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## **Institutionalized Ostracism**

Danieli Evans

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## Institutionalized Ostracism

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## INSTITUTIONALIZED OSTRACISM

*Danieli Evans\**

### ABSTRACT

*Belonging is a fundamental need, like food or water. Hundreds of social psychology studies find that people who are ostracized (excluded, rejected, or ignored) experience severe pain and suffering. Ostracism threatens basic needs, triggers the same neurocognitive processing system as physical pain, and impairs functioning. Furthermore, ostracized people may cope in ways that beget “deviant” labeling and further ostracism.*

*Belonging and ostracism are prevalent themes in social psychology research, but these constructs have received relatively little attention in law. This Article begins to explore the implications of this research for law. I make three contributions: First, I name and describe the phenomenon of “institutionalized ostracism”: When government institutions ostracize people in ways that threaten their sense of belonging. This institutionalized ostracism is mostly lawful under current anti-discrimination law. Second, I draw from social psychology literature to explain why institutionalized ostracism is so harmful—in some ways comparable to physical violence. Third, I identify and critique several ways in which current jurisprudence supports and facilitates institutionalized ostracism. In discussing these, I make some preliminary suggestions as to how our jurisprudence ought to attend to the harm of ostracism.*

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\* Assistant Professor of Law, University of Washington School of Law. For ongoing support, guidance, and mentorship on this article and other work, I am deeply thankful to Bruce Ackerman, Tracey Meares, Reva Siegel, and Tom Tyler. For very helpful comments on drafts of this article, I am grateful to Robert Chang, Guy Uriel-Charles, Jeremiah Chin, Elizabeth Ford, Wendy Greene, Kip Hustace, Yuvraj Joshi, Luke Maher, Erin Miller, Paul Ohm, Jeremy Peterman, and Kipling Williams. I also received very helpful feedback from participants in the New Directions in Law and Society Conference at UMass, Amherst in October 2022, the ClassCrits Conference at Thurgood Marshall School of Law in October 2022, the Poverty Law Scholars Conference at University of California, Berkeley School of Law in March 2023, the Law & Social Science Panel at the AALS Annual Conference in Washington D.C. in January 2024, and the American Constitution Society Junior Scholars Public Law Workshop in Washington D.C. in January 2024. For excellent research assistance, I thank Tyler Beckum, Ryland Mahre, and Kameron Powell. Finally, I am grateful to Sarah Hall, Eliane Helitzer, Daniel Horwitz and the editors at the MICHIGAN JOURNAL OF RACE & LAW for careful editing that improved this piece significantly. All mistakes are my own.

## TABLE OF CONTENTS

I.	INTRODUCTION .....	156
II.	INSTITUTIONALIZED OSTRACISM .....	160
	A. <i>Definition</i> .....	160
	B. <i>Ostracism vs. discrimination</i> .....	162
	C. <i>Examples of Institutionalized Ostracism</i> .....	164
	1. Housing .....	165
	2. Education.....	169
	3. Employment .....	181
	4. Criminal Law Enforcement .....	186
III.	THE NEED TO BELONG AND THE HARM OF OSTRACISM ....	192
	A. <i>Ostracism Threatens Basic Needs</i> .....	192
	B. <i>Coping Methods</i> .....	194
	C. <i>Interaction Between Social Background and Responses to Ostracism</i> .....	196
IV.	OUR JURISPRUDENCE OF INSTITUTIONALIZED OSTRACISM.....	198
	A. <i>Interpreting Equal Protection as an Anti-Classification Principle</i> .....	198
	B. <i>Invalidating Anti-Ostracism Policies</i> .....	205
	C. <i>Imposing Ostracizing Punishments Without Scrutiny</i> .....	210
V.	CONCLUSION.....	215

“Social exclusion crushes self-esteem, because it suggests you did something wrong. You feel powerless: Whatever you do, you will be met with silence. You are invisible, irrelevant, and studies show, in physical pain.”<sup>1</sup>

“This ostracism, this otherness, is among the most distressing feelings that can be felt by our social species.”<sup>2</sup>

## I. INTRODUCTION

A gay couple asks a web designer for a wedding website. The designer turns them away; says they don’t make wedding websites for same-gender couples.<sup>3</sup>

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1. Kipling Williams, *The Pain of Exclusion*, 26.1 SCI. AM. MIND 0, 34 (2011).

2. 303 Creative LLC v. Elenis, 600 U.S. 570, 608 (2023) (Sotomayor, J., dissenting).

3. *Id.* It is worth noting that, in 303 Creative, the evidence did not show that this factual scenario had already occurred, but the courts found the case justiciable based on the prospect of its future occurrence. *Id.* at 581–83, 597.

A schoolteacher puts one child into a windowless seclusion room for several hours as a punishment for “disruptive” behavior.<sup>4</sup>

People who lack housing are forced to camp out under a freeway overpass because the city has prohibited camping in public parks and on public streets.<sup>5</sup>

An employee complains to her employer about a coworker’s inappropriate behavior. After she complains, her coworkers give her the silent treatment: they ignore her, don’t make eye contact, exclude her from conversations.<sup>6</sup>

A transgender high school student is not allowed to use the bathroom that matches his gender identity. The school forces him to use a separate, isolated restroom that stands apart from the common restrooms.<sup>7</sup>

A group of twelve-year-old boys, who are Black and Latino,<sup>8</sup> are stopped by police regularly during their walk home from school. Police separate them from other pedestrians, ask what they are doing, where they are going, and why they are here.<sup>9</sup>

A person convicted of a crime is removed from society, kept in a cell, and cut off from their family, friends, and all of society. They know that when they are released, the stigmatizing label of a criminal record will follow them everywhere, leading everyone to treat them with suspicion.<sup>10</sup>

These scenarios involve different people, in different situations, and they are governed by various legal standards. But they all involve a common injury: A person is ostracized, and the ostracism is lawful.

In recent decades, ostracism has received significant attention in social psychology research.<sup>11</sup> In this literature, ostracism is defined as being

4. *Couture v. Bd. of Educ. of Albuquerque Pub. Sch.*, 535 F.3d 1243 (10th Cir. 2008).

5. EUGENE ROTGER, *LIVING UNDER A BRIDGE: MY FIVE YEARS OF LIVING HOMELESS ON THE STREETS OF MIAMI* (2015); Sara Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 44 (2016)

6. *Brooks v. City of San Mateo*, 229 F.3d 917, 929 (9th Cir. 2000).

7. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 600 (4th Cir. 2020); *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 832 (11th Cir. 2022) (Pryor, J., dissenting).

8. I capitalize “Black,” “Latino/a,” “White,” and other racial or ethnic identities for the reasons stated in LaToya Baldwin Clark, *Stealing Education*, 68 UCLA L. REV. 566 n.1 (2021) and Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, ATLANTIC (June 18, 2020) <https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/>.

9. See VICTOR RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* (2011); see also *infra* Part II.C.4.

10. REUBEN JONATHAN MILLER, *HALFWAY HOME: RACE, PUNISHMENT, AND THE AFTERLIFE OF MASS INCARCERATION* (2021); see also *infra* Part II.C.4

11. Kipling Williams, *Ostracism*, 58 ANN. REV. PSYCH. 425 (2007) (reviewing recent ostracism research and noting that recent interest in ostracism has been spurred, in part, by a desire to understand what drives mass acts of violence).

excluded, rejected, or ignored.<sup>12</sup> Ostracism can be wholly inadvertent and passive, such as being left out of a ball tossing game between two other players (even if they are computer-simulated characters).<sup>13</sup> Regardless of what motivates ostracism—whether it is due to prejudice or inadvertent neglect—it threatens the fundamental need to belong, triggers the neurocognitive processing system associated with physical pain, causes negative emotions, and impairs cognitive functioning.<sup>14</sup>

The burgeoning literature on ostracism has received relatively little attention in law or legal scholarship.<sup>15</sup> This Article aims to fill that void. This Article makes three main contributions:

First, in Part II, I identify the phenomenon I call “institutionalized ostracism”: When laws governing basic social institutions—including housing, education, employment, and criminal law enforcement—exclude people in ways that threaten their sense of belonging. Because the definition of ostracism is broader than the legal definition of discrimination,

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12. Ostracism includes both individual and group-based exclusion. *Id.* at 425. I discuss the definition in more detail in Part II.A.

13. See *infra* notes 24 & 25, and accompanying text.

14. Williams, *supra* note 11, at 434; Naomi Eisenberger & Matthew Liberman, *Why it Hurts to Be Left Out: The Neurocognitive Overlap Between Physical and Social Pain*, in *THE SOCIAL OUTCAST: OSTRACISM, SOCIAL EXCLUSION, REJECTION, AND BULLYING* 109, 110 (Kipling Williams et al. eds., 2005) (“[S]ocial connection is a need as basic as air, water, or food[, and] like these more basic needs, the absence of social connection causes pain—pain that may not be very different from physical pain.”).

15. There is an important body of scholarship discussing subordination, demeaning, stigma, humiliation, and similar constructs, as the types of harm that discrimination laws ought to address. See *infra* notes 30 and 238–245, and accompanying discussion. I explore the relationship between ostracism and this work in Part IV.A. There is scholarship discussing the practice of ostracism in specific contexts or situations, including social media and the formal political procedure in ancient Greece, Alex Zhang, *Ostracism and Democracy*, 96 N.Y.U. L. REV. ONLINE 235 (2021); Adriaan Lanni & Adrian Vermeule, *Precautionary Constitutionalism in Ancient Athens*, 34 CARDOZO L. REV. 893 (2013), discrimination, Susan Carle, *Acting Differently: How Science on the Social Brain Can Inform Antidiscrimination Law*, 73 U. MIAMI L. REV. 655 (2019) (discussing ostracism of people who “act differently,” and suggesting reforms to discrimination law that would recognize this), jury selection, Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592 (2013), corporate law, Jens Dammann, *Corporate Ostracism: Freezing Out Controlling Shareholders*, 33 J. CORP. L. 681 (2008); Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91 (2007), workplace retaliation, Howard Zimmerle, *Common Sense v. the EEOC: Co-Worker Ostracism and Shunning As Retaliation Under Title VII*, 30 J. CORP. L. 627 (2005), the impulse to punish, Morris B. Hoffman & Timothy H. Goldsmith, *The Biological Roots of Punishment*, 1 OHIO ST. J. CRIM. L. 627 (2004), and cooperating witnesses in criminal proceedings. Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1 (2003). I have not found any article that identifies and critiques what I call institutionalized ostracism, i.e., the various ways in which our major social policies employ and allow ostracism.

much of this institutionalized ostracism is permissible under existing discrimination law.

Institutionalized ostracism works to create and sustain cycles of social disadvantage and marginalization. People who occupy stigmatized identities are likelier to be ostracized through exclusionary policies, like school discipline, tracking students within school, exclusionary zoning, and ostracizing criminal punishments. This includes members of protected classes and also people who do not fit into any class currently protected by discrimination law, such as lower-income people and people who appear different or defy the dominant group's norms in some way.<sup>16</sup> These people, often seen as outsiders, are likeliest to experience institutionalized ostracism in various domains, and this may adversely impact their wellbeing, behavior, and their relationship to social institutions.<sup>17</sup>

Second, in Part III, I ground the phenomenon of institutionalized ostracism in a large body of social psychology literature on belonging and ostracism. This literature has developed mostly in recent decades.<sup>18</sup> This literature suggests that institutionalized ostracism may cause significant pain and suffering—as much so as physical injury. This literature also illuminates how institutionalized ostracism can interact with prior experiences of stigma and discrimination to create and sustain cycles of deviant labeling and social exclusion.

Third, in Part IV, I identify and critique three ways in which current jurisprudence upholds and facilitates institutionalized ostracism: First, interpreting the Equal Protection clause as an anti-classification principle, which focuses exclusively on discriminatory motives, rather than one concerned with the exclusionary effects of a policy. Second, invalidating or limiting the application of anti-ostracism policies, such as anti-discrimination laws and race-conscious diversity, equity, and inclusion policies. Third, allowing and imposing ostracizing methods of punishment without considering the harm of ostracism, and whether it is ill-suited or disproportionate with

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16. These disparities are illustrated by the various policies discussed in Part III.C. On socioeconomic status discrimination, see Danieli Evans Peterman, *Socioeconomic Status Discrimination*, 104 VA. L. REV. 1283 (2018). On “acting differently,” see Carle, *supra* note 15 (discussing discrimination against people because they “act differently,” and not necessarily social identity, *per se*); Susan Carle, *Analyzing Social Impairments Under Title I of the Americans With Disabilities Act*, 50 U.C. DAVIS L. REV. 1109 (2017) (discussing discrimination based on real or perceived social impairments).

17. See *infra* Part II.C.1, Part II.C.2.a, & Part III.C.; see also *infra* notes 91–95, 96–110, & 164–165, and accompanying discussions.

18. One of the first major reviews on ostracism research was published in 2007, and it notes that ostracism research had proliferated mainly within the past decade. Williams, *supra* note 11, at 427. This appears to have followed a seminal article advancing the argument that belonging is a fundamental need, published in 1995. Roy Baumeister & Mark Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCH. BULL. 497 (1995).

respect to the goals of punishment. These doctrinal moves effectively support institutionalized ostracism.

As a preview to my argument, consider one common method of disciplining primary school students for “disruptive” behavior: physically excluding them from the classroom or the school.<sup>19</sup> The law prohibits disciplining students based on race (or another protected trait) without a valid justification.<sup>20</sup> But if there are no racial disparities in discipline, or if the school can justify those disparities with race-neutral reasons, these ostracizing punishments are lawful.<sup>21</sup> In fact they are routine and commonplace.<sup>22</sup>

However, for reasons previewed above and elaborated below, regardless of the motivation, these ostracizing punishments may be profoundly harmful—they may cause pain comparable to physical injury and impact a student’s wellbeing, functioning, and relationship to the institution.<sup>23</sup> Yet, school authorities are free to ostracize students if they do so in a way the law deems non-discriminatory. This is one example of how the Court’s current approach to Equal Protection effectively allows institutionalized ostracism—a critique I explore further in Part IV.

## II. INSTITUTIONALIZED OSTRACISM

This Part names and describes the phenomenon I call institutionalized ostracism. I will begin by defining the term, and explaining how it differs from the legal definition of discrimination. Then I illustrate the phenomenon by describing examples of institutionalized ostracism in housing, education, employment, and criminal law enforcement.

### A. Definition

*Ostracism*: My definition of ostracism draws from social psychology research investigating its effects. This literature defines it as excluding, rejecting, or ignoring someone, on an individual or group-basis.<sup>24</sup> A helpful illustration of how ostracism is defined in social psychology is the “ball-tossing” paradigm, often used to operationalize ostracism in psychology experiments: The participant plays a ball tossing game with two other players (either human or computer simulated characters), and the other players

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19. See *infra* notes 102-105, and accompanying discussion.

20. See *infra* notes 115-120, and accompanying discussion.

21. *Id.*

22. *Id.*

23. See *infra* notes 109-113, and accompanying discussion, and Part III.

24. Williams, *supra* note 11, at 429 (noting that research has found no meaningful distinction between rejection, exclusion, and being ignored).



suddenly (and without explanation) begin to ignore the participant and throw the ball to one another for several more minutes, without tossing it to the participant any more.<sup>25</sup>

The ball tossing paradigm illustrates an important point about ostracism, and how it differs from the law's definition of discrimination: Ostracism includes ignoring, neglecting, or overlooking someone in an ambiguous context, and it needn't be deliberate or motivated by prejudice. It may be inadvertent—indeed in some of the ostracism experiments, the person left out of the ball tossing game knows that the other players are computer characters, who would have no awareness of the subject's personal characteristics.<sup>26</sup> In other words, ostracism is defined exclusively by the experience of being excluded, rejected, or ignored; it does not depend on the reason for it.

Experimental paradigms manipulating ostracism typically involve situations or contexts where there is potential for social interaction, where one might ordinarily be included or acknowledged, but instead they are left out or ignored—e.g., playing a ball tossing game, selecting who to work with on a group task, or a quiz predicting whether one will have family or intimate partners later in life.<sup>27</sup> In situations where there is potential for interaction or inclusion, being ignored or excluded may convey (or be interpreted as conveying) that the ostracized individual does not belong. In other words, ostracism occurs in situations where people might normally interact with one another, such that being ignored or shut out is not inevitable and can therefore be interpreted as having some social meaning.

*Institutionalized:* I use the term “institutionalized” to refer specifically to ostracism that is supported or caused by government institutions.<sup>28</sup> I use the term to distinguish the type of ostracism that I'm discussing here from ostracism by private individuals, unsupported by government policy. Most people use ostracism in their personal relationships to sanction people for behaving in hurtful or offensive ways and/or to distance themselves from people they disapprove of.<sup>29</sup> My argument is not focused on this sort of

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25. *Id.* at 430.

26. *Id.*

27. See *infra* notes 187-189, and accompanying discussion.

28. “Institutionalized” is defined as: created and controlled by an established organization, or established as a common and accepted part of a system or culture. *Institutionalized*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/institutionalized>. This term is inspired in part by Bruce Ackerman's use of the term “institutionalized humiliation” to describe the harm of racial segregation. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 13-14, 128, 136-38, 145, 154-55, 205, 208 (2014). I discuss the relationship between ostracism and humiliation further in Part IV.A.

29. There may be different arguments for using ostracism in the private relationships, when it is not sponsored or endorsed by state institutions in the way I discuss here. See, e.g., Zhang *supra* note 15, at 250-54 (arguing that ostracizing Trump from social media was necessary to

private ostracism, since it raises fundamentally different questions from state-imposed ostracism.

Hence, the term “institutionalized ostracism” captures official policies and practices that ostracize (as defined in the previous paragraph) on an individual or group basis. Institutionalized ostracism includes practices and policies that ostracize individuals deliberately and explicitly, i.e., as a means of punishment, and ones that might not be designed to ostracize people but have the effect of excluding them.

### B. *Ostracism vs. discrimination*

There is a significant overlap between the concept of ostracism and the concept of discrimination, which refers to specific types of exclusion and rejection. However, a key point of this Article is to show how the law’s concept of discrimination differs from ostracism, and how discrimination law permits many ostracizing policies. I discuss examples in Part II.C, but before moving on to these illustrations, I will parse the differences between ostracism and the law’s concept of discrimination. Ostracism differs from the legal concept of discrimination in several ways:

First, discrimination law is focused on the *reason* for excluding or rejecting a person or group of people; it prohibits such exclusion only insofar as it is based on a protected trait. The Court has adopted an anti-classification reading of the Equal Protection clause, which only implicates intentional discrimination based on a protected trait.<sup>30</sup> Discrimination statutes likewise

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prevent the harm of further subverting democracy); see also Aja Romano, *Why We Can’t Stop Fighting About Cancel Culture*, VOX (Aug. 25, 2020), <https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate>; Khiara Bridges, *Language on the Move: “Cancel Culture,” Critical Race Theory, and the Digital Public Sphere*, 131 YALE L.J. F. 767, 776 (2021) (“[C]anceling may be how the marginalized ‘speak back’ to power.”).

30. *E.g.*, *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). The Court has recognized five suspect or quasi-suspect traits that trigger heightened scrutiny under the Equal Protection clause: race, alienage, national origin, parents’ marital status, and gender. Courts have declined to treat discrimination based on wealth or income, age, disability, and criminal history as suspect. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that wealth-based disparities in school district funding do not trigger scrutiny); *Cleburn v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (stating that traits such as “intelligence” and “disability” are not suspect grounds for discrimination under the Fourteenth Amendment because, unlike gender or race, these characteristics ostensibly relate to one’s “ability to perform or contribute to society”). See also Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004) (critiquing the suspect class approach to Equal Protection).

Many scholars have criticized the Court’s focus on discriminatory motivation, rather than the effects of a policy, as ignoring social realities and the experiences of stigmatized and marginalized social groups. See, e.g., Charles Lawrence, *The Id, the Ego, and Equal Protection:*

prohibit discrimination based on specified protected traits.<sup>31</sup> Ostracism differs because it need not be based on a protected trait. While members of protected classes do encounter frequent ostracism, people are also commonly ostracized for reasons other than their status in a protected group, such as their socioeconomic status, their appearance, perceived capability, perceived deviance, and other idiosyncratic differences.<sup>32</sup> The ball tossing paradigm, where the subject is excluded from a ball tossing game with two other computer characters, seemingly at random, illustrates that ostracism is hurtful even if it is not based on protected trait.<sup>33</sup>

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*Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-53 (1978) (arguing that antidiscrimination law, by taking the perspective of the perpetrator rather than the discriminator, actually legitimates ongoing racial inequality by implying that it is not caused by what the law understands to be wrongful discrimination); Destiny Peery and Osagie K. Obasogie, *Equal Protection and the Social Sciences Thirty Years After McCleskey v. Kemp*, 112 NW. U.L. REV. 1261 (2018); Darren Hutchinson, *Inexplicable on Grounds Other Than Race: The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 622 (2003) (discussing ways in which the Court has abandoned protection for historically subordinated groups, and instead uses the clause to protect privileged groups); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107 (1976). I return to these critiques in Part IV.A.

