role). By attending to the physical and psychological afflictions of victims, restituting lost property, reimbursing them for their losses, and fixing historical injustices that systematically deprived them of dignity, only then can the ends of TJ be achieved. Finally, ending and stopping violence and combining stability permits the creation or restoration of a normal civic

face prosecution. Nearly 500 people were killed or disappeared during military rule in Brazil, a far smaller number than in neighboring Argentina and Chile.").

[22] Michael Ben-Josef Hirsch et al., *Measuring the Impacts of Truth and Reconciliation Commissions: Placing the Global 'Success' of TRCs in Local Perspective*, 47 COOPERATION & CONFLICT J. 386, 386-403 (2012) ("Truth and reconciliation commissions (TRCs) have emerged as an international norm and are assumed to be an essential element of national reconciliation, democratization, and post-conflict development. Despite the increase in the number of TRCs being initiated around the globe and the international consensus regarding their positive effects, there is little understanding of the long-term effects and consequences of TRCs.").

[23] *See generally* TERRY BELL & DUMISA BUHLE NTSEBEZA, UNFINISHED BUSINESS: SOUTH AFRICA, APARTHEID, AND TRUTH (2003) ("Many people, both in South Africa and abroad, hoped that the Truth and Reconciliation Commission established in 1996 would uncover the hidden history of South Africa's apartheid past."); Aletta J. Norval, *Truth and Reconciliation: The Birth of the Present and the Reworking of History*, 25 J. SOUTHERN AFRICAN STUD. 499, 519 (1999).

[24] *See*, *e.g.,* Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Sep. 17, 2003).

[25] *See*, *e.g*., Frederic L. Kirgis, *United Nations Commission's Report on Violations of International Humanitarian Law in Darfur,* 9 AM. SOC'Y INT'L L. 5 (Feb. 3, 2005) ("Under the ILC's articles on state responsibility for internationally wrongful acts, the state responsible for the wrongful act is under an obligation to make full reparation. The principal forms of reparation are restitution (restoring the *status quo* ante, if possible) and, if restitution is not forthcoming, compensation for the damage caused by the wrongful act.").

and commercial life, cements trust in government, and draws outside investments to the recovering nation.[26]

A. Philosophical Analysis of the Problem of Peace vs. Justice

Post-war transitions are characterized by the co-existence of possibly conflicting yet politically and morally significant goals. Some of these goals concern redressing past injustices, while others concern establishing stability and building functioning, competent institutions (a significant tension between considerations of justice and social utility after war).[27] It should be noted that the tension between what is ethically required and how leaders must occasionally act for the global benefit of their subjects has always been central to the understanding of politics.[28]

Because TJ is grounded in underlying moral and philosophical commitments, examining those foundations is central to this analysis. TJ is often framed as a Western normative project shaped by liberal legalism, secular adjudication, and individualized criminal accountability.[29] Developed largely through European and North American institutions, contemporary TJ mechanisms reflect assumptions about the primacy of the autonomous individual, the separation of law and religion, and liberal democracy as the endpoint of political transition.[30] As a result, they are sometimes perceived—particularly in Muslim-majority or postcolonial contexts—as externally imposed frameworks that insufficiently account for communal and religious conceptions of justice. Circumstances necessitating TJ typically involve war, occupation, authoritarian governance, or systemic structural injustice—situations in which ordinary legal systems fail to ensure accountability or protect human rights. While Western-derived TJ models

[26] SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE (2002); *see also* Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 456 (2001) ("Generally speaking, international criminal law on [command responsibility] seems to be somewhat more hospitable to notions of vicarious liability and other legal constructs which, in their practical application - if not already in their formulation - display a measure of insensitivity to the degree of the actor's own persona culpability.").

[27] Needless to say, this pressure occurs in usual political life as well. Posner & Vermeule, *supra* note 9.

[28] NICCOLÒ MACHIAVELLI, THE PRINCE ch. XV (Harvey C. Mansfield trans., Univ. of Chi. Press 2d ed. 1985) (1513).

[29] Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003) (tracing the liberal legalist foundations of contemporary transitional justice and its development through Western institutional paradigms).

[30] Makau Mutua, *Savages*, *Victims*, *and Saviors*: *The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001) (critiquing the Western-centric framing of human rights and its civilizing narrative, relevant to claims of external imposition).

have significantly advanced accountability efforts, they often under-theorize communal, moral, and culturally embedded dimensions of justice.[31]

Machiavelli explains that the most excellently when he argued that a Prince might have to learn how "not to be good" in order to act in the best interest of his polity.[32] Further, Sartre provides the theatrical depiction and gives the problem its most familiar name in his play *Dirty Hands*. One of his characters puts it starkly: "Well, I have dirty hands. Right up to the elbows. I've plunged them in filth and blood. But what do you hope? Do you think you can govern innocently?"[33] Observing the *peace vs. justice* problem through Sartre's "dirty hands" dilemma helps clarify the competing pressures that shape postwar transitional contexts. It should be noted that *peace vs. justice* is not a discussion between advocates of a Kantian commitment to full retributive justice versus the skeptical pragmatists who would enthusiastically, in the notorious words of the Cambodian Prime Minister Hun Sen, "dig a hole and bury the past."[34] Rather, the tension should be understood as a paradox: officials and citizens in transitional nations (e.g., Egypt and Tunisia in the Middle East) simultaneously hold two prevailing yet often contradictory ethical perceptions.[35] To build a legitimate, operative civil society in the aftermath of war or atrocity, a society must both pursue justice for the past criminal acts and secure stability through an effective government. In that process it is sometimes essential and morally adequate to leave some past crimes and past criminals alone, in the broader interest of peace. In other words, according to the western philosophical view underpinning traditional TJ, some peace must be sacrificed to prevent the further exploitation of the countries citizens, to compensate those directly harmed, and penalize those who have benefitted from their wrongdoings.

Furthermore, the philosophy of Thomas Nagel and Bernard Williams signifies a paradox about how TJ proponents make judgments about praise

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[31] Nagy, *supra* note 18.

[32] MACHIAVELLI, *supra* note 28. Machiavelli presents a pragmatic view of political leadership, arguing that a ruler's primary obligation is the stability and success of the state, even if this requires actions that might be considered morally questionable. *Id.* When he writes that a prince must learn "not to be good," he is not endorsing cruelty or deceit for its own sake, but rather emphasizing the need for flexibility and realism in governance. *Id.* at 63. In other words, a prince may have to act against conventional moral norms—using deception, coercion, or calculated force—if doing so preserves order, deters threats, and secures the long-term welfare of the polity. This insight marks a shift from idealized notions of virtue toward a consequentialist understanding of leadership, where the ends of maintaining political stability and protecting the state can justify means that would otherwise be condemned in private life.

[33] JEAN-PAUL SARTRE, NO EXIT AND THREE OTHER PLAYS 3-47 (Stuart Gilbert trans., 1946).

[34] *See*, *e.g.*, Seth Mydans, *In Cambodia, Clinton Advocates Khmer Rouge Trials*, N.Y. TIMES (Nov. 1, 2010), https://www.nytimes.com/2010/11/02/world/asia/02cambo.html?smid=url-share [https://perma.cc/Y6GB-DGMG].

[35] *See generally* Chandra Lekha Sriram, *Transitional Justice in the Middle East and North Africa* (2017).

and blame: people should be praised or blamed only on the basis of what they can control, and regularly on the basis of the results of their actions even if these are beyond the control of the agents involved.[36] A moral debate, in principle, can be resolved, though the tension between peace and justice often leads post-war discussions to favor one type of moral intuition over the other.[37] However, Philip Gourevitch has argued, it is not an easy task ensuring both peace and justice if survivors are resentful about failure to bring perpetrators to justice.[38]

In fragile democracies, such tensions can be improved by legal institutions and traditions that exemplify this compromise between justice and social utility. This can be best accomplished by establishing a constitution, a consensus constitutional jurisprudence through a democratically elected legislature, and an esteemed highest court with the power of judicial review (e.g., Cassation Court or Supreme Constitutional Court, etc.).[39] Part of the role of such institutions and traditions is to offer guidance about how to balance peace with justice most reasonably, given an inclusive interpretation of the state's legal and political history.[40] But transitional times are precisely the periods in which such institutions, traditions, and interpretive philosophies are first being set out, and thus tend to be at their most fragile.[41] Therefore, it is more difficult for transitional societies to resolve *peace versus justice* decisions because the institutions essential to navigating these inquiries are not yet in place. Further, the very act of forming such institutions generates situations where peace and justice clash. The need to swiftly set up a competent court and security/law enforcement (police) systems to permit for stable government therefore entail hiring skillful and professional administrators (e.g., historians, anthropologists, investigators, legal analysts, and other specialists as

[36] Thomas Nagel, *Moral Luck*, *in* MORTAL QUESTIONS (Cambridge Univ. Press, 1979), 24–38; *see also* BERNARD WILLIAMS, MORAL LUCK 20-39 (Cambridge Univ. Press, 1982).

[37] Williams, *supra* note 37.

[38] It should be noted that there is no actual "debate" between peace and justice after war, as some legal scholars and NGOs activists claim, only an enduring negotiation that, at any given point, will lean towards one of these intuitions, and to understand their co-equal status, settle on a policy that lies on the range between them, and constantly reassess. Philip Gourevitch, *The Life After*: *Fifteen Years after the Genocide in Rwanda*, *the Reconciliation Defies Expectations*, THE NEW YORKER, Apr. 27, 2009, https://www.newyorker.com/magazine/2009/05/04/the-life-after [https://perma.cc/H57P-CP94] ("[A]ll those bloody years ago—and for the first time in fifteen years there is near-universal agreement that there is a possibility of peace.").

[39] Nagel, *supra* note 36.

[40] Posner & Vermeule, *supra* note 9.

[41] In this regard, when the argument arose about misuses of executive power in the United States following the September 11, 2001 attacks, that argument could take place on the background of a history of executive power grabs and the responses to them (Jefferson's requisitioning of funds for the military without congressional approval and Lincoln's suspension of *habeas corpus* during the civil war come to mind).

appropriate). Many of these individuals may have been "contaminated" during the tenure of the previous regime(s), yet the need to entice foreign investors and maintain public order may necessitate some compromises on the extent and length of criminal proceedings against past perpetrators, and so forth.[42]

II. RECKONING WITH THE PAST: THE ARCHITECTURE OF TRANSITIONAL JUSTICE

Choosing an appropriate TJ mechanism, or combination of mechanisms, depends on a range of factors and the specific circumstances of the period of abuse. Were the crimes of the regime widespread and indiscriminate, or are they focused on one region or ethnic group? Are several perpetrators accountable, or only a few? Were the criminal acts of the State, or those of insurgents, or both? Are the culprits still in power, or has there been a clean transition to a new government? Does the country have sufficient resources to apply a justice mechanism? Are the existing courts trustworthy and credible? Can the nation afford individual reparations? Depending on the responses to these questions, some solutions are more feasible or more effective than others. Most significantly, an accurate assessment must be made before any TJ instrument is decided. This assessment must take into consideration the nature of the conflict and the positions and interests of the victims, leaders, and the public at large. The way to determine the needs and positions of different groups is through systematic consultations and public debate on various TJ options. Some factors that affect the efficacy of different TJ tools include the following mechanisms.

A. Prosecutions

Prosecutions offer the most straightforward mode of accountability and work best when they are conducted in reliable, objective, independent courts:

[42] *See generally* Maja Davidović, *Reconciling Complexities of Time in Criminal Justice and Transitional Justice*, 27 INT'L CRIMINAL L. REV. 1 (2021) (analyzing complexities of time in TJ and categorizing the temporal dichotomies of TJ processes as time boundless/timelessness and linearity/circularity, challenging the dominant linear conception of time in the field) ("The common conceptualization of 'transition' in TJ suggests linearity of time across three definite points: the past, the present, and the future. This linear time has been temporarily ruptured by a 'transitional' period from the past to the future. Paradigmatic transitional justice, which employs such linearity, concerns radical shifts from old, violent regimes to new, transformed, and peaceful ones."). In other words, the conflict between peace and justice is further delicate in transitional situations because the political risks are exclusively high during such moments. If a transitional society cannot unite peace and operative government, the very effort to form a decent new state suffers ruin. This sort of fragility, where the entire political project is at stake, is more likely to drift peace versus justice problems than a definite crisis in a consolidated democracy. Such localized emergencies classically involve localized endeavors, not the existence of the political system *per se*.

national, international, or hybrid. Because the number of potential defendants implicated in past misdeeds is often large, and prosecuting them all would normally exceed the country's financial, human, and political capacity, the number of culprits who can be charged is typically trivial.[43] There must be robust political will to endure trials, which is often absent when perpetrators or their political partners remain in power.[44] Still, successful prosecutions make the strongest statement against impunity and signal to victims that the new administration is willing to make a clean break with a horrendous past.[45]

Criminal prosecutions are directed at persons who bear individual accountability for criminal wrongdoings committed during a period of conflict or abuse. Prosecuting perpetrators of mass crimes is a global legal commitment and is often seen as an ethical good while simultaneously sending a robust social message that criminal performances will not be endured in the future.[46] Prosecutions also help avoid lawless revenge and retaliation by those victimized, thereby upholding or restoring the rule of law.[47] In other words, individual prosecutions do not only serve the individual desire for justice but are also symbolically necessary, to an extent, for society as a whole.

[43] Kritz, *supra* note 12.

[44] Kritz, *supra* note 13 (explaining that prosecutions take substantial time and money to accomplish, and only address the crimes of individual defendants rather than a regime as a whole). *See*, *e.g.*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: PROSECUTION INITIATIVES, HR/PUB/06/4 (2006) (detailing the basic considerations on prosecution initiatives; underscoring the strategic and technical challenges faced by domestic prosecutions) ("This tool addresses the challenges of prosecuting perpetrators of crimes such as genocide, crimes against humanity and war crimes. Prosecutions form one of the central elements of an integrated transitional justice strategy, aimed at moving a society beyond impunity and a legacy of human rights abuse. While this . . . seeks to draw lessons from past experiences, there is an obvious limitation: impunity has been the norm for serious violations of national and international law, while successful prosecutions are the exception. Nevertheless, there have been significant advances over the past two decades. [It] presumes that long-term and sustainable solutions to impunity should aim mostly at building domestic capacity to try these crimes.").

[45] *Id; see* U.N. SECRETARY-GENERAL, THE RULE OF LAW AND TRANSITIONAL JUSTICE IN CONFLICT AND POST-CONFLICT SOCIETIES, at para. 34, at S/2004/616 (Aug. 23, 2004) ("While the international community is obliged to act directly for the protection of human rights and human security where conflict has eroded or frustrated the domestic rule of law, in the long term, no ad hoc, temporary or external measures can ever replace a functioning national justice system.").

[46] Adam Michnik & Vaclav Havel, *Confronting the Past*: *Justice or Revenge*, 4 J. DEMOCRACY 1, 21-22 (1993) (noting that it is vital to excise elements of the past in order to "remove an ulcer that [is] poisoning the whole system.").

[47] *Id.*

Indicting individuals is the most direct form of accountability possible, and helps to restore legal order and inspire trust in public institutions.[48] Yet, prosecutions are often expensive, time consuming, and contentious, and no nation will have suitable resources to prosecute all wrongdoers who have committed criminal acts during a period of conflict.[49] To overcome these difficulties, prosecutions in the TJ context are often only directed to the persons most liable for the most heinous criminal acts.[50] Not only are principal offenders considered more deserving of punishment, but prosecuting them can also act as a public deterrent for future abusers by signaling that impunity will not be tolerated under the new regime(s). Such prosecutions further acknowledge the abuse and can provide some catharsis to the victims.[51]

International treaties create a duty for signatory nations to prosecute the gravest international crimes, such as genocide, torture or violation of the laws of war.[52] Still, nations must designate a court with explicit and appropriate jurisdiction to conduct a proper trial. Further, these trials must be fair and impartial, following plainly established procedures, which includes the basic due process guarantees preserved in the universal documents (e.g. Convention on the Prevention and Punishment of Genocide).[53] Moreover, fair trials must protect the accused person's right to a defense, including the right to an attorney and the right to see and to rebut the evidence against them.[54] Prosecutions in post conflict or transitional cultures often take place in fragile political contexts, which create obstacles that present difficulties in ensuring the fairness of these trials.[55] Often, perpetrators of past atrocities, or their sponsors, become part of the new régime and are unlikely to endorse prosecutions that could implicate themselves or members of their own group or party.[56] On the other hand, if one party to a conflict overcomes and initiates prosecutions against members of the losing party, the losers will

[48] *See* Sanford Levinson, *Trials*, *Commissions*, *and Investigating Committees*: *The Elusive Search for Norms of Due Process*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 211, 211-12 (Robert I. Rotberg & Dennis Thompson eds., 2000).

[49] *Id*.

[50] *See* JUDITH N. SHKLAR, LEGALISM: LAWS, MORALS, AND POLITICAL TRIALS 167 (1986).

[51] *See*, *e.g*., Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 515 (1986) (characterizing conventional transition issues as a general problem generated by uncertainty about future state policy).

[52] *See*, *e.g*.,78 U.N.T.S. 277.

[53] 78 U.N.T.S. 277.

[54] *See*, *e.g*., 999 U.N.T.S 171; 1465 U.N.T.S. 85; 2187 U.N.T.S. 90 (incorporate genocide, crimes against humanity and war crimes into its domestic legal framework); 75 U.N.T.S. 287.

[55] M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 415 (2000).

[56] Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 505 (1990).

argue that the trials are acts of revenge rather than justice.[57] To avoid these risks, trials must be as independent, transparent, and as objective as possible, following clear laws and fair procedures, administered by qualified legal professionals.[58]

While continuity between the violator regime and the post-atrocity government may promote stability, it also presents a significant structural drawback: the same individual functionaries who enabled or tolerated abuses often remain embedded within prosecutorial offices, security forces, or judicial institutions, thereby compromising the impartiality and credibility of domestic accountability efforts. International law formally reflects a preference for domestic prosecutions—most notably through the complementarity principle embodied in the Rome Statute of the International Criminal Court—on the premise that states bear primary responsibility for investigating and prosecuting atrocity crimes.[59] Yet where institutions remain politically captured, structurally weakened, or complicit in prior abuses, domestic proceedings may become selective, shield high-level perpetrators, or reinforce impunity.[60] In such circumstances, the prospect of an international criminal forum arises as a gap-filling mechanism.[61] However, this alternative carries its own drawbacks: concerns over sovereignty, accusations of external imposition, resource constraints, limited jurisdiction, and the distance (both geographic and cultural) between international tribunals and affected communities.[62]

It should be noted that mass crimes, such as crimes against humanity or genocide, are complicated to investigate and more difficult to prove in a court of law.[63] To meet the burden of proof for such charges, prosecutors must

[57] P. De Greiff, *Theorizing Transitional Justice*, in TRANSITIONAL JUSTICE 31, 45 (Kieran McEvoy & Louis Mallinder, eds., 2012).

[58] Priscilla B. Hayner, *Fifteen Truth Commissions - 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 607 (1994); *see generally* Neil J. Kritz, TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES: GENERAL CONSIDERATIONS (1995) (providing an overview of the theoretical foundations, objectives, and mechanisms of transitional justice in emerging democracies).

[59] William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 62 (2008) (explaining the ICC's complementarity regime and the primacy of domestic proceedings).

[60] *Id.* at 65-68.

[61] *Id.* at 70-72.

[62] *Id*. Together, these tensions illuminate the complex legal and political terrain that follows mass atrocity, underscoring that TJ operates within a constrained landscape shaped by competing doctrines, institutional weaknesses, and normative trade-offs rather than clear institutional solutions.

[63] M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights,* in POST-CONFLICT JUSTICE (M. Cherif Bassiouni ed., 2000) ("International civil society has expressed a growing discontent with the practice of granting impunity, particularly for the leaders who have ordered the commission of atrocities and the senior commanders who executed these unlawful orders. It is this discontent that has brought about a change in the attitude

investigate large patterns of abuse, which may include several witnesses and forensic analyses, and must establish complex links between commanders who ordered crimes and the soldiers who carried them out.[64] To prove these crimes, prosecutors need to have a strong understanding of the relevant law; experts must examine not only the law but also the historical, military and political details of the conflict; prosecutors must handle large amounts of sophisticated evidence, often employing complex trial management techniques; and counsel must handle complex, detailed rules of procedure and evidence.[65]

Moreover, many domestic tribunals or courts are seen as politically biased, particularly after periods of tyrannical rule. Even if these institutions have the technical capacity to take on complex cases, they aren't seen as reliable by one or more parties to the conflict.[66] To resolve this issue, some nations have pursued a "hybrid" model of prosecution, whereby domestic courts, attorneys, and judges are supported by international counterparts to help with trials.[67]

Prosecutions chiefly deal with the role of the accused. The official role of victims is restricted to providing witness testimony in a formal, frequently unassisted, procedure.[68] It is critical that victims comprehend the purposes and boundaries of the formal trial procedures so that they do not feel disregarded or manipulated by the process, and are not dissatisfied by false

of governments, compelling them to face the demand for justice, in particular for *jus cogens* international crimes. The *realpolitik* of reaching political settlements without regard to a post-conflict justice component is no longer acceptable."). Genocide is the intentional act to destroy, in whole or in part, a national, ethnic, racial, or religious group. It is not limited to killing; it also includes causing serious bodily or mental harm, deliberately inflicting conditions calculated to bring about the group's physical destruction, preventing births within the group, or forcibly transferring children out of the group (Defined in Article II of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, U.N.T.S. 77 (Genocide Convention)). Crimes against humanity are certain acts committed as part of a widespread or systematic attack against a civilian population, with knowledge of the attack. These acts include murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution, enforced disappearance, apartheid, and other inhumane acts. First codified in the Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 82 U.N.T.S. 279 and further elaborated in the Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90.

[64] *Id.* at 10-32.

[65] *Id.* at 11-44. In many nations recovering from conflict, local court systems are not well prepared to handle the size and difficulty of prosecutions for mass crimes.

[66] *Id.* at 13-18.

[67] *Id.* at 20. In this respect, global experts can bring both professional experience, knowledge of the developing universal jurisprudence on the matter and, as important, independence to legal proceedings (e.g., courts in East Timor, Sierra Leone, Cambodia, Bosnia and Lebanon). Each of these courts: are temporary in nature, include resident and international staff working along each other, and use a mixture of national and international law.

[68] *Id.* (discussing that in this process, victims' needs and expectations are rarely acknowledged, or acknowledged only in a limited capacity).

expectations of the outcome.[69] More significantly, victims and witnesses who do contribute in politically sensitive trials must be effectively protected so that they are not subjected to retaliation by defendants or exposed to emotional and social harm because of the information they provide.[70] To best address victim's needs, trials must be conducted in tandem with other TJ devices that address victims' needs more directly, and also address significant forms of abuse. One way to achieve these ends is to have a truth commission work side by side with a tribunal, so that the two instruments can offer a more comprehensive accounting of the causes and consequences of a conflict.[71] Criminal justice is part of the response to massive human rights abuses and works best if combined with other mechanisms of transitional justice.[72]

B. Truth (Telling) Commissions

Truth commissions are official investigative bodies encompassing independent experts who are in charge of investigating and reporting on patterns of human rights violations over a certain period of time, in a

[69] *See* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,* 100 YALE L.J. 2537 (1991).

[70] *See*, *e.g.*, R v. Bow Street Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L. 1999); Int'l Crim. Trib. for the Former Yugoslavia, Prosecutor v. Milošević, Indictment, Case Nos. IT-01-50 (Ict. 8, 2001) (Croatia) (for war crimes and crimes against humanity committed in Kosovo, Croatia, and Bosnia and for genocide, with respect to Bosnia only); Int'l Crim. Trib. for the Former Yugoslavia, Prosecutor v. Karadžić, Indictment, Case No. IT-95-18 (Nov. 16, 1995) (charging genocide, war crimes, and crimes against humanity); Int'l Crim. Trib. for Rwanda, Prosecutor v. Kambanda, Judgment and Sentence, Case No. ICTR-97-23-S (Sep. 4, 1998).

[71] *See generally* GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE (2002) (examining the historical development of international criminal law and efforts to hold perpetrators of genocide, war crimes, and crimes against humanity accountable). It is significant that joint mechanisms' relationships are undoubtedly defined so that they do not increase confusion, compete for the similar information or evidence and that they do not depress submissions to the truth mechanism for fear of subsequent prosecutions. In some countries, truth commissions have headed prosecutions, gathering and preserving evidence while the technical capacity and political will for trials advances. In others, they have proceeded concurrently. In some places, truth commissions have referred cases and evidence to prosecutors; in others, they have been banded from doing so. And in some countries, only after individuals have been accused has society moved to a wider truth commission process. Also, as trials focus on the guilt and punishment of individual defendants but do not rehabilitate their victims, compensation arrangements may also be substantial to begin to redeem victims and help them to recover from their loss. A clear prosecutorial policy supports to make the best use of limited resources.

[72] CHRISTINE BELL, TRANSITIONAL JUSTICE 45–46 (2d ed. 2021). *See also* U.S. INST. OF PEACE, TRANSITIONAL JUSTICE HANDBOOK: A GUIDE FOR STRENGTHENING LEGAL AND INSTITUTIONAL FRAMEWORKS 32 (2023), https://www.usip.org/sites/default/files/TRANSITIONAL%20JUSTICE%20formatted.pdf [https://perma.cc/T2MT-YL87] (discussing that prosecutions generally face several hurdles and entail momentous resources and a high commitment to fairness, transparency and public consultations).

particular country, or in relation to a particular conflict.[73] Truth commissions permit victims, their relatives and culprits to give evidence of human rights misuses, providing an official forum for their accounts.[74]

Generally, these commissions are formed by official law (decree) with extensive powers of investigation, exist for a designated period of time (typically 6 months –2 years), and have an explicit mandate to detect the acts and determine the time period to be investigated.[75] This investigation includes not just personal acts, but forms of abuse and the institutional and societal aspects that enabled their occurrence.[76] Truth commissions are designed to uncover the facts about comprehensive aspects of abuse, to better realize and acknowledge the scope of atrocities committed, and to address changes that need to be made to prevent future abuse.[77] They are different than criminal investigations in that they are focused on both victims and perpetrators—determining what crimes were committed against whom and why—rather than a prosecutor's focus on individual perpetrators who committed specific criminal acts.[78] The tendency of these commissions to put the victims at the center of the proceeding, gives these bodies a great degree of moral credibility and legitimacy.[79]

A truth commission is often instrumental, especially for countries in transition (e.g., Egypt and Tunisia after the failed Arab Spring) to establish

[73] *See* AMY GUTMANN & DENNIS THOMPSON, THE MORAL FOUNDATIONS OF TRUTH COMMISSIONS, 23–44 (2000) ("broadly accessible and therefore inclusive of as many people as possible . . . are to the extent possible embodied or exemplified by the commission's own proceedings.").

[74] *Id.* at 35-36 ("[Central to deliberative democracy is] the idea that citizens and officials must justify any demands for collective action by giving reasons that can be accepted by those who are bound by the action . . . which asks citizens to try to justify their political views to one another, and to treat with respect those who make…efforts to engage in this mutual enterprise even when they cannot resolve their disagreements.").

[75] *Id*. Additionally, they are led by a various group of independent experts; adopt formal procedural rules to conduct investigations; interview witnesses, conduct site visits, and hold hearings; and produce and disseminate a final report, including conclusions and recommendations on how to avert future misuses. *Id.*

[76] *See generally* COLLEEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE (2017) (developing a normative framework for transitional justice focused on restoring moral and political relationships after periods of systemic injustice).

[77] Tricia D. Olsen et al., *When Truth Commissions Improve Human Rights*, 4 INT'L J. TRANSITIONAL JUST. 457, 59 (2010).

[78] TRANSITIONAL JUSTICE 22–23 (Kieran McEvoy & Louise Mallinder eds., 2012).

[79] PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGES OF TRUTH COMMISSIONS 22 (ROUTLEDGE 2d ed. 2010) (mentioning that these commissions "deal with the past; investigate continued patterns of abuses and not specific cases; operate for up to two years and then submit reports summarizing their findings and, and are usually official bodies sanctioned by the state;" and also, they engage in "unearthing, clarifying and formally acknowledging past abuses, responding to the needs of victims, helping create a culture of accountability, outlining institutional responsibility and possible reforms, advancing the prospects of reconciliation and reducing conflict over the past.").

the facts about past violations of international law.[80] These commissions clarify the reality behind a contested or denied history, and help to signal a formal break with an abusive past by acknowledging the harms rather than dismissing them.[81] It is also important to address the broader societal need for accountability and public acknowledgment in the aftermath of mass atrocity, as formal legal proceedings alone are insufficient to restore fractured civic trust.[82] Transitional justice mechanisms must extend beyond the punishment of perpetrators to include the recognition of harm, the restoration of victims' dignity, and the reaffirmation of shared moral and civic norms.[83] Attending to this societal dimension clarifies that transitional justice functions not solely as a juridical enterprise, but as a framework for social reconstruction and normative reconstitution.[84] Objective investigations help a society acknowledge, when applicable, that there were both victims and culprits on more than one side.[85] They help a society confront and address the legacy of its troubled history comprehensively by clarifying what happened, how it happened, and why the abuses occurred.[86] They also restore victims' dignity and respond to some of their concrete needs, for example by clarifying the legal status of disappeared persons to so that their surviving family can access to social benefits.[87] Further, these commissions can help prevent future abuses by recommending reparations or institutional restructuring, reaffirm social norms by initiating and informing public

[80] *See*, *e.g.*, INTERNATIONAL STANDARDS, OFF. OF THE HIGH COMM'R FOR HUM. RTS. https://www.ohchr.org/en/special-procedures/sr-truth-justice-reparation-and-non-recurrence/international-standards [https://perma.cc/ZXT9-XAXH] (discussing the right to an effective remedy, guaranteed in international law, is a credible and objective investigation of violations) ("Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate.").

[81] HAYNER, *supra* note 79, at 22. In some cases, facts/nature of abuses has been veiled from the public; in others, each group's version of the truth is restricted to its own victimization, denying the reality of abuses committed against others.

[82] MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 214–24 (1998) (examining how societies respond to mass atrocity and explicitly discussing acknowledgment, moral repair, dignity, and the limits of criminal trials alone.).

[83] *Id.*

[84] Pablo de Greiff, *Theorizing Transitional Justice*, in TRANSITIONAL JUSTICE 31 (Melissa S. Williams, Rosemary Nagy & Jon Elster eds., 2012) (conceptualizing TJ as civic trust reconstruction and normative repair, not merely punishment).

[85] *Id.* In other words, it provides a public forum for victims by allowing and assisting them to find and tell the truth.

[86] Payam Akhavan, *Beyond Impunity*: *Can International Criminal Justice Prevent Future Atrocities*? 95 AM. J. INT'L L. 7, 12 (2001).

[87] *Id.* at 9-15.

debate, and commit to rebuilding a democratic economic and political order that respects the human rights of all people.[88]

Truth commissions and prosecutions are harmonizing mechanisms: the former focus on the forms of abuses, whereas the latter assign personal criminal accountability.[89] These commissions can help establish justice, but they do not exonerate the state of its duty to conduct judicial investigations in courts.[90] A truth commission may foster conditions that facilitate criminal prosecutions, enable vetting processes or other accountability mechanisms, and create and preserve evidence that can be used to establish criminal liability.[91] Additionally, truth commissions were unambiguously set up to foster reconciliation, irrespective of the vague relationship between truth and reconciliation.[92] Reconciliation is generally a long and complex process, and truth commissions neither guarantee reconciliation nor have the capacity to produce forgiveness on behalf of individuals. Reconciliation, however, may be facilitated through truth seeking efforts that prompt society-wide discussions about how to face the future.[93] By involving the broader public in an examination of what happened, truth commissions can open a necessary dialogue around difficult issues, which is generally needed for reconciliation to follow.[94]

Not all countries elect to establish a truth commission as they are not suitable in all circumstances and there may be sound reasons not to establish one or to delay its launch.[95] First, and most simply, implementing countries may lack needed resources and have insufficient capacity to build the necessary infrastructures.[96] Second, countries—especially authoritarian regimes—fear that sensitive investigations may stir violence or harm a

[88] *Id.* at 17-25. Also, they collect permits to identify the institutional weaknesses that may have contributed to past abuses and to prescribe priorities of reform (design the general agenda of reparation(s) program).

[89] Posner & Vermeule, *supra* note 9 ("Where the elites lead the transition, transitional justice is limited. Where the elite and the opposition enter a bargain, transitional justice is moderate. Where the opposition or a foreign nation leads the transition, transitional justice is significant.").

[90] Akhavan, *supra* note 86, at 18-20.

[91] HAYNER, *supra* note 79, at 21-26.

[92] *Id.* It should be noted that reconciliation is typically a long and complex process, and truth commissions do not promise reconciliation, nor can they enforce forgiveness by individuals. *Id.* Nevertheless, reconciliation may be facilitated by truth-seeking efforts that encourage society-wide discussions about how to confront the past and move forward. *Id.*

[93] *Id.* at 125–27 (explaining that truth commissions do not themselves guarantee reconciliation or forgiveness, but they can facilitate societal reflection and dialogue, which may contribute to longer-term reconciliation).

[94] By involving all of society in an examination of what happened, truth commissions can open the public dialogue on these hard issues that is generally needed for reconciliation to follow.

[95] Akhavan, *supra* note 86.

[96] *See*, *e.g.*, Stephen L. Esquith, *Toward a Democratic Rule of Law*: *East and West*, 27 POL. THEORY 334, 351 (1999).

demobilization and disarmament program. Further, such commissions may create security risks for representatives, victims, and/or witnesses, particularly if a conflict is ongoing. These victims may prefer other mechanisms to promote reconciliation, and broad consultations with victims and civil society should be held to make the decision of whether or not to create a truth commission.[97] Additionally, lack of political will or lack of pressure from civil society may lessen the impact of such commissions. Finally, these commissions can be misused as tools of further abuse, rather than mechanisms for positive change: politicians may deploy them to delegitimize their opponents, to offload problematic tasks, or to avoid pursuing criminal prosecutions. Although truth commissions are often promoted as mechanisms for uncovering past abuses and fostering reconciliation, they can be misused or fall short of accountability goals in practice.[98] Critics observe that commissions may be established for political convenience rather than genuine accountability, with governments using them to avoid pursuing criminal prosecutions or to manage political narratives without subjecting powerful actors to legal consequences; in some contexts, they have even been linked implicitly to expectations of foregoing trials altogether.[99] Drawing on cross-national experience, scholars caution that truth commissions alone can have limited impact on human rights outcomes or may inadvertently promote impunity when not complemented by prosecutions and institutional reform.[100]

A truth commission's mandate provides the framework of its work. It should be tailored to the country's specific needs and circumstances, and drafted through a transparent process. The most common elements contained in the mandate of a truth commission are: (1) the objectives of the commission; (2) the legal authority of the truth commission to interview witnesses and collect testimony, including in some cases, the power to

[97] If a commission is to be established, several planned decisions need to be taken. To design the most suitable design for a given context, it is sensible to include relevant stakeholders and civil society and to seek the collaboration of institutions with expertise from past truth commissions. *See*, *e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW 467-76 (2000). If critical resources, political will, or neutrality are lacking, it may be better not to arrange a truth commission at all, rather than to initiate a process that will not be able to achieve its goals. *Id*.

[98] Matiangai V.S. Sirleaf, *The Truth About Truth Commissions*: *Why They Do Not Function Optimally in Post-Conflict Societies*, 35 CARDOZO L. REV. 2263, 2275 (2014) (examining structural and political challenges that can prevent truth commissions from fulfilling their stated mandates, including in contexts where political constraints impede accountability).

[99] *Id.* at 2285.

[100] Jamie O'Connell, *Transitional Justice as Communication*: *Why Truth Commissions and International Criminal Tribunals Need to Persuade and Inform Citizens and Leaders*, *and How They Can*, 73 S.C. L. REV. 101, 119 (2021) (highlighting how truth commissions must navigate political audiences and elites to achieve impact, implicitly underscoring the risk that without effective communication or political anchoring, commissions can be disregarded, manipulated, or used for superficial legitimacy rather than substantive accountability).

compel testimony; (3) the types of violations the commission will investigate; (4) the time period to be investigated and time granted to the commission to complete its work; and (5) the authority of the commission to issue recommendations.[101] A transparent and consultative process will not only help stimulate public confidence but also ensure that the commission does not overlook the most significant aspects of the truth. The truth and reconciliation process also helps to foster trust and attract more domestic and international support (notably, financial support).[102] It is critically imperative for the TRCs to foster effective relationships with civil society (specifically local NGOs) and the media, as these can be highly fruitful and should not be taken for granted.[103] Hearing officers and statement takers are often the only direct contact victims have with the commission.[104] In other words, the only participation from those most directly harmed is through formal hearings and statements made on the record. These individuals must be thoroughly prepared for this demanding role, treating victims' accounts with respect and care while still meeting the technical requirements of the data-collection process.[105] TRCs should collect statements in a supportive and safe environment, especially given that commissions may also conduct public hearings.[106]

The investigation into victims' narratives requires careful research into the circumstances surrounding their accounts and often demands significant resources and expertise, including sophisticated information-management systems to organize and record the information. Thus, the more powers a commission is granted, the more vigorous its investigative capacities should

[101] *See*, *e.g.*, Daniel J. Hendy, *Is a Truth Commission the Solution to Restoring Peace in Post-Conflict Iraq*? 20 OHIO ST. J. ON DISP. RESOL. 527, 527-62 (2005).

[102] David Mendeloff, *Truth-Seeking*, *Truth-Telling and Post-Conflict Peacebuilding*: *Curb the Enthusiasm*? 6 INT'L STUD. REV. 355, 355-80 (2004).

[103] *Id.* For example, local NGOs may provide training, access to their information, introductions to local communities, and they may be an important partner in lobbying the government. They are also often a vital source of collected evidence for the commission, and can play a key role in facilitating victim and general public participation in the truth commission process. HAYNER, *supra* note 79, at 76-79 (describing the role of local NGOs in assisting truth commissions through outreach, information-sharing, access to communities, and supporting victim participation).

[104] *Id.*

[105] *See generally* Jo M. Pasqualucci, *The Whole Truth and Nothing but the Truth*: *Truth Commissions*, *Impunity and the Inter-American Human Rights System*, 12 BOSTON U. INT'L L. J. 2 (1994) (analyzing the relationship between truth commissions and the Inter-American human rights system and arguing that amnesties and impunity may conflict with states' obligations to investigate and punish serious human rights violations).

[106] Juan E. Mendez, *Accountability for Past Abuses*,19 HUM. RTS. Q. 255, 255-82 (1997). In other words, examine the role of numerous sectors—as the media, the educational system, religious leadership, the legal and medical professions, etc.—not in directly committing severe human rights misuses, but in assisting to make them conceivable through their actions and inactions. The publicity decreases the opportunities of denying past abuses and upsurges the visibility of the commission (security, resources, and due process concerns should be considered).

be.[107] Every effort should be made to avoid re-traumatizing victims, and their views must be considered to invent effective methods of protecting them from further harm.[108] Truth commissions' reports are often the most visible legacy of these commissions, and can shape how the public perceives its national history.[109]

In many post-conflict transitions, the "truth" can threaten those in power, prompting the destruction of evidence, denial of access to files, and retaliation or intimidation of witnesses and victims.[110] Perpetrators and their political allies who remain in office may also pressure the commission to adopt a biased view of the record by scrutinizing certain individuals and facts while ignoring others.[111]

Further, truth commissions are of little significance if not accompanied by criminal prosecution. For example, the accused may demand amnesty from criminal proceedings in exchange for revelations of truths not otherwise available ("truth for amnesty" formula), such amnesty may be granted or offered depending on the victim's consent, strength of the justice system, and nature of the charges brought.[112] Pardons for the most grave international crimes (e.g., genocide, crimes against humanity, and torture) are forbidden by international law.[113] Even for perpetrators of lesser crimes, in the absence

[107] Margaret L. Popkin & Naomi Roht-Arriaza, *Truth as Justice*: *Investigatory Commissions in Latin America*, 20 L. & SOC. INQUIRY 79, 81 (1995). Database systems, though, are resource intensive and need coders and professional statisticians.

[108] *Id.* at 105-15. Also, countries have precise tasks in relation to child victims and victims of sexual violence.

[109] *Id.* at 88-96. Final reports comprise the facts and forms of abuse as determined, analysis of liability, information on the victims; recommendations for steps to deal with the legacy of the misuses (short summaries of the final reports, or newspapers series of excerpts are acceptable too), and victims should always get a copy of the commission's report.

[110] Mark Freeman & Priscilla B. Hayner, *Truth-Telling*, *in* RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK 128 (David Bloomfield & International Institute for Democracy & Electoral Assistance eds., 2003) (discussing truth commissions; their contribution to reconciliation; their pros and cons and various attributes).

[111] *Id.* at 130. To help ease these contests, those establishing a truth commission may seek the support of a broad base through public discussions; select as commission members respected leaders with proven honesty and integrity; guarantee credible security to sustain the process, and provide actual punishments for interference with the commission's work.

[112] *See generally* TRUDY HUSKAMP PETERSON, FINAL ACTS: A GUIDE TO PRESERVING THE RECORDS OF TRUTH COMMISSIONS (2005) (providing guidance on how truth commissions should collect, preserve, and manage records to ensure long-term access, accountability, and historical memory).

[113] Carsten Stahn, *Complementarity, Amnesties* and Alternative Forms of Justice: *Some Interpretative Guidelines for the International Criminal Court*, 3 J. INT'L CRIM. JUST. 695, 699–700 (2005) (noting that exemptions from criminal responsibility for the core international crimes within ICC jurisdiction, including genocide, crimes against humanity, and torture, "should generally be considered incompatible" with the Rome Statute). *See also*, Carolyn Patty Blum, Policy Brief: Pardons, INT'L CTR. FOR TRANSITIONAL J. (Nov. 2008) (explaining that broader pardons for serious international crimes likely violate treaty and customary obligations to prosecute and punish serious human rights violations).

of an actual threat of prosecution, accusers will likely not feel obliged to collaborate with these commissions.[114]

Additionally, the public may have unrealistic expectations for the efficacy of these commissions and their ability to recognize the individual harms towards all victims. While the commissions endeavor to document each victim's case and include a comprehensive list of victims in their final report (seeking the truth), they operate under time limitations, and the push for a prompt process limits the number of cases a commission can inspect.[115] Truth commissions tend to be very unsatisfactory for victims and their families because many often expect compensation, which commissions are neither authorized nor resourced to give.[116] Therefore, public outreach that sets realistic expectations is vital. Local victim support groups, local NGOs, religious institutions or other organizations can play a valued role in communicating this information and serving to establish those expectations. Government implementation is difficult, even when a truth commission order requires the government to implement its recommendations, because resources and political will often erode over time.[117] In sum, truth commissions can foster a mutual understanding and acknowledgement of an

[114] In post-conflict atmosphere in which a truth commission operates, if pardon for minor misuses is presented, it is sensible to offer it only to persons who have collaborated by giving explicit, truthful information and not to an entire group of possible perpetrators. Victims should be informed and have a right to challenge (remedy) the amnesty decision before a judicial authority. Furthermore, consideration may be given to making it conditional on the perpetrator performing an appropriate act of repentance and restitution. *See generally* Robert I Roteberg, *Truth Commissions and the Provision of Truth*, *Justice*, *and Reconciliation*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000) (arguing that truth commissions serve multiple transitional justice goals, including establishing factual truth, promoting reconciliation, and providing a form of justice where criminal prosecutions are limited or unavailable).

[115] *See generally* RUTI G. TEITEL, TRANSITIONAL JUSTICE (Oxford Univ. Press 2000) (developing a foundational theory of transitional justice as a distinct form of justice arising in periods of political transition and characterized by a shift from ordinary legal norms to extraordinary accountability mechanisms).

[116] Being recognized as a victim by the truth commission, yet, may legally qualify such persons for ensuing victim recompence without having to go through the process of re-proving their cases (proposals on reparations along with follow-up policies may be included in the commission's report).

[117] *See* TEITEL, *supra* note 115 at 70–100 (discussing truth commissions and accountability mechanisms). Possibly via an *ad hoc* body or an existing institution (e.g., a national human rights institution). And as resources may be limited, it should be noted that to evade failure as of resource constraints, the national government should take the lead in funding the truth commission, in large part to indicate its obligation to reform. Also, the international donor community will often donate funds if it trusts the commission will be creative and fair, and international allies can offer in-kind expertise, training or material support to advance the efficacy of the commission. *See*, *e.g.*, Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted*: *Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L. J. 205, 205-236 (2000).

abusive past, and if they are efficiently implemented in an inclusive justice perception, they can offer a basis for building a robust and lasting peace.[118]

C. Institutional Reform (Vetting)

Vetting refers to the restructuring of an institution's personnel by eradicating or excluding abusive, corrupt or unqualified employees.[119] Screening/vetting programs focus mainly on reforming: (1) security apparatuses, including police, prison services, and other law enforcement entities; (2) the military; and (3) the judiciary—as these three institutions are often in charge of seeking justice from past human rights abuses and are otherwise organizations that the public must rely on to avert future violations.[120] Public trust is especially important because many citizens reasonably believe that past abuses stemmed from the corruption of such institutions. Vetting helps assure that these public institutions are fair and effective, which is critical to preventing future human rights abuses.[121] Vetting processes are used to *re*establish confidence in institutions, increase their legitimacy and efficacy in delivering services to all citizens, and indicate the break from an abusive past.[122] Vetting is typically less expensive and less multifaceted than large-scale criminal prosecutions, yet it still offers a form of personal accountability for those who committed abuses or failed to prevent them, and it often reaches far more cases than criminal proceedings can.[123] Screening aims to exclude from public office those responsible for past human rights violations, those who hold anti-constitutional views, or those involved in terrorist groups or organized crime.[124]

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[118] *Id*. at 206-10. Sensibly constructing and employing a truth commission process is critical to it having its positive influence.

[119] *See generally* PABLO DE GREIFF & ALEXANDER MAYER-RIECKH, JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES (2007) (examining vetting processes in countries emerging from armed conflict and authoritarianism).

[120] In some states, screening/excluding folks based on evidence of their contribution in past misuses has comprise candidates for elected office, school teachers, senior financial officials, etc. *See*, *e.g*., Peter Bouckaert, *The Negotiated Revolution*: *South Africa's Transition to a Multiracial Democracy*, 33 STAN. J. INT'L L 275, 275–411 (1997).

[121] *See*, *e.g*., Hugh Corder, *Judicial Authority in a Changing South Africa*, 24 LEGAL STUD. 253, 253–74 (2004).

[122] *See*, *e.g*., GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES (DCAF), VETTING AND THE SECURITY SECTOR (2006), https://www.files.ethz.ch/isn/26080/12_bg_security_vetting.pdf [https://perma.cc/HJ3V-HMK4] (explaining the basic elements of vetting in the security sector and lists its main elements and challenges).

[123] *See also* CLAUS OFFE, VARIETIES OF TRANSITION: THE EAST EUROPEAN AND EAST GERMAN EXPERIENCE 82-84 (1997) (characterizing TJ as "retroactive justice") ("[A]fter the demise of the old regime, and confronted with the chaos it has left behind, we have more important things to care about than retroactive justice.").

[124] Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925, 925-63 (2008) (arguing that "in drawing on these sources, ICL also absorbed contradictory assumptions

There are two elementary forms of vetting processes. First, retrospective review screens current personnel to determine their suitability for public service, requiring a reviewing committee to gather sufficient evidence that a particular employee should be removed on the basis of their involvement in past violations.[125] Second, the prospective appointment and reappointment review requires incumbents in covered roles to reapply and undergo screening for past misconduct alongside evaluation of their qualifications, with new candidates subject to the same screening process.[126] These principles should be transparent and as clearly defined as possible. Vetting should not be used to eliminate individuals on the basis of party affiliation; otherwise the process itself can destabilize respect for the rule of law by the new government (assess individual conduct).[127]

Institutional reform is a challenging task, and transitional or post-conflict nations face numerous challenges that affect vetting processes. These include: unavailability of resources, weak governmental institutions, an overstaffed and ineffective bureaucracy, robust political barriers to reform, a weak or inadequate legal framework, and nepotism and corruption in government appointments, especially in the Middle East and Arab

and methods of reasoning, which manifest in internal contradictions, such as inadvertent contraventions of ICL's own principles. As the urgency of articulating a recognized set of rules recedes, the time is ripe for a deeper and more systematic examination of the tapestry that we have stitched together, so that ICL may develop as a distinct and coherent discipline. The official narrative, and widespread understanding, is that ICL adheres to fundamental principles of criminal law, and that it does so in an exemplary manner. These fundamental principles distinguish a liberal system of criminal justice from an authoritarian system.").

[125] Jens Meierhenrich, *The Ethics of Lustration*, 20 ETHICS & INT'L AFF'S 99, 99-120 (2006) ("Although lustration is just one of many institutions of jus post bellum, it is arguably one of the most important. The pursuit of administrative justice affects the reconstitution of the public sphere—literally and figuratively—in more fundamental ways than most other institutions of transitional justice. Yet our understanding of the ethics of occupation in the twenty-first century continues to be incomplete, and ethical principles are needed for guiding and clarifying how occupations may justly be carried out and for establishing a legitimate role for international morals in the conduct of peace.").

[126] Reelection procedures alleviate the stigma but are more invasive than review procedures. Based on either of these processes, persons who are well competent and have not contributed to misuses may obtain a certificate that permits them to begin or endure employment. Others may be hired for a probation period and those who are found to have played a substantial role in past misuse may be excepted from a certain sort of position; be barred from promotion or benefits or be disqualified (permanently banned) from all sorts of public employment for a certain period of time. Alexander Mayer-Rieckh, *Vetting*: *the Definition, the Aim, and the Challenge, in Justice as Prevention*: *Vetting Public Employees in Transitional Societies* 18–22, 28–35 (Alexander Mayer-Rieckh & Pablo de Greiff eds., 2007) (explaining vetting procedures in post-conflict societies, including certification, probationary employment, and exclusion from public service for individuals implicated in past abuses, while distinguishing vetting from broader lustration or dismissal systems).

[127] Dana M. Hollywood, *The Search for Post-Conflict Justice in Iraq*: *A Comparative Study of Transitional Justice Mechanisms and Their Applicability to Post-Saddam Iraq*, 33 BROOK. J. INT'L L. 59-124 (2007). *See generally* Jon Elster, *On Doing What One Can*, E. EUR. CONST. REV., Spring 1992 (discussing the practical and moral constraints faced by societies transitioning from authoritarian rule and the limits of achievable justice in post-conflict settings).

World.[128] Also, vetting processes often face many practical challenges as personnel records may be inaccessible or inaccurate; it may be difficult to find non-corrupt and unbiased individuals to conduct the vetting; competent replacement candidates of integrity may be hard to find. Further, other complex features of institutional reform often need to be concurrently pursued (e.g., oversight and disciplinary measures, reform of the legal framework, changing symbols, infrastructural developments, incomes, etc.)[129] When arranging and implementing a vetting process, several difficulties may arise; however, appropriate policies can be established to manage these challenges. The most significant risk is peddling influence or the abuse of power,[130] because those who control this process wield enormous authority over the lives of individuals being screened.[131] Because vetting can severely impact an employee's livelihood and reputation, safeguards are essential to avoid abuse of authority. Review officials must have unquestionable integrity, act as genuine representatives of the population, have a clearly defined mandate, and adhere to an enforceable code of conduct (ethics).[132] Vetting programs typically should not be governed from within institutions, but by a specifically formed mechanism (e.g., an independent, impartial commission).[133] Furthermore, vetting commission members should be irremovable during the screening process except where they are found in

[128] *See* Leila N. Sadat, THE ICC AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 5-20 (2002).

[129] *See*, *e.g.*, Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L. J. 609, 611 (1984) ("Typically, the set of elements defining a crime comprise what may be called the paradigm of liability for that offense: An actor is criminally liable if and only if the state proves all these elements. The paradigm of an offense, however, does not always determine criminal liability. Even where all the elements of the paradigm are proven, rules and doctrines create exceptions that affect criminal liability.").

[130] *See* Levinson, *supra* note 48, at 219 ("[H]owever much [old-regime officials] might well have felt as a practical matter immune from punishment, [they] can scarcely be heard to say that it is 'unfair' to hold them to the formal law that had been trumpeted to the world in answer to the accusations of just such conduct as in fact was occurring.").

[131] *See* Martin Krygier, *Transitional Questions About the Rule of Law*: *Why*, *What*, and *How*?, 28 E. CENT. EUR. – L' EUROPE DU CENTREEST I (2001) (discussing the rule of law in both transitional and non-transitional contexts).

[132] Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 COLUM. J. TRANSNAT'L L. 357, 360–62 (1999) (discussing vetting ("lustration") procedures in post-communist Eastern Europe, including screening of public officials, exclusion from office, and certification mechanisms aimed at addressing past abuses while balancing administrative fairness and democratic transition).

[133] *See*, *e.g.*, Barbara A. Misztal, *How Not to Deal with the Past*: *Lustration in Poland*, 40 ARCHIVES EUROPENNES DE SOCIOLOGIE 31, 53 (1999) (noting that "[w]hile only one third of Poles saw a need for lustration in 1993, by the end of 1998 almost 70 per cent described lustration as an important and necessary policy").

violation of the transparency, integrity, and neutrality values to which they are expected to follow.[134]

A vetting process is not a criminal trial before a court of law, but due process and basic fairness still matter: if the procedure is not impartial or reasonable, the loss of one's career can function as a "life sentence."[135] Hence, a baseline of due process is essential, meaning that all employees should have the right to see the outcomes of the investigation, and the burden should be on the vetting body to prove the grounds for exclusion—though under a lower evidentiary standard of proof than "beyond reasonable doubt."[136] Exclusive screening procedures risk generating a pool of discontented unemployed persons (e.g., police or military folks who may have weapons and the training to use them against civilians/the new government) who might destabilize the transition and join illegitimate activities.[137] To avoid these practical obstacles, Nations in transition must take several important steps. First, transitioning states must evaluate both the risks associated with removal and the pool of potential replacements. Second, they must ensure the process is transparent and provide training or alternative livelihood opportunities for those removed from public institutions. For candidates who remain, offer suitable re-training and consider probationary appointments or re-appointments, during which administrators can gather additional evidence and assess workers based on

[134] Arrangements for the security of vetting officials may also be necessary. Jens D. Ohlin, *On the Very Idea of Transitional Justice*, 8 WHITEHEAD J. DIPL. & INT'L REL. 51, 52 (2007) ("A view of transitional justice as ordinary justice requires that the basic rules of justice apply in all situations, including extraordinary moments after genocide, war, and ethnic conflict. Though all of the regular rules of justice apply, implementing them is a difficult policy matter to be investigated by theorists of transitional justice. All sorts of policy matters might be considered here, such as what kind of tribunal to constitute, how to integrate warring ethnic powers into a coherent cosmopolitan whole, and how to minimize future conflicts from flaring up again. Yet these are all pragmatic questions and do not implicate the most basic foundations…conception of justice. The work of transitional justice . . . does not require revising the basic principles of justice; rather . . . a more modest inquiry into the appropriate institutional arrangements to achieve peace.").

[135] Levinson, *supra* note 48, at 217-19.

[136] *Id.* at 218. It should be noted that appealing the ruling is a possibility to an independent body to ask for a review of an adverse decision. As the retrospective assessment model includes singling out persons and punishing them (via dismissal from their jobs) for their past actions, it may entail providing the individual a higher level of due process defenses. The prospective attitude will require vetting a larger number of cases, but since it treats all candidates and re-applicants equally in assessing their credentials for future employment, it may authorize a somewhat lower standard of due process and more accelerated review of cases.

[137] *See* TEITEL, *supra* note 115, at 90 (arguing that "[w]hat is deemed just is contingent and informed by prior injustice" and that "[r]esponses to repressive rule inform the meaning of adherence to the rule of law.").

their performance, commitment to human rights values, and adherence to the rule of law.[138]

Vetting processes are tremendously sensitive because they regulate which political leaders, former soldiers, or members of ethnic, religious or political groups are ineligible for appointed or elected office.[139] Thus, raising the possibility of political intrusion, discrimination, intimidation or bribery of vetting officials.[140] These risks can be alleviated through a formally negotiated mandate (such as a peace agreement), clear legal obligations to carry out personnel reforms, and legislation offering clarity to the process.[141] Integrating with other TJ forms (mechanisms) can also strengthen its legitimacy and effectiveness. In other words, if vetting is wisely planned, sufficiently resourced, clearly mandated, and properly overseen, it can reinforce institutions' obligation to serve all citizens and to protect the rule of law.

D. Politics of Memory and Repression Programs

Reparations as a form of TJ are either payments or services (tangible or intangible) given to victims of previous abuse as compensation for the harm they or their loved ones experienced or suffered during a period of conflict.[142] International law recognizes that victims of organized human rights violations are eligible to receive swift, adequate, and effective reparation, and it imposes on countries an obligation to offer inclusive reparations.[143] Those programs are intended to recognize and repair harm,

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[138] *See*, *e.g.*, George Fletcher & Jens Ohlin, *The 1CC-Two Courts in One*? 4 J. INT'L CRIMINAL JUSTICE 428, 433 (2006).

[139] *See*, *e.g.*, Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530, 538 (1943); *see also* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 25-36 (1st ed. 2003) (concluding that international tribunals must be given wider latitude with the *nullum crimen* principle than domestic courts).

[140] *Id.*; *see also* Hon. Robert H. Jackson, *Opening Statement at the International Military Tribunal* (November 1945), https://voicesofdemocracy.umd.edu/wp-content/uploads/2019/10/JACKSON_SPEECH-TEXT.pdf [https://perma.cc/4FXH-JH5C] ("The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.").

[141] Active and transparent public information and dialogues with civil society are indispensable to foster public trust and the sustainability of the efforts. If political will is weak, a well-coordinated internationalized process may deliver essential leverage and impartiality, but domestic control is in most cases preferable to a purely global process. *See Louis Bickford, Transitional Justice, in 3* THE ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 1045-47 (2004) (noting that the term's origin is unclear but was only popularized in academic literature in 1992).

[142] *See generally* THE HANDBOOK OF REPARATIONS (Pablo de Greiff ed., 2006) (discussing the past experiences with massive reparations programs and normative guidance for future practice, and presenting reparations programs globally and thematic issues common in the design and application of reparations programs).

[143] *See* David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORDHAM L. REV. 2621, 2621-22 (2006).

restore victims' dignity, and reconstruct trust and solidarity among communities that have been torn apart by violence.[144]

In post-conflict situations no payments can ever entirely compensate for torture or killing. As with other modes of TJ, expectations must be clearly set, and the reality that many régimes cannot afford large cash payments to numerous victims must be acknowledged.[145] Damages range from purely emblematic acts to mostly material benefits. Common forms of reparations include:

Restitution and Compensation: return of stolen property and other means designed to restore victims, as much as possible, to the position they would have been in absent the violation. This also may include the payment of economically assessable damages, pensions, or smaller symbolic payments as a recognition of one's victimization.[146]

Rehabilitation: medical and psychological care; therapy centers; administrative rehabilitation (e.g., dismissal of false charges or the restoration to a job from which one was terminated on political grounds); and related legal, social, and educational benefits.[147]

Emblematic Policies and Politics of Memory: state apologies; memorials; street renaming; commemoration days; dignified re-burials; and waivers for job training (and, where applicable, educational fees).[148] Symbolic and material recompences are not exclusive but should complement other forms of reparation.[149]

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[144] *See*, Richard J. Goldstone, *International Human Rights and Criminal Justice in the First Decade of the 21st Century*, 11 HUM. RTS. BRIEF 3, 3 (2004).

[145] John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law: Legalism and the International Criminal Court,* 79 NOTRE DAME L. REV. 55, 59, 63 (2003) ("faith in the ICC…is held quite strongly in Western intellectual circles"); Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 577-78 (2005).

[146] *See* David Southern, *Restitution or Compensation: The Open Property Question*, 2 GERMAN POL. 436, 442-44 (1993). Although this example arises from the German experience, it illustrates a broader TJ principle that has been adopted in various forms across numerous post-authoritarian and post-conflict societies. The German model demonstrates how accountability mechanisms can be tailored to address past abuses while preserving institutional continuity, a lesson that has informed vetting and lustration processes in a wide range of transitional contexts.

[147] *See*, *e.g.*, Nell Jessup Newton, *Compensation*, *Reparation*, *and Restitution*: *Indian Property Claims in the United States*, 28 GA. L. REV. 453, 468-70 (1993).

[148] Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 691-92 n.4 (2003); Jean Hampton, *Correcting Harms vs. Righting Wrongs*: *The Goal of Retribution*, 39 UCLA L. REV. 1659, 1677 (1992); Jens Meierhenrich, *Varieties of Reconciliation*, 33 LAW & SOC. INQUIRY 195, 207 (2008).

[149] But alone, they may not be taken seriously and victims may demand at least some concrete material solutions. It should be noted that purely physical measures can be perceived as a way of buying victims' agreement in a weak overall TJ strategy. *See* David C. Gray, *What's So Special About Transitional Justice*? *Prolegomenon for an Excuse-Centered Approach to Transitional Justice*, 100 AM. SOC'Y INT'L L. PROC. 147, 147-48 (2006).

It should be noted that reparations can be directed at persons, communities, groups, or regions. Individual reparations recognize personal harm, but the need to impartially classify or identify all victims may present challenges.[150] Collective damages evade the need to classify victims into various classes, but they may fail to distinguish the intimate nature of each crime.[151] A combination of individual and collective reparations is the most effective way to address the damage done by war, especially when integrated into overall plan of TJ.[152] Notwithstanding the great need for reparations after a conflict, it is problematic to satisfy the demand.[153] When planning these programs, policies should be established to deal with the challenges that are most likely to arise.

First, transitional nations must recognize recipients, and in doing so must avoid re-victimization: the number of victims is significant after prevalent human rights abuses, and it can be challenging to decide which categories of harm should be treated equally.[154] An equitable recompence program therefore requires: (a) clearly defining which abuses are compensable and matching them to suitable forms of reparations; (b) approaching victims with compassion so they feel safe in disclosing what happened to them during a conflict, without forcing them to recall painful memories absent a meaningful benefit, or confirmation that doing so would assist other victims; (c) defining the victim status on a neutral basis and

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[150] *See generally* David Gray, *Constitutional Faith and Dynamic Stability*: *Thoughts on Religion*, *Constitutions*, *and Transitions to Democracy*, 69 MD. L. REV. 26 (2009) (arguing that stable democratic transitions depend on a plurality of overlapping social, religious, and political affiliations that foster resilience and reduce the risk of violent conflict).

[151] Watson Branch, *Comment*, *Reparations for Slavery*: *A Dream Deferred*, 3 SAN DIEGO INT'L L. J. 177, 191 (2002).

[152] For instance, in Timor-Leste, war widows or victims of sexual violence received individual scholarships for their kids. When mothers picked up their reimbursements, they would go to a community center where they could also receive health care and other amenities. Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 173–74 (2004).

[153] JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES 1-16 (Alexander Mayer-Rieckh & Pablo de Greiff eds., 2007) (Social Science Research Council 2007) (suggesting that creating a plan from the beginning can help to cope with these encounters). To avoid practical obstacles in vetting processes—such as removing too many essential employees, undermining institutional capacity, or creating a class of marginalized individuals—it is important to evaluate both the risks of removal and the pool of replacement candidates, ensure procedural transparency, provide training or alternative livelihood opportunities for those removed, offer suitable re-training for those who remain, and consider probationary appointments during which evidence and performance can be further assessed.

[154] *Id*. at 5-8; *see*, *e.g*., Civil Liberties Act of 1988, 50 U.S.C. § 1989b (2000) (providing education funds for subjects of World War II internments of Japanese Americans); Civil Liberties Act Amendments of 1992, Pub. L. No. 102-371, 106 Stat. 1167; *see also* Albert Mosely, *Affirmative Action as a Form of Reparations*, 33 U. MEM. L. REV. 353 (2003) (arguing that affirmative action can serve as a form of reparative justice by addressing the continuing effects of historical discrimination and systemic injustice).

within plainly expressed values; and (d) selecting criteria to qualify as a beneficiary carefully.[155]

Second, countries must acknowledge the barriers imposed by a potential lack of political support or resources. Compensations programs typically take place in circumstances with weak foundations, scarce resources, a fragile political setting, and low levels of trust among citizens and between them and their institutions.[156] Sustained political commitment is essential for a program to be viewed as genuine and to truly affect the quality of a victim's life.[157] A robust coalition, including victim groups and their partners both inside and outside the country, can assist to promote and defend the program.[158]

Third, reparation plans must be well designed to be perceived as a recognition of past abuse and the state's duty to remedy harm, rather than as a form of bribery to silence the victims demands for other forms of justice.[159] Reparations isolated from other TJ mechanisms may encourage denial of misconducts and may be counter-productive to the key goal of sustainable peace.[160] Reparations are the most meaningful if they are assisted with truthing-seeking, institutional reform, and actions to hold wrongdoers

[155] *Id*. For example, requirements of medical records can dismiss several victims with poor access to health care or psychological examinations can mean reentering traumatic experiences. And, if a person has already been officially acknowledged as a victim by a State truth commission, that should be adequate to qualify for successive reparations.