31. Major federal discrimination statutes prohibit, under certain circumstances, discrimination based on specific traits such as race, religion, sex, national origin, disability, age, and pregnancy. *See, e.g.*, 42 U.S.C. § 2000-e et seq. (prohibiting employment discrimination based on race, color, religion, sex, or national origin, and defining “sex” to include pregnancy); *Bostock v. Clayton County* 590 U.S. 644 (2020) (holding that discrimination based on “sex” includes discrimination based on sexual orientation or gender identity); 42 U.S.C. § 12101 et seq. (2012) (Americans with Disabilities Act); 29 U.S.C. § 621 et seq. (2012) (Age Discrimination in Employment Act).

32. Carle, *Acting Differently*, *supra* note 15; Carle, *Social Impairments*, *supra* note 16. People who are poor are frequently ostracized because of both social stigma and inability to afford access to institutions. Scholars of discrimination law have suggested that “the poor” are not a stigmatized social group, and therefore should not be protected under the logic of anti-discrimination law. *See, e.g.*, Evans Peterman, *supra* note 16. Owen Fiss has famously argued that the Equal Protection Clause should advance a “group disadvantaging” or “anti-subordination” principle. This principle reflects “[a]n ethical view against caste”: that it is “undesirable for any social group to occupy a position of subordination for any extended period of time.” Fiss, *supra* note 30, at 151. This principle specifically protects groups that are “interdependent”—meaning individual group members’ social reputations are intertwined with their group’s negative social reputation. On Fiss’s view, the anti-subordination/group disadvantaging principle would not cover actions that disadvantage poor people, as they “are not disadvantaged because they are members of a group called ‘the poor,’[as] [t]heir status is not dependent on the status of the group in the way that the status of [B]lacks is determined by their group status.” Owen M. Fiss, *Another Equality*, 2 ISSUES IN LEG. SCHOLARSHIP, 2004, art. 20, at 14, at 20–21.

33. For example, people of all races and social groups report feeling immediately hurt by ostracism, even when they are told that the ostracizers are computer characters (who have

Second, discrimination law allows for a defense when exclusion is justified by “valid” reasons, such as person’s qualifications, deservingness, or behavior.<sup>34</sup> Under an anti-discrimination framework, employers and other regulated entities are able to defend many facially-neutral practices that disproportionately exclude, or ostracize, members of protected groups.<sup>35</sup> In contrast, ostracism refers to the experience of being excluded, regardless of the the validity of the reason. It is hurtful even if it can be justified by seemingly neutral and arguably valid reasons, such as capability or economic rationality.

Lastly, courts have understood discrimination—and the government’s interest in protecting people from it—largely in material terms, such as economic injury.<sup>36</sup> Whereas, ostracism is a harm separate of any economic or material injury.

The following section will illustrate these differences by describing examples of institutionalized ostracism, most of which are permissible under existing discrimination law.

### C. Examples of Institutionalized Ostracism

This section draws from sociological, ethnographic, and narrative accounts to describe institutionalized ostracism in housing, education, employment, and criminal law enforcement. These examples illustrate how laws and policies in these four areas use or support ostracism. Then, in Part III, I draw from social science research on belonging and ostracism to explain why these policies are so hurtful and can have a lasting impact on peoples’ behavior and opportunities.

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no way of knowing their social group identity), part of their own social group, or despised groups that the ostracized person would not want to belong to. Stephanie A. Goodwin, Kipling D. Williams, & Adrienne R. Carter-Sowell, *The Psychological Sting of Stigma: The Costs of Attributing Ostracism to Racism*, 46 J. EXPERIMENTAL SOC. PSYCH. 612, 613 (2010).

34. Statutory definitions of discrimination cover both intentional disparate treatment and unintentional disparate impact. *E.g.*, 42 U.S.C. § 2000-e-2 (unlawful employment practices). However, neutral policies with a disparate impact may be defensible if there is a “valid” justification for the discriminatory policy, such as business necessity or efficiency. *E.g.*, 42 U.S.C. § 2000e-2(k) (an employment policy with a disparate impact on a protected group is defensible if it is “job related for the position in question and consistent with business necessity”); 42 U.S.C. § 12112(b)(5)(A) (failure to accommodate a disability is defensible if the cost of accommodation would create “undue hardship” for the business).

35. *E.g.*, *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232 (3d Cir. 2007) (upholding an employer’s policy of not hiring applicants with certain criminal records on the grounds that it was job related). For more on the limits of discrimination law, see sources cited *infra* note 136.

36. See *infra* notes 148-149 (in the employment context, courts have held that workplace ostracism is not actionable because there is no material or economic harm) and 261-262 (discussing how the Court focused on economic injury in *303 Creative*, 600 U.S. 570).

It is important to note that the policy areas I discuss here are not the only examples of institutionalized ostracism: Other significant examples include immigration law,<sup>37</sup> Indian law (and the law's treatment of indigenous people),<sup>38</sup> voting,<sup>39</sup> family regulation,<sup>40</sup> and the welfare system.<sup>41</sup> I do not mean to minimize the ostracism in these areas of law. To the contrary, exclusion, rejection, and neglect are so integral to these bodies of law that they would require a more comprehensive treatment than I could accomplish in this Article.

### 1. Housing

I begin with housing because it is integral to one's place in society. It impacts everything: where one goes to school, who one affiliates with, what type of policing one experiences, and one's employment opportunities.<sup>42</sup> Hence, a person's home is inseparable from their sense of belonging and status in society.<sup>43</sup>

Housing policies ostracize in various ways. I will focus on two examples here: First, housing segregation caused by exclusionary zoning. Second, economic policies that cause and sustain homelessness, along with policies that exile unhoused people from public spaces.

37. See, e.g., Jennifer M. Chacón, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1 (2018); MING HSU CHEN, *PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA* (2020).

38. See, e.g., Maggie Blackhawk, *Federal Indian Law as a Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019); Maggie Blackhawk, *On Power and Indian Country*, 1 WOMEN & L. 39 (2020); K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878 (2019).

39. See, e.g., GILDA R. DANIELS, *UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA* (2020); Guy-Uriel Charles, *Creating an Inclusive Political Order*, REGUL. REV. (Mar. 21, 2022), <https://www.theregreview.org/2022/03/21/charles-creating-inclusive-political-order/>; Race and Regulation Podcast, *Creating an Inclusive National Politics*, PENN PROGRAM ON REGUL. (June 8, 2022), <https://pennreg.org/episode-4/>.

40. See, e.g., DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES – AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022).

41. See, e.g., KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* (2011).

42. See, e.g., MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016); *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* (XAVIER DE SOUZA BRIGGS, ED., 2005); GREGORY D. SQUIRES & CHARLES E. KUBRIN, *PRIVILEGED PLACES: Race and Uneven Development and the Geography of Opportunity in Urban America*, 42 URB. STUD. 47 (2005); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650 (2020).

43. STEPHEN MENENDIAN, SAMIR GAMBHIR, & ARTHUR GAILES, *The Roots of Structural Racism Project: TWENTY-FIRST CENTURY RACIAL RESIDENTIAL SEGREGATION IN THE UNITED STATES, OTHERING & BELONGING INST.* (June 21, 2021), <https://belonging.berkeley.edu/roots-structural-racism>.

*a. Exclusionary zoning*

Communities across the country are segregated by race and socioeconomic status.<sup>44</sup> Exclusionary zoning policies, which restrict development and land use in ways that make it difficult to build multifamily and other forms of more affordable housing, functionally exclude lower-income people from socially desirable neighborhoods and communities.<sup>45</sup> Today, about 75% of residential land in major cities in America is zoned exclusively for single family housing, and not affordable to lower-income people.<sup>46</sup> Because of the tremendous wealth gap, Black Americans are disproportionately excluded from these neighborhoods and the social resources and opportunities they offer.<sup>47</sup>

Exclusionary zoning (and resulting racial and economic segregation) is a form of ostracism—it is not only geographic exclusion, but *social* exclusion. People who are shut out of desirable neighborhoods, relegated to identifiably poor communities marked by fewer resources and opportunities, are stigmatized. They are also shut out of access to social networks and social capital that higher-resource communities might offer. This exclusion limits social opportunities and social mobility.<sup>48</sup> As Audrey McFarlane observes, “zoning has enshrined a stigmatization of lower cost multifamily housing, in particular rental apartments,” and zoning laws “cumulatively implemented a desire by Whites to control Black movement

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44. TRACY LOH, CHRISTOPHER COES, & BECCA BUTHE, *The Great Real Estate Reset: ET AL.*, BROOKINGS INSTITUTE, SEPARATE AND UNEQUAL: PERSISTENT RESIDENTIAL SEGREGATION IS SUSTAINING RACIAL AND ECONOMIC INJUSTICE IN THE U.S., BROOKINGS INST. (Dec. 16, 2020), <https://www.brookings.edu/essay/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us/>; Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

45. THE GEOGRAPHY OF OPPORTUNITY, *supra* note 42, at 289–90; Douglas S. Massey et al., *The Changing Bases of Segregation in the United States*, 626 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 89 (2009) (“Exclusionary zoning has become a core institutional mechanism limiting opportunities for the poor and minorities . . .”); FAIR SHARE HOUS. CTR., DISMANTLING EXCLUSIONARY ZONING: NEW JERSEY’S BLUEPRINT FOR OVERCOMING SEGREGATION (2023), [https://www.fairsharehousing.org/wp-content/uploads/2023/04/Dismantling-Exclusionary-Zoning\\_New-Jerseys-Blueprint-for-Overcoming-Segregation.pdf](https://www.fairsharehousing.org/wp-content/uploads/2023/04/Dismantling-Exclusionary-Zoning_New-Jerseys-Blueprint-for-Overcoming-Segregation.pdf).

46. FAIR SHARE HOUS. CTR., *supra* note 45, at 3.

47. *Id.* (noting that Black families on average have \$24,100 in wealth compared to \$188,200 for White families).

48. Ford, *supra* note 44; MENENDIAN, GAMBHIR, & GAILES, *supra* note 43 (“[S]egregation is the primary mechanism for controlling access to resources, spaces and people. Segregation undergirds a vast array of resource disparities, tangible and intangible.”); *see generally* sources cited *supra* note 45.

and live apart from Blacks, Asians, Jews, Mexicans, immigrants or anyone stigmatized as being undesirable.”<sup>49</sup>

Policymakers are responsible in myriad ways for creating and sustaining race and wealth-based housing segregation.<sup>50</sup> Exclusionary zoning policies are constitutional, unless there is adequate evidence of racial motivation.<sup>51</sup> They are defensible under the Fair Housing Act (which prohibits policies with a disparate racial impact) if they serve legitimate neutral justifications, such as preserving a neighborhood’s character or economic value.<sup>52</sup>

*b. Homelessness and exclusion from public space*

On a more fundamental level, housing policy embraces ostracism by creating circumstances that drive homelessness.<sup>53</sup> Millions of Americans are unhoused or at risk of losing their housing.<sup>54</sup> Unhoused people are ostracized because they are effectively shut out of most private and many public spaces with no permanent place to belong to; they are stripped of the sense of belonging that comes from having a place within a geographic community or neighborhood.<sup>55</sup> Moreover, people who lack housing

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49. Audrey McFarlane, *The Properties of Integration: Mixed Income Housing as Discrimination Management*, 66 UCLA L. Rev. 1140, 1163, 1167 (2019).

50. These policies included racially restrictive covenants, redlining, tacitly tolerating private violence against Black residents, excluding Black Americans from federally subsidized mortgage programs, federal government conditioning building projects on maintaining racial separation or exclusion of Black residents, and zoning ordinances which restricted land use to single-family homes, thereby shutting out lower income residents *Id.* at 1164–67. See also, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1998); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

51. *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (upholding a town’s denial of a permit to build multi-family housing despite its racial disparate impact); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (upholding an ordinance limiting multi-family and apartment housing and regulating lot sizes on rational basis grounds).

52. *Inclusive Communities*, 576 U.S. at 541–42; see also Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 393 (2013) (finding that “courts have had little difficulty disposing of all manner of disparate impact claims,” and that plaintiffs prevailed in less than 20% of appellate cases).

53. See generally NAT’L LOW INCOME HOUS. COAL., *OUT OF REACH: THE HIGH COST OF HOUSING* (2023), <https://nlihc.org/oor>.

54. *Id.* at A (observing that on average across the U.S., a person needs to earn about three times the federal minimum wage to be able to afford a one-bedroom apartment).

55. See Rankin, *supra* note 5; *Homelessness and Human Rights: SPECIAL RAPPORTEUR ON THE RIGHT TO ADEQUATE HOUSING*, U.N., <https://www.ohchr.org/en/special->

experience more stigma, dehumanization, and discrimination than any other social group.<sup>56</sup>

Various law and policy choices contribute to homelessness: For example, not requiring employers to pay people living wages,<sup>57</sup> exclusionary zoning,<sup>58</sup> the criminalization of substance use disorder,<sup>59</sup> the failure to fund mental and behavioral health treatment,<sup>60</sup> choosing to prioritize property interests of the wealthy over investing in affordable housing,<sup>61</sup> and the Supreme Court's holding that the Fourteenth Amendment does not protect a fundamental interest in housing.<sup>62</sup> While housing is a human right under various international agreements and resolutions, including the United Nations Universal Declaration of Human Rights,<sup>63</sup> and there have been proposals to this effect in the U.S. Congress, there is currently no law in the

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procedures/sr-housing/homelessness-and-human-rights (last visited April 7, 2024) (“Homelessness is a profound assault on dignity, social inclusion and the right to life.”).

56. Rankin, *supra* note 5, at 22–25 (discussing how homelessness and poverty are the most severely and persistently stigmatized identity traits, eliciting disgust and rejection at rates higher than any other group).

57. See NAT'L LOW INCOME HOUS. COAL., *supra* note 53, <https://nlihc.org/oor>.

58. Annie Lowrey, *The U.S. Needs More Housing Than Almost Anyone Can Imagine*, ATLANTIC (Nov. 21, 2022), <https://www.theatlantic.com/ideas/archive/2022/11/us-housing-gap-cost-affordability-big-cities/672184/>; Jerusalem Demsas, *The Obvious Answer to Homelessness*, ATLANTIC (Dec. 12, 2022), <https://www.theatlantic.com/magazine/archive/2023/01/homelessness-affordable-housing-crisis-democrats-causes/672224/>.

59. Jialu L. Streeter, *Homelessness in California: Causes and Policy Considerations*, STAN. INST. ECON. POL'Y RSCH. (May 2022), <https://siepr.stanford.edu/publications/policy-brief/homelessness-california-causes-and-policy-considerations>.

60. *Id.*

61. Dave Davies, *Private Opulence, Public Squalor: How the U.S. Helps the Rich and Hurts the Poor*, NPR (March 21, 2023, 12:45 PM) (interview with Matthew Desmond), <https://www.npr.org/sections/health-shots/2023/03/21/1164275807/poverty-by-america-matthew-desmond-inequality> (noting that we spend about \$190 billion per year on homeowner tax subsidies, but only \$50 billion on housing assistance, that we could raise an additional \$175 billion each year by collecting the taxes that the top 1% actually owe under existing tax law, and just this would go a significant way toward pulling people out of poverty/providing housing). For further discussion, see MATTHEW DESMOND, *POVERTY, BY AMERICA* (2022).

62. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). *But see id.* at 81–82 (Douglas J., dissenting) (suggesting that housing should be a fundamental interest that the state cannot deprive without some compelling justification, comparing it to the right to vote and the right to interstate travel).

63. In 2021, Representatives in Congress introduced “Housing is a Human Right Act,” which would be an important first step toward this, and several states and municipalities have also considered such legislation. Katherine Fallon, *Naming Housing as a Human Right is a First Step to Solving the Housing Crisis*, URB. INST. (Dec. 2021), <https://housingmatters.urban.org/articles/naming-housing-human-right-first-step-solving-housing-crisis>. Several other countries do. *Id.*



U.S. guaranteeing a right to housing.<sup>64</sup> Laws prohibiting discrimination do not affirmatively guarantee access to housing.<sup>65</sup>

Unhoused people are ostracized even further by laws excluding them from public space. Cities throughout the country have criminalized behaviors associated with being unhoused, such as camping in public spaces, sitting or lying down in public, and obstructing sidewalks.<sup>66</sup> Sarah Rankin describes these policies as an “increasingly popular and deleterious manifestation of the urge to exile.”<sup>67</sup> Courts have allowed cities to punish unhoused people for existing in public space.<sup>68</sup>

In sum, housing policy embraces ostracism through exclusionary zoning, failing to invest in affordable housing, and excluding unhoused people from public space.

## 2. Education

Education is crucial to being a fully participating member of society.<sup>69</sup> Yet many people experience ostracism in the domain of education. I will

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64. *Id.*

65. See, e.g., 42 U.S.C. § 3604 (prohibiting discrimination in the sale, rental, or marketing of housing because of race, color, religion, sex, familial status, or national origin, and disability). Some state laws prohibit discrimination based on source of income, such as housing vouchers. ALISON BELL, BARBARA SARD, & BECKY KOEPNICK, CTR. ON BUDGET & POL’Y PRIORITIES, PROHIBITING DISCRIMINATION AGAINST RENTERS USING HOUSING VOUCHERS IMPROVES RESULTS (2019), <https://www.cbpp.org/research/housing/prohibiting-discrimination-against-renters-using-housing-vouchers-improves-results>. But these non-discrimination laws do not require people to rent or sell to those who cannot afford reasonable market rents.

66. Rankin, *supra* note 5; Jeff Olivet, *Collaborate, Don’t Criminalize: How Communities Can Effectively and Humanely Address Homelessness*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Oct. 26, 2022), <https://www.usich.gov/news-events/news/collaborate-dont-criminalize-how-communities-can-effectively-and-humanely-address>.

67. Rankin, *supra* note 5, at 6.

68. One outlier here had been the Ninth Circuit, which held that it is cruel and unusual punishment in violation of the Eighth Amendment to punish unhoused people for being in public when there are no shelter beds available. *Martin v. City of Boise*, 902 F.3d 1031, 1048 n.8 (9th Cir. 2018). For a critique of jurisdictions’ responses to *Martin*, see Sara Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CAL. L. REV. 559, 580 (2021).. However, in *City of Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024), the Court rejected the rule from *Martin*, and instead held that ordinances prohibiting camping in public do not violate the Eighth Amendment, regardless of whether there are shelter beds available for a person to go to.

69. *Brown v. Bd. of Ed.*, 347 U.S. 483, 493 (1954) (“[E]ducation [is] . . . the very foundation of good citizenship. . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”); *Plyler v. Doe*, 457 U.S. 202, 223 (1982). Many states recognize a constitutional right to education, and scholars

discuss two categories of common educational policies that ostracize: First, racial and socioeconomic segregation *between* schools; and second, ostracism *within* schools. This includes policies like culturally hegemonic curriculum, tracking, normative codes of conduct and dress, and exclusionary discipline. These ostracizing policies all threaten students' sense of belonging in educational institutions, which is essential to engagement and success in those institutions.<sup>70</sup>

*a. Segregation between schools*

When *Brown v. Board of Education* outlawed segregated schooling in 1954, it recognized the stigmatic harm of segregation (an especially odious form of ostracism).<sup>71</sup> Yet, the courts have failed to fully remedy the harm that *Brown* identified.<sup>72</sup> School segregation has been increasing since the 1980s, and today approximately 40% of Black students attend a school that is “intensely segregated” (meaning 90–100% non-White students).<sup>73</sup> School zoning and assignment policies interact with residential segregation to create schools that are largely segregated by race and economic status, and materially unequal.<sup>74</sup>

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have argued that education is a federal constitutional right, as well. *See, e.g.,* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 *YALE L.J.* 330, 337–39 (2006).

70. A vast literature finds that “school belonging” is correlated with academic outcomes, as well as social and emotional wellbeing. *See, e.g.,* Kelly Allen, et al., *What Schools Need to Know About Fostering School Belonging: A Meta-Analysis*, 30 *EDUC. PSYCH. REV.* 1, 2–3 (2018); Brief for American Psychological Association et al., as Amici Curiae Supporting Respondents, *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023) (No. 20–1199), 2022 WL 3108813 at \*10–14 (summarizing research on the importance of belonging, and how diversity on campus relates to belonging).

71. 347 U.S. 483 (1954).

72. The Court has overturned lower courts' efforts integrate and equalize schools and limited local governments' efforts to do so. *See, e.g.,* *Milliken v. Bradley*, 418 U.S. 717 (1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Parents Involved in Cmty. Schs. v. Seattle*, 551 U.S. 701 (2007). I discuss this further in Part IV.A.