[156] However, victims have suffered harm for which even the greatest funded program will be insufficient and fail to bring loved ones back to life. *See*, *e.g*., Lisa J. Laplante & Kimberly Theidon, *Truth with Consequences*: *Justice and Reparations in Post-Truth Commission Peru*, 29 HUM. RTS. Q. 228, 242–43 (2007).

[157] Pablo De Greiff, *International Courts and Transitions to Democracy*, 12 PUB. AFF. Q. 79, 79 (1998); Michel Rosenfeld, *Restitution*, *Retribution*, *Political Justice and the Rule of Law*, 2 CONSTELLATIONS 309, 310 (1996); *see*, *e.g*., Paul van Zyl, *Dilemmas of Transitional Justice*: *The Case of South Africa's Truth and Reconciliation Commission*, 52 J. INT'L AFF'S. 647, 648 (1999).

[158] In other words, legitimacy is grown if the public realizes the justification and the limits of the program and global actors may help in generating a just and fair victim registry or offer other sorts of technical assistance in the design and application of the program. *See* Roht-Arriaza, *supra* note 152, at 191-94; *see also*, Hanoch Dagan, *Restitution and Slavery*: *On Incomplete Commodification*, *Intergenerational Justice*, *and Legal Transitions*, 84 B.U. L. REV. 1139 (2004) (exploring the theoretical basis for restitution and reparations claims arising from historical injustices, including slavery, and their implications for intergenerational justice).

[159] In other words, yet, if reparations are carried out in isolation from other justice tools, there is a big risk that they may be perceived as a device to purchase victim's silence. And victims shouldn't be enforced to select between recompences and the right to know the truth or the right to justice. *See*, *e.g*., Rosewood Compensation Act of 1994, ch. 94-359, 1994 Fla. Laws 3296, 3296–98 (providing cash payments to victims and heirs of the Rosewood Massacre); Eileen Finan, *Delayed Justice: The Rosewood Story*, 22 HUM. RTS. 8–9 (1995); MICHAEL MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 49–53 (1984).

[160] Cheryl Harris, *Whiteness as Property*, 106 HARV L. REV. 1707, 1768 (1993) (arguing that objections defend background racial injustices as *status quo*).

accountable (e.g., measures through which culprits are obliged to pay to a reparations fund).[161]

The final obstacle is role confusion: victims may not understand the difference between a truth commission and a reparations program. Victims and affected communities may not clearly distinguish between the functions of truth commissions, reparations programs, and criminal prosecutions, undermining both participation and legitimacy.[162] In collectively traumatized, post-conflict societies, such confusion can diminish trust in transitional processes, erode confidence in the distinct purposes of each mechanism, and ultimately impede social reconstruction if victims' expectations for accountability, acknowledgment, or material redress go unmet.[163] Scholars have observed that the overlapping mandates of transitional mechanisms, when not clearly communicated or appropriately sequenced, risk creating ambiguity about their complementary roles and can foster frustration rather than healing.[164] A truth commission should assist and endorse the overall scheme of reparations, but it should not be the agent of the reparations program, because doing so can compromise and blur the truth-finding process; a different body should adjudicate individual recompence cases.[165] Where there has been significant and lasting harm, even the best reparations program may fall short of victims' needs/expectations, but the absence of meaningful reparations may weaken all other efforts of TJ, as this is the only measure which has a direct influence on victims' daily lives, as

[161] Anthony Sebok, *Reparations*, *Unjust Enrichment*, *and the Importance of Knowing the Difference Between the Two*, N.Y.U. ANN. SURV. AM. L. 651, 656–57 (2003); *see also* 50 U.S.C. § 1989b 1 ("acknowledg[ing] the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II" and "apologiz[ing] on behalf of the people of the United States.").

[162] MINOW, *supra* note 82, at 105–11 (discussing the challenges in managing victims' expectations and the importance of clarity among different TJ mechanisms).

[163] TEITEL, *supra* note 115, at 102–4.

[164] *Id*. (exploring the interaction between truth commissions, reparations, and prosecutions, including potential confusion when roles and goals are not distinct).

[165] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 390 (1987). In other words, if a truth commission is presently planned, the drafters of its mandate should already consider the suggestions of the commission's mandate for the damages program. It may be supportive to consult a reparations expert when drafting the commission's mandate. A reparations program may want to include victims into the program who have not testified to the telling commission. Instead, providing information about one's case to it may be recognized as a requirement to qualify for a successive recompences program (noting that effective public information will be vital to notify victims and the general public of the procedures and mandates of each body).

well as on society.[166] Reparations thus have significant potential to support sustainable peace.[167]

III. REASSESSING JUSTICE AND THE RULE OF LAW IN ISLAMIC TRANSITIONAL JUSTICE

Transitional justice in the context of Islamic law and *Qur'anic* principles encompasses both accountability for wrongdoing and the restoration of social harmony, reflecting an integrated vision of justice, reconciliation, and mercy. Traditional Islamic legal concepts such as *sulh* (amicable settlement) and *islah* (reform and reconciliation) emphasize peaceful dispute resolution, community participation, and the reintegration of offenders, aligning with many restorative justice frameworks found in contemporary TJ scholarship.[168] The *Qur'an* itself underscores values of justice (*adl*), forgiveness, and social reconciliation—urging fair treatment while also encouraging reconciliation between disputing parties (e.g., *Qur'an* 49:9–10 on resolving conflict and *Qur'an* 42:40 on recompense and forgiveness).[169] Rather than focusing solely on punitive measures, Islamic approaches informed by these scriptural principles reveal a broader understanding of justice that seeks to balance accountability with societal

[166] REPARATION FOR VICTIMS OF CRIMES AGAINST HUMANITY: THE HEALING ROLE OF REPARATION (Jo-Anne M. Wemmers ed., 1st ed. 2014) (focusing on reparations for serious human rights violations and discussing the limitations of reparations programs in addressing the profound and lasting harms suffered by victims) (highlighting how legal, psychological, and social dimensions of reparations often go beyond what financial or material measures alone can address, meaning programs may fall short of victims' expectations in practice). Where there has been significant and lasting harm, even the best reparations programs may fall short of fully meeting victims' needs and expectations, as victims often require symbolic acknowledgment, psychological support, and social recognition in addition to material compensation.

[167] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring); Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402, 402 (1987); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 652–54 (1993); Brian Havel, *In Search of a Theory of Public Memory: The State, the Individual, and Marcel Proust*, 80 IND. L. J. 605, 610 (2005) (explaining how Austria created a postwar narrative denying state complicity in Nazi crimes).

[168] Joko Budi Darmawan, Fendy Suhariadi, Suparto Widjojo, Mia Amiati, & Amjad Hamad Abdullah, *Incorporating Islah Principles into Restorative Justice: Bridging Contemporary Legal Practice and Islamic Values*, 4 METRO ISLAMIC L. REV. 269, 273-76 (2025) (explaining how *islah* in Islamic law parallels restorative justice principles of reconciliation and peace).

[169] While the *Qur'an* itself is cited directly (e.g., *Qur'an* 49:9–10; 42:40), scholars note that these passages emphasize reconciliation and forgiveness alongside justice. *See*, *e.g.,* Gunawan Widjaja & Adrian Bima Putra, *Restorative Justice in Criminal Law and Islamic Law*: *A Comparative Analysis*, 2:5 JURNAL TEOLOGI & TAFSIR 1037, 1040 (2025) (discussing *sulh* and *diyya* as mechanisms for reconciliation and repair in Islamic jurisprudence).

healing, a balance echoed in scholarly work on post-conflict justice modalities.[170]

Muslim, Christian, and Jewish advocates of reconciliation frame the concept theologically as the "restoration of right relationships," underscoring that "transitional justice" is neither an exclusively Western construct nor foreign to Arab or Islamic cultures.[171] TJ also encompasses core components and mechanisms grounded in primary and secondary sources of Islamic law, including the Qur'an and Sunnah (the teachings of the Prophet Muhammad), as well as *qiyās* and *ijmāʿ* (analogical reasoning and juristic consensus).[172] Islamic intellectual and peacebuilding scholar Professor Mohammad Abu-Nimer has drawn extensively on Qur'anic verses, *Hadith*, *fiqh* (Islamic jurisprudence), and classical *ijmāʿ* to articulate indigenous frameworks for reconciliation and peacebuilding in contemporary contexts. He demonstrates that pre-modern Arab-Islamic societies were characterized by rich communal traditions of *ṣulḥ* (amicable settlement) and *muṣālaḥa* (reconciliation). The *Qur'an* reads,

> The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his reward is due from Allah [God] . . . But indeed, if any show patience and forgive, that would truly be an exercise of courageous will and resolution in the conduct of affairs.[173]

The concept of reconciliation according to the dogma of Islam, Judaism, and Christianity is shared, and means "restoration of right relationships."[174] In other words, restoring right relationships among individuals, communities, and governing institutions fundamentally informs the concept of reconciliation, framing it not merely as the absence of conflict but as the active reestablishment of trust, dignity, and moral order in the aftermath of harm. Further, the term TJ is not purely a Western notion or

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[170] Corri Zoli, M Cherif Bassiouni, & Hamid Khan, *Justice in Post-Conflict Settings: Islamic Law and Muslim Communities as Stakeholders in Transition*, 33 UTRECHT J. INT'L & EUR. L. 38, 41 (2017) (reviewing how Islamic legal norms interact with broader post-conflict justice concerns).

[171] *Id.*

[172] *See* Daniel Philpott, *What Religion Brings to the Politics of Transitional Justice*, 61 J. INT'L. AFFS. 93, 98 (2007). The notion of reconciliation is applied in Islamic law when the Prophet Mohammad encouraged mercy by asking the victim or the victim's family four times if they were willing to forgive before rationalizing retribution.

[173] The *Qur'an* 42:40-43 (providing a new Islamic discipline on the reconciliation and healing Justice).

[174] Mohamed A. 'Arafa, *Transitional Justice*, *The Seeds of Change: Secular Law or Divine (Islamic) Law, Quo Vadis*?, 9 CREIGHTON INT'L & COMP. L.J. 2 (2018) (discussing the role of Islamic law principles in TJ, explaining in his analysis of TJ within Islamic legal frameworks, notions of accountability, reconciliation, and institutional reform must be interpreted in light of both secular and Shari'a principles in post-conflict settings).

strange to Arab or Muslim cultures.[175] TJ has been increasingly analyzed through the lens of Islamic Law.[176] The primary sources—the *Qur'an* and the *Sunnah* (Prophetic traditions)—and secondary sources—such as *al-maslahah al-mursalah* (consideration of common public good and interest), *Qiyyas*(analogical deduction), and *ijma'a* (juristic consensuses—together provide a justification for applying TJ more effectively within the context of Islam.[177] It should be noted that *Sharie'a* rejects violence and urges compassion, tolerance, and reconciliation. Thus, the elements of the TJ framework conform to the goals and principles of Islamic law. Islam calls for the removal of any corrupt régimes or administrations.[178] Muslim scholars have derived principles from the *Qur'an*, *Hadith*, *fiqh* (Islamic jurisprudence), and orthodox Islamic consensus, emphasizing *musalahah* and *sulh* (reconciliation and settlement) as mechanisms to promote peacebuilding and stability within contemporary states.[179]

How does the Islamic theology of compromise confront ethical conundrums that arise in the political realm? The *Shoura* (consultation) embodies the cornerstone concept in modern Islamic TJ policy, as it is based on *sulh* (settlement) model, the major perception in Islamic jurisprudencem in terms of the protection of civil society's *maslah* (public interest).[180]

In Islamic law, *maslahah* refers to the consideration of public interest or common good in the formulation and application of legal and ethical norms. Rooted in classical *Sharie'a* theory, *maslahah* operates as a guiding principle for promoting welfare, preventing harm, and ensuring justice within

[175] *See generally* Alan J. Torrance, *The Theological Grounds for Advocating Forgiveness and Reconciliation in the Sociopolitical Realm, in* THE POLITICS OF PAST EVIL (2006) (arguing that forgiveness and reconciliation possess theological foundations that can contribute to healing, restoration, and the reconstruction of social relationships in societies emerging from conflict and oppression).

[176] KHALED ABOU EL FADL, REASONING WITH GOD: RECLAIMING SHARI'A IN THE MODERN MUSLIM WORLD 307-23 (2014).

[177] M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 139 (2002) (discussing the politics, mechanisms and sources of divine Islamic Transitional Justice).

[178] *See generally* Irving Greenberg, *Religion as a Force for Reconciliation and Peace: A Jewish Analysis*, in BEYOND VIOLENCE: RELIGIOUS SOURCES OF SOCIAL TRANSFORMATION IN JUDAISM, CHRISTIANITY, AND ISLAM 92, 107, 110 (James L. Heft ed., 2004); *see also* Daniel Philpott, *What Religion Brings to the Politics of Transitional Justice*, 61 J. INT'L AFF'S. 93, 98 (2007) (arguing that religious traditions can contribute to transitional justice by promoting reconciliation, forgiveness, acknowledgment of wrongdoing, and the restoration of social relationships). The reconciliation idea is adopted in *Sharie'a* law when Prophet Mohammad encouraged mercy by asking the victim or the victim's family four times if they were willing to forgive before rationalizing retribution.

[179] *See*, *e.g.*, Abdel Fattah Murad et al., *The Foundations of Transitional Criminal and Civil Justice in the Holy Qur'an*, MASRA (Oct. 3, 2013); Abdel Fattah Murad et al., *The Foundations of Transitional Justice in the Noble Sunnah*, MASRA (Oct. 17, 2013) (on file with co-authors).

[180] MAJID KHADDURI, THE ISLAMIC CONCEPTION OF JUSTICE 6 (1984); Miroslav Volf, *Forgiveness, Reconciliation, and Justice*: *A Theological Contribution to a More Peaceful Social Environment*, 29 MILLENNIUM 861, 863 (2000).

society.[181] Unlike purely individual rights–based frameworks, *maslahah* emphasizes the collective well-being of the community (ummah) and the protection of societal order, moral integrity, and essential needs such as life, property, religion, intellect, and family.[182] In the context of civil society, *maslahah* underlines the idea that legal or political measures—including TJ mechanisms—should be evaluated not only on procedural fairness or individual accountability but also on whether they serve the broader interests of the community, foster social cohesion, and prevent recurrence of harm.[183] This principle can inform TJ design by highlighting restorative and reconciliatory approaches that prioritize communal stability, ethical accountability, and reconciliation, alongside formal adjudication.[184]

The mechanisms of Islamic TJ can be broadly categorized into three groups: criminal prosecution, reconciliation, and hybrid systems. Within criminal prosecution, Islamic law classifies offenses into *hudud* (fixed, divinely mandated punishments), *qisas* (retribution), and *ta'azir* (discretionary punishment), reflecting a structured approach to accountability. Reconciliation and settlement mechanisms, by contrast, draw on principles such as *musalahah* and *sulh*, emphasizing truth-seeking, reparations (monetary or otherwise), and *tawbah* (repentance or forgiveness) to restore social harmony and foster peace. The hybrid model integrates elements of both criminal prosecution and reconciliation, providing flexibility to address specific contexts while mitigating impunity.[185] This approach aligns with the broader aims of TJ by combining accountability with societal healing, thereby illustrating how Islamic TJ principles both complement and expand upon traditional secular TJ frameworks, which often prioritize prosecution over restorative mechanisms.[186]

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[181] *See generally* MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE (3rd ed., 2005) (providing a comprehensive overview of the sources, methodologies, and interpretive principles of Islamic jurisprudence, including the *Qur'an*, *Sunnah*, *ijmāʿ*, *qiyās*, and *ijtihād*).

[182] *Id*. at 351-69 (discussing *maqāṣid al-sharīʿah* and *maslahah* (public interest) as foundational concepts in uṣūl al-fiqh, and how jurists consider welfare and prevention of harm as part of *Shariʿa* objectives).

[183] ABDUL AZIZ BIN SATTAM, SHARIA AND THE CONCEPT OF BENEFIT: THE USE AND FUNCTION OF MASLAHA IN ISLAMIC JURISPRUDENCE 25-40 (2015).

[184] *Id.* (exploring the *maslaha*'*s* historical development and role in Islamic law as a legal principle for promoting welfare and preventing harm).

[185] *See generally* M. CHERIF BASSIOUNI, THE SHARI'A AND ISLAMIC CRIMINAL JUSTICE IN TIMES OF WAR AND PEACE (2013) (examining Sunni Muslim scholars and religious doctrine to current issues on armed conflict, noting Islamic legal norms are consistent with current global human rights law rules and they may be used in Muslim societies).

[186] *See generally id*. In other words, enhancing common understanding of the subjects within the well-accepted Islamic law values in their implementation to current conflicts and violence by Muslims whether against Muslims or non-Muslims.

In contemporary Islamic politics, ongoing conflicts in the Middle East and debates surrounding reconciliation through TJ measures in Muslim-majority countries—such as Tunisia, Egypt, Libya, Yemen, and possibly Syria—underscore the urgency of developing an Islamic conception of compromise.[187] The theological foundations for reconciliation within the Abrahamic traditions are typically grounded in divine character, moral commitments, and God's actions as conveyed in sacred texts, rather than in natural law or purely philosophical modes of reasoning.[188] In *Qur'anic* discourse, the Arabic term *ʿadl* (justice or fairness) is frequently understood as denoting a structured state of right relationships.[189] From this theological perspective, reconciliation—as the restoration of proper relationships—can likewise be understood as the restoration of justice itself.[190] Reconciliation, therefore, is not merely complementary to justice but constitutes a conception of justice in its own right, echoing Volf's argument in *Exclusion and Embrace* that "embrace is part and parcel of the very definition of justice."[191]

By the same token, a theology of compromise must grapple with the ethical dilemmas that arise in the political sphere. Central to this inquiry is the development of an ethical commitment to reconciliation, particularly as moral discourse continues to wrestle with the tension between forgiveness and punishment.[192] In this context, *shūrā* (consultation) emerges as a foundational principle in contemporary Islamic TJ policy. Rounded in the ideal of *ṣulḥ* (reconciliation), a dominant concept in Islamic jurisprudence, *shūrā* serves as a mechanism for safeguarding *maṣlaḥa* (the public interest) and strengthening civil society.[193]

Following the Arab Spring uprisings, the Tunisian and Egyptian governments tried to implement numerous TJ mechanisms, as truth

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[187] MOHAMMED ABU-NIMER, NONVIOLENCE AND PEACE BUILDING IN ISLAM: THEORY AND PRACTICE 15-40 (2003) (explaining Islamic theological and ethical foundations for nonviolence and peacebuilding).

[188] Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003) (tracing the intellectual development of TJ as a concept tied to political change and responses to repression).

[189] *Id.*

[190] ABU-NIMER, *supra* note 187, at 41-68.

[191] MIROSLAV VOLF, EXCLUSION AND EMBRACE: A THEOLOGICAL EXPLORATION OF IDENTITY, OTHERNESS, AND RECONCILIATION 14-33 (1996) (theologizing reconciliation with an "embrace" paradigm rather than exclusion).

[192] M. Ahmed Jummah, *Principle of Shura in Islamic Political Jurisprudence*, 8 J. ACAD. FORUM 1139 (2024) (examining *shūrā* as a foundational consultative principle in Islamic political jurisprudence).

[193] Ayesha Javed & Shahzadi Pakeeza, *Restorative Justice in Islamic Jurisprudence and Western Legal Philosophy: A Comparative Analysis of Core Principles*, 3 AL-MARJĀN 3, 2-18 (2025) (describing *sulḥ* as a reconciliation-oriented mode of dispute resolution aligned with restorative justice values); *see also* Bani Syarif Maula, *The Concept of Ṣulḥ and Mediation in Marriage Conflict Resolution in Religious Courts: A Comparative Study Between Contemporary Indonesian Family Law and Classical Islamic Law*, 2 EL-AQWAL J. SHARIA & COMP. L. 73, 73-76 (2023) (describing ṣulḥ as a reconciliation-oriented dispute resolution method rooted in classical Islamic legal tradition).

commissions, reparation plans and prosecutions, which pursued to redress the massive human rights ruins committed during that period.[194] Though Islam is the predominant religion in both nations, research on TJ and post conflict restoration has mainly ignored the issue within the *Sharie'a* context.[195] It should be noted that Islam plays a crucial role in law and politics in the Middle East and represents the main source of law in various constitutions. Thus, this section will create an Islamic legal basis for TJ strategies by discussing prosecution, reparations, and reconciliation measures under *Sharie'a*, as the Prophet Mohammad said in that area "[i]f a relative of anyone is killed, or if he suffers *khabl* (wound), he may select one of three things: he may retaliate, or forgive, or receive compensation. But if he wishes a fourth, hold his hands."[196] Hence, the objectives of Islamic TJ institutions should be pursued in light of both their continuity with and departure from classical Islamic approaches and mechanisms.[197]

A. The Islamic Criminal Blameworthiness

Islamic criminal law is based on personal (individual) liability for criminal acts, and collective punishment is not allowed as a general principle.[198] Islamic jurisprudence, throughout its numerous schools of thought, sets forth detailed and accurate circumstances for criminal accountability with subtle differences.[199] These schools consider crimes "individual, non-transferable and based on [the] conscious intentional conduct of a person possessing his mental faculties who was not acting under extenuating circumstance."[200]

In cases where a criminal action has been committed, individuals and communities are advised to come forth and tell the truth of their responsibility

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[194] *See generally* NASSER AL-KHOLAIFY, *MITIGATING AND AGGRAVATING CIRCUMSTANCES FOR PENALTY OF TA'AZIR IN ISLAMIC JURISPRUDENCE* (1992) (exploring how Islamic criminal law permits judicial flexibility in ta'zir punishments through consideration of mitigating and aggravating factors).

[195] *Id*. at 49-50.

[196] 'Arafa, *supra* note 175, at 49-54 (2018) (discussing homicide and wounding in Islamic criminal TJ context).

[197] *Id.* at 56-60.

[198] *See* MOHAMMAD H. KAMALI, SHARI'AH LAW: AN INTRODUCTION 188-89 (2008).

[199] *See* Osman Abd-el-Malek al-Saleh, *The Right of the Individual to Personal Security in Islam*, *in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 56-60 (1982).

[200] 'Arafa, *supra* note 196 ("In recent Islamic politics, both the Middle East struggle and arguments over reconciliation in TJ measures in Muslim majority nations as Tunisia, Egypt, Libya, Yemen, [and may be Syria] give urgency to the development of an Islamic conception of compromise. It is obvious that the spiritual arguments for settlement in the Abrahamic values are normally rooted in the character, commitments, and God's actions as these are reported in Holy books, not predominantly in natural law or other philosophical reasoning approaches. The Arabic term '*adl* (fair), is most frequently interpreted into justice in the *Qur'anic* provisions, similarly means systematic right link. From these theological views, reconciliation, as a sort of right relationship to a state of right correlation, can correspondingly mean restoration of justice to a state of justice.").

for the crime.[201] This *ali'tiraf* (confession of culpability) by the offender is the first positive step in any reconciliation process.[202] The *Qur'anic* provisions hold that expressively standing for justice regardless of race, religion, relationship, or class is the keystone of religious Islamic TJ, as truth-telling or seeking is vital in Islamic legal system.[203] Once criminal guilt is recognized—whether through voluntary truth-seeking or formal criminal investigation and adjudication—the TJ process can move toward retribution or recompense, reconciliation, forgiveness, or some other payment(s) based on mutual agreement.[204] To accomplish the decisive purpose of justice and community unity, wrongdoers must feel regret, seek repentance, and ask forgiveness from the victims. This repentance and clemency should be accompanied by retribution and compensation.[205]

B. Key Aspects of the Islamic Criminal Punishment

The *Sharie'a* criminal justice system interprets reform as one of the main challenges to be considered by Muslim scholars, leaders, and administrations. Punishment and TJ are justified in Islamic law by deterrence (both public and specific), retribution, rehabilitation and the protection of society through incapacitation of the lawbreaker.

1. The Islamic Retributive Justice as a Transitional Justice Model (Qisas and Ta'azir)

Qisas (retaliation) sentences deal with all forms of murder and deliberate criminal acts.[206] In contrast to the Western positive criminal laws, *Qisas* criminal acts are dealt with as civil cases, and four participants should be involved, including the state (authority), the community (tribe, clan, family), the victims, and the perpetrators.[207] Further, the state is granted the full right to use supplementary penalties (e.g. imprisonment), while the victim or his successors (in case of his death) has the final word on whether

[201] ABU-NIMER, *supra* note 187, at 91.

[202] *Id.* at 93.

[203] *See generally* MUHAMMAD S. AL'WĀ, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY (2000) (providing a systematic analysis of Islamic criminal sanctions and their underlying philosophy of deterrence, justice, and moral accountability).

[204] *Id*. at 86-87.

[205] 'Arafa, *supra* note 175 (noting that "[u]nder Islamic TJ policy, it is a grave sin for a Muslim to take the life of another person Muslim or non-Muslim, thus, it is not permitted under *Sharie'a* to carry out the death penalty either against a Muslim or a non-Muslim, except if the strict evidentiary rules (beyond reasonable doubt) had been fulfilled.").

[206] Mohamed 'Arafa, *Corruption and Bribery in Islamic Law: Are Islamic Ideals Being Met in Practice?* 18 GOLDEN GATE ANN. SURV'Y INT'L & COMP. L. J. 158, 189-95 (2012) (noting *qisas* and its elements in Islamic criminal law).

[207] *See id* at 190-92.

to choose the option of retribution or recompense.[208] As the explicit Islamic standards indicates, retribution is applicable and allowed *only* in case of intentional murder (homicide, killing) or injury.[209] In the case of an accidental killing or non-intentional wounding *diyya* (blood money or damages) will be applied.[210] It should be noted that the head of state, judge, and the attorney general have no control to grant pardons in *qisas per se* (or *diyya*).[211] Even if the victim or his relatives grant amnesty to the perpetrator, it does not derogate from the government's power to pardon or prosecute on the public right aspect of *qisas*, since this explicitly concerns public peace and order.[212] As a form of legal reparation, the victim's family may require payment in the time period when retaliation execution is still acceptable yet any reward must meet the prerequisite of the perpetrator's consent.[213]

[208] *Id*. at 193-97 (explaining that transitional justice, when examined through the lens of Islamic law, offers a distinctive framework for addressing the aftermath of conflict and promoting societal healing. Unlike Western models of criminal justice, where crimes are typically treated as violations against the state, *Qisas* (retributive justice) in Islamic law treats criminal acts as civil matters, involving not just the state, but also the community, the victims, and the perpetrators. This broader engagement reflects a communal approach to justice, where both societal interests and individual rights are balanced. The victim or their successors, in the event of death, hold the final authority on whether to pursue retribution (*qisas*) or seek recompense (*diyya*). By empowering the victim or their family with this decision, Islamic law promotes reconciliation and restorative justice alongside accountability. In addition, the state retains the right to impose supplementary penalties, such as imprisonment, ensuring that justice is both fair and comprehensive. This unique integration of state authority with community-based decision-making reveals how Islamic principles of justice, mercy, and reconciliation can be leveraged in transitional justice contexts, fostering social healing while preventing impunity. Examining these processes through the framework of *Sharie'a* law offers critical insights into how transitional justice mechanisms can be adapted to fit different cultural and legal contexts, enriching the broader discourse on post-conflict justice).

[209] ABU-NIMER, *supra* note 187, at 195.

[210] *Id*. at 193 ("As another choice, the victim [or] legal guardians may completely forgive and pardon the wrongdoer.").

[211] *Id*.

[212] *Id*. ("[…] and the punishment so imposed partakes in *ta'azir*. Only victims (their representatives) hold the right to prosecute the criminal; so public authorities have no supremacy to interrupt, unlike the Western legal model.").

[213] *Id*. at 194; *see*, *e.g*., NASSER AL-KHOLAIFY, MITIGATING AND AGGRAVATING CIRCUMSTANCES FOR PENALTY OF TA'AZIR IN ISLAMIC JURISPRUDENCE 49 (1992). In Islamic law, *Qisas* (retributive justice) offers a nuanced system for addressing severe crimes such as murder or physical injury. The term "execution" in the context of *Qisas* can be understood in two ways: first, it refers to the sentence being carried out, where the perpetrator may face punishment such as death, amputation, or flogging, depending on the nature of the crime. Second, "execution" can refer specifically to the killing of the perpetrator, in cases of murder, where the victim's family may choose the death penalty as retribution for the offense. However, this is not an automatic or mandatory requirement. Instead, the victim's family has the right to choose between retribution (i.e., executing the perpetrator) and accepting monetary compensation (*diyya*), which can be paid in lieu of the death penalty or other physical punishment. This option reflects Islamic law's emphasis on mercy and reconciliation, offering victims the possibility of compensation instead of direct retaliation. In this system, the state has the authority to enforce the punishment, but the ultimate decision rests with the victim's family, who can either accept the retribution or opt for a settlement. Regarding the concept of consent, the perpetrator does not need to explicitly agree to the *diyya* (compensation) being offered as an alternative to the execution. If the perpetrator refuses or is unable to

In the same vein, *ta'azir* sentences comprise all laws that God left for humans to make depending on the relevant time, space and settings.[214] Such decisions are subject to the discretionary power of the *qadi* (judge) and cover a variety of penalties including verbal warnings, public exposure, corporal punishment, imprisonment, exiling or even execution.[215] Hence, all acts (not included in *hudud*, *Qisas* or *diyya*) attacking individual's private interests or the public interests (welfare/common good) of the community fall under *ta'azir*, which imposes a duty on the state to codify rules punishing such actions to match the *siyasah* (*Sharie'a*-oriented policy).[216] Through the lens of Islamic justice, *ta'azir* is constrained by clear limits: (a) the culprit must have committed a crime that causes genuine harm to public order and poses an imminent threat to the public interest; (b) the penalty's core must justify the sanction *per se*; and (c) the sentence's reasoning must permit flexibility case by case so the response remains proportionate and properly protects the common good.[217]

2. Islamic Healing (Restorative) Justice: Sulh and Twabah (Reconciliation and Clemency)

Restorative justice seeks to reintegrate both victims and culprits into the community by repairing harm and restoring relationships.[218] The spirit of *Sharie'a* law advocates for restorative justice, as it incorporates

pay, the state can enforce the payment through legal mechanisms. Essentially, the Islamic approach balances justice and mercy, offering a unique system where the community, victim, perpetrator, and state are all active participants in the legal process, and victims or their families have the final say on the form of justice they wish to pursue. This model highlights the flexibility and restorative elements within the Islamic legal system, distinguishing it from more retributive Western models by integrating both punitive and restorative justice mechanisms.

[214] *Id*. at 195.

[215] *See generally* 'Arafa, *supra* note 174 (noting that thus, most penalties are unrestricted in nature and determined according to the society's local culture, as crimes may infringe God's rights and may disturb an individual's rights).

[216] *Id*. at 197. In other words, public authorities should act in accordance with the *Sharie'a* spirit and the essential *maqasid* (objectives) at the expense even of a certain departure from scholastic interpretations and *ijtihad* (personal reasoning); *see generally* Siti Ismail, *The Modern Interpretation of the Diyat Formula for the Quantum of Damages: The Case of Homicide and Personal Injuries*, 26 ARAB L. Q. 361, 362 (2012) (discussing the Islamic concept of *diyat*, a method by which a victim's family is monetarily compensated in lieu of equal punishment to the transgressor).

[217] *Id*. (noting that to guarantee a community's protection and safeguard its welfare, public welfare philosophies permit harsh sanctions); *see generally* Mohamed & Jonathan Burns, *Judicial Corporal Punishment in the United States? Lessons from Islamic Criminal Law for Curing the Ills of Mass Incarceration,* 25 IND. INT'L & COMP. L. REV. 3, 390 (2015) ("Accordingly, specific Hudud offenses, their punishment, and mitigating and aggravating circumstances were fixed and detailed in provisions of the *Qur'an* and *Sunnah* . . .").