73. GARY ORFIELD & DANIELLE JARVIE, UCLA CIVIL RIGHTS PROJECT, *BLACK SEGREGATION MATTERS: SCHOOL RESEGREGATION AND BLACK EDUCATIONAL OPPORTUNITY* 29 (2020), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/black-segregation-matters-school-resegregation-and-black-educational-opportunity/BLACK-SEGREGATION-MATTERS-final-121820.pdf>; *See Students for Fair Admissions*, 600 U.S. at 334 (Sotomayor, J., dissenting) (“About half of all Latino and Black students attend a racially homogeneous school with at least 75% minority student enrollment. The share of intensely segregated minority schools (*i.e.*, schools that enroll 90% to 100% racial minorities) has sharply increased.”).

74. Where states fund schools based on local property taxes, schools in poorer districts typically raise only a fraction of what they need to fund schools adequately, whereas wealthier districts often raise surplus funding. LaToya Baldwin Clark, *Barbed Wire Fences: The Structural Violence of Education Law*, 89 *U. CHI. L. REV.* 499, 510–520, 510 & n.67 (2021);

Lower income students, disproportionately students of color, frequently attend schools with materially inadequate facilities and resources, fewer challenging and creative courses, less-experienced teachers and administrators, and outdated technology.<sup>75</sup> Schools in less-wealthy areas tend to subject students to more control and surveillance.<sup>76</sup> This conveys suspicion and distrust of these students; it questions their belonging in school.<sup>77</sup>

These differences are not only a matter of material inequity. They have an ostracizing social meaning. Students in markedly under-resourced, visibly segregated schools understand these policies as conveying they are not welcome or valued in the educational domain.<sup>78</sup> Erika Wilson describes these exclusionary educational policies as a form of “social closure,” a “process of subordination whereby one group monopolizes advantages by closing off opportunities to another group of outsiders[,] . . . which it defines as inferior and ineligible.”<sup>79</sup> LaToya Baldwin Clark aptly captures race- and class-based school district boundaries as “barbed wire fences,” designed to “keep children ‘in their place’ both physically and socially.”<sup>80</sup>

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Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2384, 2397–2404 (2021) (describing how these policies effectively achieve similar results to de jure school segregation); see also Daniel Kiel, *The Enduring Power of Milliken’s Fences*, 45 URB. L. 137, 144 (2013); Aaron Saiger, *The School District Boundary Problem*, 42 URB. L. 495, 499–501 (2010); John a. powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 755 (1996); David G. Martínez & Julian V. Heilig, *An Opportunity to Learn: Engaging in the Praxis of School Finance Policy and Civil Rights*, 40 MINN. J. L. & INEQ. 311, 315–16 (2022).

75. U.S. DEPT. OF EDUC., OFF. OF CIV. RTS., *Dear Colleague Letter: Resource Comparability* 3–5 (2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

76. See, e.g., Jason Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79 (2014) (finding that income and race are strong predictors of carceral-style surveillance, after controlling for other relevant factors, including rates of violence and crime).

77. *Id.* at 104–05 (explaining that “many scholars argue that strict security measures undermine trust and send a negative signal to students—that they are dangerous and prone to commit illegal, violent acts,” and quoting a teacher explaining how surveillance conveys that teachers are afraid of students).

78. CARLA SHEDD, *UNEQUAL CITY* (2015) (observing that Chicago youth recognized that their economic and educational opportunities are restricted by their place in the social hierarchy); Baldwin Clark, *Stealing Education*, *supra* note 8, at 617–18 (explaining how supporters of strict enforcement of “stealing education” laws “perceive a clear demarcation between White and middle-class [district residents] and Black and poor nonresidents,” and “[t]he end conclusion [conveyed by their message is]: ‘they’ should not be let into ‘our’ schools. Black children do not belong in [the White, middle-class school district].”).

79. Wilson, *supra* note 74, at 2390 (quoting RAYMOND MURPHY, *SOCIAL CLOSURE: THE THEORY OF MONOPOLIZATION AND EXCLUSION* 8 (1988)).

80. Baldwin Clark, *supra* note 74, at 514 (quoting *Milliken*, 418 U.S. at 804–05 (Marshall, J., dissenting) (“[School district boundaries] [w]ill surely be perceived as fences to separate the races when . . . [W]hite parents withdraw their children from the Detroit city schools and move to the suburbs in order to continue them in all-[W]hite schools.”));

Education scholars argue that “the segregation of funding from minoritized students, implicit or explicit, is as damaging to students and learning as was *de facto* segregation.”<sup>81</sup>

Segregated and unequal schools are a product of the Court’s interpretation of the Equal Protection clause, which implicates only race-motivated state action, and not “race-neutral” policies that effectively exclude students based on race or socioeconomic status. I elaborate on this in Part IV.A.

*b. Ostracism within schools*

Within schools, many administrative policies segregate, isolate, and neglect certain students, as well. I will discuss several examples here: culturally hegemonic curriculum, tracking, normative codes of conduct, and exclusionary discipline.

*Exclusionary curriculum:* Curriculum conveys important, official messages about who belongs and who is valued within the school and in society more broadly. When school administrators choose a culturally hegemonic curriculum—one that focuses exclusively on the dominant group’s perspective (typically White, Eurocentric, cis- and hetero-normative)—they ignore and implicitly silence the perspectives of those outside the dominant group.<sup>82</sup> Students’ whose cultural identities and perspectives are ignored or overlooked may experience ostracism, since the message of such curricular choices is that their views and perspectives are unimportant or insignificant, at least to the culturally dominant groups.<sup>83</sup> Consistent with

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*id.* at 521 (stating that these policies “manifest structural violence in poor Black children’s lives” by “marginalizing [them] and [their] communities, constraining their capabilities and agency, assaulting their dignity, and sustaining inequalities”).

81. Martínez & Heilig, *supra* note 74, at 316 (“Segregation of students from funding and resources in contemporary schooling mimics the segregation of students in the era of *Brown*.”).

82. Shelby Anderson, *Transgress, Disrupt, Intercept: Eradicating Hegemonic Curriculum*, 5 J. FOR SOC. STUD. & HISTORY EDUC. 1 (2021); Shelly Brown-Jeffy & Jewell E. Cooper, *Toward a Conceptual Framework of Culturally Relevant Pedagogy: An Overview of the Conceptual and Theoretical Literature*, 38 TCHR. EDUC. Q. 65 (2011); Michelle Jay, *Critical Race Theory, Multicultural Education, and the Hidden Curriculum of Hegemony*, 5 MULTICULTURAL PERSPS., 3 (2003); Cati V. de los Ríos et al., *Toward a Critical Pedagogy of Race: Ethnic Studies and Literacies of Power in High School Classrooms*, 7 RACE & SOC. PROBS. 84 (2015); Lupe S. Salinas, *Arizona’s Desire to Eliminate Ethnic Studies Programs: A Time to Take the Pill and to Engage Latino Students in Critical Education about Their History*, 14 HARV. LATINO L. REV. 301 (2011); see also Filiberto Barajas-López, *Mexican Immigrant Students’ Schooling Experiences and the Construction of Disengagement in Mathematics Learning Contexts*, 13 J. LATINOS & EDUC. 1, 16 (2014).

83. DeLeon Gray et al., *Black and Belonging at School: A Case for Interpersonal, Instructional, and Institutional Opportunity Structures*, 53 ED. PSYCH. 97, 100 (2018) (“A curriculum that

this, experience suggests that curriculum centered around students' perspectives, including critical consciousness, can support a sense of belonging.<sup>84</sup>

Our laws and policies are responsible for culturally hegemonic curriculum in several ways: Schools, by default, tend to use culturally hegemonic curriculum.<sup>85</sup> Moreover, when teachers or school officials have attempted to adopt culturally relevant or critical pedagogy, legislators have passed laws limiting their ability to do so. For example, the Mexican American Studies program in a Tucson public school had a significant positive impact on students' experiences and academic achievement.<sup>86</sup> Yet, in 2010, Arizona passed a law designed to eliminate the Mexican American Studies program, despite (or perhaps because of) its demonstrated value to Mexican American students.<sup>87</sup> More recently, numerous states have enacted laws limiting or prohibiting teaching critical lessons about our history of oppression, racism, and systems that sustain social inequality.<sup>88</sup> Florida prohibited classroom discussion about sexual orientation and gender identity in public schools.<sup>89</sup>

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does not acknowledge the cultural values of its learners signals that the perspectives, philosophies, and histories of Eurocentric racial-ethnic groups are more important than those of other groups.”)

84. *Id.*; see also sources cited *supra* note 82; Noah De Lissovoy & Anthony L. Brown, *Antiracist Solidarity in Critical Education: Contemporary Problems and Possibilities*, 45 *URB. REV.* 539 (2013); RIOS, *supra* note 9, at 162-64 (discussing the benefits of programs that engage and embrace the critical consciousness of criminalized youth). Of course, any effort to adopt culturally relevant curriculum is dependent on how teachers implement it. See, e.g., Ramon Vasquez, *(Re)inscribing White Cultural Hegemony: The Paradox of Culturally Relevant Pedagogy?*, 57 *EDUC. STUD.* 509 (2021).

85. See, e.g., Anderson, *supra* note 82; Jay, *supra* note 82.

86. The Mexican American Studies program in Tucson, Arizona significantly increased graduation and standardized test passage rates among students who had previously failed. See NOLAN CABRERA ET AL., AN EMPIRICAL ANALYSIS OF THE EFFECTS OF MEXICAN AMERICAN STUDIES PARTICIPATION ON STUDENT ACHIEVEMENT WITHIN TUCSON UNIFIED SCHOOL DISTRICT (June 20, 2012), [https://old.coe.arizona.edu/sites/default/files/MAS\\_report\\_2012\\_0.pdf](https://old.coe.arizona.edu/sites/default/files/MAS_report_2012_0.pdf). For a comprehensive discussion of the Mexican American Studies program and efforts to ban it, see generally NOLAN L. CABRERA AND ROBERT S. CHANG, *BANNED! THE FIGHT FOR MEXICAN AMERICAN STUDIES IN THE STREETS AND IN THE COURTS* (forthcoming) (on file with author).

87. *Arce v. Douglas*, 793 F.3d 968, 986 (9th Cir. 2015).

88. Sarah Schwartz, *Map: Where Critical Race Theory is Under Attack*, ED WEEK (updated Jun. 13, 2023), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06>; see also LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 *YALE L.J.* 2139 (2023) (arguing that the movement to limit teaching about critical race theory and the movement for parents' rights protects White dominance and reverses efforts to achieve racial justice).

89. Meredith Johnson, *The Dangerous Consequences of Florida's "Don't Say Gay" Bill on LGBTQ+ Youth*, 23 *GEO. J. GENDER & L.* (2020).

Laws restricting culturally relevant curriculum may be unconstitutional if a court finds they were motivated by racial bias or designed to suppress the views of a particular group.<sup>90</sup> But this only occurs after educators have taken initiative to pursue culturally inclusive curricula. There is no affirmative constitutional requirement for schools to adopt more culturally inclusive curricula, or to correct their default culturally hegemonic curricula.

*Tracking*: The practice of tracking students within school based on perceived ability and aptitude also ostracizes by labeling some students as “special needs,” or “regular” as opposed to “gifted” or “advanced,” and separating them physically and socially.<sup>91</sup> Once a student is categorized as having lower ability, this categorization may change how teachers interact with the student in a way that produces a self-fulfilling cycle of exclusion from educational opportunities.<sup>92</sup>

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90. Courts have applied different standards to determine when limitations on curriculum violate the First Amendment, given that school authorities have discretion to determine curriculum. Some have said that there is only a First Amendment issue if the curricular decision was “motivated by narrowly partisan or political considerations,” whereas others have held that “the state may not remove materials otherwise available in a local classroom unless its actions are reasonably related to legitimate pedagogical concerns.” *Arce*, 793 F.3d at 983–86. A trial court found that Arizona’s law banning the MAS program was motivated by racial animus, and served no legitimate pedagogical purpose, and therefore violated the Fourteenth and First Amendments. *Gonzalez v. Douglas*, 269 F. Supp. 3d 948 (D. Ariz. 2017).

91. Students of color are disproportionately assigned to “special needs” classes and classes geared toward students designate as having disabilities. *See, e.g.*, Beth Ferri & Connor David, *Tools of Exclusion: Race, Disability, and (Re)segregated Education*, 107 TCHRS. COLL. REC. 453, 454 (2005) (“Disability has become a more socially accepted, even normalized, category of marginalization for students of color.”); *see also* JAWANZA KUNJUFU, KEEPING BLACK BOYS OUT OF SPECIAL EDUCATION (2005). More generally, *see also* Derrick Bell, *School Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 487–88 (1976) (observing that even if schools are racially balanced, racial subordination will survive and flourish through other means, such as disciplinary actions and providing inadequate school resources); LaToya Baldwin Clark, *Whose Child Is This? Education, Property, and Belonging*, 123 COLUM. L. REV. 1201 (2023) (exploring how four different hypothetical students, all attending the same school, are not equally entitled to belonging in that environment due to rules and practices that qualify and condition some students’ status on compatibility/acceptability).

92. Seth Gershenson & Nicholas Papageorge, *The Power of Teacher Expectations: How Racial Bias Hinders Student Attainment*, 18 EDUC. NEXT 64, 65–66 (2018); *see also* JOHN A. POWELL, UCLA CIVIL RIGHTS PROJECT, AN “INTEGRATED” THEORY OF INTEGRATED EDUCATION at 12 (2002), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/an-integrated-theory-of-integrated-education/powell-integrated-theory-education-2002.pdf> (“[Tracking] continues to produce short- and long-term educational disparities by race and class. Indeed, students tend to internalize the negative surroundings and lower teacher expectations, which in turn reifies the racialized system itself.”); *id.* (“[R]esearch has shown that ability grouping has little effect on the scholastic achievement of either minority or non-minority children.”). *See also* Becky Francis et al.,

These policies violate discrimination law if schools assign students based on a protected trait, such as race or disability.<sup>93</sup> But tracking policies are commonplace, and courts have upheld them where there is a race-neutral justification for racial disparities in assignments, including socioeconomic status.<sup>94</sup> Though assignments may be ostensibly based on “neutral” criteria, such as aptitude or ability assessments, there is substantial evidence that they often reflect race- and class-based biases of teachers and administrators.<sup>95</sup>

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*The Impact of Tracking by Attainment on Pupil Self-Confidence Over Time*, 41 BRITISH J. SOC. IN EDUC. 626 (2020).

93. See, e.g., U.S. DEPT. OF EDUC., OFF. OF CIV. RTS, STUDENT ASSIGNMENT IN ELEMENTARY AND SECONDARY SCHOOL AND TITLE VI (1998), <https://www2.ed.gov/about/offices/list/ocr/docs/tviassgn.html>; RESOLUTION AGREEMENT BETWEEN U.S. DEPT. OF JUST. CIV. RTS. DIV., U.S. DEPT. OF EDUC., OFF. OF CIV. RTS, AND THE GALLUP-MCKINLEY COUNTY SCHOOL DISTRICT (2017), <https://www.justice.gov/crt/case-document/gallup-mckinley-countyschool-district-resolution-agreement> (agreeing to resolve complaints that the school district discriminated against Native American students by establishing policies and procedures limiting their access to “gifted” and advanced placement and honors courses).

94. See, e.g., *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 534–536 (7th Cir. 1997) (striking down ability grouping because the school manipulated the criteria to achieve greater segregation, but stating that tracking can be constitutional as long as the criteria used were validated as objective and race neutral); *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 762, 763–64 (3d Cir. 1996) (holding that students were not discriminated against with regard to classroom assignment despite fact that Black students with identical test scores to White students were more likely to be placed in lower level classes); *Georgia State Conference of Branches of NAACP v. State of Ga.*, 775 F.2d 1403, 1412–13 (11th Cir. 1985); *McNeal v. Tate County School Dist.*, 508 F.2d 1017, 1020 (5th Cir. 1975); *Montgomery v. Starkville Mun. Separate School Dist.*, 665 F. Supp. 487 (N.D. Miss. 1987), *aff’d*, 854 F.2d 127 (5th Cir. 1988) (upholding tracking where socioeconomic factors provided acceptable explanation for the disproportionate number of White children in the district’s more advanced achievement groups).

95. Studies show that Black, Latino/a students, and lower income students are disproportionately assigned to lower-track classes. See, e.g., Lena V. Groeger et al., *Miseducation: Is there Racial Inequality at Your School?*, PROPUBLICA (Oct. 16, 2018), <https://projects.propublica.org/miseducation/>; Susan Dynarski, *Why Talented Black and Latino Students Can Go Undiscovered*, N.Y. TIMES (Apr. 8, 2016), <https://www.nytimes.com/2016/04/10/upshot/whytalented-black-and-hispanic-students-can-goundiscovered.html>; David Card & Laura Giuliano, *Can Universal Screening Increase the Representation of Low Income and Minority Students in Gifted Education?* (Nat’l Bureau of Econ. Research, Working Paper No. 21519, 2015) (Low-SES students in a large, urban school district were less likely to be identified as gifted.); Joseph Neff et al., *5 Ways to Help Bright Low-Income Students to Excel*, CHARLOTTE OBSERVER, <http://www.charlotteobserver.com/news/local/education/article150893387.html> (“An investigation . . . reveals that thousands of low-income children who score at the highest level in end-of-grade tests aren’t getting picked for advanced classes – and that they are excluded at a far higher rate than their more affluent classmates who earn the same scores.”); Barajas-López, *supra* note 82, at 24–25 (discussing how qualified Mexican students were excluded from gifted classes because of misperceptions about their abilities).

*Normative Codes of Conduct:* Schools ostracize through codes of conduct and dress that enforce the dominant group's norms, and censor or sanction students who deviate in some way. For example, schools may ostracize LGBTQ+ students, and encourage students to do the same, by adopting cis/heteronormative codes of conduct that punish LGBTQ+ students for expressing their identities. Many LGBTQ+ students report having been prohibited from using chosen names and/or pronouns, wearing clothes deemed "inappropriate" for their gender, engaging in displays of affection, discussing or writing about their identity, and using the bathroom that matches their gender.<sup>96</sup> These policies are stigmatizing and ostracizing because they convey that LGBTQ+ individuals are deviant, abnormal, and unwelcome.<sup>97</sup> Studies find that LGBTQ+ students who experience such treatment are significantly likelier to drop out of school.<sup>98</sup> Schools also ostracize students through codes of grooming and dress that impose norms associated with Whiteness, prohibiting natural hairstyles or clothing styles associated with minoritized racial and cultural groups.<sup>99</sup>

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Tracking has been tied to de jure segregation. *See, e.g.,* *Hoots v. Pennsylvania*, 118 F. Supp. 2d 577, 592 (W.D. Pa. 2000) ("Minority students tended to be concentrated in standard courses, while being virtually absent from advanced level courses throughout the curriculum . . . We found this stratification to be 'the most critical disparity in the system because it is a direct measure of the educational deprivation suffered by minority students as a direct result of the formerly segregated system.'"); *see also* *United States v. Texas*, 2005 WL 1868844 (E.D. Tex. 2005) (ability grouping system in which black students overwhelmingly end up in the lower ability group indicates that a school district is suffering from the lingering effects of segregation); Daniel J. Losen, *Silent Segregation in Our Nation's Schools*, 34 HARV. CR-CL L. REV. 517 (1999).

96. Nadra Nittle, *LGBTQ+ Students Face Disproportionately High Rates of Discipline in Schools*, THEM (June 30, 2022), <https://www.them.us/story/lgbtq-students-discipline-schools-supportive-leadership>.

97. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 600 (4th Cir. 2020); *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 832 (11th Cir. 2022) (Pryor, J., dissenting) ("Each time teenager Andrew Adams needed to use the bathroom at his school, . . . he was forced to endure a stigmatizing and humiliating walk of shame—past the boys' bathrooms and into a single-stall "gender neutral" bathroom.").

98. GLSEN, EDUCATIONAL EXCLUSION: DROP OUT, PUSH OUT AND THE SCHOOL-TO-PRISON PIPELINE AMONG LGBTQ YOUTH 17–19 (2013), [https://www.glsen.org/sites/default/files/2019-11/Educational\\_Exclusion\\_2013.pdf](https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf) (finding that likelihood of dropping out significantly higher for LGBTQ+ youth who experienced discrimination and quoting several students who avoided going to school because they felt excluded, unsafe, uncomfortable there).