[218] ABU-NIMER, *supra* note 187, at 193; *see generally* Mohamed 'Arafa & Jonathan Burns, *supra* note 217, at 390 ("Accordingly, specific Hudud offenses, their punishment, and mitigating and aggravating circumstances were fixed and detailed in provisions of the *Qur'an* and *Sunnah* . . .").

reconciliation values, repentance, and clemency to criminal sentences. The critical objective of the *Sharie'a* implementation is to achieve justice among the *ummah* (community).[219] In this respect, it should be noted that the first step in the *ṣulḥ* (settlement) process is for the aggressor to recognize their accountability and acknowledge responsibility, even if this acknowledgment is expressed as an explanation or justification for the action.[220] Thus, for pardon without the ability to strike back is equal to vulnerability.[221] Yet, reconciling pardon and punishment in the sphere of criminal justice, mainly in a post-conflict situation, poses inquiries often of conflicting interests.[222] In Islamic *Fiqh*, '*afw* means a waiver of a duly necessary sentence for wrongdoing, however, '*afw* does not always lead to omission of punishment.[223] Moreover, amnesty and pardon may be granted when government authorities make a significant contribution, while forgiveness is typically initiated by an individual or a nonstate party. However, pardon can also apply in both contexts.[224]

Reconciliation represents the keystone of restorative Islamic TJ, and is used as a curative element of TJ that varies from the criminal proceedings and trials.[225] In Islamic legal thinking, *sulh* (settlement) includes three approaches: religious, human-rights/communal, and divine.[226] In practice, it emphasizes reconciliation and peace with an opponent, most often through a negotiated agreement between the two conflicting parties, a well-known conflict-resolution device in the MENA region.[227] The *Qur'an* affirms

[219] Taymour Kamel, *The Principle of Legality and Its Application in Islamic Criminal Justice*, *in* ISLAMIC CRIMINAL JUSTICE SYSTEM 149, 163-64 (M. Cherif Bassiouni ed., 1982) (discussing the notion of compensation of a wrongdoing by equalizing the harm).

[220] *Id.* at 165-68 (explaining '*afw* (amnesty/pardon) would be irrelevant without the reality of an adverse consequence or punishment).

[221] *See generally* RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY (2005) (describing the historical evolution of punishment in Islamic law).

[222] Kamel, *supra* note 219, at 167.

[223] *See* Awad M. Awad, *The Rights of the Accused Under Islamic Criminal Procedure*, *in* ISLAMIC CRIMINAL JUSTICE SYSTEM 91, 93 (M. Cherif Bassiouni, 1982) (discussing the administration of justice in the Islamic *Shari*e'*a*) noting that (pardon may be granted by an individual or a group of individuals, and by extension also by a corporate body or institution).

[224] *See generally* M. Cherif Bassiouni, *Sources of Islamic Law*, *and the Protection of Human Rights in the Islamic Criminal Justice System*, in ISLAMIC CRIMINAL JUSTICE SYSTEM 3, 6-8 (M. Cherif Bassiouni ed., 1982) (discussing the differences in the application of *Shari'a* law as opposed to other legal systems).

[225] *Id.* at 7; 'Arafa, *supra* note 174.

[226] *Id*.

[227] *See generally* Abdullahi An-Na'im, *Islam*, *Islamic Law*, *and the Dilemma of Cultural Legitimacy for Universal Human Rights*, *in* ASIAN PERSPECTIVES ON HUMAN RIGHTS 31, 33-34 (Claude E. Welch Jr. & Virginia A. Leary eds., 1990) (arguing that "[h]uman rights need to be perceived as culturally legitimate in order for them to be given more than lip service . . . [b]ut in Islamic cultures a deep division exists between those who are Muslim and those who are not, as well as between men and women. As long as

reconciliation and promises great rewards from God to those who accept compromises, those who are involved in implementing them, and those who mediate.[228] In juristic terms, *sulh* is a contractual pact, which must fulfill three conditions: (a) that the agreed sum is apparently quantified such that eliminates ambiguity and ignorance; (b) that it disqualifies non-*halal* (impermissible) substances such as alcohol; and (c) that it is not about something that cannot be waived or alienated (e.g., someone else's share in an inheritance).[229]

In cases of mutual violence or civil conflict, Islamic law also emphasizes "peace with justice" and provides additional mechanisms including *al-tahkim* (arbitration or mediation). *Al-tahkim* occurs when a third person, chosen by the disputants, is brought in to resolve the conflict either through conciliation (mediation/negotiations) or adjudication.[230] Thus, the disputants use an arbitrator in order to work towards a compromise in case they fail to settle a deal by themselves.[231] Arbitration differs from reconciliation, as the latter represents an amicable arrangement that may be reached between the litigants with or without a third party, while in the former, the appointment of a third party is indispensable.[232] Likewise, the

these divisions exist, appeals to universal human rights will continue to clash with deeply held cultural and religious views . . .").

[228] *Id.*; *see also* 'Arafa, *supra* note 174, noting that (The Prophet Mohammad warns against relying only on adjudication, which occasionally includes errors because of the articulacy of one of the litigants).

[229] *See* Muhammad S. al'Awwa, *The Basis of Islamic Penal Legislation*, *in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM (1982); Robert Carle, *Revealing and Concealing*: *Islamist Discourse on Human Rights*, 6 HUM. RTS. REV. 122, 123 (2005) ("The relationship between religion and democratic pluralism in the Muslim world has been problematic. In [this] world, both governments and popular movements are using religious documents (*Qur'an* and *hadith*) to inspire political and social change . . . the fusion of religion and politics that characterizes revivalist Islam has impeded the development of both democracy and religious pluralism. An area of particular concern . . . of Muslim countries to implement international standards of human rights . . . the two most influential international Islamic statements on Human Rights (the Universal Islamic Declaration on Human Rights and the Cairo Declaration on Human Rights) attempt to reconcile Islamic law and modern norms of human rights.").

[230] *See generally* Mohamed 'Arafa, *Procedural Islamic Criminal Justice in Terms of Human Rights*: *Beyond the Zero-Sum Game*, 1 J. OF L. IN THE MIDDLE E. 83 (2021) (arguing that Islamic criminal procedure and international human rights norms should not be viewed as mutually exclusive and examining how procedural safeguards in Islamic criminal justice can complement modern human rights standards in areas such as due process, evidentiary rules, and judicial fairness).

[231] *Id.*; *see also* Rushmi Ramakrishna, *Universal Rights*, *Non-Universal Process*: *Confronting Culturally Grounded Human Rights Abuses*, 30 U. PA. J. INT'L L. 1383, 1403 (2009) (arguing that while human rights norms are universal in aspiration, their enforcement mechanisms and implementation processes must account for culturally grounded practices that may themselves perpetuate human rights violations, and examining the tension between universalism and cultural relativism in addressing such abuses).

[232] Carle, *supra* note 229 at 437-38; M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts in the United States*, 10 ANN. SURV. OF INT'L & COMPAR. L. 27, 31-40 (2014); *see generally* Richard Carver, *A New Answer to an Old Question*: *National Human Rights Institutions and the Domestication of International Law*, 10 HUM. RTS. L. REV. 1, 13-22 (2010) (examining the role of national human rights institutions in incorporating and enforcing international human rights norms at the domestic

reconciliation agreement is *not* binding unless it has taken place before the court, while arbitration is legally binding without court intrusion.[233]

Under Islamic legal principles, the unintentional killing of civilians during civil unrest or armed conflict is generally not subject to corporal punishment if the perpetrators are state actors, as the state may establish reparation programs to compensate the victims' families.[234] In contrast, autonomous actors—such as rebel forces, protesters, or other nonstate participants—are responsible for compensating the victims' families themselves.[235] The amount of compensation is evaluated according to changes in currency value and considers *al-maṣlaḥa al-'āmah* (the community's public interest).[236] Similarly, eyewitnesses are not strictly required to establish accountability in cases of intentional killing; however, the Prophet Muhammad required approximately fifty oaths affirming the accuracy of testimony before assigning responsibility and calculating *diyah* (blood money).[237] Overall, the *Sharie'a* emphasizes caution in criminal adjudication, reflecting a preference against conviction when there is even minor doubt regarding the defendant's guilt.[238]

Repentance and forgiveness are directly linked to each other. Feelings of regret and guilt are typical reflections of sinning if the individual who has sinned has a spiritual-moral conscience, meaning that after committing a sin the person who fears God would feel a sense of sadness.[239] In the same vein, the *Qur'an* speaks of proportionality and equivalence in punishment, but advocates it with a recommendation for compassion.[240] Reconciliation,

level and arguing that such institutions serve as key mechanisms for the "domestication" of international human rights law through monitoring, advocacy, and quasi-judicial functions).

233 Mohamed Y. Mattar, *Human Rights in Islamic Law*, *Specifically the Guarantee of Procedural Justice*, 16 EUR. J. OF L. REFORM 274, 274-278 (2014) ("Islamic law, as indicated, provides for general principles of procedural justice, especially the principle of non-retroactivity, the principle of personal accountability, the principle of no crime or punishment without the law, the right to be presumed innocent until proven guilty and the right to defence. Islamic law also insists on strict evidentiary rules that are based on direct evidence and witness testimony or confession.").

234 KHALED ABOU EL FADL, SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY, AND WOMEN 185–88 (2001).

235 WAEL B. HALLAQ, SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS 310–12 (2009).

236 HALLAQ, *supra* note 235.

237 Jonathan Brockopp, Robert Gleave & Eugenia Kermeli, *Islamic Law: Theory and Practice*, 15 J. L. & RELIGION 417 (2000)

238 *Id.* at 418-20.

239 *See generally* ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITIONS AND POLITICS (1991) (examining the relationship between Islamic legal traditions and international human rights norms and analyzing how appeals to Islamic authenticity have shaped debates over the universality and implementation of human rights in Muslim societies).

240 Mohamed Y. Mattar, *Combating Trafficking in Persons in Accordance with the Principles of Islamic Law*, UN OFFICE ON DRUGS AND CRIME 104 (NY 2009). In other words, *tawbah* (repentance) and amnesty are sensibly connected, as pardon is typically due when the criminal shows regret and repents.

amnesty, and compassion fall under the *Qur'anic* principle of *ihsan* (benevolence or juristic preference), which is strongly valued and, when appropriate, preferred over rigorous and punitive approaches—and even over '*adl* (justice).[241] As a general rule in both the Islamic and modern criminal law, the criminal legislation should be interpreted in favor of the accused and on the side of leniency.[242] Muslim jurists are almost unanimous that valid repentance must be indicative of genuine remorse, a firm resolve not to repeat the conduct in question, and the absence of any actual recurrence.[243]

Taqadum (statute of limitations) in the reconciliation process, could be practiced by an individual or the government and, if it expires at all, does so only after a lapse of the time period in which no action is taken by any of the parties concerned.[244] Modern scholars conclude that the head of state may

[241] *Id*; *see*, *e.g*., LEAGUE OF ARAB STATES, ARAB CHARTER ON HUMAN RIGHTS, Sep.15, 1994, at art.16(3).

> Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgement rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees: (a) the right to be informed promptly, in detail and in a language which he understands, of the charges against him; (b) The right to have adequate time and facilities for the preparation of his defence and to be allowed to communicate with his family; (c) The right to be tried in his presence before an ordinary court and to defend himself in person or through a lawyer of his own choosing with whom he can communicate freely and confidentially; (d) The right to the free assistance of a lawyer who will defend him if he cannot defend himself or if the interests of justice so require, and the right to the free assistance of an interpreter if he cannot understand or does not speak the language used in court; (e) The right to examine or have his lawyer examine the prosecution witnesses and to summon defence according to the conditions applied to the prosecution witnesses; (f) The right not to be compelled to testify against himself or to confess guilt; (g) The right, if convicted of the crime, to file an appeal in accordance with the law before a higher tribunal, and (h) The right to respect for his security of person and his privacy in all circumstances.

Id. See also Mohamed Y. Mattar, *Article 43 of the Arab Charter on Human Rights*: *Reconciling National*, *Regional*, *and International Standards*, 26 HARV. HUM. RTS. J. 91, 91 (2013) (discussing the various rights afforded in the Charter).

[242] Mattar, *supra* note 241, at 93-98.

[243] *See*, *e.g*., Kathryn Christine Arnold, *Are the Perpetrators of Honor Killings Getting Away with Murder*? *Article 340 of the Jordanian Penal Code Analyzed Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 AM. U. INT'L L. REV. 1343, 1353–71 (2001); Lama Abu-Odeh, *Honor Killings and the Construction of Gender in Arab Societies*, 58 AM. J. COMP. L. 911, 913–16 (2010); *see generally* Phyllis Chesler, *Are Honor Killings Simply Domestic Violence*?, MIDDLE E. F., Spring 2009 (examining the social and cultural dynamics of honor killings and arguing that they should not be subsumed under general domestic violence frameworks); *see*, *e.g*., Nafissatou Diop-Sidibe, Jacquelyn C. Campbell, & Stan Becker, *Domestic Violence Against Women in Egypt—Wife Beating and Health Outcomes*, 62 SOC. SCI. & MED. 1260, 1273 (2006) (confirming that "as elsewhere, wife beating is prevalent in Egypt").

[244] The major Islamic schools argue, however, on *ta'azir* offences, which are subject to the discretionary powers of the public authorities who may decide not to prosecute them—based on the public interest—as they have powers to grant amnesty regarding either the punishment, crime, or both, at any time. Arafa, *supra* note 174; *see also* George Irani, *Islamic Mediation Techniques for Middle East Conflicts*, 3 MIDDLE E. REV. INT'L. AFF. 6, 7-12 (1999) (reviewing traditional Islamic measures for

set time limits for accepting or rejecting the witnesses' testimony when such testimony is the sole means of proof for the offence.[245] Prophet Mohammad applied a range of the Islamic TJ tools: (a) he pursued criminal accountability for five individuals whose atrocities (heinous crimes) were unpardonable; (b) he exonerated (pardoned) three other individuals after the community intervened to seek amnesty, on their behalf; and (c) he demanded for a complete reform of the institutions, including restructuring military and security forces and building new institutions oriented toward the welfare of the *ummah* (community).[246] Therefore, any implementation of the Islamic *Sharie'a* in the Arab and Muslim World—especially as relating to TJ mechanisms and processes—should account for the multiple schools of Islamic jurisprudence and the principle of *ihktlaf* (legal pluralism adopted by the *Shaf'i* school of jurisprudential thought), recognizing the legitimate roles of both sacred and political authorities in resolving difficult legal cases.

The *Sharie'a* is often characterized as diversity within unity and its diversity is due to the degree of flexibility and openness in the textual language of the *Qur'an*, and the space it leaves for reasonable interpretation and *ijtihad* (individual reasoning).[247] But to preserve its vitality and

resolving conflicts and supporting conciliation as an applicable tool to the current regional disputes in the Middle Eastern region); *see also* Cairo Declaration on Human Rights in Islam art. 6(a), Aug. 5, 1990, U.N. Doc. A/CONF.157/PC/62/Add.18. In the TJ context, the Declaration recognizes the divine nature of these rights. It states in the preamble:

> Believing that fundamental rights and freedoms according to Islam are an integral part of the Islamic religion and that no one shall have the right as a matter of principle to abolish them either in whole or in part or to violate or ignore them in as much as they are binding divine commands, which are contained in the Revealed Books of Allah and which were sent through the last of His Prophets to complete the preceding divine messages and that safeguarding those fundamental rights and freedoms is an act of worship whereas the neglect or violation thereof is an abominable sin, and that the safeguarding of those fundamental rights and freedoms is an individual responsibility of every person and a collective responsibility of the entire Ummah.

Id.

[245] The opening of *Makkah* (birthplace of Mohammad) is placed in the historical roots of the application of Islamic TJ in Islam. *See*, *e.g.*, Mohamed 'Arafa, *Rethinking Justice in Transitional Justice in the Muslim World*: *Any Role of Sharie'a,* JURIST NEWS (Nov. 3, 2019), https://www.jurist.org/commentary/2019/11/mohamed-arafa-transitional-justice/ [https://perma.cc/663N-A9B7] (defining scriptural interpretation).

[246] *Id*. (noting that Prophet Mohammad announced public pardon to all the folks of *Makkah*).

[247] Bernard Weiss, *Interpretation in Islamic Law*: *The Theory of Ijtihād*, 26 AM. J. COMP. L. 2 199, 202-08 (1978) (explaining that *Ijtihad* in Islamic law refers to the process of independent legal reasoning or juridical effort undertaken by qualified scholars (known as *mujtahids*) to interpret and apply Islamic principles to new or complex issues not explicitly addressed in the *Qur'an* or *Hadith*. It involves a scholar's exercise of judgment to derive legal rulings based on the foundational texts of Islam, including the *Qur'an*, *Hadith*, and other sources such as *ijma*' (consensus) and *qiyas* (analogy). *Ijtihad* plays a crucial role in the development of Islamic jurisprudence, particularly when new situations arise that require legal resolution. It is seen as a dynamic and contextual process, allowing Islamic law to adapt and

significance, the *Sharie'a* is to be read side by side with the changing facets of social reality and the living conditions of the general public. It is dynamic in the juristic details of *fiqh,* reflecting how Muslim scholars have tried to contextualize the source of Islamic norms with their own conditions and realities. *Hudud* and *qisas* laws remain foundational to Islamic criminal law and can hardly be dismissed altogether in the name of modernity, change, or even amnesty and reconciliation. Yet, the realities of the criminal justice system and those of the nation that now prevail are symbolic of discontinuity, at least in some respects, with the *fiqh* details *hudud* and *qisas*. The prevalence of *taqlid* (unquestioning acceptance of legal decisions) for decades, followed by colonial rule, interrupted the continuity of *Sharie'a* and *ijtihad*.

In Islamic law, the higher objectives of *Sharie'a* or *maqasid al-shari'ea*, prioritize public welfare, peace, and social order. Accordingly, any genuine effort to restore justice, end conflict, and promote societal stability is considered legitimate under Sharia, provided it does not compromise truth or ethical integrity. This approach is most effective when it reflects the values of the broader population and pragmatically incorporates local customs, ensuring that legal and social measures are culturally acceptable. Importantly, Islamic thought emphasizes that faith in divine justice precedes reliance on human or earthly justice, framing human efforts as a reflection of divine principles. In the context of TJ, this perspective legitimizes mechanisms such as reconciliation, reparations, and hybrid accountability measures, highlighting the potential for Islamic frameworks to guide post conflict peacebuilding while balancing both societal welfare and moral integrity.

IV. UNMASKING INEQUALITY: A FRAMEWORK FOR UNDERSTANDING SYSTEMIC RACISM

TJ frameworks, whether in Islamic or secular contexts, are fundamentally concerned with addressing past injustices, restoring social order, and promoting reconciliation. While much of the literature on Islamic TJ focuses on mechanisms such as *Qisas*, *musalahah*, and *sulh*, the principles underlying these approaches—justice, accountability, and societal healing—are not limited to post-conflict Muslim-majority societies. In fact, examining these principles can offer valuable insights when analyzing systemic injustices in other contexts, such as racial discrimination and structural inequalities in the United States. By drawing parallels between Islamic approaches to TJ and efforts to confront historical and ongoing injustices

remain relevant to changing societal needs. However, it is traditionally reserved for scholars who have deep knowledge of Islamic texts, legal theory, and the principles of jurisprudence.).

domestically, it becomes possible to explore how restorative and reconciliatory principles might inform contemporary policy debates, legal reforms, and community-based interventions aimed at repairing social harm. This approach highlights the universality of justice as both a moral and practical imperative, emphasizing the potential for comparative perspectives to enrich our understanding of accountability, reparations, and reconciliation across diverse legal and cultural frameworks.

Although the United States has not experienced formal regime change or a conventional post-conflict transition, examining its struggles with systemic racial injustice, police violence, and accountability through a TJ lens illuminates structural patterns of harm, collective trauma, and societal demands for recognition and reform that parallel the aims of TJ mechanisms elsewhere. A sequence of cruel police killings of African Americans, including George Floyd and Breonna Taylor, in 2020 was a moment of mass awakening to the systemic racism in the U.S. criminal justice system.[248] Black Lives Matter demonstrations in cities across the United States put systemic racism at the forefront of national awareness.[249] For example, Floyd's killing was not an isolated event, but part of a long history of racial injustice in criminal law and enforcement—and a renewed confrontation with that legacy.[250]

After the Civil War, racialized violence and terror surged, permitting whites to preserve control over Black bodies and preserve the racial hierarchy established by enslavement.[251] Local governments were complicit, repeatedly failing to protect Black individuals from criminal activity or hold perpetrators accountable.[252] These patterns of systematic racial violence,

[248] *See* Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), https://time.com/5851855/systemic-racism-america/ [https://perma.cc/BBM2-JVQC].

[249] Juliana Menasce Horowitz, Kiana Cox & Kiley Hurst, *Views of Race*, *Policing and Black Lives Matter in the 5 Years Since George Floyd's Killing*, PEW RESEARCH CENTER (May 7, 2025), https://www.pewresearch.org/race-and-ethnicity/2025/05/07/views-of-race-policing-and-black-lives-matter-in-the-5-years-since-george-floyds-killing/ [https://perma.cc/CW44-2Q8Q] (noting that George Floyd's murder "sparked nationwide protests" and that millions of Americans marched across the country, "drawing attention to issues of racial inequality"); *see generally* ERIKA LEE, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED SATES (2019) (analyzing the periodic outbursts of xenophobia in U.S. history).

[250] Michael J. Pfeifer, *The Origins of Postbellum Lynching*: *Collective Violence in Reconstruction Louisiana*, 50 LA. HIST. 189, 194 (2009) ("Significantly, during the war and after, vigilante bands also made freed people their targets throughout Louisiana."); Gregg Cantrell, *Racial Violence and Reconstruction Politics in Texas*, 1867–1868, 93 SW. HIST. Q. 333, 335 (1990).

[251] *See* GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 22 (2007).

[252] *Id*. at 21; Civil Rights Act of 1866, ch. 31, 14 Stat. 27; *see also* John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L. J. 1135, 1135–37 (1990) (describing how the Act was an "important factor in the protection of the rights of freedmen"); *see also* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U.

along with the reluctance of state and municipal governments to protect Black people, inspired Congress to enact the Civil Rights Act of 1866 and immediately after the Civil War to suggest the Thirteenth and Fifteenth Amendments.[253]

Even though the Black Lives Matter movement seeks both nonlegal and legal remedies for systemic racism, current mechanisms remain ill-suited to redress systemic racial discrimination. Indeed, several legal rules, doctrines, policies, and public officials continue to contribute to the subordination of people of color and reinforce white supremacy.[254] The systematic use of criminal law and enforcement to construct the United States' racial pyramid began during slavery, when policies like *Slave Codes* shaped prejudiced criminal law and subjected Black people—*enslaved or free*—to heightened punishment and control.[255] Judicial interpretation of criminal law authorized Black submission to white people, while allowing white people to exercise full dominion over Black people.[256]

Even after the end of slavery and the passage of the 13th, 14th, and 15th Amendments granting "equal protection under the law," many states and localities continued to discriminate against Black Americans.[257] One such method was the Black Codes. While facially neutral, the Black Codes included civil and criminal provisions mostly intended for the same purpose as the Slave Codes: to control Black bodies, maintain white supremacy, and

L. REV. 1801, 1855 (2010) (discussing the motivations behind Congress's passage of the Civil Rights Act of 1866).

253 U.S. CONST. amend. XIV; *see also* Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 131–32 (1991) (discussing the Fourteenth Amendment).

254 *See* Khiara M. Bridges, *Race in the Roberts Court,* 136 HARV. L. REV. 23, 24-25 (2022) (arguing that contemporary Supreme Court doctrine and legal institutions often function to preserve racial hierarchy and entrench white supremacy despite the formal repudiation of overt racial discrimination), *see also* Dorothy E. Roberts, *Racial Justice, Public Policy, and the Dismantling of Structural Racism*, 116 MICH. L. REV. 1381, 1382-84 (2018) (contending that laws, polices, and state institutions continue to reproduce racial subordination and maintain systems of white supremacy).

255 See DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 53-54 (2009) (explaining that Southern slave codes and later Black Codes criminalized ordinary conduct by Black people and used the machinery of criminal law to preserve racial hierarchy and labor control).

256 Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541, 541. It should be noted that during Reconstruction, "Slave Codes reemerged as Black Codes." *Id.*

257 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 199-205 (2d ed. 2014); ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 77–85 (2004) (discussing that even after the abolition of slavery and the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments guaranteeing equal protection under the law, many states and local governments continued to discriminate systematically against Black Americans—one prominent mechanism of this discrimination was the enactment of the Black Codes, which restricted the civil, economic, and legal rights of formerly enslaved persons).

extract unpaid labor to service the local economy.[258] Despite the formal end of the Black Codes and the ultimate expiry of explicit race taxonomies in state action, the execution of anticrime strategies endures to result in noticeable racial inequalities. In other words, the law has largely removed race from its text, but racism persists in operation. The trial for Derek Chauvin, the officer who killed George Floyd, represents not only a milestone in American confrontation of racial bias, especially in criminal justice and law enforcement, but also as the catalyst for parallel movements around the world.[259] George Floyd's death became a global symbol of racial justice struggles, prompting dynamic calls for police reform and new federal legislation in the United States, as well as a reckoning with the history of British expansionism in the United Kingdom, and a renaissance in activism over Indigenous deaths in custody in Australia.[260]

American anti-Black racism has been deeply embedded in the nation's legal, political, and social structures since its founding.[261] Beginning with chattel slavery, Black Americans were systematically dehumanized and exploited through laws that treated them as property rather than persons.[262] Although slavery formally ended with the Thirteenth Amendment, racial subordination persisted through the Black Codes, Jim Crow segregation, and widespread racial violence, which together enforced economic dependence

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[258] *Id*.; *see*, *e.g*., Eric Levenson & Aaron Cooper, *Derek Chauvin Found Guilty of All Three Charges for Killing George Floyd*, CNN (April 21, 2021), https://www.cnn.com/2021/04/20/us/derek-chauvin-trialgeorge-floyd-deliberations/index.html [https://perma.cc/WG4Q-2U3V].

[259] *See*, Theodore Schleifer & Allie Malloy, *Black Lives Matter Activists Join Obama at Forum on Policing*, CNN (July 14, 2016), https://www.cnn.com/2016/07/13/politics/obama-blacklives-matter-meeting/index.html [https://perma.cc/54TF-BQH7] (describing BLM activists' conversations with then-President Obama); *see also* Dana Liebelson & Ryan J. Reilly, *Black Lives Matter Activists Meet with Bernie Sanders to Make Sure He's on Board*, HUFFINGTON POST (Sep. 16, 2015), https://www.huffpost.com/entry/bernie-sanders-black-lives-matter_n_55f9ca9ce4b00310edf57b02 [https://perma.cc/MHV9-GYA5] (describing Senator Bernie Sanders's meeting with BLM activists).

[260] Bill Chappell, *Minneapolis Trial Postponed for 3 Former Police Officers in George Floyd's Murder*, NPR (May 13, 2021, 3:23 PM), https://www.npr.org/2021/05/13/996562538/mpls-trial-for-former-police-officers-lane-thao-and-kueng-is-pushed-back-to-2022 [https://perma.cc/MZ99-Y74F]; Matt Furber, John Eligon & Audra D.S. Burch, *Minneapolis Police*, *Long Accused of Racism, Face Wrath of Wounded City*, N.Y. TIMES https://www.nytimes.com/2020/05/27/us/minneapolis-police.html (last updated Oct 29, 2021) [https://perma.cc/B8XQ-W27X]; Richard A. Oppel Jr. & Richard Fausset, *Klobuchar Ramped Up Prosecutions*, *Except in Cases Against Police*, N.Y. TIMES (Feb. 26, 2020), https://www.nytimes.com/2020/02/26/us/klobuchar-prosecutormyon-burrell.html [https://perma.cc/F5BW-Z9ME].

[261] DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 1–15 (6th ed. 2008); IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 21–45 (2005); EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 4–6 (1975).

[262] Dred Scott v. Sandford, 60 U.S. 393, 407 (1857); ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 38–45 (1982); ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 3–7 (2000).

and political exclusion.[263] Throughout the twentieth century, discriminatory practices such as redlining, exclusion from New Deal benefits, unequal education, and racially biased policing entrenched racial inequality despite constitutional guarantees of equal protection.[264] While the civil rights movement achieved major legal reforms, including the Civil Rights and Voting Rights Acts, structural racism continues to manifest in disparities in wealth, incarceration, health, and political representation.[265] This historical continuity demonstrates that anti-Black racism in the United States is not merely the result of individual prejudice, but a systemic phenomenon rooted in law and institutional practice.[266]

V. AMENDMENTS BETRAYED: FREEDOM AND THE LIMITS OF CONSTITUTIONAL PROTECTIONS IN THE UNITED STATES

After two and a half centuries of indenture and slavery (1619–1865), Reconstruction (1865–1877) promised equality and empowerment that were never fully realized.[267] A century of Jim Crow followed (1877–1960s), marked by racial violence and repression was so extreme that it later served as a model for Hitler's Germany.[268] During the civil rights movement and the Second Reconstruction (1950s–1968), the country again endeavored to confront mistreatment of Black individuals and other racial minorities.[269]

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[263] U.S. CONST. Amend. XIII; Foner, *supra* note 257, at 199–205; DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 53–57 (2008); Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896).

[264] RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 63–80 (2017); Katznelson, *supra* note 261, at 29–33; Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 40–58 (2010).

[265] *See*, *e.g.*, Civil Rights Act, 78 Stat. 241 (1964); Voting Rights Act, 79 Stat. 437 (1965); ALEXANDER, *supra* note 264, at 180–220; Ruqaiijah Yearby, *Structural Racism and Health Disparities*, 48 HASTINGS CTR. REP. 10, 11–13 (2018).

[266] Kimberlé Williams Crenshaw, *Race*, *Reform*, *and Retrenchment*: *Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1334–36 (1988); EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 9–14 (2014); DERRICK A. BELL, JR., FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 12–14 (1992).

[267] *See generally* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978) (examining how colonial legislatures used slave codes and other legal mechanisms to impose harsher punishments and restrictions on Black people, thereby embedding racial discrimination into the foundations of the American legal system).

[268] JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED SATES AND THE MAKING OF NAZI RACE LAW 87-116 (2017); *see generally* GLENDA E. GILMORE, GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896–1920 (1996) (examining how gender shaped the construction and maintenance of white supremacy during the Jim Crow era and analyzing the political roles of both Black and white women in contests over race, citizenship, and power in the post-Reconstruction South).

[269] *See generally* Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (2005) (reconceptualizing the civil rights movement as an extended

Yet, despite the significant civil rights advancements of this time, such movements were met with enormous confrontation and a long period of racist retrenchment that remains to this day.[270]

This move can, and should, be regarded as a form of transition. In other words, applying the TJ framework, particularly the 'Islamic TJ' interpretation, to U.S. race relations sheds light on the enduring patterns of human rights abuses throughout U.S. history and their continuing social and institutional effects. Within that transition the U.S. Supreme Court has played a critical role.[271] For much of its history, the Court's decisions openly preserved white supremacy.[272] Its 1954 decision in *Brown v. Board of Education*, however, helped revolutionize the Court's race jurisprudence.[273] In the Civil Rights era, the Supreme Court imposed and extended measures intended to articulate the legacies of historical racism, and the Court's rulings moved from reckoning toward distancing.[274] Racial equality views are said to rest on two key theories of equal protection: "anticlassification" theory, concerned with individual colorblindness, and "anti-subordination" theory, concerned with group inequalities.[275] In trying to separate the United States of today from its Jim Crow histories, the Court condemned obvious and deliberate forms of racism from the past while ignoring the racism present today and denying endurances between past and present racism.[276]

With this shift from reckoning to distancing, civil rights actions that were once believed essential and crucial were acknowledged as unsuitable, outdated, and even adversarial to the project of ensuring a racially just

struggle against racial and economic injustice and exploring the political consequences of competing historical narratives about race in the United States).

[270] Crenshaw, *supra* note 266, at 1336-38.

[271] *Id.*

[272] *See* Dred Scott v. Sandford, 60 U.S. 393, 407 (1857); Plessy v. Ferguson, 163 U.S. 537 (1896).