99. *See, e.g.,* *Second Black Teen Told by School to Cut His Dreadlocks, According to his Mom*, NBC (Jan. 2020), <https://www.nbcnews.com/news/us-news/second-teen-suspended-over-dreadlocks-texas-school-n1122261>; Memorandum Opinion and Order Granting 44 Motion for a Preliminary Injunction, *Arnold v. Barbers Hill Indep. Sch. Dist.*, 479 F.Supp. 3d 511 (S.D. Texas, Aug. 17, 2020). *See also* Evan R. Katz, *Dorris "Wendy" Green Helped Fight for New York City's Ban on Natural Hair Discrimination*, TEEN VOGUE (Feb. 28, 2019),



Normative codes of conduct, grooming, and dress may violate the Equal Protection clause if courts find they are motivated by sex or race, and they are not justified by sufficiently important or compelling interests to withstand heightened scrutiny.<sup>100</sup> But courts have upheld these policies after finding that they satisfy scrutiny, without considering the harm of ostracism.<sup>101</sup>

*Exclusionary discipline:* Finally, schools ostracize students through exclusionary discipline. Prevailing approaches to school discipline ostracize—they physically shut a student out of the classroom or school, and explicitly label them as deviant. Furthermore, most disciplinary incidents go on a student’s permanent record, which will shape how authorities perceive and interact with them in the future.

Millions of students are suspended each year, beginning as early as preschool.<sup>102</sup> Members of stigmatized social groups are likelier to be disciplined: Black, Latino/a, and Native American students,<sup>103</sup> students with

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<https://www.teenvogue.com/story/doris-wendy-greene-natural-hair-anti-discrimination-ban>.

100. For example, the Fourth Circuit found that a policy requiring students to use the bathroom matching their birth-assigned sex violated the Fourteenth Amendment, observing that “[s]egregation not only makes for physical inconveniences, but it does something spiritually to an individual,” and requiring transgender students to use a separate restroom apart from the others “very publicly brand[s] all transgender students with a scarlet ‘T’” and conveyed that they were “not welcome.” *Grimm*, 972 F.3d at 617–18 (quotations omitted). See also Memorandum Opinion at 21, *Arnold*, 479 F.Supp. 3d 511 (“[T]here is credible statistical evidence in the record showing that African-American students were more likely than white students to be punished, and to be punished harshly, on account of the hair-length policy.”).

101. The Eleventh Circuit rejected a challenge to a policy requiring transgender students to use the bathroom matching their birth-assigned sex, reasoning that the school’s interest in “sex-specific privacy” justifies such a policy, without discussing the harms of ostracism, stigma, and exclusion. *Adams*, 57 F.4th at 803; *id.* at 832, 840 (Pryor, J., dissenting) (discussing humiliation and stigma, and criticizing majority for not acknowledging this harm).

102. U.S. DEPT. OF EDUC., OFF. OF CIV. RTS., DISCIPLINE PRACTICES IN PRESCHOOL (July 2021), <https://ocrdata.ed.gov/assets/downloads/crdc-DOE-Discipline-Practices-in-Preschool-part1.pdf>. In the 2017–18 school year, there were 2,800 preschool suspensions, and the rate of out-of-school suspension for Black preschoolers was approximately 2.5 the rate for white preschoolers. *Id.* Among k-12 students, there were over 2.5 million in-school suspensions, over 2.5 million out-of-school suspensions, and over 100,000 expulsions. U.S. DEPT. OF EDUC., OFF. OF CIV. RTS., SUSPENSIONS AND EXPULSIONS IN PUBLIC SCHOOLS (Aug. 2022), [https://ocrdata.ed.gov/assets/downloads/Exclusionary%20Discipline\\_v18-FINAL.pdf](https://ocrdata.ed.gov/assets/downloads/Exclusionary%20Discipline_v18-FINAL.pdf). Approximately 100,000 students were subject to physical restraint or seclusion, the overwhelming majority were students with disabilities. U.S. DEPT. OF EDUC., OFF. OF CIV. RTS., THE USE OF RESTRAINT AND SECLUSION ON STUDENTS WITH DISABILITIES (Oct. 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf>.

103. See *supra* note 102; Prudence L. Carter et al., *You Can’t Fix What You Don’t Look At: Acknowledging Race in Addressing Racial Discipline Disparities*, 52 URBAN EDUC. 207 (2017); DANIEL J. LOSEN & JONATHAN GILLESPIE, OPPORTUNITIES SUSPENDED: THE

disabilities,<sup>104</sup> LGBTQ+ students,<sup>105</sup> and lower SES students<sup>106</sup> are disciplined at disproportionate rates. Research consistently suggests that these disparities are largely attributable to social and cultural biases.<sup>107</sup> These are the same students who are also disproportionately ostracized through other policies, such as tracking, exclusionary curriculum, and normative codes of conduct and grooming.<sup>108</sup>

Ostracizing punishments may lead to self-escalating cycles of deviant labeling and more severe exclusion. A large literature on the school to prison pipeline documents how these policies push students out of school and into the criminal system.<sup>109</sup> Studies suggest that being shut out of the classroom labels a student as deviant, sets them up for further suspicion, exclusion, and rejection, and this may drive them toward more “deviant” peers and behavior.<sup>110</sup> Students who have been suspended are less likely to

DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 12 (2012), <https://civil-rightsproject.ucla.edu/resources/projects/centerfor-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losengillespie-opportunity-suspended-2012.pdf>.

104. U.S. DEPT. OF EDUC., OFF. OF CIV. RTS, SUSPENSIONS AND EXPULSIONS OF STUDENTS WITH DISABILITIES IN PUBLIC SCHOOLS (Aug. 2022), [https://ocrdata.ed.gov/as-sets/downloads/School\\_Disability\\_v16-FINAL.pdf](https://ocrdata.ed.gov/as-sets/downloads/School_Disability_v16-FINAL.pdf) (students with disabilities make up 15.9% of enrollments but 28.1% of out-of-school suspensions); USE OF RESTRAINT AND SECLUSION ON STUDENTS WITH DISABILITIES, *supra* note 102 (approximately 80% of seclusions involve students with disabilities).

105. Nittle, *supra* note 96; GLSEN, *supra* note 98.

106. *Id.*

107. White students are most likely to be punished for objective events, such as smoking or vandalism, Black students are more often punished for violations requiring subjective judgment—including subjective judgment of student speech—like “disrespect” or “loitering.” Russell J. Skiba, Robert S. Michael, Abra Carroll Nardo, & Reece L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 *URB. REV.* 317, 332, 334 (2002); Stephen Hoffman, *Zero Benefit: Estimating the Effect of Zero Tolerance Discipline*, 28 *EDUC. POL’Y* 69, 81 (2014). Students experiencing trauma and poverty may behave in ways (like being tardy, tired, frustrated, distracted, or short-tempered) that teachers *misconstrue* as reflecting disengagement, defiance, or disrespect. MONIQUE MORRIS, *PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS* (2018).

108. *E.g.*, Memorandum Opinion at 21, *Arnold*, 479 F.Supp. 3d 511 (“[T]here is credible statistical evidence in the record showing that African-American students were more likely than [W]hite students to be punished, and to be punished harshly, on account of the hair-length policy.”).

109. *See, e.g.*, NATHERN OKILWA ET AL., *THE SCHOOL TO PRISON PIPELINE* (VOL. 4, 2017); MONIQUE MORRIS, *PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS* (2018); RIOS, *supra* note 9; *THE PUSHOUTS* (Katie Galloway & Dawn Valadez 2018), <https://www.thepushouts.com>.

110. *See* RIOS, *supra* note 9, at 45 (describing how “the boys in this study felt outcast, shamed, and unaccepted, sometimes leading them to a sense of hopelessness and ‘deviant self-concept,’” and they were “caught in a spiral of punitive responses” whereby “being labeled or marked for minor transgressions would place the boys at risk for being granted additional, more serious labels”); *id.* at 50-51 (describing how a particularly tall 12 year old

graduate on time, more likely to drop out of school, and less likely to attend college.<sup>111</sup> Students who are suspended or expelled are significantly more likely to be arrested and convicted of a crime, compared to those who are not.<sup>112</sup> Hemez et al. describe suspensions as a “negative turning point,” since children without early behavioral issues are more likely to be arrested after being suspended, compared to children who did show early behavioral issues.<sup>113</sup> Though the construct of ostracism (and related social psychology literature) has not been a focus in school discipline policy

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boy reported that teachers and police continually treated him with suspicion because of his height, race, and apparent maturity (he was stopped 21 times by police over the three year study) and he eventually began selling drugs because he came to believe that he had “no other choice” and “nothing to lose”); MARSHA WEISSMAN, *PRELUDE TO PRISON* at 14 (2017) (quoting a student who was suspended to an alternative school: they “label you as a bad child,” and “I felt nervous, ashamed, different” and “embarrassed”); *id.* at 184 (discussing how children outside social norms are stigmatized as troublemakers and dangerous, and how children recognized this stigma); Neal Palmer & Emily Greytak, *LGBTQ Student Victimization and Its Relationship to School Discipline and Justice System Involvement*, 42 *CRIM. JUST. REV.* 163 (2017) (surveying over 8,000 LGBTQ youth, finding that those who are victimized at school experience greater school discipline, including disciplinary referrals to school administration, school detention, suspension, expulsion, and greater involvement in the criminal system).

“Labeling theory” posits that people who are labeled as deviant experience stigma and exclusion, and this drives them to either withdraw from the environment or seek a sense of belonging by joining others who are likewise labeled. Hence, deviant labeling “enhances involvement with, support from, and commitment to deviant peers. It is within these deviant groups that labeled individuals can enjoy social solidarity, identify with a set of values, and defend personal integrity.” Stephanie Wiley, Lee Ann Slocum, Finn-Aage Ebbesen, *The Unintended Consequences of Being Stopped or Arrested*, 51 *CRIMINOLOGY* 927, 931 (2013).

111. See RUSSELL W. RUMBERGER & DANIEL J. LOSEN, *THE HIGH COST OF HARSH DISCIPLINE AND ITS DISPARATE IMPACT* 14–18 (2016), <https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/the-high-cost-of-harsh-discipline-and-its-disparate-impact/> UCLA\_HighCost\_6-2\_948.pdf; Talisha Lee et al., *High Suspension Schools and Dropout Rates for Black and White Students*, 34 *EDUC. & TREATMENT CHILD.* 167, 182, 186 (2011); Andrew Bacher-Hicks, Stephen B. Billings, & David J. Deming, *The School to Prison Pipeline: Long-Run Impacts of School Suspensions on Adult Crime* 4 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26257, 2019); MINER MARCHBANKS III & JAMILIA BLAKE, *ASSESSING THE ROLE OF SCHOOL DISCIPLINE IN DISPROPORTIONATE MINORITY CONTACT WITH THE JUVENILE JUSTICE SYSTEM* 6 (2018), <https://www.ojp.gov/pdffiles1/ojdp/grants/252059.pdf>.

112. Kathryn C. Monahan et al., *From the School Yard to the Squad Car: School Discipline, Truancy, and Arrest*, 43 *J. YOUTH ADOLESCENCE* 1110, 1118–20 (2014).

113. Paul Hemez et al., *Exploring the School-to-Prison Pipeline: How School Suspensions Influence Incarceration During Young Adulthood*, 18 *YOUTH VIOLENCE & JUV. JUST.* 235, 248 (2020); Thomas Mowen & John Brent, *School Discipline as a Turning Point: The Cumulative Effect of Suspension on Arrest*, 53 *J. RES. CRIME & DELINQUENCY* 628, 645–48 (2016).

guidance,<sup>114</sup> it seems to capture a significant problem with prevailing approaches.

In Equal Protection challenges, plaintiffs must show that disparities in discipline are motivated by the student's race, gender, or another protected trait.<sup>115</sup> Absent a finding of discriminatory motives, courts tend to defer to school officials' disciplinary decisions.<sup>116</sup>

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114. U.S. DEPT. OF EDUC., OFF. OF CIV. RTS. GUIDING PRINCIPLES FOR CREATING SAFE, INCLUSIVE, SUPPORTIVE, AND FAIR SCHOOL CLIMATES (Mar. 2023), <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf> (discussing the importance of belonging and the harm of exclusionary discipline, but not mentioning ostracism and related research).

115. See, e.g., *Mohamed v. Irving Indep. Sch. Dist.*, 252 F. Supp. 3d 602 (N.D. Tex. 2017) (rejecting the claim that principal's conduct was motivated by racial or religious animus, or that principal treated student differently than other similarly situated students based on religion or race, as required for an equal protection claim); *Reese v. Jefferson Sch. Dist.* No. 14J, 208 F.3d 736, 740 (9th Cir.2000) (stating, in a claim of disparate punishment on the basis of gender that "[t]o succeed on a § 1983 equal protection claim, the plaintiffs must prove that the defendants acted in a discriminatory manner and that the discrimination was intentional."); *Corales v. Bennett*, 567 F.3d 554, 569–70 (9th Cir.2009) (affirming summary judgment against students because of the absence of evidence in the record suggesting that race or ethnicity motivated punishment).

While the Department of Education has interpreted Title VI of the Civil Rights Act to prohibit racial disparities in discipline in schools receiving federal funds, this is limited to the Department of Education's enforcement actions, as there is no private right of action to enforce disparate-impact regulations promulgated under Title VI. *Alexander v. Sandoval*, 532 U.S. 275 (2001). The Department of Education has done important work to address disparities in discipline in schools. See, e.g., *Resource on Confronting Discrimination in Student Discipline*, U.S. DEPT. OF EDUC., OFF. OF CIV. RTS (May 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/tvi-student-discipline-resource-202305.pdf> (describing recent cases); OF EDUC., OFF. OF CIV. *Dear Colleague Letter: Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973*, U.S. DEPT. RTS. (Jul. 19, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/504-discipline-guidance.pdf>.

116. While the Court has recognized a procedural due process right to a hearing before a significant suspension in *Goss v. Lopez*, 419 U.S. 565 (1975), there are few substantive limits on when schools may impose exclusionary discipline, so long as they comply with procedural rules. Claims of unconstitutionally excessive discipline in school are typically analyzed under the substantive due process framework, which requires an abuse of power so arbitrary that it "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952); *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("[O]nly the most egregious official conduct is arbitrary in the constitutional sense."). Courts rarely, if ever, find that exclusionary discipline violates this standard. See, e.g., *Schomburg v. Johnson*, 2009 WL 799466, at \*4 (D. Mass. 2009) ("As unfortunate as it may be, a short suspension from school, however unjust, does not 'shock the conscience' in any objective sense."); *Sabol v. Walter Payton Preparatory High Sch.*, 804 F. Supp. 2d 747, 752–53 (N.D. Ill. 2011) ("[C]ourts are extremely hesitant to second-guess the disciplinary decisions made by those entrusted with educating the nation's children.").

Courts have rejected constitutional challenges to the arrest of an eleven-year old student with disabilities for kicking a teacher;<sup>117</sup> locking a kindergartner with significant disabilities in a restraining desk that prevented them from moving;<sup>118</sup> detaining a six-year-old with disabilities in a windowless closet for over an hour for infractions like not following directions, giving angry looks, mimicking his peers, and continuously talking;<sup>119</sup> and placing a nine-year-old in a seclusion room for an entire day because he allegedly committed minor physical transgressions against other students.<sup>120</sup> These opinions do not consider the adverse psychological effects of ostracism, which I discuss below, or how it may undermine the school's goals by alienating students, driving withdrawal, disengagement, and further identification with "deviant" peer groups.

In sum, institutionalized ostracism is common in our school system. This includes segregation between schools, and various policies that ostracize students within school. Some of these may be covered by discrimination law. But many are not, either because there is no proof of illicit motivation or there is a 'valid' justification for disparities. I will discuss this further in Part IV.A.

### 3. Employment

Work is a vital determinant of a person's belonging and status in society.<sup>121</sup> Despite laws prohibiting employment discrimination,

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117. *J.H. ex rel. J.P. v. Bernalillo Cnty.*, 806 F.3d 1255, 1257 (10th Cir. 2015).

118. *Ebonie S. v. Pueblo Sch. Dist.* 60, 695 F.3d 1051, 1055 (10th Cir. 2012).

119. *Couture v. Bd. of Educ.*, 535 F.3d 1243, 1253 (10th Cir. 2008).

120. *I.U. v. Pioneer Valley Chinese Immersion Charter Sch.*, 2016 WL 8679257, at \*9 (D. Mass. 2016), *report and recommendation adopted*, 2016 WL 4792182 (D. Mass. 2016) (allowing IIED claim to survive summary judgment motion but dismissing substantive due process claim). State tort law may allow claims for intentional infliction of emotional distress, but courts have rejected claims based on ordinary disciplinary actions. *See e.g.*, *Wilson v. Longview Sch. Dist.*, 775 F. App'x 277, 281 (9th Cir. 2019) ("[R]easonable minds could differ on whether [a teacher's] alleged conduct—placing general education students in the isolation booth—was outrageous [b]ut the district court correctly dismissed the claim because Plaintiffs produced no evidence that [the teacher] acted with the requisite intent to cause, or reckless disregard for the possibility of causing, emotional distress."); *T.L. v. Sherwood Charter School*, 68 F. Supp. 3d 1295 (D. Or. 2014) ("[D]isciplinary actions, even if negligent or reckless, should not be seen as inflicting extreme emotional distress unless accompanied by particularly appalling facts."); *L.H. v. Pittston Area Sch. Dist.*, 130 F. Supp. 3d 918, 927 (M.D. Pa. 2015), *aff'd*, 666 F. App'x 213 (3d Cir. 2016) ("The standard for IIED is generally not satisfied by allegations of 'insults, indignities, threats,' or other similar conduct.").

121. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 16 (1999); ALFORD YOUNG, JR., *THE MINDS OF MARGINALIZED BLACK MEN: MAKING SENSE OF MOBILITY, OPPORTUNITY, AND FUTURE LIFE CHANCES* 135-36 (2003) (discussing how marginalized Black men were preoccupied with finding decent, stable careers, as a means

employment-related policies ostracize people in various ways. Here I discuss two examples: chronic unemployment and ostracism within one's workplace.

*a. Exclusion from dignified work*

Being shut out of stable, reliable work is a form of ostracism. As William Forbath explains, “[w]ork has much to do with defining the person. Not only cash but respect, honor, and recognition—the currencies of status.”<sup>122</sup> Those who are unemployed and “working poor,” who work unreliable, degrading, and demeaning jobs and make barely enough to survive, experience persistent “degradation and stigma.”<sup>123</sup> The harm is one of status and belonging, not just money.<sup>124</sup>

Despite laws prohibiting discrimination, many people are unemployed, particularly people who occupy stigmatized identities, including racial minorities,<sup>125</sup> LGBTQ+ people,<sup>126</sup> people with a criminal record,<sup>127</sup> people who have traits associated with poverty (e.g., bad credit history; no college education; missing or broken teeth; lacking housing),<sup>128</sup> people

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to “establishing materially and emotionally enriched family lives”). See also WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996).

122. Forbath, *supra* note 121, at 16.

123. *Id.* at 16–17.

124. See, e.g., YOUNG JR., *supra* note 121, at 166 (describing how marginalized men in his study, specifically sought “careers” rather than hourly jobs, because “a career was what adult men did (or wanted to be seen doing), as a statement of independent functioning and well-being”).

125. According to data from 2021, the unemployment rate was 8.6% for Black people, 8.2% for American Indians and Alaska Natives, and 6.8% for Hispanic or Latino people compared to about 4.7% for White people. Though they make up approximately 13% of the working age population, Black Americans were approximately 22% of those considered “discouraged workers” and “marginally attached” workers—not currently looking for work because they believe that no jobs are available for them. *Lab. Force Characteristics by Race and Ethnicity*, BUREAU OF LAB. STAT. REPORTS (Jan. 2023), <https://www.bls.gov/opub/reports/race-and-ethnicity/2021/home.htm>.

126. BRAD SEARS ET AL., *LGBT PEOPLE’S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT*, WILLIAMS INST., (Sept. 2021), <https://williamsinstitute.law.ucla.edu/publications/lgbt-workplace-discrimination/>.

127. See generally DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007) (finding that criminal record reduces the likelihood of a callback by about 50% for all applicants, but this effect is approximately double for Black applicants).

128. Evans Peterman, *supra* note 16, at 1321–27.

with disabilities,<sup>129</sup> people who are older,<sup>130</sup> people who have higher body weight.<sup>131</sup> Some joblessness is due to discrimination, and some is due to structural factors in the economy.<sup>132</sup>

People who face persistent exclusion from work may give up on trying to find a job—why continue to put yourself in a situation where you will experience the pain of rejection?<sup>133</sup> This withdrawal may be self-protective, insofar as it avoids the pain of subsequent rejection, but it also means that the person sacrifices the potential to attain stable, meaningful work, and may be relegated to underground economies, which can lead to criminalization and more severe ostracism (as I discuss in Part II.D).

For example, in a multi-year study of Black and Latino boys growing up in heavily policed neighborhoods in Oakland, California, Victor Rios describes how the boys—who also experienced ostracism in school and through policing and criminalization—worked hard to find jobs and prepare for interviews. But they became discouraged after repeated rejection.<sup>134</sup> Turning to the illegal economy meant risking incarceration. But it was worth it to “avoid the stigma, shame, and feeling of failure that the job-application process produced . . . .”<sup>135</sup>

Our laws do little to protect people from the ostracism of unemployment. Discrimination law is a limited tool when it comes to addressing discriminatory employment practices, because biased motives are notoriously difficult to prove, and employers can defend policies with a disparate impact by advancing a neutral, non-discriminatory business justification.<sup>136</sup>

129. *Id.* at 1321–27.

129. *Persons With a Disability: Labor Force Characteristics—2022*, BUREAU OF LAB. STAT. (Feb. 2023), <https://www.bls.gov/news.release/pdf/disabl.pdf>.

130. Edith Baker, *Is There Age Discrimination in Hiring?* BLS MONTHLY LAB. REV. (Feb. 2017), <https://www.bls.gov/opub/mlr/2017/beyond-bls/is-there-age-discrimination-in-hiring.htm>

131. Kylie Lobell, *How Some Employers are Addressing Weight Discrimination*, SOC’Y FOR HUM. RES. MGMT. (May 2022), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/how-employers-are-tackling-weight-discrimination.aspx>; Adam Vanhove & Randall Gordon, *Weight and Work-Related Outcomes*, 44 J. APPLIED SOC. PSYCH. 12 (2014).

132. See generally WILSON, *supra* note 121.

133. YOUNG, JR., *supra* note 121, at 54 (“The [men in the study] generally did not believe that potential employment existed. Thus, the common logic was ‘There’s no point in seeking that which is not there in the first place.’”)

134. RIOS, *supra* note 9, at 97–102.

135. *Id.* at 102.

136. For a comprehensive discussion of how courts have narrowed and limited the scope of employment discrimination law, see SANDRA SPERINO & SUJA THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* (2017). Many have observed that discrimination law is not apt to addressing less explicit (oftentimes unconscious and structural) forms of discrimination that pervade today. Samuel R. Bagenstos, *The*

Moreover, discrimination law does not require job creation, mandate employers hire people who lack job-related qualifications, or address structural changes in the economy that produce real mismatches between job-seekers and jobs.<sup>137</sup>

Progressives and civil rights leaders have long argued that guaranteeing full and equal citizenship requires guaranteeing decent employment to anyone who wants it.<sup>138</sup> Franklin Delano Roosevelt proposed a “social and economic bill of rights” that included the right to “a useful and remunerative job” and to earn enough to make a living.<sup>139</sup> In 1967, Martin Luther King, Philip Randolph, and Bayard Rustin proposed a “Freedom Budget for All Americans,” which would guarantee full employment to anyone willing to work.<sup>140</sup> But this “social citizenship” was not adopted, and policymakers instead chose to focus on piecemeal interventions and “quick fixes” that control, criminalize and further marginalize jobless people.<sup>141</sup>

#### *b. Ostracism within the workplace*

Our laws also tolerate ostracism within workplaces. “Workplace ostracism” occurs when coworkers neglect, ignore, or exclude an employee in circumstances where it would be appropriate to include them.<sup>142</sup> This sort of omission is more subtle, passive, and sometimes ambiguous or inadvertent than the type of overtly hostile action typically

*Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1282–85 (2012) (noting low success rate for discrimination claims); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 738–40 (2006) (noting that the success rate for employment discrimination plaintiffs is about 35%, compared to a 50% success rate for civil litigants; and the success rate for disparate-impact plaintiffs in district court is approximately 25%).

137. Forbath, *supra* note 121, at 86 (“It is ‘essential’ but insufficient ‘to outlaw discrimination in employment when there are not enough [jobs] to go around.’”) (quoting Bayard Rustin, Address to Democratic National Convention, Atlantic City, N.J. (Aug. 1964)).

138. These arguments were part of what William Forbath calls the “social citizenship” tradition: “that the guarantee of equal citizenship entail[s] decent work, a measure of economic autonomy and democracy, and social provision for ‘all Americans.’” *Id.* at 4.

139. William Darity Jr. et al., *An Economic Bill of Rights for the 21<sup>st</sup> Century*, AM. PROSPECT (Mar. 5, 2018), <https://prospect.org/economy/economic-bill-rights-21st-century/>.

140. A FREEDOM BUDGET FOR ALL AMERICANS, PHILIP RANDOLPH INST. (Jan. 1967), <https://www.prrac.org/pdf/FreedomBudget.pdf>.

141. Forbath, *supra* note 121, at 88–89 (discussing how this vision was ultimately rejected). For an in-depth discussion of how this social welfare agenda degenerated into a crime control agenda, see ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME* (2017).

142. Sandra Robinson et al., *Invisible at Work: An Integrated Model of Workplace Ostracism*, 39 J. MGMT. 203, 207 (2013).



considered discrimination or harassment.<sup>143</sup> According to research, workplace ostracism is common,<sup>144</sup> and compared to harassment, may have an even stronger negative effect on employees' wellbeing, sense of belonging, and retention.<sup>145</sup>

Studies find that ostracized individuals may withdraw, disengage, practice "defensive silence," engage in acts of deviance or defiance or leave the job.<sup>146</sup> While these coping behaviors may be self-protective, they are likely counterproductive with respect to the employee's advancement in the workplace. Workplace ostracism may disparately impact members of stigmatized groups, who are likelier to be ostracized repeatedly.<sup>147</sup>

Discrimination law does little to address even overt forms of verbal hostility and harassment, and it does not address ostracism.<sup>148</sup> Courts have concluded that being ignored or ostracized does not count as an "adverse employment action," and therefore cannot be grounds for a discrimination claim.<sup>149</sup>

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143. *Id.* at 208.

144. Cong Liu, *Workplace Ostracism*, HOFSTRA HORIZONS (May 21, 2020), <https://news.hofstra.edu/2020/05/21/workplace-ostracism-peoples-psychological-attributions-coping-strategies/>; Robinson et al., *supra* note 142; Nupur Sharma & Rajib Dhar, *From Curse to Cure of Workplace Ostracism: A Systematic Review and Future Research Agenda*, 32 HUM. RES. MGMT. REV. (2022).

145. Jane O'Reilly et al., *Is Negative Attention Better Than No Attention? The Comparative Effects of Ostracism and Harassment at Work*, 26 ORG. SCI. 774 (2014).

146. *Id.* See also Robinson et al., *supra* note 142, at 222; Sadia Jahanzeb & Tanseem Fatima, *How Workplace Ostracism Influences Interpersonal Deviance*, 33 J. BUS. & PSYCH. 779 (2018); M. Eickholt & K. Goodboy, *Investment Model Predictions of Workplace Ostracism on K-12 Teachers' Commitment to Their Schools and The Profession of Teaching*, 32 J. WORKPLACE BEHAV. HEALTH 139 (2017); Lilia Cortina et al., *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact*, 39 J. MGMT. 1579 (2013).

147. See *infra* Part III.C. See also Liu, *Workplace Ostracism*, *supra* note 144; Cortina et al., *supra* note 146.

148. Though a person can make a discrimination claim based on a "hostile environment," they must show they experienced harassment or hostility "sufficiently severe or pervasive to alter the conditions of [their] employment and create an abusive working environment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (stating that Title VII is not a "a general civility code," and that simple teasing, offhand comments, and isolated incidents (unless extremely serious) are insufficient). Courts have allowed degrading, exclusionary language and behavior, including racial epithets, sexual remarks and gestures, xenophobic language, and the like, upon finding that they were not sufficiently severe or pervasive to alter the conditions of employment. SPERINO & THOMAS, *supra* note 136, at 30-59 (discussing cases where courts trivialized harassing remarks and conduct) and 59-87 (discussing other doctrines, including "stray remarks," same-actor inference, honest belief, and reluctance to intervene in personnel matters, that courts rely on when rejecting discrimination claims).

149. *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 969 (8th Cir. 1999) ("[O]stracism and disrespect by supervisors d[oes] not rise to the level of an adverse employment action"); *Miller v. Aluminum Co. of Am.*, 679 F.Supp. 495, 505 (W.D. Pa. 1988) (snubbing by

## 4. Criminal Law Enforcement

Institutionalized ostracism in housing, education, and employment may drive people toward behavior that society labels as “deviant” or “anti-social.” Thus, experiences of social disadvantage and economic exclusion may channel people into even more severe ostracism: The ostracizing punishments of the criminal system. In the most extreme instance, studies find that ostracism is a common experience among people who commit acts of mass violence.<sup>150</sup> People who have committed such acts have been described by the media as being “invisible,”<sup>151</sup> “slow,” “dull,” “not part of the in crowd,” “displaced,”<sup>152</sup> “lone wolves,” “losers,” and “on the edge of society with difficulty holding down jobs and problems as well in their sexual relationships.”<sup>153</sup>

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supervisors does not amount to unlawful retaliation), *aff'd*, 856 F.2d 184 (3d Cir.1988); *Ross v. Glickman*, 125 F.3d 859 (9th Cir. 1997) (shunning by office staff not actionable hostile work environment under Title VII); *Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir. 1997) (shunning of plaintiff by co-workers at direction of supervisor does not, as a matter of law, rise to the level of an adverse employment action for Title VII purposes). One reason for this (which I return to in Part IV.A) is that prohibiting employees from ostracizing coworkers would implicate their First Amendment rights. *E.g.*, *Brooks v. City of San Mateo*, 229 F.3d 917, 929 (9th Cir. 2000) (“Because an employer cannot force employees to socialize with one another, ostracism suffered at the hands of coworkers cannot constitute an adverse employment action.”); *DiRuzza v. Cnty. of Tehama*, 206 F.3d 1304, 1308 (9th Cir. 2000) (“[H]olding an employer liable because its employees refuse to associate with each other might well be unconstitutional.”). I discuss the balancing of First Amendment interests and the harm of ostracism more in Part IV.

150. Mark Leary, Robin M. Kowalski, Laura Smith, & Stephen Phillips, *Teasing, Rejection, and Violence: Case Studies of the School Shootings*, 29 *AGGRESSIVE BEHAV.* 202 (2003) (finding that out of 15 people who committed school shootings after 1995, most of them had experienced significant ostracism of some form). *See also* Williams, *Ostracism, supra* note 11, at 427 (discussing other examples not included in this study, and discussing the relationship between violence and ostracism). A more recent study of hundreds of shootings in primary schools, on college campuses, and in other public spaces found evidence that most of the perpetrators had experienced some form of either acute or chronic rejection/ostracism. Robin Kowalski et al., *K-12, College/University, and Mass Shootings: Similarities and Differences*, 161 *J. SOC. PSYCH.* 753 (2021). It is quite conceivable that a larger proportion of perpetrators had experienced rejection/ostracism but there was no documentation. *Id.* at 764, 767, 773.

151. Staci Hupp & John Tuohy, 7 *Valparaiso High Students Hurt in Stabbing Rampage*, *INDIANAPOLIS STAR*, Nov. 25, 2004, at 1.

152. Rachel Kaadzi Ghansah, *A Most American Terrorist: The Making of Dylann Roof*, *GQ* (Aug. 21, 2017), <https://www.gq.com/story/dylann-roof-making-of-an-american-terrorist>.

153. Christopher Dickey, *Inside the Head of Dylann Roof, Jihadist for White Hate*, *DAILY BEAST* (May 22, 2017, 1:00 AM EDT), <https://www.thedailybeast.com/inside-the-head-of-dylann-roof-a-terrorist-paradigm> [<https://web.archive.org/web/20240217150615/https://www.thedailybeast.com/inside-the-head-of-dylann-roof-a-terrorist-paradigm>] (last updated Aug. 24, 2017, 7:09AM EDT).

Various accounts also suggest that people may be driven to join extremist groups, including Right Wing and Jihadist groups, by experiences of social marginalization and their search for belonging.<sup>154</sup> Similar themes emerge in Rios's study of Black and Latino boys growing up in heavily policed neighborhoods in Oakland, California. Rios

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154. See, e.g., Sean Illing, *This Filmmaker Spent Months Interviewing Neo-Nazis and Jihadists. Here's What She Learned*, VOX, <https://www.vox.com/world/2019/1/14/18151799/extremism-white-supremacy-jihadism-deeyah-khan> (last updated Mar. 17, 2019, 11:40 AM EDT) (observing that people who join these movements typically “feel shunned . . . in their personal lives or in wider society,” and joining these groups they them “a sense of meaning in life, a belief that they matter, that their voice matters”); *What Drives Far Right and Radical Islamist Movements?* U. OXFORD (May 27, 2014), <https://www.ox.ac.uk/news/2014-05-27-what-drives-far-right-and-radical-islamist-movements>; FRANCOIS BURGAT & PIERRE-ANDRÉ ARQUÉ, ISLAMOPHOBIA, DISCRIMINATION, AND EXCLUSION AS DRIVERS OF RADICALISATION TOWARDS VIOLENT EXTREMISM, IEMED. (2014), <https://www.iemed.org/publication/islamophobia-discrimination-and-exclusion-as-drivers-of-radicalisation-towards-violent-extremism/>.

One anecdotal example is the sentencing memorandum of an eighteen-year-old who was convicted of terrorism-related charges after attempting to travel to Syria to join ISIL. His memorandum describes how he struggled to find a sense of belonging after he moved from Somalia to a predominately White school. He coped with exclusion by befriending “a group of social outcasts” who “participated in petty crimes, occasionally stole cars, smoked marijuana, and skipped school.” Defendant’s Position with Regard to Sentencing and Motion for a Downward Variance at 8, *U.S. v. Yusuf*, Criminal No. 15-046 (MJD) (D. Minn. Nov. 3, 2016). He felt “there was no hope for him in the United States: he came from a poor family and there were no members of his family who could be defined as ‘successful’ within the understanding of the American mainstream,” *id.* at 16–17, and connecting with a group that supported ISIL gave him a sense of being part of “something important,” *id.* at 17; “[h]e had hungered for inclusion and [joining a group that supported ISIL] helped fill the void. *Id.* at 11.

White people may be motivated to join right wing groups by a sense of alienation and displacement stemming from economic, demographic, and cultural changes. See Edward Lempinen, *Loss, Fear, and Rage: Are White Men Rebelling Against Democracy*, BERKELEY NEWS (Nov. 14, 2022), <https://news.berkeley.edu/2022/11/14/loss-fear-and-rage-are-white-men-rebelling-against-democracy/>; Spencer Phipps Boyer, *It’s Time for the United States and Europe to Face the Politics of Cultural Displacement*, BROOKINGS (July 31, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/07/31/its-time-for-the-united-states-and-europe-to-face-the-politics-of-cultural-displacement/>. For more on the sense of alienation and displacement among working class Whites, particularly those in more rural areas, see ARLIE RUSSELL HOCHSCHILD, *STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT* (2016), and The Ezra Klein Show, *Barbara Kingsolver Thinks Liberals Have it All Wrong on Appalachia*, N.Y. TIMES (July 21, 2023), <https://www.nytimes.com/2023/07/21/opinion/ezra-klein-podcast-barbara-kingsolver.html> (discussing a pervasive sense of stigma, shame, and cultural invisibility among “rural” people, particularly in Appalachia, and how this ties in with their history of economic exploitation, physically demanding, degrading work, and the opioid epidemic). It is important to note that the marginalization working-class Whites experience (largely a product of economic forces and culture), is qualitatively different from the state-imposed segregation, subordination, and control that racialized minorities, especially Black Americans, have experienced throughout history.

documented how the boys were “injected with microdoses of social death,” ultimately leading to “social incapacitation.”<sup>155</sup> Authorities labeled these youth as “delinquent” or “at risk,” oftentimes because of their physical appearance or social background, treated them with suspicion, and punished them for minor transgressions.<sup>156</sup> Many of the boys felt like their teachers feared them and regarded them with suspicion.<sup>157</sup>

Rios explains how the boys in his study, who felt excluded from “a network of positive credentials, education, and employment opportunities,” adopted “resistance identities”—identities that operate by “excluding the excluder.”<sup>158</sup> Sometimes, in response to disrespect and exclusion, the boys committed “crimes of resistance”—trivial transgressions (like stealing a \$.25 bag of chips) to protest “a system that seemed to be stacked against them.”<sup>159</sup> While seemingly futile or irrational, “[t]hese transgressions served as a resource for feeling empowered and for gaining redress for the humiliation, stigma, and punishment they encountered even when they were being ‘good.’”<sup>160</sup>

These behaviors are often misinterpreted as reflecting an individual’s “deviant,” “antisocial,” or “violent” character or culture.<sup>161</sup> But the research on ostracism, which I discuss below, suggests that these behaviors may be normal, universal human responses to experiencing chronic ostracism.<sup>162</sup>

155. RIOS, *supra* note 9, at 160 (observing that this “prevented them from gaining acceptance, affirmation, achievement in school, landing a job, or . . . learning a reintegrative lesson for minor transgressions”). Monica Bell uses the term “legal estrangement” to describe “detachment and eventual alienation from the law’s enforcers” that “reflects the intuition among many people in poor communities of color that the law operates to exclude them from society.” Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2054 (2017). Bell attributes this perception to mistreatment by law enforcement and other government authorities, structural exclusion, and vicarious experiences of marginalization. *Id.* at 2067–68. See also Monica Bell, Stephanie Garlock, Alexander Nabavi-Nouri, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473 (2020).

156. RIOS, *supra* note 9, at 46–50.

157. *Id.* at 50 (observing that twenty-two of the boys reported feeling this).

158. *Id.* at 102.

159. For example, one teenage boy stole a \$.25 bag of chips after a store clerk asked him to leave the store, citing a policy of allowing only two teenagers in the store at one time. He had the money to pay and had been waiting in line to pay, but stealing the chips was a means of “redeem[ing] himself from being shamed and feeling disrespected.” Victor Rios, *Stealing a Bag of Potato Chips and Other Crimes of Resistance*, 11 CONTEXTS 49, 50–52 (2012).

160. *Id.* at 53.

161. RIOS, *supra* note 9, at 105 (“The youth in this study demonstrated a yearning for being accepted by mainstream society and used the resources available to them in an attempt to do so. However, their actions were misinterpreted as acts of deviance, and at times their phenotypes were seen as indicating deviance. This in turn led the system to further criminalize them.”).

162. *Id.* See also *infra* Parts III.B and III.C.

*a. Ostracizing punishment*

Standard approaches to criminal law enforcement use ostracism to incapacitate and punish people suspected or convicted of wrongdoing. This ostracism begins with street policing—stops, frisks, citations, and arrests—and escalates with criminal conviction and incarceration.

Police stops are a formative experience for many people, especially members of socially stigmatized groups: Approximately one third of Americans experience an arrest by the age of 23—nearly 50% of Black males and 40% of White males.<sup>163</sup> People with disabilities are at significantly higher risk of arrest (approximately 42% by age 28), regardless of race, and Black people with disabilities have a disproportionately high risk of being arrested (55% by age 28).<sup>164</sup> Volumes of scholarship documents how members of socially stigmatized, historically marginalized groups are disproportionately policed and punished.<sup>165</sup>

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163. Robert Brame, Michael G. Turner, Raymond Paternoster, & Shawn D. Bushway, *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 *PEDIATRICS* 21, 21 (2012); Robert Brame, Shawn D. Bushway, Ray Paternoster, & Michael G. Turner, *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 *CRIME & DELINQ.* 471, 471 (2014).

164. Erin McCauley, *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender*, 107 *AM. J. PUB. HEALTH* 1977, 1977 (2017) (finding that people with disabilities are at significantly higher risk of arrest, and Black people with disabilities have a disproportionately high risk (55% probability by age 28)). For more on the criminalization of disability, see, e.g., Jamelia Morgan, *Disability, Policing and Punishment: An Intersectional Approach*, 75 *OKLA. L. REV.* 169 (2022); LIAT BEN-MOSHE, *DECARCERATING DISABILITY* (2020).