[273] *Brown v. Bd. of Educ*., 347 U.S. 483 (1954) (noting that justices across the political spectrum are in consensus and argued in favor of the need to overcome racial acts and divisions). Recent rulings limiting civil rights, like *Parents Involved v. Seattle* and *Shelby County v. Holder*, are as soaked in transitional reasoning as the landmark decision in Brown, although their underlying philosophies of transition are quite different. *See*, *e.g*., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist*. No. 1, 551 U.S. 701 (2007); *Shelby County v. Holder*, 570 U.S. 529 (2013).

[274] *See* Jasmine R. Silver, *Moral Foundations, Intuitions of Justice, and the Intricacies of Punitive Sentiment*, 51 LAW & SOC'Y REV. 413, 413-14 (2017) (discussing punitive sentiment or punitiveness).

[275] *See generally* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003) (surveying competing theories of equality in constitutional law and highlighting the civil rights tradition's concern with dismantling entrenched systems of social and racial hierarchy).

[276] *Id.* Further, the Court became preoccupied with recognizing a distinct end point of the transition process—the point at which America's link to its racist history would be considered severed once and for all and "extraordinary" strategies such as voter protections and affirmative action would be cast apart. *Id.*

society.[277] Currently, this distancing perspective leads the jurisprudence of a progressively conservative Court, largely demoting reckoning attitudes to liberal dissents.[278] These trends are likely to accelerate with a durable conservative majority on the Supreme Court.[279] The Roberts Court can be anticipated to further use distancing discourses to depart from the racial equality model, to terminate or weaken contemporary measures that redress racial harms, and to hinder the introduction of similar polices in the future.[280] How the Court interprets transition has outcomes not only for the development of legal doctrine, but also for how law affects social spheres.[281]

TJ (including the Islamic model) focuses on endorsing accountability for misconducts, opening political and social space to harmed or victimized individuals, providing redress for and guaranteeing non-repetition of injustices, and easing societal reconciliation by improving negative emotions and altering individual and communal identities, to name a few key concerns.[282] While the United States has required a racial transition from slavery and Jim Crow, it has mainly avoided the TJ model in response to racist human rights abuses.[283]

While the United States has advocated truth commissions and other TJ measures abroad, it has neglected the need for such measures at home.[284] The

[277] Silver, *supra* note 274, at 415-18 (noting that TJ lens places the Supreme Court's efforts within a universal dialogue).

[278] *See* Kimberlé W. Crenshaw, *"Framing Affirmative Action,"* 105 MICH. L. REV. FIRST IMPRESSIONS 123, 128 (2006) (arguing that "the racial past" in affirmative action opinions "has been pictured as a distant reality disconnected from the present"); *see also* Elise C. Boddie, *The Contested Role of Time in Equal Protection*, 117 COLUM. L. REV. 1825, 1826 (2017) (noting on desegregation that opinions "obscure the relationship between present-day racial inequality and past discrimination").

[279] *See generally* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021) (arguing that the Supreme Court's counter majoritarian structure has contributed to democratic deficits and proposing institutional reforms designed to increase the Court's accountability to democratic governance while preserving judicial independence).

[280] *Id.* at 1708–18. This distancing jurisprudence would limit efforts to underscore racial inequality through other channels (e.g., school integration strategies, voting rights legislation, affirmative action agendas, and disparate impact assessments).

[281] *Id.* at 1731–50. In other words, how racial justice activists can seek to reorient a principally distancing jurisprudence toward greater racial reckoning, while concurrently pursuing reckoning through other measures. TJ is a field of practice concerned with how societies move from tyranny and violence toward a more just and peaceful order.

[282] Societies pursue these concerns through such actions as truth commissions and reparations programs, with courts often playing a vital role. Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 449, 452–66 (1990); Juan E. Mendez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 256-257 (1997); Alex Jeffrey, *The Political Geographies of Transitional Justice*, 36 TRANSACTIONS INST. BRIT. GEOGRAPHERS 344, 346–49 (2011).

[283] Balkin & Siegel, *supra* note 275, at 12-16.

[284] Yuvraj Joshi, *Does Transitional Justice Belong in the United States?*, JUST SECURITY (July 13, 2020), https://www.justsecurity.org/71372/does-transitional-justice-belong-in-the-united-states/ [https://perma.cc/CF94-363D]. *See generally* Yuvraj Joshi, *Affirmative Action as Transitional Justice*,

tragic killings of Breonna Taylor, Tony McDade, George Floyd, and countless other Black persons have led to increased calls for TJ in this country, which is a noticeable departure from the norm within the United States.[285] As the United States continues to fight against systemic racism in various forms, a TJ evaluation of Supreme Court decision-making may elucidate the state of the ongoing fight for racial equality.[286] Such an assessment would reveal the Court's inadequate treatment of TJ standards—accountability, redress, guarantees of non-repetition, and reconciliation—that have guided other societies emerging from histories of mass abuse.[287] TJ theory thus provides a framework not only for assessing TJ models, but also for enlightening how courts and other segments of society pursue these ideals.[288]

TJ includes a variety of perspectives established precisely to address structural and systematic abuses. With an emphasis on truth, justice, reparations, and institutional reform, it has assisted countries emerging from periods of conflict and authoritarianism address large-scale or systematic human rights abuses and take steps to prevent their repetition.[289] A public misconception is that TJ can only be applied in a society that is experiencing a substantial transition (e.g., Egypt and Tunisia), either at the end of a conflict or during a transfer of power.[290] However, while such a transition does enable efforts to reform and improve institutions and recompense past atrocities, what is also needed is a political, social, legal, and cultural opening, and a public demand for change.[291] Debatably, the US now finds itself in such a moment of reckoning, as protests and citizens' demands crack open the door to comprehensive debates on how to confront the legacy of slavery and white supremacy and restructure existing institutions such as

2020 WIS. L. REV. 1 (2020) (providing a richer understanding of current racial equality doctrine, insights into its history and likely future, independent criteria for critiquing it, and new ideas for reorienting it).

[285] *See*, *e.g.*, Augustine S.J. Park, *Settler Colonialism, Decolonization and Radicalizing Transitional Justice*, 14 INT'L J. TRANSITIONAL JUST. 260, 260–62 & 273–77 (2020).

[286] Patricia Lundy & Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom Up*, 35 J.L. & SOC'Y 265, 272 (2008).

[287] *See generally* Andrew Valls, *Racial Justice as Transitional Justice*, 36 POLITY 53 (2003) (noting that why the United States has struggled to surmount its racist past).

[288] *See* U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 (Aug. 23, 2004).

[289] *See*, *e.g.*, CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 72–78, 91–97 (2018).

[290] CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE 85-92 (2016).

[291] *Id*. In other words, over the past decade the general understanding of TJ has changed; primarily perceived as a set of trends to accomplish justice and redress in the aftermath of war or totalitarian regimes, it is now seen as relevant to traditional democracies and has been progressively applied in them to address legacies of misuse and historical injustices.

police and the criminal penal system.[292] Central to all efforts to recognize victims and the abuses they suffered, challenge the dominant historical tale, repair harm, and transform broken systems is the need to link the dots between past and present violations and affirm the humanity and dignity of Black people.[293] Slavery is far from a sin of the past. As historian Edward Baptist notes, "slavery's expansion shaped every crucial aspect of the economy and politics of the new nation . . . the commodification and suffering and forced labor of African Americans [are] what made the US powerful and rich."[294] In his book "The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America," Khalil Muhammed designates "Black delinquency" as a process by which "people are assigned the label of criminal, whether they are guilty or not."[295]

Some human rights defenders and activists (and leaders), yet, reject symbolic efforts, such as the removal of flags and statutes celebrating the Confederacy, and consider these efforts to be a disruption from meaningful and much-needed institutional reforms.[296] But while it is accurate that the immediate influence of these actions on the lives of victims and people of

[292] *Id*. The International Center for Transitional Justice (ICTJ) has escorted victims' survivors, and human rights defenders in their mission for justice and has recommended/supported policymaker/governments in their efforts to efficiently deal with past human rights abuses and lay the basis for a more just and all-encompassing future. It should be noted that experiences from TJ processes in places as South Africa, Colombia, Tunisia, and Canada, along with lessons from enduring work in the US, can propose inspiration and philosophies for what can be done in the US to respond to current calls for larger and more comprehensive restructurings.

[293] *See* Isabel Wilkerson, *America's Enduring Caste System*, N.Y. TIMES MAG. (July 5, 2020), www.nytimes.com/2020/07/01/magazine/isabel-wilkerson-caste.html [https://perma.cc/YVB8-NECP]; *see generally*

JAMES BALDWIN, THE FIRE NEXT TIME (Vintage Int'l ed. 1993).

[294] EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM 31–38, 141–48 (2014).

[295] KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 3–7, 13–18 (2019). Further, he argues that this cycle—whereby black people were arrested to avert them from exercising their rights and then believed dangerous because of their high arrest rates, which deprived them of their rights—has been repeated throughout US history. *See*, *e.g*., Anna North, *How Racist Policing Took Over American Cities, Explained by a Historian*, VOX (June 6, 2020, 8:00 AM), https://www.vox.com/2020/6/6/21280643/police-brutality-violence-protests-racism-khalil-muhammad [https://perma.cc/A69A-BLF6] ("What this moment leads us to is a crossroads . . . to define justice beyond an individual case or even cases, but to define justice as a form of limiting what police officers have been able to do, which is to protect white privileges in America. Some people call that defunding the police. Some people call it abolition. But what it all means is that there should be less policing of black America and more investment in the [socioeconomic] infrastructure of black communities. And police officers are not the people to do that work.").

[296] *See*, *e.g*., Paul LeBlanc, *Mississippi State Legislature Passes Bill to Remove Confederate Symbol from State Flag in Historic Vote*, CNN (June 29, 2020, 3:08 PM), https://www.cnn.com/2020/06/28/politics/mississippi-flag-confederate-emblem [https://perma.cc/J4JV-7GVF] ("[…] the death of George Floyd has led to the removal—by protesters in some cases and . . . in others—of contentious statues and Confederate symbols that have upset some residents for decades, if not longer.").

color more broadly may appear inadequate, these monuments signal an official acknowledgment of and respect for stories of the past that have been dismissed or dynamically suppressed, and to that degree, removal represents a first step toward justice.[297] From a TJ perspective, the social pressure on those in power to reconsider the life and legacy of these provocative historic figures creates an opening for broader public acknowledgment of past and ongoing violations and for concrete action to modify or dismantle the systems that preserve racial injustice.[298] In this respect, an official apology or removal of offensive symbols can strengthen symbolic reparative measures and acknowledgment of historical wrongdoing, as it should reflect a societal reckoning with past and present criminal acts and help unite the public around shared goals for moving forward.[299]

Relatedly, leaders and officials can expressively apologize in numerous ways, and there are many instances of what might be said and what perhaps should not be.[300] An expression of "regret" alone is not sufficient, and the most operative apologies also consider the victims' present and future well-being.[301] For instance, following the 1988 Civil Liberties Act, Japanese

[297] *See* E. Arnold Modlin et al., *Can Plantation Museums Do Full Justice to the Story of the Enslaved? A Discussion of Problems, Possibilities, and the Place of Memory*, 4 GEOHUMANITIES 1, 339-40 (2018) (noting that a truth-seeking process, can further reinforce this recognition).

[298] A. Leon Higginbotham & Anne F. Jacobs, *The Law Only as an Enemy: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1021-22 (1992).

[299] *See* RUBEN CARRANZA, CRISTIÁN CORREA & ELENA NAUGHTON, MORE THAN WORDS: APOLOGIES AS A FORM OF REPARATION 5-55 (2015) (Int'l Ctr. for Transitional Just.) ("[A]n apology should signal the intention of a state and/or liable parties to recognize their obligations to victims and encourage citizens and society at-large to take steps toward addressing the root causes of conflict, violence, repression, or exclusion that have made massive and systematic human rights violations possible.").

[300] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 54-55 (1785) (discussing natural differences between races and defending slavery); ANNETTE GORDON-REED, THE HEMINGSES OF MONTICELLO: AN AMERICAN FAMILY 40-45 (2008) (discussing the origin of negative view of race in English culture and the economic reality that existed in Virginia during colonization); PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 125-30 (2001) (examining Jefferson's legal and political practices in perpetuating slavery).

[301] JEFFERSON, *supra* note 300, at 56-57; *see also* Samuel Petrequin, *Belgium Takes Down Statue, King Expresses Regret for Colonial Violence*, PBS NEWSHOUR (June 30, 2020, 4:54 PM), https://www.pbs.org/newshour/world/belgium-takes-down-statue-king-expresses-regret-for-colonial-violence [https://perma.cc/2P9Z-SFCT] (noting toward reconciliation). Regret, in this context, refers to an expression of sorrow, disappointment, or moral unease regarding a past action or institution (such as slavery), articulated without an accompanying acknowledgment of personal responsibility, culpability, or obligation to repair the harm caused. *See generally* Jeffrey S. Helmreich, *Regret*, *Remorse*, *and Accidents*: *Where the New Apology Laws Go Wrong* (Colum. Law & Culture, Working Paper, 2011) (unpublished working paper) (arguing that expressions of sympathy/regret alone are treated differently under law and often are insufficient as full apologies); David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043, 1096 (2010) (discussing the inadequacy of superficial remedies and the need for reparative action that addresses ongoing harms). In the Jeffersonian context, expressions of regret often take the form of abstract moral disapproval of slavery

Americans who had been incarcerated received a formal letter of apology from President Reagan along with a check for individual reparations.[302] To date, the U.S. government has yet to apologize to African Americans for the profound harm they suffered as a result of slavery, centuries of systemic racism and discrimination, and other grave injustices.[303] While significant,

as an evil or misfortune, while simultaneously distancing the speaker from accountability for its creation, maintenance, or consequences. *Id.* As such, regret functions as a rhetorical gesture that signals awareness of injustice but stops short of apology, restitution, or commitments to address the ongoing effects of the harm on affected communities. *Id.* In other words, it should be noted that the difference between expressions of regret/sympathy and full apologies in legal settings, showing that a mere expression of regret doesn't carry the legal or moral weight of a full apology. It situates apology/regret within TJ and reparative law, arguing that effective remedies must engage with ongoing injuries and not just acknowledge past wrongdoing.

[302] *See* Civil Liberties Act of 1988, 50 U.S.C. § 1989b (2000); Letter from President Bill Clinton to the United States (Oct. 1, 1993) (on file with California State University, Sacramento, Department of Special Collections and University Archives (Oct. 1, 1993); *see also* Letter from President George H.W. Bush to Japanese Americans (Oct. 1990) (on file with California State University, Sacramento, Department of Special Collections and University Archives (Oct. 1990). Congress officially apologized to Native Americans in a joint resolution that it signed into law as part of the 2010 US Defense Appropriations Bill. H.R. Con. Res. 194, 111th Cong. (2008) (apologizing for the enslavement and racial segregation of African-Americans); S. Con. Res. 26, 111th Cong. (2009) (apologizing for the enslavement and racial segregation of African Americans); Angelique M. Davis, *Apologies*, *Reparations*, *and the Continuing Legacy of the European Slave Trade in the United States*, 45 J. BLACK STUD. 4, 1-16 (2014) (noting that the apology was criticized for not being delivered in public). As a partial response to the forcible relocation and incarceration of Japanese Americans during World War II, Congress enacted the Civil Liberties Act of 1988, which formally acknowledged that the injury resulted from "racial prejudice, wartime hysteria, and a failure of political leadership," and authorized reparations. Civil Liberties Act of 1988, Pub. L. No. 100-383, § 2(a), 102 Stat. 903, 903–04. The Act provided a formal apology and monetary compensation of $20,000 to each surviving internee, paid between 1990 and 1998. *Id.*§ 105, 102 Stat. at 906. Approximately 82,219 Japanese Americans ultimately received compensation, totaling roughly $1.6 billion in federal reparations. Fair Housing Amendments Act, 102 Stat. 1619 (1988). The underlying injury included loss of liberty, forced displacement, confiscation or distress sale of property, prolonged incarceration (often lasting up to four years), and severe dignitary and psychological harm. Although the compensation was limited and did not fully account for intergenerational or economic losses, it remains the most significant example of federally authorized reparations in U.S. history and provides an important reference point for assessing the scale, form, and justification of reparative measures for other state-sanctioned racial injustices—particularly slavery and its continuing structural effects on Black Americans. *See generally* Sarah L. Brew, *Making Amends for History*: *Legislative Reparations for Japanese Americans and Other Minority Groups*, 8 L. & INEQUALITY J. 179 (1989) (exploring the history and implications of the Civil Liberties Act of 1988 and its reparations framework, including congressional debate and the significance of awarding monetary compensation and a formal apology); *see generally* Jerry Kang, *Denying Prejudice*: *Internment*, *Redress*, *and Denial*, 34 UCLA L. REV. 933 (2003) (analyzing the legal and historical aspects of Japanese American incarceration, the Civil Liberties Act's reparations provisions, and how legal institutions have acknowledged and denied aspects of prejudice, including discussions of coram nobis vacatur and the broader meaning of redress).

[303] Following the attack on Pearl Harbor, the United States government forcibly relocated and incarcerated approximately 120,000 persons of Japanese ancestry—nearly two-thirds of whom were U.S. citizens—under Executive Order 9066. See Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). Japanese Americans were targeted not on the basis of individualized suspicion, but because of race and perceived ancestry-based disloyalty, driven by wartime hysteria, racial prejudice, and longstanding anti-Asian animus on the West Coast. Families were given little notice to dispose of homes, businesses, and personal property, resulting in significant economic and dignitary losses, and were confined for up to four

these apologies do not represent the overall U.S. population and fall short of a national political commitment to policy that would meaningfully redress past and ongoing injustices.[304]

In terms of nationwide protest and reckoning, an appropriate response requires a formal, public, and nonpartisan apology by the federal government that not only reiterates the founding principle that "all [people] are created equal," but also clearly and unequivocally commits to meaningful, systemic change.[305] Ultimately, the apology must capture the essence of this specific moment in U.S. modern history, articulate and what it demands not only for Black Americans but for a universal image of a just American society, and help set transformational change in the motion.[306] The advocacy for that Bill—to provide reparations, strengthen civil rights protections, or address structural injustice—underscores the real-world significance of this important law. This legislation, offers a crucial step towards remedying the enduring effects of systemic racial harm into concrete policy action, demonstrating how law cannot only recognize past wrongs but also promote equitable remedies for affected communities.

As an imperative first step, Congress should enact H.R. 40, which would establish the "Commission to Study and Develop Reparation Proposals for African Americans Act."[307] Under the bill, the commission would:

> [E]xamine slavery and discrimination in the colonies and the United States from 1619 to the present and recommend appropriate remedies. Among

years in remote incarceration camps under armed guard. Hirabayashi v. United States, 320 U.S. 81, 96–99 (1943); Korematsu v. United States, 323 U.S. 214, 219–20 (1944). Although the Supreme Court upheld the exclusion and incarceration at the time, those decisions were later repudiated when federal courts granted writs of coram nobis after evidence surfaced that the government had suppressed and falsified intelligence reports undermining claims of military necessity. *Hirabayashi*, 828 F.2d at 608–09; *Korematsu,* 584 F. Supp. at 1420. These proceedings established that the incarceration was not justified by security concerns and is now widely recognized as a grave injustice and a paradigmatic example of race-based collective punishment incompatible with constitutional guarantees of equal protection and due process. Civil Liberties Act of 1988, Pub. L. No. 100-383, § 2(a), 102 Stat. 903, 903–04 (formally acknowledging the injustice and providing reparations).

[304] It should be noted that President Bill Clinton in 1998 recognized that the United States was "wrong" to benefit "from the fruits of the slave trade" during a trip to Uganda. *See*, *e.g.*, Thomas Geoghegan, *Lincoln Apologizes*, N.Y. TIMES (Apr. 5, 1998), www.nytimes.com/1998/04/05/opinion/lincolnapologizes.html [https://perma.cc/YBR3-NNBE].

[305] *See* Paul Zielbauer, *A Newspaper Apologizes for Slave-Era Ads*, N.Y. TIMES (July 6, 2000), https://www.nytimes.com/2000/07/06/nyregion/a-newspaper-apologizes-for-slave-era-ads.html [https://perma.cc/925M-XS7C] (noting that the Hartford Courant, a newspaper based in Connecticut, apologized for advertising the sale of slaves).

[306] H.R. 40, 117th Cong. §3(b)(7) (2021).

[307] *See*, *e.g.*, A.B. 3121, 2020 Reg. Sess. ch. 319 (Cal. 2020); Taryn Luna, *California Task Force Will Consider Paying Reparations for Slavery*, L.A. TIMES (Sep. 30, 2020), www.latimes.com/california/story/2020-09-30/california-task-force-reparations-slavery-gavin-newsomshirleyweber [https://perma.cc/J3SZ-9AHJ].

> other requirements, the commission shall identify (1) the role of federal and state governments in supporting the institution of slavery, (2) forms of discrimination in the public and private sectors against freed slaves and their descendants, and (3) lingering negative effects of slavery on living African Americans and society.[308]

Such truth-seeking and recompense processes could help map out essential reforms by revealing the continuing influence of past abuses on communities of color.[309] One sector that merits specific attention in this process is law enforcement, which has been a flashpoint in debates about race for decades.

VI. WHEN THE BADGE MEETS THE LAW: RETHINKING SOVEREIGN AND QUALIFIED IMMUNITY

Biased policing against minorities and people of color in the U.S. has been rampant since the creation of this nation and has affected generations. Fearful that their slaves would revolt or escape, slaveholders shaped slave patrols "(1) to chase down, apprehend, and return to their owners, runaway slaves; (2) to provide a form of organized terror to deter slave revolts; and (3) to maintain a form of discipline for slave-workers who were subject to summary justice, outside the law."[310] As one of the earliest and most prevalent policing forms, these patrols were designed to control rather than protect.[311] A constitutional clause at the time, and later the Fugitive Slave

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[308] Also, Congress should pass H. Con. Res.19 calling for a US Commission on Truth, Racial Healing, and Transformation and these federal level creativities should be supplemented by state and city efforts (e.g., the California Task Force to Study and Develop Reparation Proposals for African Americans, and the Reparations Program recently launched in Evanston, Illinois). *See Evanston Local Reparations*, CITY OF EVANSTON, https://www.cityofevanston.org/government/initiatives/evanston_local_reparations.php [https://perma.cc/RX8R-CNWK] (noting the policies directly affecting minorities).

[309] In other words, dismantling systemic racism will entail reforms in almost every sector of government and society, including the economy, elections, health care system, housing, education, and the social safety net. *See* Darren Lenard Hutchinson, "*Continually Reminded of Their Inferior Position"*: *Social Dominance*, *Implicit Bias*, *Criminality*, *and Race*, 46 WASH. U. J.L. & POL'Y 23, 75–76 (2014) (discussing Black Codes); *see also* Christopher R. Adamson, *Punishment After Slavery*: *Southern Penal Systems*, 1865–1890, 30 SOC. PROBS. 555, 558–59 (1983) (analyzing race and criminal law enforcement during Reconstruction) (discussing the application of TJ; exploring the history of racially biased policing actions and racially inspired police brutality and the need to reform the law enforcement and criminal justice sectors as part of any effort to repair past and enduring harms).

[310] *See*, *e.g.*, Gary Potter, *The History of Policing in the United States*, E. KENTUCKY UNIV. (June 25, 2013), https://ekuonline.eku.edu/blog/police-studies/the-history-of-policing-in-the-united-states-part-1/ [https://perma.cc/U8ET-NNCQ] ("More than crime, modern police forces in the United States emerged as a response to 'disorder.' What constitutes social and public order depends largely on who is defining those terms. The cities of 19th century America were defined by the mercantile interests. These interests through taxes and political influence supported the development of bureaucratic policing institutions.").

[311] *Id.*

Act of 1850, further legitimatized these patrols and their cruel actions.[312] As journalist Nikole Hannah-Jones writes, "[while] the names and mechanisms of social control have change . . . the presumption that white patrollers have the legal right to kill black people deemed to have committed minor infractions or to have breached the social order has remained."[313] George Floyd is only one in a long list of persons police murdered while under arrest, while in custody, or during police operations.[314] Criminologists are in consensus that age, race, and gender continue to be the determining factors in police violence in America.[315]

Any serious conversation about systemic racism and state violence in the U.S. must grapple with two powerful doctrinal barriers to accountability: sovereign immunity and qualified immunity. Although framed as neutral structural protections, both doctrines often operate in practice to shield government actors from meaningful redress, particularly in cases involving police brutality and constitutional violations against marginalized communities.

Sovereign immunity reflects the inherited common law principle that the sovereign cannot be sued without its consent. In the United States, this

[312] U.S. Const. art. IV, § 2; Fugitive Slave Act of 1850, ch. 60, 9 stat. 462 (1850) (repealed 1864) ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

[313] *See* Mark Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 9 JUDICATURE 6, 6-8 (July-Aug. 2010) (heightening his testimony); *see also Mass Incarceration Trends*, THE SENT'G PROJECT (May 21, 2024), https://www.sentencingproject.org/reports/mass-incarceration-trends [https://perma.cc/NJA9-TVMW] (highlighting the growth in state and federal prison populations since the early 1970s, and its far reaching effect on families, communities, and society as a whole) ("The year 2023 marks the 50th year since the U.S. prison population began its unprecedented surge. The United States is unparalleled historically and ranks among the highest worldwide in its dependence on incarceration. Over five million people in total are under supervision by the criminal legal system. Nearly two million people, disproportionately Black, are living in prisons and jails instead of their communities. Compare this to the figures of the early 1970s when this count was 360,000. The social, moral, and fiscal costs associated with the large-scale, decades-long investment in mass imprisonment cannot be justified by any evidence of its effectiveness. Misguided changes in sentencing law and policy—not crime—account for the majority of the increase in correctional supervision.").

[314] Jeffrey A. Fagan, *Race and Reasonableness in Police Killings*, 2020 COLUM. L. SCH. FAC. SCHOLARSHIP 1, 951–56 (2020) (examining racial disparities in police killings and situating individual high-profile deaths—such as George Floyd's—within a sustained pattern of lethal police force and structuralized decision-making that contributes to disproportionate fatalities); *see also*, Frank R. Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age*, *Race–Ethnicity*, *and Sex*, 116 PROC. NAT'L ACAD. SCI. U.S.A. 16793, 16793–97 (2019) (reporting that U.S. police use of force results in hundreds to over a thousand deaths annually and documenting the persistent prevalence of lethal force encounters, situating George Floyd's killing within a broader pattern of police-involved deaths).

[315] *See* Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 1, 97-132 (2008) (discussing the effects of incarceration on communities where it occurs at high levels of concentration); *see also*, ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015 (2018), https://bjs.ojp.gov/library/publications/contacts-between-police-and-public-2015 [https://perma.cc/HXC3-UB57] (Bureau of Just. Stats.)

doctrine is embedded both constitutionally and statutorily. The Eleventh Amendment has been interpreted to bar suits against states in federal court absent waiver or valid congressional abrogation.[316] The Supreme Court has repeatedly reaffirmed that states retain broad immunity from private damages actions.[317] At the federal level, Congress enacted the Federal Tort Claims Act ("FTCA") to provide a limited waiver of sovereign immunity.[318] Yet the FTCA contains significant exceptions—including the discretionary function exception—that frequently preclude recovery.[319] As a result, even where government conduct results in serious harm, victims often confront a labyrinth of jurisdictional and statutory barriers before reaching the merits of their claims.[320] In theory, sovereign immunity preserves governmental stability and protects the public fisc. In practice, however, it can function as a structural mechanism that distances the state from accountability, particularly where the harms alleged arise from systemic policing practices or entrenched racial inequities.

If sovereign immunity shields the state as an entity, qualified immunity shields individual officials. In § 1983 litigation, government officials are protected from civil liability unless they violated "clearly established" constitutional law.[321] In *Harlow v. Fitzgerald*, the Supreme Court reformulated qualified immunity as an objective inquiry designed to protect officials from the burdens of litigation.[322] Subsequent cases have strengthened this shield. In *Pearson v. Callahan*, the Court held that lower courts may grant qualified immunity without first deciding whether a constitutional violation occurred.[323] This sequencing discretion has produced a doctrinal stagnation problem: when courts resolve cases solely on "clearly established" grounds, constitutional standards fail to develop, making it increasingly difficult for future plaintiffs to overcome the same barrier.

Critics have argued that qualified immunity lacks firm historical grounding and operates as a near-categorical bar in excessive force cases.[324]

316 U.S. CONST. amend. XI.

317 *See, e.g.*, Hans v. Louisiana, 134 U.S. 1 (1890) (discussing sovereign immunity and the structural shielding of the State).

318 Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 (2018).

319 § 2680(a).

320 *Id.*

321 42 U.S.C. § 1983 (2018).

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

323 Pearson v. Callahan, 555 U.S. 223, 236 (2009). Although courts emphasize that immunity doctrines are not absolute, the cumulative effect of sovereign immunity, qualified immunity, standing doctrine, statutes of limitation, and procedural gatekeeping creates a layered system of insulation. These doctrines operate within a broader legal culture that often prioritizes institutional stability over victim restoration.

324 *See* Ziglar v. Abbasi, 582 U.S. 120, 157–58 (2017) (Thomas, J., concurring) (questioning historical foundations of modern qualified immunity doctrine).

The practical consequence is that plaintiffs alleging police misconduct frequently see their claims dismissed at the pleading or summary judgment stage—not because no harm occurred, but because no prior case presented sufficiently similar facts. While formal avenues for redress remain (42 U.S.C. § 1983), procedural hurdles, heightened pleading standards, immunity doctrines, and judicial deference significantly narrow those paths.[325] For many victims of violence, especially in racially marginalized communities, the promise of constitutional accountability remains largely symbolic.

This structure raises deeper concerns about judicial discretion and implicit bias.[326] Where systemic inequities already shape policing practices, housing patterns, and economic opportunity, doctrines that require extreme factual specificity or defer heavily to state actors risk reproducing the very inequities they purport to neutrally adjudicate.[327]

Public trust—the foundation law enforcement depends to uphold law and order—has eroded in recent decades, mainly in communities of color.[328] Many in the Black community are cynical that the police would apply in earnest any reform that is adopted or have lost hope that any improvement would produce real change.[329] For governmental institutions, such as law enforcement agencies, to gain society's trust, they must commit to institutional reform at the local, state, and federal levels and to procedures that hold individual wrongdoers accountable.[330] Contemporary public narratives of police violence must also change, because police violence is too often explained as the product of isolated "bad apples" acting in unusually problematic circumstances, rather than as conduct shaped by institutional practices and restraints.[331] Under this theory, when using excessive force, officers violate clear boundaries or otherwise depart from the official code of

[325] *Id.* (Kennedy, J., concurring) at 150–51 (explaining the qualified immunity doctrine and the "Clearly Established" barrier).

[326] *Id.* (highlighting the structural roadblocks and the persistence of systemic inequity).

[327] *Id.* In this sense, immunity doctrines do not merely reflect technical procedural rules; they participate in the maintenance of structural racial hierarchy.

[328] *See* Amma A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 449 (2018) ("With regard to Black life, the role of police expanded over time: from patrolling slaves and runaway slaves to enforcing of the Black Codes and Jim Crow.").

[329] *Id.* (noting the growing distrust approach and "defunding" the police, with some radical proposals on abolishing the police all together).

[330] Amanda Taub, *Police the Public, or Protect It? For a U.S. in Crisis, Hard Lessons from Other Countries*, N.Y. TIMES (June 11, 2020), https://www.nytimes.com/2020/06/11/world/police-brutality-protests.html [https://perma.cc/GHM2-EP7Y] ("Those intent on remaking law enforcement to redress decades of racial injustice would do well to look at the experiences of other countries that have wrestled with just that challenge. So would those who insist that there is no problem to be fixed.").