165. See, e.g., Dorothy Roberts, *Abolition Constitutionalism*, 133 *HARV. L. REV.* 1, 4 (2018) (“[C]riminal procedure and punishment in the United States still function to maintain forms of racial subordination that originated in the institution of slavery—despite the dominant constitutional narrative that those forms of subordination were abolished. Key aspects of carceral law enforcement—police, prisons, and the death penalty—can be traced back to slavery and the white supremacist regime that replaced slavery after white terror nullified Reconstruction.”); Darren Lenard Hutchinson, *“With All the Majesty of the Law”*: *Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 *CAL. L. REV.* 297 (2022); Bell, *supra*, note 42; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 49–58 (2010) (presenting a compelling account of how the war on drugs disproportionately targeted Black communities in ways that are difficult to rationalize with any legitimate neutral objective of the criminal law); ALEX VITALE, *THE END OF POLICING* (2017); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006); *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* (David Weiman & Mary Pattillo eds., 2002); ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018); GUSTAFSON, *supra* note 41; BEN-MOSHE, *supra* note 164; Darren Lenard Hutchinson, *“With All the Majesty of the Law”*: *Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 *CAL. L. REV.* 297 (2022); Elizabeth Hinton, LaShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the*

Criminal law enforcement is violent in many respects. Police kill and injure people daily.<sup>166</sup> By focusing on ostracism, I do not mean to trivialize the physical violence of policing and incarceration. But ostracism is a distinct and significant harm inflicted by policing and criminal punishment. Even if police use minimal physical force and cause no physical injury, being stopped, frisked, or arrested inflicts the harm of ostracism. Being stopped and questioned impugns a person's credibility and belonging.<sup>167</sup> It is stigmatizing; it labels the person as a suspect, a deviant.<sup>168</sup> For example, one man described the experience when police first stopped him as an eleven-year-old while he was playing in a water-balloon fight: “[T]hey [] like criminalized us, you know? [B]ecause afterwards, even though we were kids, . . . the entire communities thought that we were up to something bad. So, [] it really changed the perspective of how [] my neighbors looked at me. And how they reacted towards me.”<sup>169</sup>

When an arrest publicly labels a person as deviant, it socially distinguishes them, and sets them up for further ostracism by other members of the community. Studies have found that youth who are arrested or stopped by police are likelier to report a sense of social exclusion, a lower commitment to education, identify as “deviant,” and associate with “deviant” peers.<sup>170</sup> People who scored higher on these “labeling mechanisms” were also more likely to report engaging in deviant behavior, compared to people who had not been arrested.<sup>171</sup> The labeling effects of an arrest may be particularly harmful to Black youth and members of other stigmatized racial

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*Criminal Justice System*, VERA INST. (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> (showing that Black people constitute 15% of people who used drugs, but they constitute 31% and 38% of people sentenced to state and federal prison, respectively, for drug offenses).

166. For more on the violence of policing, see generally Ndjuoh MehChu, *Policing as Assault*, 111 CAL. L. REV. 865 (2023); DEVON CARBADO, *UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT* (2022); Jordan DeVlyder et al., *Police Violence and Public Health*, 18 ANN. REV. CLINICAL PSYCH. 527, 531 (2022).

167. See, e.g., Benjamin Justice & Tracey Meares, *How the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 159, 167 (2014) (encounters with the criminal system “bombard[] [people] with messages that they . . . are a class of problem people to be excluded, monitored, and surveilled, treated harshly and punished arbitrarily”).

168. Vesla Weaver & Amanda Geller, *De-Policing America's Youth: Disrupting Criminal Justice Policy Feedbacks That Distort Power and Derail Prospects*, 685 ANNALS AM. ACAD. POL. & SOC. SCI. 190, 203 (2019) (“Police stops are neither momentary or neutral encounters with street-level bureaucrats . . . they are moments of humiliation, state force, and racial learning.”).

169. *Id.* at 203.

170. Wiley, Slocum, & Esbensen, *supra* note 110, at 949.

171. *Id.* (finding arrests associated with a seventy-five percent increase in delinquency through labeling mechanisms).

groups, because an arrest record coupled with racial stereotypes appears to make police extra-suspicious of them during future encounters.<sup>172</sup>

A stop or arrest is an ostracizing experience in and of itself, but incarceration is an even more severe and totalizing form of ostracism. Prison is “social death.”<sup>173</sup> Prison physically separates someone from mainstream society and their social connections. And even after a person reenters society, they face lasting, perpetual exclusion and stigma due to their criminal record.<sup>174</sup>

Encounters with criminal law enforcement may lead people to withdraw from politics and civic institutions. Amy Lerman and Vesla Weaver found that people who were stopped and frisked (even if not arrested or convicted) were significantly less likely to vote, and the demobilizing effect is larger with arrest and incarceration.<sup>175</sup> They observe that experiences with the criminal system socialize people to view themselves as “custodial

172. Anne McGlynn-Wright, Robert D. Crutchfield, Martie L. Skinner, & Kevin P. Haggerty, *The Usual, Racialized Suspects: The Consequences of Police Contacts With Black and White Youth on Adult Arrest*, 69 SOC. PROBS. 299 (2022) (finding that Black youth arrested by eighth grade were eleven times likelier to be arrested again by age twenty, controlling for illegal behavior and other relevant variables, but no similar labeling effect for White youth, and attributing this to a stereotype-based “secondary sanctioning” process).

173. JOSHUA M. PRICE, PRISON AND SOCIAL DEATH 5 (2015) (“To be sentenced to prison is to be sentenced to social death. Social death is a permanent condition. While many people integrate themselves back into the society after imprisonment, they often testify that they permanently bear a social mark, a stigma.”); RIOS, *supra* note 9, at 159 (discussing “social incapacitation” and “microdoses of social death” caused by the policing and criminalization of youth). These works draw from Orlando Patterson’s use of the term “social death” to describe slavery, which he defined as “the permanent, violent domination of natively alienated and generally dishonored persons.” ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 13 (1982).

174. MILLER, *supra* note 10, at 159 (“[O]nce you are labeled criminal in this country, your life will never be the same. The record whispers of the potential for danger in the ears of all who will listen, and it changes the nature of one’s relationships with almost everyone one encounters . . .”) (footnote omitted); Anthony C. Thomson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 256 (2004). The experience of stigma is apparent in some personal accounts. Douglas Evans, Emily Pelletier, & Jason Szkola, et al., *Education in Prison and the Self-Stigma: Empowerment Continuum*, 64 CRIME & DELINQ. 255, 265 (2018) (“I came out when I was still young and I was stigmatized in a certain way on how people looked at me . . . As far in my community as where I live, I just don’t interact with anybody and I’m always on guard.”); *id.* (“[W]hen I first got out, I feared that everyone was looking at me. You’re always going to live with that fear . . .”); *id.* at 265–66 (“I think about [my criminal record] pretty much on a daily basis . . . I am kind of paranoid in a sense that someone is going to recognize me and see me as the ex-convict.”).

175. AMY LERMAN & VESLA WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 221–23 (2014). *See also* Danieli Evans, *Carceral Socialization as Voter Suppression*, 28 MICH. J. RACE & L. 39 (2023) (discussing the implications of this effect for citizenship and voting rights).

citizens,” “constituted not as participatory members of the democratic polity, but . . . outside the bounds of political consideration.”<sup>176</sup>

Courts impose ostracizing punishments routinely, without recognizing the harm ostracism causes, or its potential to perpetuate cycles of deviant labeling and exclusion.<sup>177</sup> I will return to this point in Part IV.C.

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The foregoing described institutionalized ostracism in housing, education, employment, and criminal law enforcement. It described how these ostracizing policies can create and sustain cycles of social exclusion. In the next Part, I draw from social science research on ostracism to explain why institutionalized ostracism is so harmful, and why people may respond in ways that tend to beget further social exclusion.

### III. THE NEED TO BELONG AND THE HARM OF OSTRACISM

#### A. *Ostracism Threatens Basic Needs*

A central premise in social psychology, and related fields of social and cultural behavior, is that human behavior is oriented around fulfilling the fundamental need to belong.<sup>178</sup> In recent decades, social psychologists have focused on belonging as the “core social motive,” a need “that underlies and helps to explain a great deal of human behavior.”<sup>179</sup> Belonging is a “need,” as distinct from a mere want, because it is essential to wellbeing, and deprivation causes dysfunctional outcomes.<sup>180</sup> People deprived of belonging display a range of adverse effects “including stress, depression, poor psychological adjustment, a lowered ability to self-regulate, and compromised psychological health.”<sup>181</sup> The need to belong underlies other widely

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176. LERMAN & WEAVER, *supra* note 175, at 111.

177. See, e.g., U.S. v. Gementera, 379 F.3d 596, 599 (9th Cir. 2004) (acknowledging that most criminal punishments ostracize and stigmatize, but presuming they are nonetheless effective for achieving their goals). I discuss this point further in Part IV.C.

178. SUSAN T. FISKE, SOCIAL BEINGS: CORE MOTIVES IN SOCIAL PSYCHOLOGY (4TH ED. 2018); Baumeister & Leary, *supra* note 18. A large body of research in “procedural justice” theory likewise suggests that people’s motives stem from relationships, their sense of social standing, respect, and trust, as opposed to potential individual material interests. See, e.g., TOM TYLER, WHY PEOPLE OBEY THE LAW (2006); Tom Tyler & Steven Blader, *The Group Engagement Model: Procedural Justice, Social Identity, and Cooperative Behavior*, 7 PERSONALITY & SOC. PSYCH. REV. 349 (2003).

179. Mark Leary & Cody Cox, *Belongingness Motivation: A Mainspring of Social Action* in HANDBOOK OF MOTIVATION SCIENCE 27, 28 (James Shah & Wendi Gardner eds., 2008).

180. *Id.* at 29.

181. *Id.* at 28–31 (discussing how the drive to belong manifests in several well-documented behavioral patterns, including loyalty to the social groups’ beliefs and values even when they are contrary to one’s own perceptual judgements, values, or material interests).



recognized social motives, including the needs for self-esteem, trust, control, understanding, and meaningful existence.<sup>182</sup>

The need to belong is innate and has an evolutionary and neurobiological basis. From the earliest human civilizations, people lived in groups whose members relied on one another for survival. Being outcast could be life-threatening.<sup>183</sup> Because of this, people are evolutionarily programmed to seek acceptance and to respond to rejection as a threat.<sup>184</sup>

In light of the focus on belonging, there has been a recent proliferation of research investigating what happens when peoples' sense of belonging is threatened, i.e., when a person is ostracized.<sup>185</sup> As noted previously, ostracism is defined as excluding, rejecting, or ignoring an individual or a group.<sup>186</sup> In lab experiments, ostracism has been operationalized through several common paradigms: One is the "ball-tossing" paradigm, which I discussed in Part II.A.<sup>187</sup> Another is the "life-alone paradigm," where participants fill out a fake personality quiz, and those in the ostracism condition are told that their quiz responses predict they will end up alone later in life.<sup>188</sup> A third is the "get acquainted" paradigm, where participants do a meet-and-greet with potential collaborators on a group task, and those in the ostracism condition are told that no one wanted to work with them.<sup>189</sup>

Nearly universally, these ostracism manipulations cause significant pain and distress. fMRI studies show that ostracism activates the same region of the brain that is activated when a person experiences physical pain.<sup>190</sup> This is because the pain system is a warning mechanism, designed to alert the brain and body to danger, and social exclusion is recognized as a threat just like physical injury.<sup>191</sup> Accordingly, people who experience rejection report feeling pain comparable to chronic back pain and childbirth.<sup>192</sup> When asked to recall a physically painful event or a socially painful

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182. FISKE, SOCIAL BEINGS, *supra* note 178, at 13 (all of these motives serve the overriding drive to belong, as they are oriented toward "making people fit better into groups, thus increasing their chances for survival"); Laura Stevens & Susan Fiske, *Motivation and Cognition in Social Life: A Social Survival Perspective*, 13 SOC. COGNITION 189 (1995).

183. Stevens & Fiske, *supra* note 182, at 190.

184. *Id.* at 191.

185. Williams, *supra* note 11, at 427 ("[I]t is somewhat perplexing that these powerful and universal processes have only recently attracted attention in social psychology").

186. *Id.* at 429 (noting that research has found no meaningful distinction between rejection, exclusion, and being ignored).

187. *Id.* at 430.

188. *Id.*

189. *Id.* at 431.

190. Eisenberger & Liberman, *supra* note 14, at 109.

191. *Id.* at 213.

192. Williams, *supra* note 11, at 43.

event, people reported considerably higher levels of pain when recalling socially painful events, especially those coded as including ostracism.<sup>193</sup> Opioids alleviate both physical and social pain, which further suggests that both physical trauma and social exclusion trigger the same neurocognitive processing system.<sup>194</sup>

Over 200 publications report that experimentally-induced ostracism threatens the fundamental need to belong, and related needs of self-esteem, control, and meaningful existence.<sup>195</sup> Many studies also find that ostracism increases feelings of sadness, anger, and distress.<sup>196</sup> Ostracism elicits this reaction even when the subject knows that the ostracism is unintentional, that the excluders are simply following a script, and when the excluders are non-human characters in a computer game.<sup>197</sup>

In the short term, ostracism appears to cause pain and threaten basic needs for most people. But, in the longer term, people may cope with ostracism in different ways, depending on the circumstances and their own social background. I elaborate on these coping strategies and the factors that appear to influence them in Parts II.B and II.C.

### B. Coping Methods

In addition to causing immediate social and emotional pain, ostracism may have longer-term impacts on a person's behavior. People may cope with ostracism in ways that are self-defeating or maladaptive; these coping mechanisms may hurt a person's wellbeing, undermine their prospects of succeeding within an institution, and ultimately lead to more ostracism. How a person copes may depend on their social background—specifically their own prior experiences with social exclusion and rejection.

Reviewing ostracism research, Kipling Williams identifies four types of coping behaviors: “tend and befriend,” “fight,” “flight,” and “freeze.”<sup>198</sup> “Tend and befriend” involves making extra effort to gain acceptance.<sup>199</sup> Numerous studies find that ostracized people are likelier to agree with, mimic, obey, and positively rate other people, even if doing so goes against

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193. *Id.*

194. *Id.*. See also Paolo Riva, Eric D. Wesselmann, James H Wirth, Adrienne R. Carter-Sowell, & Kipling D. Williams, *When Pain Does Not Heal: The Common Antecedents and Consequences of Chronic Social and Physical Pain*, 36 BASIC & APPLIED SOC. PSYCH. 329 (2014).

195. Williams, *supra* note 11, at 434; Paolo Riva, Lorenzo Montali, James H. Wirth, Simona Curioni, & Kipling D. Williams, *Chronic Social Exclusion and Evidence for the Resignation Stage*, 34 J. SOC. & PERS. RELATIONSHIPS 541, 543 (2017).

196. Williams, *supra* note 11, at 434.

197. *Id.* at 434–35.

198. *Id.* at 436–39.

199. *Id.* at 439.

their own knowledge, values, or perceptions.<sup>200</sup> While this is in one sense an adaptive response, as it may gain acceptance and fortify the need to belong, it can also be harmful or self-defeating: “In many instances, trying to be more socially acceptable can lead individuals down the path of gullibility and social susceptibility, making them easy targets for social manipulation.”<sup>201</sup>

“Fight” is another common way of coping with ostracism. Many studies demonstrate a causal link between ostracism, aggression, derogating the excluder, and other behavior regarded as “deviant” or “antisocial.”<sup>202</sup> For example, a series of experiments found that participants who experienced ostracism, when later asked to prepare a meal for somebody else, poured significantly more hot sauce on the other person’s food (knowing they hate hot sauce).<sup>203</sup> Studies find that ostracism makes people likelier to endorse radical and extremist views, more willing to “fight and die” for their group’s beliefs, and more willing to join a group that engages in illegal activity.<sup>204</sup> Williams hypothesizes that people who have been chronically ignored or overlooked may commit an act of violence as a means of getting noticed, even if in a negative way.<sup>205</sup>

People may also cope with ostracism with “flight,” avoiding or withdrawing from the excluding group or situation where they experience ostracism.<sup>206</sup> Just like someone who touches a hot stove will avoid touching it again, a person who experiences ostracism in a particular situation may avoid that situation in the future. While flight may avoid the pain of further ostracism, it may be self-defeating, since the person who withdraws from an institution will lose out on the social connections, resources, and opportunities the institution offers.<sup>207</sup>

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200. *Id.* at 439–40.

201. *Id.* at 439.

202. *Id.* at 441. See also Mark R. Leary, Jean M. Twenge, & Erin Quinlivan, *Interpersonal Rejection as a Determinant of Anger and Aggression*, 10 PERSONALITY SOC. PSYCH. REV. 111 (2006); Dianne Tice, Jean M. Twenge, & Brandon J. Schmeichel, *Threatened Selves: The Effects of Social Exclusion on Prosocial and Antisocial Behavior*, in THE SOCIAL SELF: COGNITIVE, INTERPERSONAL, AND INTERGROUP PERSPECTIVES 175 (Joseph P. Forgas & Kipling D. Williams eds., 2002); Jean M. Twenge, Roy Baumeitser, Dianne M. Tice, & Tanja S. Stucke, *If You Can't Join Them, Beat Them: Effects of Social Exclusion on Aggressive Behavior*, 81 J. PERS. SOC. PSYCH. 1058 (2001).

203. Williams, *supra* note 11, at 441.

204. Michela Pfundmaier, Natasha R. Wood, Andrew Hales, & Eric D. Wesselmann, *How Social Exclusion Makes Radicalism Flourish: A Review of Empirical Evidence*, J. SOC. ISSUES 1 (2022); Leary, Kowalski, Smith, & Phillips, *supra* note 150 (finding that most people who committed school shootings within the study period had experienced significant ostracism of some form).

205. Williams, *supra* note 11, at 427.

206. *Id.* at 438, 442.

207. See *id.* at 438.

Some research also indicates that ostracism may elicit a “freeze” response, a “concussed or affectively numb” state, a sense of lethargy, meaninglessness, and flat emotions.<sup>208</sup> This state is associated with reduced empathy and cognitive functioning, and dysregulation.<sup>209</sup> This may be particularly likely if the ostracism seems interminable or unavoidable. For example, people ostracized through the “life alone” paradigm<sup>210</sup> performed worse on an “IQ” test in both speed and accuracy; and people rejected from a collaborative group ate more junk food, but enjoyed the food less, compared to those who were accepted.<sup>211</sup> Researchers hypothesize that people ostracized in these situations lose motivation to regulate their behavior, since behavioral regulation is largely calibrated toward fitting in with the group. If there is no hope of fitting in, why bother self-regulating?<sup>212</sup>

### C. Interaction Between Social Background and Responses to Ostracism

How people interpret ostracism—and thus, how they cope with it—may be influenced by their social history and background. People who are higher in a trait called “rejection sensitivity,” which means that they “tend to chronically expect rejection, to see it when it may not be happening, and to respond to it hostilely,” tend to have stronger and more adverse reactions to ostracism.<sup>213</sup> People who have histories of trauma (including discrimination, neglect, abuse, rejection by caregivers, bullying, or teasing) tend to be higher in rejection sensitivity.<sup>214</sup> Thus, people from disadvantaged social backgrounds—those characterized by abuse, neglect, and/or discrimination—may be likelier to respond to ostracism in adverse ways.

For this reason, institutionalized ostracism may be especially harmful to those who occupy stigmatized social identities. This is because these individuals are likelier to have more prior experiences of

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208. *Id.* at 438.

209. See Roy Baumeister, C. Nathan DeWall, Natalie J. Ciarocco, & Jean M. Twenge, *Social Exclusion Impairs Self-Regulation*, 88 J. PERSONALITY & SOC. PSYCH. 589 (2005).

210. See Williams, *supra* note 11, at 188.

211. Baumeister, DeWall, Ciarocco, & Twenge, *supra* note 209, at 601.

212. Roy Baumeister, Lauren E. Brewer, Dianne M. Tice, & Jean M. Twenge, *Thwarting the Need to Belong: Understanding the Interpersonal and Inner Effects of Social Exclusion*, SOC. & PERSONALITY PSYCH. COMPASS 506, 515 (2007).

213. Riva, Wesselmann, Carter-Sowell, & Williams, *supra* note 194, at 333. See also Ashley Araiza, Antonio L. Freitas, & Daniel M. Klein, *Social Experience and Temperamental Predictors of Rejection Sensitivity: A Prospective Study*, 11 SOC. PSYCH. & PERSONALITY SCI. 733, 734 (2020); Pfundmaier, Wood, Hales, & Wesselmann, *supra* note 204, at 6–7 (suggesting that people higher in rejection sensitivity are likelier to respond to ostracism by joining radical groups and expressing willingness to engage in violence).

214. Araiza, Freitas, & Klein, *supra* note 213.

discrimination, rejection, and social exclusion.<sup>215</sup> Intergroup settings “might prompt individuals with stigmatized identities to anticipate greater social pain, priming prior exclusionary experiences and heightening the psychological experience of social pain.”<sup>216</sup> Because of prior experience with prejudice (and/or awareness of its prevalence), members of stigmatized social groups may be more conscious of a risk that people may harbor prejudice against them, and hence likelier to attribute ambiguous, unexplained ostracism to prejudice.<sup>217</sup>

Consistent with this theory, one study found that Black participants were more likely to attribute being left out of a ball tossing game to prejudice, even if the other players were members of the same racial group.<sup>218</sup> All participants reported that being left out of the game made them feel like an outsider, less worthy, invisible, and out of control, but these feelings were more enduring for those who attributed their ostracism to prejudice.<sup>219</sup> The authors observe that “anticipating prejudice, particularly race-based prejudice, may magnify the experience of ostracism when it occurs.”<sup>220</sup>

Ostracism attributed to racial prejudice may be especially harmful and threatening because racial prejudice is unfair, fundamentally degrading, pervasive, and largely outside a person’s control.<sup>221</sup> Another study found that participants who attributed ostracism to racial prejudice felt more out of control and meaningless, had more negative affect, and expressed more willingness to use alcohol—and these effects were most pronounced among people who had previous experiences with racial discrimination.<sup>222</sup>

This point is significant in terms of how the institutionalized ostracism described above in Part II.C interacts with and reinforces social inequality. People who occupy stigmatized identities are likelier to be

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215. Goodwin, Williams, & Carter-Sowell, *supra* note 33, at 613.