[331] Petter Gottschalk, Dean Geoff & Rune Glomseth, *Police Misconduct and Crime: Bad Apples or Systems Failure?*, 15 J. MONEY LAUNDERING Control 1, 6-24 (2012).

ethics/conduct.[332] The security officers concerned are characterized as having a challenging temperament, often stemming from the intense pressure and constant danger inherent in their work.[333] Yet, examples of police brutality cannot always be described as the actions of a few bad apples, and the role that the institutional culture can play in determining how police officers interpret an unfolding scenario, define the level of risk, and decide on the suitable course of action.[334]

One element that significantly erodes public trust, particularly as applied to American race relations and systemic accountability are the doctrines of Sovereign and Qualified Immunity. In policing contexts, both federal and state legal regimes provide immunity doctrines designed to reduce the risk that officers will hesitate in performing their duties due to potential civil liability. Individual states apply sovereign immunity in different ways. Virginia, one of the oldest southern states and one with a robust history of racial violence, provides a useful framework for analyzing its state-level sovereign immunity factors in the 1980 case *James v. Jane*. To qualify for sovereign immunity, the public official's action must pass a four-prong test, which considers: (a) the nature of the employee's work; (b) the state's involvement in that work; (c) the degree of control the state has over the employee; and (d) whether the negligent act in question (task) involved judgment and discretion.[335] Virginia's sovereign immunity framework not merely for analytical clarity, but because the state's jurisprudence—shaped by its historical, political, and regional context as a southern and frequently conservative jurisdiction—provides a particularly instructive example of how political leanings can influence judicial interpretations of immunity, in

[332] Todd May & George Yancy, *Policing Is Doing What It Was Meant to Do. That's the Problem*, N.Y. TIMES (June 21, 2020), https://www.nytimes.com/2020/06/21/opinion/police-violence-racism-reform.html [https://perma.cc/GJ3Y-XTKU] ("When it comes to racism and policing, we argue that the bad-apple metaphor places 'bad police officers' outside of the social and historical fabric of racism and institutional policing that affects all of the apples. In fact, in this case, the tree itself is rotten.").

[333] *See id.* ("To truly confront problems of racist violence in our society, let's not once again begin with the question of how to reform the police. Let's instead start with the question of how to build healthy and safe communities of mutual respect and see which institutions we need to reach that goal. If anything, that is to be called policing emerges from that inquiry, it should be at its end rather than assumed at the outset.").

[334] Mohamed 'Arafa, *The Derek Chauvin Trial As a Landmark in the American History of Racial Bias*, JURIST NEWS (May 1, 2021), https://www.jurist.org/commentary/2021/05/mohamed-arafa-derek-chauvin-verdict [https://perma.cc/C3BG-8DMC].

[335] *Id.* ("This test is very broad and does not establish any specific definition to each element. Generally, while police officers aren't guaranteed sovereign immunity, it is still controversial whether to bypass accountability or ends up benefitting the citizens of the state."); *See James v. Jane*, 221 Va. 43, 53-54 (1980) ("Sovereign immunity is less likely to be granted where the employee has the independence to make his or her own decisions with regard to a matter and is not being strictly controlled by the employer.").

contrast to states with different ideological orientations, such as California or Texas.[336]

At the federal level, sovereign immunity establishes that the United States cannot be sued without its consent, a principle grounded in the Eleventh Amendment and longstanding common law doctrines. Federal courts consistently recognize that Congress may waive this immunity, either expressly or by implication, through statutes such as the Federal Tort Claims Act (FTCA) and civil rights laws like 42 U.S.C. § 1983 (though §1983 applies to state actors).[337] Case law further clarifies the scope of immunity, distinguishing between discretionary and ministerial acts, limiting liability for government policy decisions, and often granting broad protections to shield federal agencies and officials from lawsuits arising from policy judgments.[338] Notable examples include *United States v. Mitchell* (1983), which affirms that statutory consent is required before the government may be sued, and *FDIC v. Meyer* (1994), which underscores that sovereign immunity extends to federal agencies in the absence of explicit waiver.[339] Collectively, these decisions establish a legal landscape in which federal sovereign immunity functions as both a shield for the government and a framework for carefully delineated exceptions where Congress has authorized litigation.[340]

The protests that exploded after the killing of George Floyd have further put a focus on the qualified immunity doctrine,[341] a deeply-rooted judicial doctrine that protects government officials from personal liability for monetary damages under federal law for constitutional abuses—such as excessive police force—unless their conduct violated "clearly established" law.[342] When public officials are sued for their actions, qualified immunity functions as an affirmative defense defendants can raise, averting damages

[336] Sandra B. Zellmer, *Waiving Federal Sovereign Immunity in Original Actions Between States,* 53 U. MICH. J. L. REFORM 447, 449–60 (2019) (analyzing waiver issues in sovereign immunity, which you could use comparatively even if it focuses on federal context).

[337] 28 U.S.C. §§ 1346(b), 2671–2680 (2018).

[338] United States v. Gaubert, 499 U.S. 315, 323–24 (1991).

[339] United States v. Mitchell, 463 U.S. 206, 212–13 (1983); FDIC v. Meyer, 510 U.S. 471, 475–77 (1994).

[340] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[341] 'Arafa, *supra* note 334 ("It is one of the various structural factors that make it problematic to hold police officers accountable for misconduct.") (arguing that for decades, it has been a legal standard, but when applying an understanding of justice in a transitional context, it becomes illuminated that such protections for state employees should come to an end).

[342] *Cooper v. Flaig*, No. 19-1001; Pearson v. Callahan, 555 U.S. 223, 231 (2009) (noting that "[q]ualified immunity is not merely a defense, but instead provides complete immunity from suit, which means that it must be resolved as early as possible during litigation"); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

even if they committed unlawful acts; however, it is not a defense to claims for injunctive relief.[343]

Generally, the Supreme Court justified this doctrine, as plainly stated in its ruling in *Harlow v. Fitzgerald*, as a measure to reach a "balance" between permitting victims to hold officials accountable and reducing the "social costs" to "society as a whole" that come along with suits against the government.[344] The complexities of this doctrine, which can apply in certain suits against the government, lie outside the scope of this article. What is relevant to this analysis, however, is the degree of power this doctrine grants to the judiciary. Justice Sonia Sotomayor, who has considered qualified immunity a "one-sided approach" that "transforms the doctrine into an absolute shield for law enforcement officers," illustrated the core of that critique in 2015 case *Mullenix v. Luna* (joined by late Justice Ruth Bader Ginsburg).[345] She wrote, that qualified immunity "sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[346]

In the TJ domain, the purpose of institutional reform is to create and develop civic trust between citizens and state institutions by converting institutions that are abusive, apply discriminatory strategies, and defend partisan or elite interests into agencies that sustain and respect the rule of law, defend human rights, serve the public at large, and thereby safeguard democracy.[347] These improvements should comprise measures for shifting the underlying culture of law enforcement, while also addressing larger institutional shortcomings (e.g., systemic police brutality) and seek to rebuild relationships between law enforcement and the general public grounded in trust and collective responsibility, with the goal of preventing violent interactions before they occur.[348]

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[343] 'Arafa, *supra* note 334 ("It protects police officers and other government executives from civil litigation in certain cases, granting lawsuits only when a person's 'clearly established' statutory or constitutional rights have been breached.").

[344] Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982).

[345] Mullenix v. Luna, 577 U.S. 7, 136 S. Ct. 305 (2015) (reexamining qualified immunity).

[346] *See also* District of Columbia v. Wesby, 138 S.Ct. 577 (2018); Arafa, *supra* note 334 ("The Supreme Court established qualified immunity and could of course overrule it, according to stare decisis principles and recently it has signaled a possible moderating of its attitude to it. Qualified immunity doesn't even realize the policy objectives it aims to accomplish.").

[347] *See generally* Paige Arthur, *How* "*Transitions*" *Reshaped Human Rights*: *A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321 (2009) (tracing the emergence of TJ as a field linking human rights accountability to political transitions and post-authoritarian reconstruction).

[348] *See The Counted*: *People Killed by police in the US*, THE GUARDIAN, June 1, 2015, www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database [https://perma.cc/LF3T-4GMJ]; *see also* Rob Picheta & Henrik Petterson, *American Police Shoot*, *Kill and Imprison More People Than Other Developed Countries*. *Here's the Data*," CNN (June 8, 2020),

Meaningful institutional change is a long-term process, and it requires institutional leaders to become the first advocates and implementers of the new standards. In law enforcement, change begins when the leadership and the majority of police officers recognize racially motivated decisions and behaviors in themselves and their fellow officers as improper and unacceptable.[349] This includes responding to abuse by signifying solidarity with victimized groups and endorsing internal and external oversight to ensure that episodes of police brutality are controlled and fully investigated, and requires that accountability be available through a robust judicial system that is not influenced by the very evils it seeks to adjudicate.[350] This analysis highlights a central lesson of TJ: efforts to address systemic harm are severely constrained without an impartial judiciary committed to upholding victims' rights. The TJ principles discussed above, including accountability, recognition of harm, and restoration of social and moral relationships, cannot be fully realized when judicial institutions are politically captured, biased, or otherwise unwilling to enforce remedies.[351] As the U.S. example demonstrates, even well-designed legal frameworks for accountability and reparations are insufficient on their own; without judicial independence, victims of institutional violence may remain unprotected, procedural formalities may supplant substantive justice, and the broader societal aims of reconciliation and communal healing are undermined.[352]

After George Floyd's story, numerous individual police officers and police departments around the country showed exactly this sort of understanding and solidarity with victims of police brutality.[353] A society's

www.cnn.com/2020/06/08/us/us-police-floyd-protests-country-comparisons-intl/index.html [https://perma.cc/6MHL-VV8U] (discussing a comparative analysis of the violence applied during police operations in the US and in Europe) ("[D]emanding justice for the death of George Floyd and seeking to end a litany of police killings of black Americans. Floyd was just one of the many Americans killed by police officers each year. But in other developed countries, such incidents are rare."). *See*, *e.g.*, Law No. 121 of April 1, 1981 (Italy) "*Nuovo ordinamento dell'Amministrazione della pubblica sicurezza*" (GUSerie Generale n. 100 del 10-04-1981 – Suppl. Ordinario), https://www.gazzettaufficiale.it/eli/id/1981/04/10/081U0121/sg [https://perma.cc/N5EY-Q9NM].

349 *See generally* Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 920–22 (2009) (introducing a theory of "racial exhaustion" describing the cumulative psychological, political, and social effects of persistent structural racism and limited legal redress).

350 *See*, *e.g.*, Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 52–55 (2000) (discussing racism in criminal law and enforcement during the interwar period create the institutional and national political will for transformational reform).

351 Abou Elfadl, *supra* note 177.

352 *Id*. In other words, this underscores the analytical utility of Islamic-informed TJ frameworks, which foreground ethical obligations, *maslahah* (communal welfare), and *sulh* (reconciliation) as necessary complements to formal adjudication, emphasizing that justice is both a legal and relational enterprise. *Id*.

353 *Id*. (noting that as institutions tend to resist adapting to socio-cultural changes, but experience shows that it can be done).

values and standards develop over time, and practices once considered appropriate can progressively become objectionable or proscribed. Accordingly, law enforcement agencies must endure periodic institutional transformation to better reflect current social values.[354] The historical record has firmly established the enduring harms of racist policies, and the ways in which those harms persist in contemporary policing and carceral systems. The question is no longer whether structural injustice exists, but how it should be remedied. A TJ lens provides the analytical bridge.[355] It recognizes that when systemic abuses carry forward across generations, ordinary reform measures are insufficient; instead, states must adopt institutional mechanisms aimed at acknowledgment, accountability, and structural transformation. Moreover, the United States' obligations are not merely moral but also legal and ethical, grounded in its status as a signatory to international human rights treaties that require meaningful protection against discrimination and state violence.[356] These commitments cannot remain outward facing, invoked only in foreign policy contexts, while domestic institutions perpetuate patterns of racialized harm. A TJ framework thus reframes institutional reform not as political preference, but as a fulfillment of international human rights obligations, requiring structural change at home as seriously as the U.S. demands it abroad.[357]

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[354] *Id*. In several nations evolving from conflict or repression, a reimagining of the police is essential to distance the foundation from the legacy of past abuses and guarantee that moving forward it sustains and defends human rights and serves all societal members. In other words, meaningful institutional change is a long-term process, requiring leaders to become the first advocates and implementers of new standards. In law enforcement, change begins when leadership and the majority of officers recognize racially motivated decisions and behaviors—in themselves and their colleagues—as improper and unacceptable. This includes responding to abuse by signifying solidarity with victimized groups and endorsing internal and external oversight to ensure that episodes of police brutality are controlled and fully investigated. After George Floyd's death, numerous individual police officers and departments around the country demonstrated this understanding and solidarity. Yet, cultural change alone cannot guarantee accountability: even when misconduct is recognized and condemned internally, legal and policy doctrines such as qualified immunity often shield officers from personal liability, limiting the deterrent effect of litigation and complicating efforts to enforce constitutional rights. A society's values and standards develop over time, and practices once considered appropriate can progressively become objectionable or proscribed. Accordingly, law enforcement agencies must endure periodic institutional transformation not only to reflect current social values but also to ensure that these evolving standards are supported and reinforced by legal mechanisms, including reforms to doctrines that may inadvertently insulate unconstitutional behavior. Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982) (establishing the "clearly established law" standard for qualified immunity).

[355] *See generally* Sarah H. Cleveland & Catherine Powell, *Human Rights in the United States*, 40 COLUM. HUM. RTS. L. REV. 1 (2008) (situating human rights commitments (including treaty obligations) within U.S. domestic law and policy).

[356] *See generally* Harold Hongju Koh, *Why Do Nations Obey International Law*?, 106 YALE L.J. 2599 (1997) (explaining why states comply with international law norms, international legal obligations and compliance).

[357] Medellín v. Texas, 552 U.S. 491 (2008); Roper v. Simmons, 543 U.S. 551 (2005).

Civil actions (remedies) pursue justice for victims while also serving as a preventive (deterrent factor) for future violations by signaling to society that new standards now govern state-society relations.[358] Moreover, trials and prosecutions serve a truth-telling function by establishing facts about specific violations and allocating responsibility to identifiable actors.[359] There is no doubt that truth, redress, and reform ("TRR") in the United States needs to look very different from TJ processes that have happened in any other nation.[360] Accordingly, what is being discussed may be more precisely labelled as "accountability," as it raises issues of liability, due process, amnesties and pardons, restorative justice, and rule of law.[361] Significantly for the U.S., the country's approach to human rights enforcement encompasses both institutional accountability and the responsibility to remedy economic rights violations.[362]

American history has key transitional moments where the government could have recognized and remedied historical wrongs. However, nothing has led to a victory over the continuing legacy of white supremacy, nor to a public reckoning with the violence and human rights violations.[363] These failures are made plain in Derek Chauvin's cruel killing of George Floyd, in the dozens of recent police-involved shootings of Black Americans, in the lasting economic disparity distressing African Americans compared to other parts of American society, and more generally in the disproportionate toll of the COVID-19 pandemic on minority communities, mainly African Americans and Native Americans.[364] For instance, TJ ideals, such as

[358] *See* Juan E. Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 2 (1997), at 255–82 (explaining accountability for police misconduct is most often pursued through criminal prosecutions, in which individual perpetrators can be held accountable for explicit human and civil rights abuses).

[359] Rachel Kerr, *International Criminal Justice*, *in* AN INTRODUCTION TO TRANSITIONAL JUSTICE 49-72 (Olivera Simić ed., 2020).

[360] Paul Gready & Simon Robins, *Transitional Justice and Theories of Change*: *Towards Evaluation as Understanding*, INT'L J. TRANSITIONAL JUSTICE, July 2020, at 286–87. In other countries, TJ is largely applied at the national level, often with international support, and given that the US is a large, federal system with a prejudice toward locally driven creativities, TRR will certainly reflect this orientation and center on a bottom-up approach to restructuring, perhaps ultimately generating a nationally led effort.

[361] *See generally* Arthur, *supra* note 347 (clarifying the origins of the field of TJ and its preliminary conceptual boundaries).

[362] *See* Kerr, *supra* note 359. Although truth commissions are not judicial bodies—and are rather complementary to criminal justice processes—for some commissions, attaining justice encompassed detecting perpetrators and assigning accountability.

[363] *See generally* Jamillah Bowman Williams, Naomi Mezey & Lisa Singh, *#BlackLivesMatter: From Protest to Policy*, 28 WM. & MARY J. RACE, GENDER & SOCI. JUST. 103, 103-05 (2021) (documenting the scale of the 2020 Black Lives Matter protests and analyzing how mas protest activity translated into formal policy responses at the local and state levels).

[364] *Fatal Force*: *Police Shootings Database*, *2015–2021*, WASH. POST, https://www.washingtonpost.com/graphics/investigations/police-shootings-database [https://perma.cc/T38A-CKLG]; Don Bambino Geno Tai, Aditya Shah, Chyke A. Doubeni, Irene G. Sia & Mark L. Wieland, *The Disproportionate Impact of COVID-19 on Racial and Ethnic Minorities in the*

accountability, redress, non-repetition, and reconciliation, have been considered vital in other societies struggling to recover from conflict and tyranny.[365]

In January 2026, the fatal shooting of 37-year-old Alex Pretti by a U.S. Customs and Border Protection (CBP) agent during a federal immigration enforcement operation in Minneapolis intensified public and legal scrutiny of law enforcement immunity in the United States.[366] The incident sparked bipartisan calls for transparency and independent investigation, as state and local authorities challenged the federal narrative and sought to preserve evidence for legal review.[367] Federal officials, however, have highlighted doctrines of sovereign and qualified immunity that severely limit civil litigation against federal officers for constitutional violations, insulating agents from suits that would otherwise be permissible under 42 U.S.C. § 1983 if the defendant were a state or local actor.[368] This case underscores the broader doctrinal tensions in U.S. law between protecting federal agents' decision-making in high-stress encounters and ensuring remedies for individuals whose constitutional rights may have been violated, and it has catalyzed renewed debates about whether current immunity frameworks should be reformed to enhance accountability for use of deadly force by federal law enforcement.[369]

United States, 72 CLINICAL INFECTIOUS DISEASES 703-06 (2021) ("The coronavirus disease 2019 (COVID-19) pandemic has disproportionately affected racial and ethnic minority groups, with high rates of death in African American, Native American, and LatinX communities. Although the mechanisms of these disparities are being investigated, they can be conceived as arising from biomedical factors as well as social determinants of health. Minority groups are disproportionately affected by chronic medical conditions and lower access to healthcare that may portend worse COVID-19 outcomes. Furthermore, minority communities are more likely to experience living and working conditions that predispose them to worse outcomes.").

365 Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95, 98 (2008); Jon Elster, *Justice*, *Truth*, *Peace*, 51 NOMOS 78, 85 (2012).

366 *See*, *e.g.*, Adam Gray, *2 Federal Officers Fired Shots During Encounter That Killed Alex Pretti*, *DHS Tells Congress*, AP NEWS (Jan. 27, 2026), https://apnews.com/article/b0cec9d1c5bae4b62469011775082300 [https://perma.cc/Z8M9-RUW9]. Pretti, a lawful concealed-carry permit holder and ICU nurse, was killed after federal agents confronted him on the street; bystander footage verified by multiple outlets shows he was holding a phone and never brandished his firearm prior to being shot multiple times by agents on the scene. *Id.*

367 Michael Biesecker, Tim Sullivan, & Jim Mustian, *The Man Killed by a US Border Patrol Officer in Minneapolis Was an ICU Nurse*, *Family Says*, AP NEWS (Jan. 25, 2026), https://apnews.com/article/immigration-enforcement-minnesota-protester-alex-pretti-15ade7de6e19cb0291734e85dac763dc [https://perma.cc/JLP7-758P].

368 It should be noted that because Supreme Court precedents have narrowed avenues for damages claims against federal officers—even where rights violations are alleged—Pretti's family faces substantial legal barriers to holding the involved agents accountable in civil court.

369 *See generally* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing a cause of action for constitutional violations by federal officers).

TJ not only moves toward democracy and the rule of law, but also paves a path toward peace and justice. The U.N. Special Rapporteur on racism, E. Tendayi Achiume, counsels looking beyond the United States for guidance because "international human rights norms require and offer the foundation for a better system than the one currently in place in this country."[370] Achiume calls for "push[ing] back against the sort of exceptionalism that implicitly treats existing domestic law as a high watermark for achieving justice and equality, when this law falls short even of global human rights anti-racism standards . . . ."[371]

A. An Islamic Transitional Justice Framework as Normative Corrective

An Islamic TJ framework offers more than moral rhetoric; it provides a jurisprudential structure for evaluating state accountability. In Islamic legal thought, political authority is not sovereign in the modern absolutist sense, but is constrained by divine law and moral obligation. Governance is an *amāna* (trust), and rulers are accountable to both law and community.[372] The *Qur'an* repeatedly commands believers to uphold justice—even against themselves or authority figures.[373] *ʿAdl* (justice) as binding legal obligation, is not merely procedural fairness; it is a substantive moral equilibrium requiring restoration when harm occurs. Classical jurists treated justice as a foundational objective of governance. Al-Māwardī (an Arab Muslim jurist of the *Shafi'i* school of thought), for example, described the ruler's foremost duty as securing justice and protecting rights.[374] Modern scholars similarly emphasize that justice in Islamic jurisprudence functions as a constraint on political power rather than as an aspirational value.[375] If the state violates

[370] E. Tendayi Achiume, *The United States' Racial Justice Problem Is Also an International Human Rights Law Problem*, JUST SEC. (June 5, 2020), https://www.justsecurity.org/70589/the-united-states-racial-justice-problem-is-also-an-international-human-rights-law-problem [https://perma.cc/MD8H-F4RV]. *See*, *e.g.*, *UN Experts Condemn Modern-day Racial Terror Lynchings in US and Call for Systemic Reform and Justice*, UN NEWS CTR. (June 5, 2020), https://www.ohchr.org/en/press-releases/2020/06/un-experts-condemn-modern-day-racial-terror-lynchings-us-and-call-systemic ("[C]alled on the United States Government to take decisive action to address systemic racism and racial bias in the country's criminal justice system by launching independent investigations and ensuring accountability in all cases of excessive use of force by police. They . . . regarding the nationwide protests against racial injustice.").

[371] Achiume, *supra* note 370.

[372] 'Alī ibn Muḥammad Māwardī, THE ORDINANCES OF GOVERNMENT: A TRANSLATION OF AL-AḤKĀM AL-SULṬĀNIYYA W' AL-WILĀYĀT AL-DĪNIYYA 5–20 (Wafaa H. Wahba trans., garnet publ'g 1996) (describing governance as a trust grounded in justice).

[373] *Qur'an* 4:135 & 5:8.

[374] Māwardī, *supra* note 372, at 15–16.

[375] *See* Amana Raquib, *Maqasid al-Sharīah: A Traditional Source for Ensuring Design and Development of Modern Technology for Humanity's Benefit,* in *Islamic Perspectives on Science and Technology* 143 *(Springer 2016).*

rights and then insulates itself through immunity doctrines, it fails to meet this binding obligation of ʿ*adl*.[376]

While ʿ*adl* reflects justice broadly, *qisṭ* (equitable justice) emphasizes distributive and structural fairness.[377] Islamic jurisprudence does not confine justice to individualized fault; it recognizes systemic imbalance as a moral concern. Wael Hallaq explains that the *Sharieʿa* historically functioned as a moral check on political authority, ensuring that rulers did not create structural injustice.[378] Under a *qisṭ*-centered framework, courts must examine not only whether precedent clearly established liability, but whether legal doctrines disproportionately burden marginalized communities. If immunity doctrines functionally deny remedies to victims of racially patterned state violence, the structure itself contradicts equitable justice. *Karāma* (human dignity) as foundational norm is grounded in *Qur'anic* affirmation that all human beings are honored.[379] Contemporary Islamic legal theorists have treated dignity as a foundational normative principle underlying rights and accountability.[380] State violence, especially when shielded from remedy, constitutes not only physical harm but a degradation of dignity. A system that dismisses claims on technical immunity grounds without acknowledgment compounds the injury. Islamic legal ethics would require restoration of dignity through recognition, remedy, and institutional reform.

Immunity (and its limits) doctrines are often justified as necessary for efficient governance and protection of public resources. Islamic jurisprudence similarly recognizes the importance of public welfare (*maṣlaḥa*), particularly in the work of al-Ghazālī and later jurists.[381] However, maṣlaḥa is not synonymous with state convenience. Rather, it requires that law advance the protection of religion, life, intellect, lineage, and property—the classical objectives of the law (*maqāṣid al-sharīʿa*).[382] Modern theorists argue that the *maqāṣid* framework should be understood dynamically, emphasizing justice, rights, and institutional reform.[383] When immunity doctrines erode public trust and perpetuate racial inequity, they undermine rather than advance public welfare.[384] Accountability is therefore

[376] *Qur'an* 57:25

[377] For further details see WAEL B. HALLAQ, THE IMPOSSIBLE STATE 88–94 (2013).

[378] *Id*.

[379] *Id*.

[380] *Qur'an* 17:70.

[381] JASSER AUDA, MAQASID AL-SHARIAH AS PHILOSOPHY OF ISLAMIC LAW 1–25 (2008).

[382] *Id*.

[383] ABDULLAHI AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE 35-36 (2008).

[384] *See* NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE 34–35, 41 (2008) (describing juristic constraints on rulers).

not contrary to governance, it is constitutive of legitimate governance.[385] Early juristic and political traditions contain examples of rulers being publicly corrected or subject to adjudication.[386] The ethical orientation of Islamic governance presumes answerability, moral responsibility, not insulation. Moreover, TJ in Islamic thought is not limited to compensation; it includes acknowledgment, reconciliation, and structural reform—dimensions captured by the concept of *iṣlāḥ* (reform).[387] Justice must restore social harmony and prevent recurrence.

Applied to the American context, this framework challenges the moral legitimacy of doctrines that prioritize institutional protection over victim restoration. It reorients judicial analysis toward: substantive justice (*ʿadl*) rather than technical immunity thresholds; structural equity (*qisṭ*) rather than atomized precedent; restoration of dignity (*karāma*) rather than dismissal on procedural grounds; public welfare (*maṣlaḥa*) understood as institutional legitimacy and racial equity; and reform (*iṣlāḥ*) that addresses historical and systemic injustice.

Taken together, the U.S. federal and state-level accountability landscape illustrates both the possibilities and limitations of a Western-style approach to TJ. Sovereign immunity doctrines, procedural barriers, and politically inflected judicial interpretations have historically constrained avenues for redress, highlighting structural gaps in how domestic law can respond to systemic harm.[388] When examined through the lens of Islamic-informed TJ, these gaps become analytically meaningful: principles such as *maslahah*, *sulh*, and communal welfare emphasize not only legal remedies but also the restoration of moral and social relationships, the recognition of collective harm, and the proactive prevention of future violations.[389] This comparison reveals that while Western TJ frameworks often prioritize individual accountability and procedural formalities, Islamic-informed approaches foreground the ethical and societal dimensions of justice, suggesting a complementary paradigm in which legal and restorative mechanisms operate together to address both harm and social cohesion.[390] Far from simply prescribing what the U.S. "should have done," this perspective offers a conceptual lens to understand the limitations of existing

[385] *Id*. (arguing that Islamic legal history does not treat rulers as categorically immune from accountability).

[386] MOHAMMAD HASHIM KAMALI, MAQASID AL-SHARI'AH MADE SIMPLE 14–20 (2008).

[387] *Qur'an* 49:10 (emphasizing reconciliation among believers).

[388] Kari Kouvo, *Islamic Law and Transitional Justice*: *Why the "Islamic Law" Turn in Transitional Justice Matters*, 16 INT'L J. TRANSITIONAL JUST. 243 (2022).

[389] *Id*.

[390] *See generally* M. CHERIF BASSIOUNI, THE ISLAMIC CRIMINAL JUSTICE SYSTEM (M. Cherif Bassiouni ed., 1982).

institutions and to illuminate opportunities for integrating restorative and relational justice into contexts historically dominated by formal legalism.[391]

VII. RACISM'S LEGACY

The legacy of racism and other forms of marginalization in the United States should inform judicial skepticism of present-day discrimination. Certain human rights notions emphasize the protection and recognition of victims' rights, including affirming their dignity and their right to psychosocial support, and formulating proposals for reparations.[392] In the context of historic discrimination, restoration of victims' rights can include express instructions to consider measures to protect and preserve a community's language and culture, as well as the provision of mental and psychological support, among other steps.[393]

Now, activists, human rights defenders, think tanks, and public officials continue to push for (and against) institutional transformations to eliminate racial injustice linked with criminal justice practices and strategies in other contexts.[394] Legal scholars and attorneys should revive their work by imbuing it with the same commitment to equal justice.[395] Much of today's criminal-justice activism targets executive actors such as police departments, prosecutors' offices, and prisons.[396] Comparatively, courts have received far less sustained critique as contributors to systemic racism, despite their historical and current judicial role in enabling racial inequality.[397] Judicial decisions themselves—through interpretations, precedents, or deference to

[391] *See generally* Carrie Menkel-Meadow, *Restorative Justice: What is it and Does it Work*? (Georgetown Pub. L. & Legal Theory Research Paper No. 1005485, 2007) (arguing that restorative justice provides a conceptual alternative to formal legalism by emphasizing relational repair, accountability, and community-based responses to harm rather than purely adjudicative punishment).

[392] Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001) 1203–05 (arguing that sovereign immunity undermines constitutional accountability by preventing individuals from obtaining remedies against the state even when government actors violate legal rights, thereby privileging structural protection of the state over individual redress).

[393] *See*, *e.g.*, Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1, 65-66 (2015) (discussing antisubordination theory).

[394] Hutchinson, *supra* note 393, at 65-66.

[395] Paul Stern, *Hold Police Accountable by Changing Public Tort Law, Not Just Qualified Immunity*, LAWFARE (June 24, 2020, 11:34 AM), https://www.lawfaremedia.org/article/hold-police-accountable-changing-public-tort-law-not-just-qualified-immunity [https://perma.cc/N4BB-K9ZM] ("The historical distinction between the Supreme Court's Fourth Amendment excessive force jurisprudence and traditional common-law torts, such as assault, battery and negligence, makes clear that generic tort cases can examine a broader array of conduct than can constitutional litigation.").

[396] *See*, *e.g.*, *Our Six Demands for Accountability for This Moment*, BLACK LIVES MATTER (Jan. 13, 2021), https://blacklivesmatter.com/our-six-demands-for-accountability-for-this-moment [https://perma.cc/Y6WW-BTG9] (listing six "demands" that focus exclusively on executives, including police, President Trump, and former President Biden).

[397] *See*, *e.g.*, McClesky v. Kemp, 481 U.S. 279, 345-67 (1987) (Blackmun, J., dissenting).

government authority—often perpetuate systemic inequalities, highlighting the judiciary's dual role as both protector and potential enabler of civil rights.[398] The judicial legitimization of racism arises when courts, applying proper equality policies, legalize discrimination against people of color, while establishing exacting—often insurmountable—blockades to strategies intended to diminish racial hierarchy.[399]

Also, comparable to the systemic racism rooted in criminal law enforcement, racism has historically plagued the U.S. immigration system and continues to do so to this day.[400] With systemic racism under attack in the criminal justice system, this is no less than an ideal moment in history for a devoted effort to bring racial justice to immigration law and other areas.[401]

Throughout its history, America has experienced irregular *xenophobic* upsurges, often tinged with heavy doses of racism.[402] From the early twentieth century, immigration policies favored white Europeans while excluding nonwhite populations, including Black immigrants from the Caribbean and Africa, perpetuating notions of racial inferiority and restricting access to citizenship and legal protection.[403] Laws such as the Chinese Exclusion Act of 1882 and the Immigration Act of 1924 codified racial hierarchies, and enforcement practices disproportionately targeted nonwhite immigrants, including Black individuals, for deportation,

[398] *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227-28 (1995) (holding that all racial classifications by the federal government must also meet strict scrutiny and emphasizing the requirement of narrow tailoring and a compelling interest); *see also* Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (applying strict scrutiny to an affirmative action admissions policy and highlighting that narrowly tailored consideration of race may serve the compelling interest of diversity in higher education).

[399] *See*, *e.g.*, Darren Lenard Hutchinson, *"Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordinate in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 619-27 (describing potential interpretations of the equality concept and equal protection notion, as proposed by themes contained in judicial precedent and American history).

[400] *See generally*, Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), https://time.com/5851855/systemic-racism-america (noting that truth-seeking initiatives in America have been at the state, city, or county level, an attitude that is likely to continue in the near future).

[401] *See*, *e.g.*, Rose Cuison Villazor, *Reflecting on California and Prop. 187*: *From the Anti-Immigrant State to the*

Sanctuary State, 53 U.C. DAVIS L. REV. 2015, 2017–19 (2020).

[402] *See generally* ERIKA LEE, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES (2019) (analyzing the periodic outbursts of xenophobia in U.S. history) (discussing criminal law and racial equality doctrine rather than historical analysis of xenophobia provided in the source).

[403] Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L.J. 1455 (2022) (examining how immigration laws have embedded and perpetuated racial hierarchies, including historical exclusionary policies and doctrines like plenary power that insulated racially discriminatory immigration regulation from meaningful constitutional review).

detention, and surveillance.[404] Contemporary immigration enforcement continues to reproduce these disparities: Black immigrants are often subjected to greater surveillance, face harsher detention conditions, and are subject to discretionary practices that echo historical patterns of exclusion and marginalization. By linking anti-Black bias in policing with similar patterns in immigration law, it becomes clear that structural racism in U.S. institutions is not isolated to criminal law but permeates multiple systems of governance, shaping who is afforded rights, protections, and social mobility. Thus, the current atmosphere is ripe for the kind of TJ that has been long overdue.

A. Lessons from Around the World

The United States has never comprehensively challenged its history of colonialism, slavery, and racism by providing reparations or restructuring the systems that disseminate harm to minorities, such as Black communities and other marginalized and oppressed groups, or to treat and cure these wrongs.[405] Events over the past few years—comprising local, domestic, and international protests in response to the killings of members of Black communities—have galvanized calls for expressive action to reckon with the past and forge a more fair and equitable future for this nation.[406] While the United States is not evolving from armed conflict or autocratic rule, as may be the case for numerous states that have accepted a TJ process, it can learn from the practices and experiences of these nations to address its legacy of human rights abuses.[407]

International activists—together with the ICTJ and the International Arbitration Group's Racial Justice Initiatives—can examine the lessons and experiences of official truth commissions worldwide to identify insights applicable to U.S. stakeholders at the local, state, and national levels. All TJ procedures should be framed with direct input from members of the affected communities and should consider their suffering and concerns. In the United States, this means inspecting the grounds and values of the long historical and organizational injustices, discrimination, and inequality, and evaluating

404 Kathleen Kim, Kevin Lapp & Jennifer J. Lee, *Critical Immigration Legal Theory*, 104 B.U. L. REV. 1515 (2024) (developing Critical Immigration Legal Theory (CILT), which interrogates how immigration law structures and sustains racial subordination and exclusion even when it appears neutral).

405 *See generally* Mariela Olivares, *The Rise of Zero Tolerance and the Demise of Family*, 36 GA. ST. U. L. REV. 287 (2020) (reviewing the Trump administration's use of family separation as a tool of U.S. immigration enforcement).

406 *See*, *e.g.*, Angélica Cházaro, *Challenging the* "*Criminal Alien*" *Paradigm*, 63 UCLA L. REV. 594 (2016).

407 *See generally* Kevin R. Johnson, *Doubling Down on Racial Discrimination*: *The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RSRV. L. REV. 993 (2016) (analyzing disparate impacts of criminal removals).

the need for systemic reform.[408] TJ theory suggests that racial injustice is both historical and current as well as systemic and felt by persons in their everyday lives.[409] It is thus critical that truth-seeking efforts provide guidance on material and emblematic reparations, as well as on institutional and structural improvements, including those in law enforcement and the criminal justice system.[410] Experience from other nations shows that civil society—especially victims and others directly affected by past abuses—can play a decisive role in TJ processes. Their sustained engagement is essential to help push open the window of opportunity for transformative change in America.[411]

The United States' ongoing public reckoning with its history of racial injustice has resonated globally, inspiring international discussions on truth, racial healing, and institutional transformation. In response, activists and practitioners worldwide have explored national and subnational commissions, reparations programs, and reform initiatives to address systemic racial harms, drawing on lessons from both historical and contemporary U.S. efforts.[412] Recent contemporary efforts include legal national proposals for truth, racial healing, and transformation and recompense commissions, as well as dozens of subnational initiatives on reparations, truth, and reform.[413] Diverse in form, these efforts are joint in their goal of looking for remedies for state-sanctioned racial violence and

[408] *See*, *e.g.*, Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 UCLA L. REV. DISCOURSE 200, 210 (2020) ("The Black Codes—criminal laws that applied only to Black people and were intended to control the Black body—allowed police to terrorize Blacks to enforce racial subjugation.").

[409] *See generally* Richard Delgado & Jean Stefancic, *Critical Race Theory*: *An Introduction* (2010) (setting out CRT's core assertions about the centrality and persistence of racism in U.S. law and society, recognizes that the legacy of slavery, segregation, and second-class citizenship continues to permeate the social fabric of this nation, meaning racism is both historical and contemporary, systemic, and experienced in lived contexts).

[410] *See*, *e.g.*, Mohamed 'Arafa, *The Tale of Post-Arab Spring in Egypt*: *The Struggle of Civil Society Against a Janus-Faced State*, 27(1) IND. INT'L & COMP. L. REV. 43, 46 (2017) ("Notwithstanding the vastly restrictive spirit of these legal norms, Egyptian civil society in both public and private sectors plays a fundamental role particularly in raising social awareness of political, social, and economic civil rights among the general public.").

[411] *Id*. at 50 ("While NGOs remain crucial to promote civil society, consolidate democracy, and build social capital, the fruitful application of advocacy policies employed by activists to achieve these objectives depend on contextual factors such as the politics of power within institutions and the extent to which grassroots organizations are able to carry out their tasks unrestricted. NGOs nevertheless remain significant facilitators of transition periods, serving as 'microorganisms of the democratic process.'").

[412] *See generally* Tricia D. Olsen, Leigh A. Payne & Andrew G. Reiter, *Transitional Justice in the World*, *1970-2007*: *Insights from a New Dataset*, 47 J. PEACE RES. 803 (2010) (discussing a new dataset of TJ mechanisms (e.g., lustration policies, trials, reparations, amnesties) utilized worldwide from 1970-2007).

[413] *Id*. (noting emergent TRR movement is drawing deeply from the field of TJ, as a global practice designed to help countries reconcile with a history of past human rights abuses).

bias.[414] While it is customarily used in nations transitioning from conflict and fascism, U.S. stakeholders are adjusting their tools (e.g., truth tribunals, recompense, institutional reforms) as well as their lessons (approaches) for local purposes. Most relevant for the United States is the Truth, Tribunal, and Recompense (TTR) approach, illustrated through three case studies: Brazil, South Africa, and Northern Ireland. Together, these examples offer practical lessons for both practitioners and donors seeking to design, implement, and support TRR initiatives in a U.S. context.

The case study of Brazil highlights the significance of challenging the legacies of pardon and the traditions that can license communal disremembering of the effects of past harms.[415] These tribunals highlight the significant contributions of subnational truth commissions, which not only generate nuanced findings that challenge broader national narratives but also develop locally relevant recommendations and endorsements.[416] In failing to fully capitalize on subnational contributions, the case of Brazil also proves the importance of managing subnational and national TRR efforts and of leveraging a national commission to participate and strengthen local findings.[417] These tribunals highlight the significant contributions of subnational truth commissions, which not only generate nuanced findings that challenge broader national narratives but also develop locally relevant recommendations and endorsements.[418] Yet, when national efforts fail to fully capitalize on these subnational insights, important lessons can be lost.

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[414] CATH COLLINS, POST-TRANSITIONAL JUSTICE: HUMAN RIGHTS TRIALS IN CHILE AND EL SALVADOR 72–73 (2010); MUNA B. NDULO & ROGER DUTHIE, THE ROLE OF JUDICIAL REFORM IN DEVELOPMENT AND TRANSITIONAL JUSTICE, IN TRANSITIONAL JUSTICE AND DEVELOPMENT 250–81 (2009).

[415] Nina Schneider, *What Makes a State Apology Authoritative*? *Lessons from Post-Authoritarian Brazil*, *in* ON THE USES AND ABUSES OF POLITICAL APOLOGIES 154–69 (Mihaela Mihai & Mathias Thaler eds., 2014).

[416] Scott Mainwaring, *The Transition to Democracy in Brazil*, 18 J. INTERAMERICAN STUD. & WORLD AFFS 28 (1986), 171–75; Ignacio Cano & Patrícia Salvão Ferreira, *The Reparations Program in Brazil*, *in* THE HANDBOOK OF REPARATIONS 102–53 (Pablo de Greiff ed., 2006).

[417] Marcelo Torelly, *Assessing a Late Truth Commission*: *Challenges and Achievements of the Brazilian National Truth Commission*, 12 INT'L J. TRANSITIONAL JUSTICE (2018). *See* Marcelo Torelly & Paulo Abrão, *The Reparations Program as the Lynchpin of Transitional Justice in Brazil*, *in* TRANSITIONAL JUSTICE: HANDBOOK FOR LATIN AMERICA 458–59 (arguing that reparations constitute the central organizing mechanism of Brazil's transitional justice system by linking truth-seeking, accountability, and victim recognition); *see also* Ernesto Londoño and Manuela Andreoni, *Brazil*'s *Military Strides into Politics*, *by the Ballot or by Force*, N.Y. TIMES (July 21, 2018) https://www.nytimes.com/2018/07/21/world/americas/brazils-election-military.html (noting the role of the Brazilian military in Brazilian politics).

[418] *See generally* Cristina Hollanda, *Brazilian Truth Commissions as Experiments of Representation*: *Between Impartiality and Proximity*, in TRUTH COMMISSIONS AND TRANSITIONAL JUSTICE: EXPERIMENTS OF REPRESENTATION AND CLAIMS TO LEGITIMACY (2018) (analyzing the proliferation of subnational truth commissions in Brazil and their complex relationship with the National Truth Commission, including the challenges of coordination and narrative integration).

For example, in Brazil, the National Truth Commission (Comissão Nacional da Verdade) did not formally incorporate the extensive work of roughly 140 subnational commissions, many of which documented abuses affecting rural, poor, and marginalized communities that were largely absent from the national narrative.[419] Because most subnational investigations concluded after the national commission had finalized its report—and because their findings were relegated to supplementary volumes—the full richness of local experiences was underutilized, representing a missed opportunity to broaden public understanding of systemic injustices and inform lasting reforms.[420]

Furthermore, South Africa offers an influential example of how a truth commission can be a vessel for redesigning public memory and national identity, using nationally televised public hearings, emotional victim testimony, and cherished national leaders to engage the general public.[421] However, South Africa's case also shows the restrictions of a process that focused principally on individual human rights abuses and devoted less to inspecting both the organizational elements that empowered those violations and the socioeconomic dimensions of harm.[422] With the appropriate mandate, resources, and protocols, institutional hearings can be a critical tool for truth commissions to analyze structural harms.[423] Finally, the case study of Northern Ireland establishes the potential parameters of truth-telling and the significance of focusing on modifications that remedy the bond between the state and the citizens that have been damaged by its actions and strategies.[424] Northern Ireland's Independent Commission on Policing initiated a new perspective to policing based on community partnership,

[419] *See generally* THE BRAZILIAN TRUTH COMMISSION: LOCAL, NATIONAL AND GLOBAL PERSPECTIVES (Nina Schneider ed., 2019) (providing a comprehensive analysis of the NTC's work and the broader network of local and regional truth commissions).

[420] *Id*. (discussing the emergence of subnational truth commissions in Brazil and their distinctive approaches and interactions with the National Truth Commission).

[421] *See generally* Robert B. Mattes, *South Afric*a: *Democracy Without the People*? 13 J. DEMOCRACY 22 (2002) (arguing that South Africa's democratic transition produced robust formal institutions but was accompanied by low levels of citizen participation, political trust, and popular engagement necessary for a deeply rooted democratic culture).

[422] HEIDI GRUNEBAUM, MEMORIALIZING THE PAST: EVERYDAY LIFE IN SOUTH AFRICA AFTER THE TRUTH AND RECONCILIATION COMMISSION 94-98 (Heidi Grunebaum ed., Routledge, 1st ed. 2011). *See* 6 THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, vol. 1, ch. 5, ¶¶ 35–38 (2003) (discussing the Commission's conception of factual, narrative, social, and restorative truth), https://www.justice.gov.za/trc/report [https://perma.cc/HS85-5M7N].

[423] Eliria Bornman, *National Symbols and Nation-Building in the Post-Apartheid South Africa*, 30 INT'L J. INTERCULTURAL RELATIONS 383, 383–85 (2006); Paul van Zyl, *Dilemmas of Transitional Justice*: *The Case of South Africa's Truth and Reconciliation Commission*, 52 J. INT'L AFFS, 647, 647-50 (1999); TOM LODGE, BLACK POLITICS IN SOUTH AFRICA SINCE 1945 201-255 (Longman 5th ed., 1983).

[424] OMAR GRECH, HUMAN RIGHTS AND THE NORTHERN IRELAND CONFLICT: LAW, POLITICS AND CONFLICT 71-112 (1st ed., 2017); Colin Knox, '*See No Evil*, *Hear No Evil*': *Insidious Paramilitary Violence in Northern Ireland*, 42 BRITISH J. CRIMINOLOGY 164, 164-185 (2002).

human rights, and accountability, which has led to measurable change in public opinion toward the police.[425] Northern Ireland's success in addressing the socioeconomic drivers of conflict can be attributed to its mainstreaming of economic equality as a core governance objective.[426]

The United States likely faces a difficult fight in translating varied, clumsy subnational efforts into an inclusive TRR program.[427] Political transitions, such as those in the above case studies, create exceptional opportunities and spaces for TJ initiatives that grip the nation.[428] Also, the United States is undoubtedly in need of symbolic initiatives, like memorialization, that can guarantee past harms are not repeated in the future.[429] Together, these cases reveal imperative conduct that the United

[425] Bill Rolston, '*An Effective Mask for Terror*': *Democracy*, *Death Squads and Northern Ireland*, 44 CRIME, L. & SOC. CHANGE 12, 12-20 (2005).

[426] Robert W. White and Terry Falkenberg White, *Repression and the Liberal State*: *The Case of Northern Ireland*, 1969–1972, 39 J. CONFLICT RESOL. 330, 334 (1995); Nevin T. Aiken, *The Bloody Sunday Inquiry*: *Transitional Justice and Postconflict Reconciliation in Northern Ireland*, 14 J. HUM. RTS. 101, 101-23 (2015).

[427] *See generally* Ruti Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 16 (2003) (examining the genealogy of transitional justice and explaining how changing political contexts shaped the development of its normative commitments and institutional forms).

[428] For further details see Louis, *Unofficial Truth Projects*, 29 HUM. RTS. Q. 994, 1010-12 (2007).

[429] The United States is undoubtedly in need of symbolic initiatives, such as memorialization, truth commissions, and public commemorations, to confront the legacy of historical injustices and ensure that past harms are not repeated. Memorials and other symbolic forms of recognition serve multiple critical purposes: they acknowledge the suffering of victims, educate the broader public about systemic injustices, and signal a societal commitment to non-recurrence. Research from TJ contexts demonstrates that such initiatives, when thoughtfully implemented, can foster a sense of moral accountability, encourage civic dialogue, and support the development of institutional safeguards against future abuses. For example, Greeley explains that memorialization in Latin America, through monuments, museums, and formal ceremonies, has acted as a form of symbolic reparation, providing both victims and society at large a concrete acknowledgment of past wrongs and helping establish cultural and institutional norms that deter recurrence of abuses. Robin Adèle Greeley et al., *Repairing Symbolic Reparations: Assessing the Effectiveness of Memorialization in the Inter-American System of Human Rights*, 14 INT'L J. TRANSITIONAL JUSTICE 165, 165-92 (2020) Similarly, the United Nations' Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations identify commemorations, tributes, and public recognition as essential elements of reparative justice, underscoring that symbolic measures are not merely ceremonial but carry substantive legal and moral weight in holding governments accountable and signaling commitment to systemic change. In the U.S. context, such initiatives could include national or local monuments, educational programs, official apology statements, or designated memorial days, each functioning to embed historical awareness into public consciousness and guide institutions toward fairer policies and practices. By institutionalizing remembrance and acknowledgment, symbolic measures complement other justice mechanisms, creating a multi-layered strategy to prevent the repetition of historical harms. *See id.* (analyzing memorialization as symbolic reparation and its role in fostering acknowledgement, dignity for victims, and non-recurrence of abuses). *See*, *e.g.*, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER (Mar. 21, 2006), https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation [https://perma.cc/NF6C-C3G5] (listing commemorations and tributes to victims as valid forms of symbolic reparations contributing to non-repetition).

States can learn from and innovate on the international practice of TJ as it seeks to capture the opportunity of this moment.

VIII. RACISM, ISLAM, ISLAMOPHOBIA, AND THE ESTABLISHMENT CLAUSE

Religion and culture outpace politics across all regions, measured as the root cause of the clash between the Muslim and Western worlds.[430] This framing is essential in deliberations over *Islamophobia* because political interests can vary and change, while cultural and *de facto* religious transformations are more deep-rooted within populations.[431] Islamophobia fosters prejudice, which not only reflects negative attitudes toward Muslims but also amplifies the spread and intensity of Islamophobic sentiment. When these prejudices are coupled with explicit behaviors or policies, they escalate into discrimination, producing unsafe and hostile environments for targeted individuals and communities.[432] In the United States, as in many other places, "Muslims are being treated as a race, and more specifically, a suspect race, rather than as a religious minority to be protected from persecution."[433]

Freedom of religion is among the most celebrated of "American values" and is presumptively protected by the First Amendment to the Constitution, which both forbids state establishment of religion (Establishment Clause) and guarantees the free exercise of religion (Free Exercise Clause).[434] The Free Exercise Clause defends citizens' right to practice their faith (religion) as they please, so long as the practice does not run afoul of "public morals" or a "compelling" governmental interest.[435] *Islamophobia* is a fluid, active

[430] *See* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 19-39 (1996); *see also* Major Alex. Osborn, *The* "*Clash of Civilisations*" *Thesis as a Tool for Explaining Cultural Conflict*, 5 DEFENCE STUDIES 395, 394–95 (discussing Huntington's argument that cultural and religious identities, rather than economics or ideology, are the primary sources of post–Cold War conflict).

[431] *See generally* SAHAR AZIZ, THE RACIAL MUSLIM: WHEN RACISM QUASHES RELIGIOUS FREEDOM, 1-7 (Cali Univ. Press, 1st ed., 2022) (arguing that Muslims in the United States have been racialized through the intersection of race and religion, resulting in the denial of equal religious freedom and the treatment of Muslims as a suspect group).

[432] *Id.* at169–78 (examining how legal and administrative practices, including surveillance and preventive policing, have contributed to the criminalization of Muslim identity in the United States).

[433] *Id.* at 3.

[434] U.S. CONST. amend. I.

[435] In other words, The First Amendment's Establishment Clause prohibits the government from making any law "respecting an establishment of religion." *Id.* This clause not only forbids the government from establishing an official religion but also prohibits government actions that unduly favor one religion over another. It also prohibits the government from unduly preferring religion over non-religion, or non-religion over religion. For example, in *Prince v. Massachusetts*, the Supreme Court held that "a state could force the inoculation of children whose parents would not allow such action for religious reasons. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) ("The Court held that the state had an overriding

system in which both private actors and institutions target Muslim Americans based on irrational fear and abhorrence.[436] From a legal perspective:

> *Islamophobia* [is] the presumption that Islam is inherently violent alien and inassimilable . . . [and] expressions of Muslim identity are correlative with a propensity for terrorism. . . . Islamophobia is rooted in understandings of Islam as civilizational antithesis and perpetuated by government structures and private citizens. Finally . . . Islamophobia is also process—namely, the dialectic by which state policies targeting Muslims endorse prevailing stereotypes and, in turn, embolden private animus toward Muslim subjects.[437]

In the same vein, on September 20, 2015, the Republican candidate, Ben Carson for U.S. President, said that "[Islam is] inconsistent with the [C]onstitution . . . "and that he" would not advocate that we put a Muslim in charge of this nation."[438] Moreover, in *In re Ahmed Hassan* (December 15, 1942), Judge Arthur J. Tuttle, Eastern District Court of Michigan, said, " It cannot be expected that as a class [Muslims] would readily intermarry with our population and be assimilated into our civilization."[439] While outlined as a recent phenomenon, modern *Islamophobia* finds its epistemological origins in systems of Orientalism that precede the formation of the United States *per se*.[440] Orientalism places Islam, *Shārīe'ā* law, and Muslims as an inferior

interest in protecting public health and safety") ("finding it was not in violation of the Fourteenth Amendment's free exercise of religion clause.").

[436] *See generally* Wajahat Ali et al., *Fear, Inc.: The Roots of the Islamophobia Network in America*, CTR. FOR AM. PROGRESS (Aug. 26, 2011), https://www.americanprogress.org/issues/religion/report/2011/08/26/10165/fear- [https://perma.cc/AN9W-QCPC] (presenting a pivotal analysis underscoring the complex facilitate, and dispense anti-Muslim bigotry in America).

[437] Khaled A. Beydoun, *Islamophobia*: *Toward a Legal Definition and Framework*, 116 COLUM. L. REV. ONLINE 1, 5-7 (2016).

[438] *Meet the Press Transcript*, NBC NEWS (Sep. 20, 2015), https://www.nbcnews.com/meet-the-press/meet-press-transcript-september-20-2015-n430581 [https://perma.cc/2M6A-G5XR] (statement made by Republican presidential candidate Ben Carson).

[439] *See* United States v. Thind, 261 U.S. 204 (1923); *see also* Ozawa v. United States, 260 U.S. 178 (1922); *see also* In re Ahmed Hassan, 48 F. Supp. 843 (E.D. Mich. 1942) (denying naturalization to a Yemeni Muslim petitioner on the ground that he was not a "white person" under the Nationality Act, and emphasizing that, as a class, Muslims would not "readily intermarry with our population and be assimilated into our civilization," reflecting how racial, religious, and cultural assumptions shaped U.S. immigration and naturalization law). In this case, a federal district court in Michigan denied naturalization to a Yemeni Muslim petitioner on the ground that he was not a "white person" under the then-applicable Nationality Code. *Id.* The court, relying on prior racial prerequisite cases, concluded that Arabs were not "white" and emphasized cultural and religious differences—stating that as a class they would not "readily intermarry with our population and be assimilated into our civilization"—thereby illustrating how race, religion, and cultural assumptions were legally intertwined in naturalization decisions during that era. *Id.*

[440] *See generally* Race and Arab Americans Before and After 9/11: From Invisible Citizens to Visible Subjects (Amany Jamal & Nadine Naber eds., 2008).

civilization, geopolitical opposition, and ever-looming threat.[441] Seeded profoundly, these systems recur during moments of crisis and drive contemporary conceptions of Muslim suspicion and peril.[442] Further, *In re Ahmed Hassan* reads,

> Apart from the dark skin of the Arabs . . . it is well known that they are a part of the Mohammedan world and that a wide gulf separates their culture from that of the predominately Christian peoples of Europe. It cannot be expected that as a class they would readily intermarry with our population and be assimilated into our civilization. The small amount of immigration of these peoples to the United States is in itself evidence of that fact. Arabia, moreover, is not immediately contiguous to Europe or even to the Mediterranean.[443]

Islam was treated as an "ethnoracial identity" for decades, and endures to be seen in these terms today.[444] Broadly, Muslim identity is imagined along racial lines as normally, if not more, than it is along religious lines.[445] In the wake of 9/11, some scholars observed, "We are witnessing the

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[441] *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2011: The Targeting of Arabs and Muslims*, 528 N.Y.U. ANN. SURV. AM. L. 295 (2022); *see generally* EDWARD W. SAID ORIENTALISM (1979) (asserting that the Middle East is positioned as the diametric opposite of the West, classifying the former as the "Orient" and the latter as the "Occident"). Said defines Orientalism as:

> [A] created body of theory and practice in which, for many generations, there has been a considerable material investment. Continued investment made Orientalism, as a system of knowledge about the Orient, an accept grid for filtering through the Orient into Western consciousness, just as the same investment multiplied—indeed, made truly productive—the statements proliferating out from Orientalism into the gene

Id. at 7. He also said that "Orientalism depends for its strategy on this flexible positional superiority, which puts the Westerner in a whole series of possible relationships with the Orient without ever losing him the relative upper hand." *Id*.

[442] *See* Sahar F. Aziz, *Caught in a Preventative Dragnet: Selective Counterterrorism a Post 9-11 America*, 47 GONZ. L. REV. 429 (2012) (discussing the disparate focus on explicit racial and religious categories of several post-9/11 anticipatory counterterrorism programs).

[443] *See In re Hassan*, 48 F. Supp. at 845; *see also Ex Parte* Caldwell, 118 N.W. 133, 135 (Neb. 1908) (upholding a statute prohibiting common labor on Sunday and concluding that Sunday closing laws constituted a valid exercise of the state's police power rather than an unconstitutional establishment of religion or deprivation of liberty. Also, observing, in dicta, that Sunday laws reflected the state's power to promote public welfare and invoking contemporary assumptions about Christianity and Islam in defending the compatibility of such legislation with American constitutional values); *see also*, Khaled A Beydoun, *Viewpoint: Islamophobia Has a Long History in the U.S.*, BBC NEWS (Sep. 29, 2015), https://www.bbc.com/news/magazine-34385051 [https://perma.cc/6E3Y-P4N6] ("'Islamophobia' is what it's called today. But the rising fear, hate and discrimination that currently threatens [sic] eight million Muslim Americans stems from a long and established American tradition of branding Islam as un-American, and demonizing Muslim bodies as threat.").

[444] *See* Hilal Elver, *Racializing Islam Before and After 9/11: From Melting Pot to Islamophobia*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 119, 124 (2012).

[445] *See* Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015); Khaled A. Beydoun, *Between Muslim and White*: *The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29, 29-31 (2014).

redeployment of old Orientalist tropes" that color, from the American perspective, Muslims as firmly aggressive, violent, and bent on conquering the West.[446] These tropes repeat the very prosaic philosophies and echo the detrimental images conveyed during the formation of the United States as a sovereign nation, which planted the notion that Islam cannot be reconciled with freedom, modernity, democracy, and human progress.[447] In this regard, Orientalism fashioned judicial insights and misunderstandings of Islam and Muslims through the "Naturalization Era" thereby implanting an understanding of Muslims as "irreducibly foreign and inassimilable," Arab, and un-American.[448] This inaccurate understanding of Muslim Americans hides the fact that a significant segment of that population is impoverished or near indigent.[449] This framework erased the diversity of Muslim Americans' experiences, obscuring socioeconomic realities, including the fact that a substantial proportion of Muslim immigrants and their descendants lived in poverty or near-indigence.[450] Beyond socioeconomic marginalization, contemporary scholarship shows that Islamophobia is also profoundly racialized: Black Muslims in particular are subjected to a "double bind" in which anti-Muslim prejudice overlaps with anti-Black racism, producing compounded social and legal vulnerabilities.[451] Consequently, Islamophobia in the United States is not solely a matter of religious prejudice but functions as a structural system of racialized discrimination, echoing historical patterns

[446] Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002).

[447] *See* Ross v. McIntyre, 140 U.S. 453, 463 (1891) (citing the "intense hostility of the people of Moslem faith"); *see also* Reid v. Covert, 354 U.S. 1, 57-58 (1957) (holding that the federal government may not exercise its treaty or foreign affairs powers in a manner that contravenes constitutional guarantees and that American citizens abroad remain protected by the Constitution); U.S. *ex rel*. Karamian v. Curran, F.2d 958, 959 (2d Cir. 1927) ("[H]e [Yerwand Karamian] and other boys of his race were most cruelly treated by the Turks, and he himself 'burned from the hip to the knee with a hot steel rod, because wanted [him] to be a Mohammedan.'"); *In re* Halladjian, 174 F. 834, 839 (C.C.D. Mass. 1909) ("Turks and the Saracens did not exterminate the people they conquered. Conversion Mohammedanism and tribute were usually offered as alternatives to the sword.").

[448] Khaled A. Beydoun, Comment, *Dar al-Islam Meets* "*Islam as Civilization*": *An Alignment of Politico-Theoretical Fundamentalisms and the Geopolitical Realism of this Worldview*, 4 UCLA J. ISLAMIC & NEAR E. L. 143, 159 (2005).

[449] *Id*; *see generally* Angela P. Harris, *From Color Line to Color Chart*: *Racism and Colorism in the New Century*, BERKELEY J. AF. AM. L. & POL'Y 52, 54 (2008) (framing and discussing colorism and its impacts).

[450] *See* Emmanuel Mauleón, *Black Twice*: *Policing Black Muslim Identities*, 65 UCLA L. REV. 1326, 1373 (2018) (demonstrating how Islamophobia intersects with anti-Black racism, producing compounded legal and social vulnerabilities for Black Muslims and illustrating the racialized dimensions of religious prejudice).

[451] *See id.* at 1332.

of racial exclusion and state-sanctioned bias, and linking Muslim marginalization to the broader landscape of anti-Black oppression.[452]

Islamophobia is not a novel spectacle, but is deeply entrenched in the American halls of power and prevalent perception.[453] Through it precedes the system of Muslim demonization, *Islamophobic* notions and images find their fundamental meanings from Orientalist baselines.[454] A shared rage, whether from citizens or state agencies, toward Islam and Muslims (especially Muslim Americans) embodies the state of *Islamophobia* in America today.[455] *En masse* targeting of Muslims Americans in the United States started well before the 9/11 attacks, but rose to official state policy with the creation of the Department of Homeland Security ("DHS") on November 25, 2002.[456] The DHS combined the state's immigration and emigration regimes and served as the institutional pivot for comprehensive federal and local antiterror surveillance and policing, as authorized by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("The Patriot Act").[457] The Patriot Act increased state suspicion and surveillance of Muslim communities in the United States and introduced a "War on Terror" that observed this population as presumptive or prospective terrorists both at home and abroad.[458] State action against Muslims using the Patriot Act and adopted by DHS encouraged sentiment against Muslims.[459] If government agencies and laws deemed Muslims as a dangerous "fifth column," then it is

[452] Khaled A. Beydoun, *Between Indigence, Islamophobia, and Erasure: How American Orientalism Has Shaped the Legal and Social Construction of Muslim Identity*, in ISLAMOPHOBIA AND THE LAW 6–9 (Khaled A. Beydoun & Maimon Schwarzschild eds., 2026)

[453] *Id*.

[454] Beydoun, *supra* note 437, at 4 ("Structural *Islamophobia*: [F]ear and suspicion of Muslims executed by institutions through the enactment and advancement of policies, most notably government agencies. These policies are built upon the presumption that Muslim identity is associated with national security threat, and while usually framed in a facially neutral fashion, disproportionately target Muslim subjects and disparately jeopardize, chill, and curtail their civil liberties.").

[455] *See generally* Muneer I. Ahmad, *A Rage Shared by Law*: *Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1264 (2004) (arguing that post-September 11 racial violence was not simply the product of individual animus but was enabled by legal and political structures that sanctioned suspicion toward racialized communities associated with terrorism).

[456] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified scattered sections of 5, 6, 18, 44, & 49 U.S.C.).

[457] USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (codified in scat sections of 8, 15,1 8, 21, 28, & 42 U.S.C).

[458] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 634-35 (2006) (holding that military tribunals created by the Bush administration violated the law); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (holding that a U.S. citizen held as an "enemy combatant" held a right to a hearing to challenge designation); *see also* Rumsfeld v. Padilla, 542 U.S. 426 (2004) (highlighting policies adopted by Bush administration in the war on terror).

[459] Beydoun, *supra* note 437, at 4.

unsurprising that private citizens would mimic that framing and direct hostility and violence at a group marked as an internal enemy.[460] Many believe that anti-Muslim animus and violence would slowly diminish after the immediate aftermath of 9/11, however, unfolding events and statistics have proven otherwise.[461]

Muslim America is diverse along racial, ethnic, and nationality-based lines.[462] Indeed, Muslim Americans hail from "nearly 80 nationalities and cultural backgrounds," moving some to brand the Muslim American population "a 'microcosm' of the Muslim world."[463] Fear of "[r]adicalization," which "suggests that the path from Muslim to terrorist is a predictable one" must be counteracted. Further, the United States must invest in methodologies for "counter-radicalizing" non-Muslim Americans from their hatred and fear of Muslim Americans.[464] Concerns about "radicalization" have primarily reflected the anxieties of White Americans, who fear that Muslim Americans could be influenced by extremist Islamic ideologies or recruited by terrorist organizations such as Al-Qaeda or ISIS.[465] These perceptions often frame Muslim communities as inherently suspect and politically unreliable, producing a discourse in which ordinary religious

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460 Khyati Y. Joshi, *The Racialization of Hinduism*, *Islam and Sikhism in the United States*, 39 EQUITY & EXCELLENCE EDUC. 211, 217 (2006); Ahmad, *supra* note 455, at 1321-25. For instance, "[i]n 2007, CAIR [Council on American Islamic Relations] report receiving about 1,900 complaints of abuse and noted that anti-Muslim physical violence increased by 52 percent between 2003 and 2004." Ashley Moore, *American Muslim Minorities*: *The New Human Rights Struggle*, HUM. RTS. & HUM. WELFARE 91, 92-93 (2010).