216. *Id.*

217. *Id.*

218. *Id.* at 616–17 (noting that this was true for Black participants, but not for White participants (who attributed ostracism to prejudice only if the ostracizing individuals were members of a different racial group)).

219. *Id.* at 615–17. The authors did not measure participants’ prior experiences with prejudice and discrimination, so the study cannot link the link this finding to an individual’s specific history of experiencing discrimination. *Id.* at 617.

220. *Id.* at 617.

221. Michelle L. Stock, Laurel M. Peterson, Brianne K. Molloy, & Sharon F. Lambert, *Past Racial Discrimination Exacerbates the Effect of Racial Exclusion on Negative Affect, Perceived Control, and Alcohol Risk Conditions Among Black Young Adults*, 40 J. BEHAV. MED. 377, 280 (2017); Smart Richman & Mark Leary, *Reactions to Discrimination, Stigmatization, Ostracism, and Other Forms of Interpersonal Rejection: A Multimotive Model*, 119 PSYCH. REV. 365, 369 (2009) (suggesting that ostracism is more harmful if it is perceived as being unfair, and if it is chronic or pervasive, as racial discrimination is).

222. Stock, Peterson, Molloy, & Lambert, *supra* note 221, at 377.

ostracized,<sup>223</sup> and being ostracized may harm them relatively more, because it reinforces and amplifies prior experiences with stigma, prejudice, and social rejection.

In sum, the social science research suggests that ostracism is profoundly hurtful—especially for people who have prior experiences with social stigmatization and prejudice. Furthermore, ostracism may lead people to behave in ways that beget further social exclusion.

#### IV. OUR JURISPRUDENCE OF INSTITUTIONALIZED OSTRACISM

In Part II, I discussed various examples of institutionalized ostracism that are lawful and prevalent. The literature discussed in Part III illuminates why these practices might be profoundly hurtful, especially for members of stigmatized groups who experience ostracism more frequently. In this Part, I critique several ways in which our jurisprudence supports and facilitates institutionalized ostracism. In each of these areas, courts have overlooked or trivialized the need to belong and the harm of ostracism. I make some preliminary suggestions as to how jurisprudence ought to consider the harm of ostracism.<sup>224</sup>

##### A. *Interpreting Equal Protection as an Anti-Classification Principle*

The Court has interpreted the Equal Protection clause as an anti-classification principle, which implicates only policies that *purposefully* discriminate based on a fixed set of suspect classifications.<sup>225</sup> This approach supports institutionalized ostracism: Policies that disproportionately ostracize members of stigmatized and marginalized social groups, like

223. See *supra* notes 46–47, 73, 95, 96–98, 102–105, 125–131, and 163–164.

224. These suggestions are only preliminary. I do not have space to fully elaborate and defend them. My goal here is to introduce early ideas for further development and discussion. I plan to address some of these in future work.

225. The Court has recognized five suspect or quasi-suspect traits, which trigger heightened scrutiny under the Equal Protection clause: race, alienage, national origin, parents' marital status, and gender. See Goldberg, *supra* note 30. The Court has stated that traits which relate to one's "ability to perform or contribute to society" are not suspect grounds for discrimination. *Cleburn v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Courts have rejected arguments for treating discrimination based on criminal history as a suspect classification. See, e.g., *Nicholas v. Mason*, No. 23-CV-196-LM-AJ, 2023 WL 10668991, at \*10 (D.N.H. Dec. 28, 2023) ("On the premise of public safety, governments have long restricted the ability of those convicted of felonies to obtain licenses to engage in professions or business, even if the applicant can prove his rehabilitation.") (citing cases); *Irwin v. Miami-Dade Cnty. Pub. Sch.*, No. 06-23029-CIV, 2009 WL 465054, at \*5 (S.D. Fla. Feb. 24, 2009) ("A person with a criminal record does not fall into a protected category, since such a characteristic . . . is not an immutable trait . . .").

exclusionary zoning, segregated schools, within-school tracking, exclusionary discipline, and criminal law enforcement do not trigger scrutiny except in relatively rare cases where the plaintiff can prove the policy was motivated by race or another suspect trait.<sup>226</sup>

This approach to interpreting the Equal Protection clause was not inevitable: It is not compelled by the text of the clause and courts have not always interpreted it this way. *Brown v. Board of Education* declared segregation (a particularly explicit and odious form of ostracism) unconstitutional in part, because of its stigmatizing social meaning.<sup>227</sup> After this, many lower courts had found that zoning, school assignment and funding policies violated Equal Protection because they effectively perpetuated racial segregation and stigmatization—these findings did not depend on the purpose motivating the policy.<sup>228</sup> This interpretation of Equal Protection imposed an affirmative duty to remedy patterns of segregation. It meant that policies that effectively perpetuated or sustained systemic exclusion were subject to scrutiny, regardless of the motivation for them.<sup>229</sup>

In the 1970s, however, the Court rejected this approach and adopted the anti-classification reading, holding that the Equal Protection clause only implicates state action intended to harm members of a protected

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226. For discussion of the effects of exclusionary zoning, see Part II.C.1, school district boundaries that create racial and socioeconomic segregation, see Part II.C.2.a, disparities in exclusionary school discipline, see *supra* notes 102-110, tracking within schools, see *supra* notes 91-95, exclusionary codes of conduct and grooming, see *supra* notes 96-101, and policing and criminal punishment, see *supra* notes 164-165.

227. *Brown v. Bd. of Ed.*, 347 U.S. 483, 493-94 (1954) (stating that segregation violates the Equal Protection Clause because it labels separated students as “inferior” and this deprives them of “equal educational opportunities”). See also *McLaurin v. Oklahoma*, 339 U.S. 637 (1950) (holding that physically segregating a Black graduate student from other students deprived that student of an equal educational opportunity and therefore violated Equal Protection).

228. *Washington v. Davis*, 426 U.S. 229, 244 n. 12 (1972) (collecting cases). See also *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931 (2d Cir. 1968) (“Equal protection of the laws means more than merely the absence of governmental action designed to discriminate . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.”) (quoting *Hobson v. Hansen*, 269 F.Supp. 401, 497 (D.D.C.1967)).

229. For example, the Seventh Circuit held that a town’s refusal to approve an affordable housing development triggered heightened scrutiny because it effectively perpetuated segregation. See, e.g., *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 517 F.2d 409, 415 (7th Cir. 1975), *rev’d*, 429 U.S. 252 (1977) (“Arlington Heights . . . has been exploiting the problem [of segregation] by allowing itself to become an almost one hundred percent [W]hite community. . . . [W]e cannot ignore segregation. . . .”); *id.* (A decision “reject[ing] the only present hope of Arlington Heights making even a small contribution toward eliminating the pervasive problem of segregated housing . . . has racially discriminatory effects [and] could be upheld only if it were shown that a compelling public interest necessitated the decision.”).

class.<sup>230</sup> It did so in acquiescence to public backlash to school desegregation, in order to *limit* the scope of integration orders.<sup>231</sup> Thus, the anti-classification rule allowed politically powerful groups to adopt policies that effectively ostracize those they wish to exclude, so long as they do so on a ‘race-neutral’ and non-suspect basis, such as socioeconomic status, aptitude, capability, or ostensibly deviant behavior.<sup>232</sup>

By adopting the anti-classification approach, the Court facilitated racial and socioeconomic segregation. The Court’s focus on discriminatory purpose as the touchstone of an Equal Protection violation meant that courts could not order integration across school district boundaries unless there was proof those boundaries were drawn for discriminatory purposes.<sup>233</sup> This allowed “White flight”—White families moving to suburban areas with separate school districts in order to avoid integrated schools.<sup>234</sup> And, by holding that wealth is not a suspect classification, the Court allowed school funding policies that create stark differences in resources

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230. *Davis*, 426 U.S. at 245.

231. In rejecting lower court decisions recognizing an Equal Protection violation based on the discriminatory effects of state action, the Court stated that such a rule would “be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average [B]lack than to the more affluent [W]hite.” *Davis*, 426 U.S. at 248 n. 14. See also *Milliken v. Bradley*, 418 U.S. 717, 742-44 (1974) (discussing the extent to which ordering inter-district desegregation would disrupt the administration of the school system); *McCleskey v. Kemp*, 481 U.S. 279, 315-19 (1987) (discussing how *McCleskey*’s claim, if accepted, would implicate most criminal punishment). For more on how the discriminatory purpose doctrine developed in relation to public resistance to public backlash, see Siegel, *supra* note 30, at 1131-35; Danieli Evans, *The Nixon Sabotage: The Political Origins of the Equal Protection Challenge to the Voting Rights Act*, 33 B.C. J. LAW & SOC. JUST. 325 (2013) (drawing from archival documents to explore how the court adopted the discriminatory purpose doctrine in response to political pressure).

232. Siegel, *supra* note 30. Discrimination based on socioeconomic-status is not actually race-neutral, since past and present racial discrimination causes disparities in income and wealth. See Evans Peterman, *supra* note 16 (elaborating on this point).

233. *Milliken*, 418 U.S. 717.

234. See, e.g., *Milliken*, 418 U.S. at 804-05 (Marshall, J., dissenting); *Id.* at 761 (Douglas, J., dissenting); *Missouri v. Jenkins*, 515 U.S. 70 (1995); Powell, *Living and Learning*, *supra* note 74, at 760. See also Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139 (2016) (describing how suburban regions and townships have been succeeding from county-wide school districts in order to create separate districts, which are predominately White and higher-income). The anti-classification rule also insulates choice policies, which tend to reproduce segregation by giving White parents the option of sending their children to predominately-White charter schools instead of the more diverse schools within their school zone. Erika K. Wilson, *The New White Flight*, 14 DUKE J. CONST. L. & PUB. POL’Y 233, 237 (2019) (describing how the school choice movement has allowed White parents who live in majority non-White districts nonetheless send their children to predominately White charter schools).



between schools in higher- and lower-income neighborhoods.<sup>235</sup> Such observable disparities in school resources further stigmatize lower income neighborhoods and create an incentive for wealthier people to cluster in neighborhoods with higher property values.

The Court's anti-classification reading, by focusing exclusively on a fixed set of illicit motives while allowing policies that ostracize on other grounds, entirely overlooks the need to belong and the harm of ostracism. The Court has never considered how belonging is vital to basic welfare and functioning, or how ostracism may inflict harm that compares in ways to physical violence—literally triggering the same pain response system.<sup>236</sup> Once one recognizes this, it becomes easier to see why an anti-classification principle, by allowing state-imposed ostracism, falls short of fulfilling the Fourteenth Amendment's promise of equal citizenship.<sup>237</sup>

Many scholars have critiqued the Court's interpretation of the Equal Protection clause and argued that, rather than focusing exclusively on motivation, the Court should consider harms such as subordination,<sup>238</sup>

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235. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). Where states fund schools based on local property taxes, schools in poorer districts typically raise only a fraction of what they need to fund schools adequately, whereas wealthier districts often raise surplus funding. Baldwin Clark, *supra* note 74, at 515–17. See also David G. Martínez & Julian V. Heilig, *An Opportunity to Learn: Engaging in the Praxis of School Finance Policy and Civil Rights*, 40 MINN. J. L. & INEQ. 311, 315–16 (2022).

236. Scholars have used the term “structural violence” to describe the “taken-for-granted institutionalized social arrangements that dehumanize and distribute suffering inequitably in society.” Baldwin Clark, *supra* note 74, at 501. One way to understand institutionalized ostracism is as a form of structural violence, and the ostracism research suggests that such structural violence may inflict pain comparable to physical pain.

237. For further discussion of this point, see Evans, *supra* note 175, at 51–52 (“Democratic citizenship—being recognized and treated as a political equal—is a signifier of belonging; a status bestowed on those who are full members of a community,” and this “means that citizenship is, at core, about social experience—i.e., being treated in a way that establishes your status as a valued member of the community—as much as it is about legal rights.”) (quotation omitted).

238. See, e.g., Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9 (2003) (“Antisubordination theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups.”); Hutchinson, *supra* note 30, at 622 (“‘Antisubordination,’ ‘antisubjugation,’ ‘anti-caste,’ and ‘antidomination’ theories of equality all emphasize the impact of governmental actions upon historically subordinate groups.”); Freeman, *supra* note 30; Siegel, *supra* note 30; Fiss, *supra* note 30.

stigmatization,<sup>239</sup> demeaning or disrespect,<sup>240</sup> and institutionalized humiliation.<sup>241</sup> Relatedly, scholars have argued that the Fourteenth Amendment's guarantees of full and equal citizenship impose an affirmative duty on government to protect and secure peoples' sense of belonging (or equal access to institutions that confer belonging and status).<sup>242</sup> These "respect inflected" definitions all share a common concern with what a policy or practice conveys about a person's belonging and status.<sup>243</sup>

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239. See, e.g., IYIOLA SOLANKE, *DISCRIMINATION AS STIGMA: A THEORY OF ANTI-DISCRIMINATION LAW* (2017) (proposing that discrimination law be oriented around an anti-stigma principle); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004) (arguing that racial stigma imposes citizenship harms and should be subject to constitutional scrutiny); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got To Do With It?*, 79 U. COLO. L. REV. 1355 (2008) (arguing that courts should consider how rules that prohibit certain hairstyles or clothing perpetuate racial stigmatization, and recognize them as a form of racial discrimination).

240. Deborah Hellman, *Discrimination and Social Meaning*, in *THE ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION* 97, 102 (Kasper Lippert-Rasmussen ed., 2017) (arguing that discrimination is wrong when it is "demeaning," meaning that it "expresses that a person or group is of lower status" and "the actor or institution expressing this meaning must have sufficient social power for this expression to have force"); BENJAMIN EIDELSON, *DISCRIMINATION AND DISRESPECT* 6-7 (2015) ("The normative root of our convictions about core cases of wrongful discrimination is the recognition that these acts manifest disrespect for the discriminatees as persons.");

241. ACKERMAN, *supra* note 28, at 137-45 (arguing constitutional and statutory reforms during the civil rights revolution were about eliminating institutionalized humiliation, and defining humiliation as the experience of having one's standing as a minimally competent actor impugned or questioned in a public sphere).

242. For instance, john a. powell argues that "the most important thing our government or any government extends to its people is the right to belong," and the state should "ensure the security and opportunities necessary and essential not only to participate in the political and social life of the community and the democracy, but to receive the standing and respect of that community." john a. powell, *Constitutionalism and the Extreme Poor: Neo-Dred Scott and the Contemporary "Discrete and Insular Minorities,"* 60 DRAKE L. REV. 1069, 1075-1076, 1078 (2012); See also john a. powell, *The Needs of Members in a Legitimate Democratic State*, 44 SANTA CLARA L. REV. 969, 987-88 (2004); Goodwin Liu describes citizenship as "not only a set of legal rights and duties, but also a level of human 'functionings and capabilities' essential to being regarded by oneself and by others as a full member of one's society," and argues that this includes a duty to ensure an adequate education. Liu, *supra* note 69, at 342 (quotation omitted). See also Kenneth Karst, *The Supreme Court, 1976 Term—Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6 (1977) (arguing that citizenship is about a sense of belonging, and equal citizenship guards against degradation and stigma); Frank I. Michelman, *The Supreme Court, 1968 Term—Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9-10 (1969) (arguing that equal citizenship requires society to provide basic social goods or "minimum welfare" to shield against the "stigma" and "social debilitation" of poverty); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) (arguing that the state is obligated to provide basic social goods).

243. See, e.g., Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L.J. 3036, 3046-51 (2014) (discussing how the concepts of humiliation and demeaning are expressive

I do not have the space to develop what an ostracism-sensitive approach to Equal Protection would look like—this is a topic for future work. But, as a preliminary step, an approach that considered the harm of ostracism would be more aligned with the aforementioned “respect-inflected” approaches. There seems to be substantial overlap between ostracism and disrespect, demeaning, subordination, humiliation, and the like. Oftentimes, ostracizing state action causes these harms.<sup>244</sup> Hence, if Equal Protection jurisprudence were more centered around values of respect, belonging, and anti-subordination, it would be more concerned about ostracism. And conversely, a jurisprudence more concerned about the harm of ostracism would do more to address state action that disrespects, demeans, humiliates, stigmatizes, and subordinates.<sup>245</sup>

Like these other respect-inflected interpretations of Equal Protection, an ostracism-sensitive jurisprudence would consider the social meaning of a state action—how excluded people understand and experience the act—as opposed to the motivation for the act. It would implicate state action

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in nature, and how social context and power dynamics determine whether an action is disrespectful, demeaning, or humiliating); Jane S. Schacter, *A Moment for Pragmatism*, 113 MICH. L. REV. 973, 986 (2015) (discussing the overlap between dignitary harm, humiliation, stigma, and anti-subordination theory, and noting that all “involve disrespect”).

244. Racial segregation is one example of how ostracism is a means of demeaning, humiliating, and stigmatizing. Hellman, *supra* note 243, at 3046–51 (discussing how racial segregation is demeaning and humiliating, but segregating people based on sex or age may not be, because these traits don’t have the same social meaning). This is not to suggest that all subordination, stigmatization, etc., involves ostracism. There are examples of demeaning and subordination that do not fit neatly within the concept of ostracism. For example, hyper-intrusive regulation, harassment, physical violence are all forms of subordination that are not adequately captured by the concept of ostracism. *E.g.*, DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997). I don’t mean to argue for recognizing ostracism as the only type of harm that can violate Equal Protection, but only to suggest that it is one type of harm that courts ought to recognize.

245. There are some differences between ostracism and these other constructs, which I don’t have space to explore here. Ostracism may capture some state action that might not be covered by humiliation or demeaning, depending on how these concepts are understood: Humiliation, as Ackerman defines it, is an “*effort* to impugn [the target’s] standing as a minimally competent actor within a particular sphere of life.” ACKERMAN, *supra* note 28, at 138 (emphasis added). Demeaning, as Hellman defines it, is “to show an especially strong and virulent form of disrespect: one must express that the other is of lesser moral worth and one must do so in a manner that can put the other down (in other words, the actor must have some power).” Hellman, *supra* note 243, at 3058. Hellman states that certain types of exclusion may not convey that the excluded people are “of lesser moral worth,” and therefore would not fall under the concept of demeaning. *Id.* at 3057 (discussing a law that excludes same-gender couples from marriage, and an employer who refuses to hire a person with a disability because the accommodation would be too expensive as examples of ambiguous cases). Whereas ostracism, as I understand it, includes exclusion that is unintentional and that arguably has rational and legitimate justifications, such as profit incentives.

that ostracizes groups or individuals under circumstances that threaten their sense of belonging within the relevant institution. Under an ostracism-sensitive approach, courts would recognize that members of stigmatized social groups may be likelier to attribute ostracism to social prejudice (due to prior experiences of prejudice and discrimination), and that ostracism is more harmful when people attribute it to prejudice.<sup>246</sup> Hence, an ostracism-sensitive approach would be particularly skeptical of policies that disproportionately ostracize members of stigmatized social groups.

The motivation would not be dispositive, since people (especially those who have experienced social prejudice) tend to attribute ostracism to prejudice regardless of whether this is the actual motive. Scrutiny would not be limited to a fixed set of suspect traits, since people can be ostracized for myriad reasons, not amenable to fixed or rigid definition.<sup>247</sup> Moreover, the important question would not be the grounds for ostracism, but the social context. A classification used to exclude members of stigmatized groups most likely causes the harm of ostracism, whereas using the same classification to include or integrate members of these groups arguably does not.<sup>248</sup>

This approach to Equal Protection might implicate many of the policies I discussed in Part II.C, which are not suspect under the current anti-classification principle unless there is proof of invidious motives:

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246. See *supra* Part III.C. Furthermore, policies that ostracize people with stigmatized social identities are likelier to reflect (conscious and unconscious) social biases (or to be interpreted as doing so), and to perpetuate those social biases by creating social distance and potentially generating cycles of deviant labeling and exclusion.

247. In practice, this approach might be closer to approach Justice Marshall advocated for, where Equal Protection analysis would not be so focused on a fixed set of suspect classifications, but instead balance the harm of an exclusionary policy against the state's justification for it. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting) (arguing that wealth-based discrimination should receive some measure of scrutiny, critiquing the Court's "rigidified approach" to Equal Protection analysis, and advocating a more flexible analysis, where the degree of scrutiny depends "on the constitutional and societal importance of the interest adversely affected," and the strength of the state's justification for the policy). See also Goldberg, *supra* note 30 (proposing an alternative to the suspect class framework); Carle, *supra* note 15 (arguing that people who are seen as "acting differently" experience discrimination, not based on recognized protected traits, but rather on the perception that someone "acts differently," and that discrimination law and theory should be more oriented around a right to "act differently").