461 Dean Obeidallah, *13 Years After 9/11*, *Anti-Muslim Bigotry Is Worse Than Ever*, DAILY BEAST (Sep. 11, 2014), https://www.thedailybeast.com/13-years-after-911-anti-muslim-bigotry-is-worse-than-ever ("Undisputedly the horrible acts committed by radical Muslims have . . . a big impact . . . reason is that many Americans . . . don't see Muslims publicly condemning these terrorists . . . be convinced that the radicals are truly the exception and not 'true Islam.'").

462 *Id*.; Beydoun, *supra* note 437, at 4.

463 Moore, *supra* note 460, at 91 (discussing that, it is important to establish reconciliation for historical wrongs against Muslim Americans, in line with TJ measures as applied to the United States, as it is particularly necessary amid today's context of escalating Islamophobia). *See*, *e.g*., Toni Johnson, *Muslims in the United States*, COUNCIL ON FOREIGN REL. (Sep. 19, 2011), https://www.cfr.org/backgrounder/muslims-united-states [perma.cc/FH7H-LDS9] ("Since 9/11, the U.S. war on terror abroad and domestic terror incidents involving U.S. and immigrant Muslims have focused attention on Islam in the United States. Muslims face increased scrutiny and backlash on issues ranging from mosques and *shari'a* law to questions of terrorism. U.S. Muslims are more affluent, educated, and culturally integrated than Muslims in Western Europe . . . bitter discussions about ethnic and religious integration and that the debate about Muslims in America . . . .").

464 *See* Amna Akbar, *Policing* "*Radicalization"*, 3 U.C. IRVINE L. REV. 809, 814 (2013) ("[C]ounter-radicalization . . . conforms to 'the preemptive logic of counterterrorism, which focuses on strategies that minimize the risk and intensity of future terrorist attacks.'").

465 KHALED A. BEYDOUN, AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR 161–83 (2018) (analyzing how Islamophobia is legally and socially constructed and intersects with race) (explaining how fears of "radicalization" have been framed by White American anxieties about terrorism and have shaped public perception of Muslim communities).

practice is conflated with potential violence.[466] This narrative has fueled legal and policy interventions ranging from heightened surveillance, profiling, and policing of Muslim neighborhoods to restrictive immigration measures and monitoring of mosques, schools, and community organizations.[467] By casting Muslim Americans as a potential threat, the "radicalization" framework amplifies social marginalization and contributes to the broader system of Islamophobia that intersects with racialized biases, particularly against Black and Brown Muslims.[468]

Islamophobia is not static, however, as "private" or "structural" *Islamophobia* rarely functions on distinct paths; they join to amplify the damages wrought on Muslims.[469] The threats stimulated by private and public *Islamophobia* are greater within impoverished and working-class Muslim communities in the US, where local and federal law enforcement prodigiously focus their surveillance resources and where anti-Muslim bigots tend to target.[470] *Islamophobia* is legally fluid and adaptive across cultures, as its basic and philosophical or ideological contours are shaped by its host country and framework.[471] In the same vein, American society observes Muslim Americans as a racial and socioeconomic *monolith*; it perceives Muslim Americans as a victim in uniform terms, but gender, race, and economic position impact how *Islamophobia* is experienced; oftentimes, these features determine who law enforcement suspects of radicalization.[472]

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466 *Id.* at 17–30 (defining Islamophobia and explaining its racial dimensions).

467 LORI PEEK, BEHIND THE BACKLASH: MUSLIM AMERICANS AFTER 9/11 12–15 (2008) (documenting the concrete legal, social, and political consequences of radicalization fears, including surveillance, profiling, and discriminatory policy targeting Muslim Americans).

468 *Id*.

469 Beydoun, *supra* note 437, at 2 ("'*Private Islamophobia*'—the fear, suspicion and violent targeting of Muslims by individuals, or private actors. This animus is generally carried forward by use of religious or racial slurs, mass protests or rallies, or violence and hate crimes inflicted on Muslim subjects by non-state actors.").

470 *See*, *e.g.*, Arsalan Iftikhar, Freedom of Religion Requires Freedom From Fear, ATLANTIC (Oct. 9, 2015), https://www.theatlantic.com/politics/archive/2015/10/protesting-american-mosques-at-gunpoint/409987 [https://perma.cc/3DNS-FMU5] ("[O]ver 28 percent of American voters believe Muslims should not "even be eligible to sit on the U.S. Supreme Court" and that nearly one-third of the country thinks that followers of Islam should be "barred from even running for President"—a slightly higher percentage than the 24 percent who believe that Barack Obama is himself a Muslim.").

471 Beydoun, *supra* note 437, at 2-3 ("[…] dialectical *Islamophobia*, [which occurs when] "state policies legitimize prevailing misconceptions, misrepresentations and tropes widely held by private citizens.").

472 *See*, *e.g.*, Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim-American Women in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191 (2012) (explaining how Muslims face discrimination at the intersection of gender, religion, and race in unique ways). In other words, indigent Muslims are separately profiled, reported, policed, and prosecuted, and they are ignored victims of both public and private *Islamophobic* violence.

A. Muslimophobia versus Islamophobia

There is now no clarity on what the term Islamophobia covers: Does it relate to hostility towards the religion of Islam and Muslims as practitioners of Islam, or racism against Muslims rooted in Orientalism? While some scholars argue that the term Muslimophobia should substitute Islamophobia due to the anger/hate being directed at Muslims as individuals, rather than Islam the religion, it is not obvious if this is the case in practice.[473] Islamophobia and Muslimophobia are different from each other but mostly occur in a cycle. Moreover, Muslimophobia can be but is not always a form of racism due to the manipulation of culture in which advocates of some Islamic cultural bans can de-essentialize, or essentialize certain social characters to argue that Muslims can, and should, become integrated if they fulfil certain conditions.[474] Such policies can, though, be easily operated to recurrently eliminate various unwelcome 'others.'[475] These bans and initiatives depend profoundly on the "slippery slope" fallacy to make both Islamophobic and Muslimophobic arguments. That is, these policies implicitly accuse Muslims and Islam of wrongdoings and violations against Western society that have not even happened.[476] There is growing attention paid to the categorization and naming of debates about Muslims and Islam in order to contest and challenge them, which is perplexing.[477] The dilemma is, nevertheless, that classical categories for challenging discrimination no

[473] Tariq Modood, '*Difference*', *Cultural Racism and Anti-racism in* DEBATING CULTURAL HYBRIDITY: MULTICULTURAL IDENTITIES AND THE POLITICS OF ANTI-RACISM 154-72 (Tariq Modood & Pnina Werbner eds., 1997).

[474] Tariq Modood**,** *Muslim Integration and Secularism*, *in* ISLAM AND EUROPE: CHALLENGES AND OPPORTUNITIES 85-101 (Jean-Yves Carlier ed., 2008) (explaining that a consideration of the historical context is essential to situate contemporary Islamophobia and Muslimophobia within the longer trajectory of social, political, and religious relations).

[475] Leon Moosavi, *The Racialization of Muslim Converts in Britain and Their Experiences of Islamophobia*, 41 CRITICAL SOCIO**.** 41, 41–56 (2015) ("*Islamophobia* refers to stereotypical generalizations about Islam and/or Muslims that can result in Muslims being discriminated against or harassed. Over the last decade there has been much discussion about the growth of *Islamophobia* in 'Western' societies.").

[476] *Id*. ("[S]ince 9/11, levels of *Islamophobia* have increased so dramatically that Britain is now engulfed in extensive *Islamophobia*. Deep concern about *Islamophobia* is a perception common amongst Muslims in general, who often express a belief that they are under siege. This is why . . . '*Islamophobia*, racism and discrimination, thus remain an important influence on how British Muslims understand their lives.'").

[477] *Id*.; *See*, *e.g*., Nasar Meer, *The Politics of Voluntary and Involuntary Identities: Are Muslims in Britain an Ethnic, Racial or Religious Minority?,* 42 PATTERNS OF PREJUDICE 61, 61–81 (2008) ("The denial that racism operates against Muslims qua Muslims has permeated public and media discourse of late. Intellectuals, commentators and legislators from across the political spectrum have explicitly rationalized this position by distinguishing involuntary racial identities from voluntary religious identities. Meer explores the nature of Muslim identity vis-à-vis the involuntary and voluntary dichotomy before examining the consequences of recognizing some 'racial' identities in anti-discrimination formulas while ignoring others.").

longer apply to 'Muslims' as a group: Muslims transcend categories of race, nationality, ethnicity, and skin colour, because, theoretically, anyone can choose to become Muslim.[478]

Is Islamophobia a new phenomenon? Are Islam and the Judeo-Christian West detestable of and hostile toward each other? To fully understand the roots of these contemporary dynamics, it is useful to examine the historical development of attitudes toward Islam and Muslims. In other words, while modern policies and rhetoric shape Islamophobia today, these patterns are deeply rooted in centuries of historical interaction between Islam and Western societies. Islamophobia or anti-Muslim racism is obviously not a recent phenomenon; dislike and hatred of Islam is deep-rooted in the 7th century when the Prophet Mohammed (570–632) started campaigning and spreading the faith throughout Arabia. Islam was assailed "by rival groups such as the residents of Mecca."[479] Thus, there seems to be a change between conversational discrimination in talking destructively about Muslims and street-level discrimination, for instance, in physical attacks on Muslims.[480] In other words, one of the explicit problems the pro-ban politicians had with Islam as a faith was the Islam's perceived overlap of religion, law, and politics. They argued that minarets symbolize Islam's political power and claimed that restricting Islamic cultural expression would help avert Islam from taking hold legitimately and politically in the West.[481] Within the

[478] *See generally* Katherine Bullock, *Rethinking Muslim Women and the Veil*: *Challenging Historical and Modern Stereotypes* 35-52 (2002) (challenging Western representations of veiled Muslim women as passive, oppressed, and lacking agency, and arguing that veiling may reflect diverse religious, cultural, and political choices made by Muslim women themselves); *see also* Fred Halliday, *Islamophobia Reconsidered*, 22 ETHNIC & RACIAL STUD. 5 892, 892–95 (1999) (arguing that hostility toward Muslims should be understood in light of broader dynamics of racism, political conflict, and cultural stereotyping rather than through overly simplistic conceptions of religious intolerance).

[479] *See generally* Raymond Taras, XENOPHOBIA AND ISLAM IN EUROPE 95-112 (2012) (exploring the relationship between European identity, immigration, and anti-Muslim attitudes, and arguing that Islamophobia has become intertwined with contemporary forms of xenophobic politics). It should be noted that there is currently no clear consensus on what the term Islamophobia covers. Does it refer to hostility toward the religion of Islam, or toward Muslims as practitioners of Islam? Some scholars argue that the term Muslimophobia is more precise, as the anger and hate are often directed at Muslims as individuals rather than at Islam itself. *Id*. While the two concepts are distinct, they frequently occur in a cyclical pattern. Muslimophobia can, but is not always, a form of racism, as cultural narratives are manipulated to argue that Muslims must meet certain conditions to be "integrated" into society. Such policies and bans, however, can be used to systematically exclude unwelcome "others," often relying on slippery slope arguments that falsely ascribe wrongdoing to Muslims or Islam without evidence. *Id*.

[480] *Id*. One clear reason for this is that while one can broadly attack Islam, it is not conceivable to physically attack Islam as such; one can only attack Muslims or the Islamic symbols.

[481] Mattias Gardell, *Crusader Dreams*: *Islamophobia*, *and the Quest for a Monocultural Europe*, 26 TERRORISM & POL. VIOLENCE 1, 129 (2014); *see generally* JOHN SOLOMOS, RACE AND RACISM IN BRITAIN (2003) (examining the historical evolution of race and racism in Britain and arguing that racial inequality is reproduced through institutional arrangements, political discourse, and broader social structures).

Islamophobic debate, Islam and Muslims have been treated as a *monolithic* bloc, erasing Muslim's multiplicity and the many ways Muslims and non-Muslims coexist and interact.[482] Adding to the complexity, there is growing debate over the categorization and terminology used to describe anti-Muslim prejudice.[483] Classical frameworks for addressing discrimination are often inadequate when applied to Muslims, who cannot be easily categorized by race, nationality, ethnicity, or skin color, since anyone can theoretically choose to become Muslim. This highlights the need for precise conceptual tools when analyzing discrimination against Muslims.[484] One explicit source of contemporary Islamophobia stems from perceptions of Islam's overlap with law and politics. For example, some pro-ban politicians argue that minarets symbolize Islam's political power, claiming that restricting Islamic cultural expression prevents Islam from gaining legitimate political influence in the West.[485] Within these debates, Islam and Muslims are often treated as a monolithic group, erasing the multiplicity of Muslim experiences.[486]

Example: *Trump Muslim Travel Ban*: Thus, the Muslim movement in this new world order finds itself living under constant inspection and

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[482] Salman Sayyid, *A Measure of Islamaphobia*, 2 ISLAMAPHOBIA STUD. J. 10, 11-25 (2014); *see*, *e.g.*, *Reuters*, *Europe's Muslims Face Islamophobia*, *Study Says*, NY TIMES (Dec. 19, 2006) https://www.nytimes.com/2006/12/19/world/europe/19islamophobia.html ("Europe's Muslims face deep-seated discrimination in education, housing and jobs but also say they could do more themselves to connect with wider society . . . cover Muslims across the Union and coincides with growing scrutiny of Muslims spurred by terrorism and increased immigration from the Islamic world . . . "*Islamophobia*," which is more often verbal than violent, arises from an increasing tendency to associate Muslims in general with terrorist acts by a relative few and has intertwined with pre-existing *xenophobia*."). *See generally* GABRIELE MARRANCI, THE ANTHROPOLOGY OF ISLAM (2008) (examining how anthropologists have conceptualized Islam and advocating an approach that focuses on the everyday experiences, emotions, and social practices through which Muslims construct religious meaning).

[483] JOHN ESPOSITO & IBRAHIM KALIN, ISLAMOPHOBIA: THE CHALLENGE OF PLURALISM IN THE 21ST CENTURY 78–82 (2011).

[484] *Id*.

[485] *Id*. The Muslim Ban and associated policies are the latest reiterations of Islamophobic strategies developed over decades, including programs like "Countering Islamic Violence," which target Muslim activism and political participation. While each law or guideline may have a specific legal focus, their cumulative impact extends far beyond the immediate scope, affecting social, political, and cultural spheres. *See generally*, ERIK BLEICH & MAURITS VAN DER VEEN, COVERING MUSLIMS: AMERICAN NEWSPAPERS IN COMPARATIVE PERSPECTIVE (2022) (analyzing media portrayals of Muslims and showing how journalistic framing influences public understandings of Islam, often emphasizing security, conflict, and cultural difference).

[486] Erik Bleich, *What Is Islamophobia and How Much Is There*? *Theorizing and Measuring an Emerging Comparative Concept*, 55 AM. BEHAV. SCIENTIST 1581 (2011). The enactment of these policies galvanized civil rights advocates and community organizers, who responded by forming new coalitions and reinforcing existing partnerships. Despite the stereotypes that frame Muslims as a monolithic group, the Muslim population in the U.S. is diverse and growing rapidly, with different segments experiencing the Muslim Ban in varied and often unequal ways. Those who are racially or socioeconomically marginalized were particularly affected, illustrating how structural Islamophobia can compound existing inequalities.

surveillance and in constant fear.[487] *Islamophobia* has, consequently, been politically and ideologically created to rationalize the reasons why Muslims are persecuted and discriminated against, which gives the impression that Muslims are culpable for generating the fear of and the *phobia* of Islam that Islamophobia infers.[488] "Make America Great Again" was an idea for the country that not only excluded Islam but demonized it and its believers.[489] Trump enhanced his call to revive American greatness with the bold rhetoric of *Islamophobia*, stating, "I think Islam hates us," on the campaign trail, and on December 7, 2015, notoriously calling for a "total and complete shutdown of Muslims entering the United States."[490] Trump's strategic disposition of political Islamophobia proved reverberating and effective.[491] In addition to his immigration plan, Trump assured to expand and strengthen the "counter-radicalization" surveillance executed by President Obama in 2011, and proposed reinstallation of a "Muslim registry" that would target immigrants coming in and out of the U.S., and supported labelling the Muslim Brotherhood as a terrorist organization as an express means to defeat the First Amendment free exercise, speech and assembly rights of Muslims.[492]

The morning after Donald Trump surprised the world, civil rights advocates and lawyers across the country understood the horror of the contests that lay ahead.[493] Organizing and merging around the matters started

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[487] JASMINE ZINE, CANADIAN ISLAMIC SCHOOLS: UNRAVELLING THE POLITICS OF FAITH, GENDER, KNOWLEDGE, AND IDENTITY 60 (2008).

[488] *See generally* JOE JENKINS, CONTEMPORARY MORAL ISSUES 72-79 (4th ed. 2002) (surveying key debates in applied ethics and examining how moral philosophy informs contemporary questions of justice, rights, and state authority). *See*, *e.g.*, Korematsu v. United States, 323 U.S. 214, 218–19 (1944) (upholding an Executive Action ordering the internment of at least one-hundred Japanese citizens and residents under the pretense of it being a compelling national security interest).

[489] *See* Kaveh Waddell, *America Already Had a Muslim Registry*, ATLANTIC (Dec. 20, 2016), https://www.theatlantic.com/technology/archive/2016/12/america-already-had-a-muslim-registry/511214 [https://perma.cc/L4FS-RC4R]; *see also* Leti Volpp, *Impossible Subjects*: *Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1626 (2004) (arguing that immigration law produces racialized categories of "illegal aliens" and "alien citizens," thereby constructing belonging and exclusion through legal status in ways that are deeply intertwined with race).

[490] *See*, *e.g.*, Jose A. DelReal, *Trump*: '*I Think Islam Hates Us*', WASH. POST (Mar. 9, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/03/09/trump-i-think-islamhatesus/?utm_term=.116b936072c4 [https://perma.cc/HMF7-HXLX]; *see also* Jenna Johnson, *Trump Calls for* '*Total and Complete Shutdown of Muslims Entering the United States*,' WASH. POST (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.659573d2ce28 (explaining that the Trump administration enacted the Muslim Ban during his first week as President).

[491] Beydoun, *supra* note 437, at 7.

[492] Waddell, *supra* note 489; Akbar, *supra* note 464, at 809-11 (noting that These agendas are not only part and parcel of a larger program of *Islamophobia* coordinated by Trump and his brain trust, but if applied, will operate in concert to develop state-sanctioned *Islamophobia* aiming Muslim immigrants and citizens).

[493] Mohamed A. 'Arafa, *Inside the Border-Outside of the Law: Trump's Muslim Travel Ban*, 15 CREIGHTON INT'L & COMP. L.J. 15, 15-37 (2025) (analyzing the legal and constitutional controversies

progressively, as attorneys and activists began to form new coalitions and reinforce prevailing partnerships.[494] A key factor in the post-ban activism was the willingness to organize and sense of firmness rising within the community after Trump's election.[495] Although the stereotypes that direct the Muslim Ban imagine Muslims as a monolith, the global and U.S. population reveals that it is anything but. Islam is the fastest-growing religion in the world, outpacing every other faith group in the U.S. in terms of membership.[496] Therefore, when the Muslim Ban was enacted, it had disparate effects on different segments of the Muslim population, and furthermore, compounded the threat to and injury on subsets of the faith group that are racially and socioeconomically marginalized.[497] Both versions of the Muslim Ban are but the latest reiteration of Islamophobic strategies developed by the state during the prolonged war on terror, and for the Trump Administration, the first of a series of other rules and programs built upon the idea that Muslim identity is presumptively terroristic.[498]

Additional Islamophobic strategies, including the application of "Countering Islamic Violence," the description of the Muslim Brotherhood as a terrorist group (as a means to stifle Muslim American activism), and reinstitution of a "Muslim Registry," are *structural Islamophobic* plans planned to follow the Muslim Ban.[499] Like the Muslim Ban, these laws and guidelines have a specific legal object and effect, but their cumulative impact is far wider.[500]

surrounding the Trump administration's travel ban targeting primarily Muslim-majority countries and its implications for immigration law and discrimination).

494 *See* Evan Perez, Pamela Brown & Kevin Liptak, *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017), http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban [https://perma.cc/KTP5-DRKT] ("Administration officials weren't immediately sure which countries' citizens would be barred from entering the United States. The Department of Homeland Security was left making a legal analysis on the order after Trump signed it. A Border Patrol agent, confronted with arriving refugees, referred questions only to the President himself, according to court filings.").

495 *See* Janell Ross, *6 Big Things Donald Trump Is Now Trying to Re-Negotiate — With Himself,* WASH. POST (May 12, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/05/12/6-big-things-donald-trump-is-now-trying-to-re-negotiate-with-himself (describing Trump's travel Muslim ban).

496 *See* Khaled A. Beydoun, *How Muslim Ban Incites Vigilante Islamophobic Violence*, ALJAZEERA (Mar. 7, 2017), http://www.aljazeera.com/indepth/opinion/2017/03/muslim-ban-incites-vigilante-islamophobic-violence170307065614706.html [https://perma.cc/8UZ4-64BA].

497 'Arafa, supra note 493.

498 *See*, *e.g.*, Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1 (2018).

499 Sahar F. Aziz, *A Muslim Registry: The Precursor to Internment?*, 2018 BYU L. REV. 101, 101-05 (2018) (arguing that proposals for a "Muslim registry" in the United States reflect a racialized counterterrorism logic that constructs Muslims as a presumptive security threats and risk repeating historical patterns of exclusion and internment).

500 *See generally* Khaled A. Beydoun, *Trump's Counterterror Program*, ALJAZEERA (Mar. 7, 2017) [https://perma.cc/H48S-XXZ9]. Several of the organizations awarded large grants by the Obama

In short, Islamophobia and Muslimophobia target both Muslims as individuals and Islam as a religion, often reinforcing stereotypes and justifying exclusionary policies. Historical and contemporary examples, such as the Muslim Ban, show how these mechanisms disproportionately affect marginalized communities while treating Muslims as a monolithic group. These dynamics challenge traditional categories for understanding discrimination, underscoring the need for more precise frameworks to address the social, political, and legal dimensions of anti-Muslim prejudice.

CONCLUSION

While the American TJ debate has appropriately focused on reparations, TJ should encompass structural changes to address the root causes of conflict and prevent its recurrence. In the United States, TJ can help explain fluctuations in public education, criminal legal systems, and electoral and judicial institutions (e.g., movements to end mass incarceration have been characterized as TJ efforts).[501] Inasmuch as the Supreme Court hinders America's transition from white supremacy, Supreme Court reform may itself be understood as a TJ tool. Beyond institutional changes, collective reforms aimed at restructuring and canceling debts may help address entrenched inequalities and be justified on TJ grounds. Inaccessible TJ actions are likely to be inadequate, unsuccessful, and even counterproductive without supplementary organizational changes.

By delivering the forms of reckoning and reconciliation that the United States has failed to achieve at the national level, local government and community activities can identify effective pathways to "domesticating" TJ standards.[502] Given the sheer size of America, exclusively localized measures may be inevitable. Yet, they may be inadequate to address widespread racial prejudice and may be seen as absolving all levels of government of their commitments. Eventually, local arrangements must influence national ones.[503] The Unites States government should harmonize a program to address the history and legacies of American racism, building

administration, with reach into vulnerable Muslim American communities, are financially bound to carry their counter-radicalization initiatives under President Trump. *Id.*

[501] Desmond King & Jennifer Page, *Towards Transitional Justice*? *Black Reparations and the End of Mass Incarceration*, 41 ETHNIC & RACIAL STUD. 739, 741 (2018).

[502] Daniel Posthumus & Kelebogile Zvobgo, *Democratizing Truth: An Analysis of Truth Commissions in the United States*, 15 INT'L. J. TRANSITIONAL JUS. 510, 510–32 (2021) (examining U.S. truth commissions at the subnational level and analyzing their role in addressing historical and contemporary racial injustice).

[503] *See*, *e.g.*, INT'L CTR. FOR TRANSITIONAL JUSTICE, TRUTH, RECONCILIATION, AND REDRESS FOR RACIAL INJUSTICE IN THE UNITED STATES: INSIGHTS FROM EXPERIENCES OF COMMISSIONS AROUND THE WORLD 1-3 (2022) (discussing how global truth-seeking lessons can be applied to U.S. subnational and national TJ initiatives).

on lessons learned at home and abroad. Racial justice movements (e.g., the Movement for Black Lives) are driving fundamental changes in American society.[504] The United States government should develop a coordinated program to address the historical and ongoing legacies of American racism, drawing on lessons from both domestic initiatives and international experiences with truth and reconciliation.[505] While racial justice movements, such as the Movement for Black Lives, have catalyzed profound social awareness and policy conversations, the political environment under the Trump administration significantly curtailed opportunities for national reckoning.[506] Policies and rhetoric during this period often reinforced systemic inequities and restricted the implementation of transformative reforms, demonstrating that grassroots and subnational efforts may be necessary but insufficient on their own.[507] As the political pendulum continues to shift, it remains critical that local and state innovations feed into broader national strategies to ensure durable progress toward racial justice.[508] Their demands are linked as much to the past and future as to the present. advocates for racial equality today are not demanding discrete remedies for discrete harms. Instead, they are calling for an inclusive and coordinated transition process that deals with the history, legacy, and future threat of

[504] *Id.*; *see also* Olivia J. Reneau, *Justice Delayed: An Analysis of Local Proposals for Black Reparations*, 10 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 140, 140–61 (2024) (analyzing Black reparations efforts at the municipal and state level and identifying structural limitations of local approaches).

[505] Jamillah B. Williams, *#BlackLivesMatter*: *From Protest to Policy*, 28 WM. & MARY J. RACIAL & SOC. JUST. 103, 103–05 (2021) (describing how Black Lives Matter protests catalyzed policy reforms at local and state levels but also generated significant backlash that risks undermining structural change. Also, it illustrates both the momentum created by the Movement for Black Lives and the fragility of policy gains absent sustained national commitment, supporting your point about localized racial justice efforts being important yet insufficient).

[506] *See* Anna Griffith & David D. Troutt, REWRITING RACIAL EQUALITY: THE STATE OF CIVIL RIGHTS LAW UNDER TRUMP 1-6 (2025) https://static1.squarespace.com/static/5b996f553917ee5e584ba742/t/691793269a07c11d9e172547/1763152679747/CLiME+Rewriting+Racial+Equality.pdf [https://perma.cc/4USJ-Y32R] (Rutgers Ctr. on L. Ineq. & Metro. Equity) (analyzing how the Trump administration's civil rights enforcement agenda has undermined Reconstruction-era understandings of equal protection, redefined racial discrimination, dismantled institutional equity frameworks, and discouraged federal support for equity and investigation initiatives).

[507] Saul A. Starr & Genevieve Lakier, *The Constitution and the War on DEI* 1-4 (U. Chi. Pub. L. & Legal Theory Working Paper No. 25-35 2025) (examining the legal implications of recent executive attacks on DEI programs under the Second Trump Administration, situating these policies within broader constitutional and civil rights enforcement debates).

[508] Rose C. Villazor & Kevin Johnson, *The Trump Administration and the War on Civil Rights*, 54 WAKE FOREST L. REV. 575, 578 (2024) (analyzing the structural changes and legal risks posed by the Trump Administration's efforts to redefine civil rights enforcement, including rollbacks of anti-discrimination standards and regulatory protection).

white supremacy in this nation.[509] As Americans pursue realizing this transition process through or beyond the Supreme Court, they have much to learn from and contribute to universal dialogues around transitional justice.

The *Sharie'a* is often characterized as a '*diversity within unity*.' Diversity is due to a degree of flexibility and openness in the textual language of the *Qur'an*, to reasonable interpretation and *ijtihad*.[510] Yet if it were to recall its vitality and significance, the *Sharie'a* needs to be read side by side with the changing facets of social reality and the living conditions of the general public. It is vital to understand the juristic specifics of *fiqh* (jurisprudence) and how Muslim scholars have sought to contextualize the source policies of Islamic norms within their own contexts and realities.[511] Yet, the realisms of the Islamic criminal justice system and that of the nation that now prevail are symbolic of discontinuity, in some respects, with the *fiqh* details.[512]

The prevalence of *taqlid* for decades and then of colonial rule interrupted the continuity of *Sharie'a*, scriptural interpretation and *ijtihad*.[513] But since the consciousness of public welfare, peace, and normal order establishes the basic *maqasid* (essential spirits) of Islamic law, all *bona fide* efforts that do not compromise the integrity of truth and justice and seek to put an end to conflict command *Sharie'a* validity. If we understand Muslimophobia and Islamophobia as separate phenomena, it changes how we notice the contests to these biased dialogues.[514] Recognizing the details

[509] *Id*. (arguing that the Trump administration's policies collectively operated as a sustained rollback of civil rights protections, particularly through immigration enforcement and race-related policy shifts).

[510] *See generally* Nouraddin Karrat, *Maqasid al-Shariah (The Objectives of Islamic Law) and Their Relationship with Legal Evidence*, 1 Ijtihad J. for Islamic & Arabic Stud. 363 (Sara El Hadi trans., 2024) (discussing how the objectives of Islamic law (*maqāṣid al-sharīʿah*) interact with legal reasoning and evidence within Islamic jurisprudence).

[511] *See generally* Habib Yesuf Yimam, *Maqasid in the Thought of Muhammad Hashim Kamali: A Search for an Epistemological Integration* (2023) (providing an analysis of Muhammad Hashim Kamali's contributions).

[512] *See* Bassiouni & Badr, *supra* note 177 (examining the principal sources of Islamic law and approaches to interpretive rule-making); *see also* M. Cherif Bassiouni, *The Shariʿa and Islamic Criminal Justice in Time of War and Peace* 32 THE AM. J. OF ISLAMIC SOC. SCIENCES 107 (2014) (providing comprehensive analysis of Islamic legal sources and methodology, including *usūl al-fiqh* and the relationship between *Shariʿah* and contemporary justice norms).

[513] Mahroof Athambawa, *Ijtihād Maqāṣidī and Legal Adaptation: A Comparative Analysis of Contemporary Islamic Jurisprudence in Responding to Emerging Issues*, 7 MAZAHIBUNA J. PERBANDINGAN MAZHAB 89, 89–103 (2025) (examining the role of ijtihād maqāṣidī in adapting Islamic legal reasoning to contemporary socio-legal challenges).

[514] M. Cherif Bassiouni, *The Purpose of Islamic Law (maqāṣid al-sharīʿa)*, *in* HUMAN RIGHTS BETWEEN UNIVERSALITY AND ISLAMIC LEGITIMACY 115, 115–45 (2024) (explaining how *maqāṣid al-sharīʿah* theorizes justice and public welfare as core aims of *Shariʿa*, and how these objectives can inform contemporary legal reasoning and human rights discourse).

of anti-Muslim and anti-Islamic rhetoric is only one half of the equation—how we battle these is equally, if not more, imperative.[515]

Integrating principles of Islamic TJ into the U.S. legal framework offers a unique opportunity to reimagine approaches to systemic inequities, particularly for marginalized communities such as Muslims and Black Americans. The Islamic model's emphasis on *sulh* (reconciliation), communal welfare, and ethical accountability complements the U.S. focus on individual rights and procedural justice, providing mechanisms for restorative remedies that go beyond punitive measures. By adopting elements of this model, policymakers and legal practitioners can address historical and ongoing racial and religious disparities in a more holistic way, fostering avenues for healing, reparative justice, and community empowerment. Ultimately, such integration not only enriches the American justice system with alternative frameworks for fairness and reconciliation but also highlights the shared moral and ethical imperatives across legal traditions to confront systemic racism and cultivate a more inclusive society.

Such integration can transform justice from a system of punishment into a catalyst for healing and empowerment. It creates a moral architecture that bridges communities, dismantles structural barriers, and reclaims dignity for those historically marginalized. By fusing Islamic restorative principles with American legal frameworks, we can reimagine a justice system that is not only fair but visionary, resilient, and deeply human. It is appropriate to the overwhelming mutual population and offers the best option if collective with classical customs realistically and the belief must be in divine justice before earthly justice.

[515] *See generally* Khaled A. Beydoun, *Exporting Islamophobia in the Global* "*War on Terror*", 95 N.Y.U. L. REV. ONLINE 81 (2020) (analyzing Islamophobia as a structural, political, and legal phenomenon and arguing that confronting Islamophobic rhetoric demands active challenge beyond mere recognition).