248. *C.f.* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357-58 (1978) (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring in part and dissenting in part) ("Nor has anyone suggested that the University's purposes contravene the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more.").

Exclusionary zoning that effectively segregates based on race and class,<sup>249</sup> school district zoning and funding policies that create segregated and unequal schools,<sup>250</sup> exclusionary school discipline,<sup>251</sup> culturally hegemonic curricula, normative codes of conduct and grooming that effectively stigmatize minoritized social groups,<sup>252</sup> and criminal law enforcement.<sup>253</sup> This approach might be similar, in some ways, to the disparate impact principles that some lower courts had applied in the 1960s and '70s, before the Court adopted the anti-classification reading.<sup>254</sup>

### B. Invalidating Anti-Ostracism Policies

Second, and relatedly, the Court has furthered institutionalized ostracism by striking down or limiting the application of policies designed to protect people from ostracism, such as anti-discrimination laws and race-conscious diversity, equity, and inclusion policies. It has done so on the grounds that these policies do not serve state interests compelling enough to justify infringing individuals' constitutional rights. Two recent examples of this are *303 Creative v. Elenis*<sup>255</sup> and *Students for Fair Admissions v. Harvard* ("*SFFA*").<sup>256</sup> In both cases, the Court struck down policies that were arguably designed to protect people from ostracism. It did so without considering the harm of ostracism.

In *303 Creative v. Elenis*, the Court held that a state's anti-discrimination law would violate the First Amendment if it were applied to prohibit a web designer from discriminating based on sexual orientation in the sale of wedding websites.<sup>257</sup> The web designer claimed that selling wedding websites to same-gender couples would violate her freedom of expression by compelling her to express a message she disagreed with. The Court held that the state's interest in preventing discrimination was not sufficiently compelling to justify infringing the designer's freedom of

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249. See, e.g., *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

250. See, e.g., *Milliken*, 418 U.S. at 781 (Marshall, J., dissenting); *Id.* at 761 (Douglas, J., dissenting); *Rodriguez*, 411 U.S. at 71 (Marshall, J., dissenting).

251. See *supra* notes 102-113, and accompanying discussion.

252. See *supra* notes 97-101; Greene, *supra* note 239.

253. See *supra* notes 164-168, and accompanying text. See also *McCleskey v. Kemp*, 481 U.S. 279, 346 (1987) (Blackmun, J., dissenting) ("The legislative history of the Fourteenth Amendment reminds us that discriminatory enforcement of States' criminal laws was a matter of great concern for the drafters.").

254. See *supra* notes 228-229, and accompanying discussion.

255. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

256. *Students for Fair Admissions v. Harvard*, 600 U.S. 181, 214 (2023).

257. *303 Creative*, 600 U.S. at 570.

expression.<sup>258</sup> The majority acknowledged that discrimination is a “deprivation of personal dignity” and that governments have a compelling interest in addressing it.<sup>259</sup> But it stated, without much explanation, that this interest must yield to the designer’s First Amendment freedoms.<sup>260</sup>

The majority opinion minimized the government’s interest in applying the anti-discrimination law to the web designer. It suggested that the government’s interest in prohibiting discrimination is paramount when the discriminatory businesses have “something like monopoly power,” implying that was not the case here.<sup>261</sup> This emphasis on monopoly power indicates that, in the majority’s view, the state’s interest in protecting people from discrimination is most compelling if there is an *economic* injury—i.e., inability to purchase goods/services—and the interest is less compelling when the excluded customers could purchase goods and services elsewhere.<sup>262</sup>

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258. The Court assumed, based on the parties’ stipulations, that the web designer’s wedding websites were expression protected by the First Amendment, and so it applied strict scrutiny. *303 Creative*, 600 U.S. at 590.

259. *Id.* at 592.

260. *Id.* (“When a state public accommodations law and the Constitution collide, there can be no question which must prevail.” (citing U. S. CONST., art. VI, cl. 2)). The Court reached the same result in several earlier cases involving LGBT rights. Earlier decisions reached similar conclusions with respect to parade organizers who refused to include a LGB group, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U. S. 557 (1995), the Boy Scouts’ refusal to accept an openly-gay member, *Boy Scouts of Am. v. Dale*, 530 U. S. 640 (2000), and a religious charity that refused to provide foster-care certifications to same-gender couples. *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021).

It has reached a different conclusion when it balances the government’s compelling interest in protecting people from discrimination based on sex or race against the First Amendment freedom to exclude. This suggests the Court may regard discrimination against LGBTQ+ people as being more valid or defensible than race or sex discrimination. See Carlos A. Ball, *First Amendment Exemptions for Some*, 137 HARV. L. REV. F. 46, 47 (2023) (“In recent years, conservative Justices have repeatedly emphasized that opponents of marital rights for same-sex couples are neither prejudiced nor bigoted.”); *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015) (stating that “reasonable and sincere people” oppose same-gender marriage in “good faith”). See also Hellman, *supra* note 243, at 3058 (considering the argument that laws excluding same-gender couples from marriage are not demeaning because they are rooted in religious beliefs and therefore may not express an “that a person is of lesser moral worth”).

261. *303 Creative*, 600 U.S. at 590 (observing that states have expanded the types of public accommodations covered by anti-discrimination laws beyond the traditional enterprises, which “exercised something like monopoly power or hosted or transported others or their belongings much like bailees”).

262. Justice Sotomayor’s dissent recognized and responded to the majority’s focus on whether there was an economic injury. *Id.* at 607 (Sotomayor, J., dissenting) (“Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his [social identity].”).

By focusing on economic injury as the primary harm associated with discrimination, the majority overlooked the distinct harm of ostracism.<sup>263</sup> The Court did not appreciate that ostracism may inflict pain comparable to physical injury, and this is separate from any economic injury. Justice Sotomayor's dissent pointed out this inconsistency in a rare judicial acknowledgement of the ostracism research I discuss here, stating that ostracism is "one of the most distressing feelings" a person can experience.<sup>264</sup>

The Court similarly overlooked the harm of ostracism in *SFFA*, holding that race-conscious admissions policies at Harvard and the University of North Carolina violate the Equal Protection clause.<sup>265</sup> It stated that the educational benefits of diversity are "elusive," "imponderable," and "not sufficiently coherent" to satisfy strict scrutiny.<sup>266</sup> The Court contrasted the educational benefits of diversity with an interest that it has found sufficiently compelling: preventing physical violence.<sup>267</sup>

In litigation about race-conscious admissions policies, including in *SFFA*, courts have framed the educational benefits of diversity in terms of utilitarian and largely market-based values, such as training future leaders, producing new knowledge, and preparing people to work in diverse environments.<sup>268</sup> This framing overlooks a distinct, equity-related purpose of diversity-oriented policies: Namely, these policies aim to reduce the well-documented isolation, tokenization, stigmatization, and

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263. The Court's fleeting reference to dignitary harm does not capture the pain and suffering caused by ostracism, specifically. The term dignity has different meanings, and the Court has vacillated between different uses: Sometimes it uses the term to convey respect for individual choices; but other times it uses the term to convey "respectability," i.e., conformity to social norms and being proper and socially acceptable. See Yuvraj Joshi, *The Respectable Dignity of Obergefell v. Hodges*, 6 CAL. L. REV. CIR. 117 (2015). Because the term has various uses, dignitary harm is not synonymous with the more precise act of ostracism. Though ostracism could certainly inflict dignitary harm (at least in some uses of the term) by conveying disrespect, one could also say that freedom to ostracize is a dignitary interest—i.e., a matter of personal autonomy.

264. *303 Creative*, 600 U.S. at 608 (Sotomayor, J., dissenting) (citing Williams, *supra* note 11)).

265. *Students for Fair Admissions v. Harvard* ("SFFA"), 600 U.S. 181, 214 (2023).

266. *Id.*

267. *Id.* ("In the context of racial violence in a prison, for example, courts can ask whether temporary racial segregation of inmates will prevent harm to those in the prison.").

268. Ofra Bloch, *Diversity Gone Wrong: A Historical Inquiry Into the Evolving Meaning of Diversity From Bakke to Fisher*, 20 PENN. J. CON. L. 1143 (2018). The purported benefits, at least as the Court understood them, included training future leaders and citizens to operate in a diverse and pluralistic society, promoting the robust exchange of ideas, producing new knowledge stemming from diverse outlooks, broadening and refining understanding, fostering innovation and problem solving, and enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes. *SFFA*, 600 U.S. at 214-15.

ostracism that members of historically-excluded groups experience within the institution.<sup>269</sup>

In *SFFA*, the Court failed to appreciate that race-conscious diversity policies work to ameliorate ostracism, and it failed to see the connection between belonging, wellbeing, and educational opportunity.<sup>270</sup> Research discussed in Part III indicates that ostracism threatens students' basic needs, and therefore may be as adverse as if they were deprived of food or water or subject to physical harm. In this sense, diversity—insofar as it counteracts the routine ostracism that members of minoritized groups experience—is integral to alleviating what might otherwise be a hostile educational environment for members of those groups.<sup>271</sup>

In evaluating the government's justification for anti-ostracism policies like the ones at issue in *303 Creative* and *SFFA*, courts ought to consider the severe harm associated with ostracism—in particular, that ostracism may cause pain comparable to physical injury. This point is noteworthy because the Court has recognized that protecting people from physical injury is a state interest sufficiently compelling to justify infringing the

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269. The lower court recognized these harms. *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, 567 F. Supp. 3d 580, 667 (M.D.N.C. 2021) (“Nearly seventy years after the first Black students were admitted to UNC, the minority students at the university still report being confronted with racial epithets, as well as feeling isolated, ostracized, stereotyped and viewed as tokens.”). Justice Sotomayor’s dissenting opinion recognized them, as well. *SFFA*, 600 U.S. at 339 & n.20 (Sotomayor, J., dissenting) (observing that “students of color . . . continue to experience racial harassment, isolation, and tokenism” and quoting students testifying about how being the only representative of their racial group made them hesitant to speak up and feel “foreign” and “like an outsider”). And the American Psychological Association’s Amicus Brief discussed these harms in detail. Brief for American Psychological Association et al., as Amici Curiae Supporting Respondents, *Students for Fair Admissions v. Harvard*, No. 20-1199, 2022 WL 3108813, \*9-\*10 (U.S. June 29, 2023) (“[S]ubtle discrimination and implicit bias in communities lacking sufficient racial and ethnic minority representation” causes “a feeling of distinctiveness and unbelonging” and “these feelings of distinctiveness often create an internal fear that one will conform to others’ implicit biases,” called “social identity threat,” and research has consistently shown that it negatively impacts educational outcomes.); *id.* at \*12 (“[W]hen someone is the *only* person of a social identity within a group, their “solo status” causes extreme isolation and “tokenism” which can cause people who are sole representatives of their group to underperform, relative to when they are in more diverse groups . . . because being the sole representative of the group leads the person to . . . feel pressure to act as a representative of that group.”).

270. See sources cited *supra* note 70.

271. For similar arguments focused on addressing racial isolation, see, e.g., Jonathan Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 2019 UTAH L. REV. 59 (2019); Meera Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 HASTINGS L.J. 661, 690-99 (2014) (discussing the compelling interest in avoiding racial isolation).



individual rights at issue in *303 Creative* and *SFFA*.<sup>272</sup> But ostracism may cause similar or even more severe pain and suffering.<sup>273</sup> Courts should consider this point when balancing the state's interest against individual rights in cases like these.<sup>274</sup>

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272. In *SFFA*, the Court stated that race-conscious policies may be allowed to prevent physical harm. 600 U.S. at 614. And in the First Amendment context, the Court has long held that one's freedom of speech does not protect a right to use physical force or threaten violence. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitements to violence or lawlessness are not protected); *Counterman v. Colorado*, 600 U.S. 66, 74 (2023) ("True threats of violence are not protected because they subject individuals to fear of violence and to the many kinds of disruption that fear engenders."). This implies that the government's interest in protecting people from physical injury (or the threat thereof) outweighs any right to express oneself through physical violence or threats thereof. For instance, if they were to use (or threaten) violence against a potential customer as a means of expressing their sincerely held moral opposition to that customer's lifestyle, they could not claim a First Amendment right to be exempted from a law prohibiting physical assault. Though I don't develop it here, this point also applies to the argument that applying discrimination law to prohibit workplace ostracism would conflict with the First Amendment. *See supra* note 149 (discussing cases stating that allowing Title VII liability for ostracism might infringe First Amendment freedoms). If we appreciate that ostracism inflicts injury comparable to physical violence, then we should understand ostracism and harassing speech as harmful conduct, just like a physical assault, that the state can regulate. Many scholars have argued along these lines that the First Amendment should not protect racist speech. *See, e.g.*, Richard Delgado, *Words That Wound, A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 133 (1982); MARI MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993); Tasnim Motala, *Words Still Wound: IIED & Evolving Attitudes Toward Racist Speech*, 56 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 115 (2021); Charles Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431. The ostracism research and the argument I develop here supports these arguments for regulating racist speech. It is further evidence that racist speech, an especially virulent form of ostracism, rejection, and stigmatization, inflicts injury comparable to physical violence, and should not be treated differently.

273. One might argue that physical injury potentially causes more lasting, potentially permanent harm or impairment, but this is not necessarily true. A minor slap or punch may cause a bruise that would recover quickly, and an assault is nonetheless prohibited even if the physical injuries are minor. (Even threats of physical assault are regulated because of the recognized harm of physical intimidation. *See, e.g.*, *Counterman*, 600 U.S. at 74.)

274. I do not have space to elaborate on how these interests might be balanced, and I do not intend to prescribe how any specific case should be decided. My main point is that courts should at least consider the harm of ostracism in such cases. I appreciate that in some cases, there may be concerns about ostracism on both sides. For example, in a zero-sum admissions context, a member of the predominate racial group, who receives no benefit from a race-conscious diversity policy, might contend that they are ostracized by the policy. For reasons stated previously, I would contend that ostracizing a member of a dominant group is, while undoubtedly hurtful, less concerning than the ostracism of stigmatized minorities, which the policy seeks to redress. This is because ostracism that reflects and replicates social stigmas is more hurtful for the reasons stated previously. *See* Part III.C.

*C. Imposing Ostracizing Punishments Without Scrutiny*

A third way in which courts support institutionalized ostracism is by deferring to policymakers' judgements about exclusionary and stigmatizing methods of punishment, without recognizing the harm they cause or questioning their justifications.<sup>275</sup> Courts consider ostracism to be a normal part of punishment, as opposed to an exceptional harm that warrants justification.

In 1958, the Court recognized that one of the most extreme forms of ostracism—expatriation—is cruel and unusual because it leads to “discrimination” and “banishment,” “a fate universally decried by civilized people.”<sup>276</sup> Though the Court acknowledged the cruelty of this particularly extreme form of ostracism, it has otherwise adopted a deferential posture toward ostracizing punishments, such as incarceration,<sup>277</sup> solitary confinement,<sup>278</sup> and myriad exclusions imposed on people with criminal convictions.<sup>279</sup> These policies cause harms similar to expatriation (i.e., discrimination, alienation from mainstream society, and banishment from social institutions), albeit without formally stripping a person of citizenship. The courts have also granted police broad discretion to stop, question, and arrest people, even in circumstances where the arrest serves no purpose but “gratuitous humiliation.”<sup>280</sup>

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275. See policies discussed *supra*, Parts II.C.2.b (discussing school discipline) and II.C.4 (discussing arrest and incarceration). See also Evans, *supra* note 175, at 89–95 (critiquing the Court's deferential stance to policing and punishment policies); *Ewing v. Cal.*, 538 U.S. 11, 28 (2003) (rejecting the claim that a sentence of 25 years-to-life for stealing three golf clubs violated the Eighth Amendment, and stating that Ewing's claim that the punishment lacked any legitimate justification “is appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme,” and the Court “do[es] not sit as a ‘superlegislature’ to second-guess these policy choices.”).

276. *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

277. *E.g.*, *Ewing*, 538 U.S. at 28.

278. *Wilkinson v. Austin*, 545 U.S. 209, 214–15 (2005) (upholding the policy of assigning people to a “supermax” facility that kept people under “extreme isolation”). No court has found long-term solitary confinement to be facially unconstitutional. See Andrew L. Hanna, *The Present Constitutional Status of Solitary Confinement*, 25 U. PA. J. CONST. L. ONLINE 1, 1 (2019); see also Lindley A. Bassett, *The Constitutionality of Solitary Confinement: Insights from Maslow's Hierarchy of Needs*, 26 HEALTH MATRIX 403, 405 (2016).

279. In *Smith v. Doe*, the Court held that a law requiring people convicted of “sex offenses” to register their personal information on an online database was not a criminal punishment, even though it may have “adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism.” 538 U.S. 84, 97–101 (2003).

280. The Court upheld an arrest for a fine-only traffic offense even though it admittedly served no purpose but “gratuitous humiliation.” *Atwater v. City of Lago Vista*, 532 U.S. 318, 346–47 (2001). Following this, courts upheld arrests of a seventh-grade student for

Apart from constitutional limits on punishment, sentencing codes require courts to consider whether a sentence serves the goals of punishment, including retribution, deterrence, incapacitation, and rehabilitation.<sup>281</sup> Courts generally presume, without serious consideration, that ostracizing punishments serve these goals. For example, in *U.S. v. Gemen-tera*, the Ninth Circuit upheld a sentencing condition that required the defendant to stand in front of a post office while displaying a two-sided sandwich board sign stating “I stole mail; this is my punishment.”<sup>282</sup>

The court rejected the defendant’s argument that shaming punishments cannot be rehabilitative because they cause a person to withdraw from society and inflict psychological injury.<sup>283</sup> It noted that “[v]irtually all individuals who are convicted of serious crimes suffer humiliation and shame, and many may be ostracized by their communities. Indeed, the mere fact of conviction . . . is stigmatic.”<sup>284</sup> Hence, the Court reasoned, this effect does not deprive the punishment of rehabilitative value.<sup>285</sup> This logic is circular: The court presumed that ostracism must serve the goals of punishment simply because ostracizing punishments are the norm.<sup>286</sup>

Properly accounting for the harm of ostracism should lead courts to more carefully analyze whether, and under what circumstances, ostracizing punishments are appropriate. One way to better understand the circumstances in which ostracizing punishments may be ill-suited or disproportionate is to consider such punishments in relation to the recognized goals of punishment: retribution, deterrence, incapacitation, rehabilitation, and expressing condemnation.

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“fake burping” in class, *A.M. ex rel. F.M. v. Holmes*, 830 F.3d 1123 (10th Cir. 2016), and a fourteen-year-old for eating a single French fry in the subway in violation of the metro transit policy. *Hedgepeth ex rel. Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1156 (D.C. Cir. 2004). For more on the Court’s failure to appreciate the harm of arrest, see Alexandra Natapoff, *Atwater and the Misdemeanor Carceral State*, 133 HARV. L. REV. 147 (2020); Rachel Harmon, *Why Arrest?* 115 MICH. L. REV. 307 (2016). Acknowledging that an arrest is “humiliating,” the Court brushed off the harm as fleeting and temporary. *Atwater*, 532 U.S. at 354–55.

281. See, e.g., 18 U.S.C.A. § 3553 (instructing courts to impose a prison sentence to serve the goals of retribution, deterrence, incapacitation, and rehabilitation).

282. 379 F.3d 596, 599 (9th Cir. 2004).

283. *Id.* at 605.

284. *Id.* (citation omitted).

285. *Id.*

286. *Id.* at 606. Scholars have argued that shaming punishments are inappropriately harmful and contrary to rehabilitative goals. See, e.g., Toni Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1920–21 (1991); A. Rachel Camp, *Pursuing Accountability for Perpetrators of Intimate Partner Violence: The Peril (and Utility?) Of Shame*, 98 B.U. L. REV. 1677 (2018). I submit that the same arguments apply to incarceration, as this ostracizes much like shaming sanctions do.

If retribution is the goal, the punishment should be proportionate to the wrongdoing.<sup>287</sup> Corporal punishment, or the deliberate infliction of physical injury as a punishment, has been considered by some courts as being cruel and unusual, and has been condemned by the federal government.<sup>288</sup> In contrast, ostracizing punishments are much more commonly accepted, and rarely questioned as inherently cruel. But understanding that ostracism triggers the same neurocognitive response as physical pain suggests that ostracism might be as hurtful (and arguably as cruel) as physical punishments, such as whipping and caning.

If the objective of punishment is specific deterrence (detering the punished person from future crime),<sup>289</sup> ostracism research suggests that exclusion may exacerbate, rather than ameliorate, the causes of “deviant” behavior. For the reasons elaborated in Part III.B, ostracized people may cope in ways that seem “deviant” or “antisocial”—though these behaviors are ultimately efforts to fortify the need to belong and related needs.<sup>290</sup> If seemingly “deviant” behavior is driven by a sense of alienation and exclusion, ostracizing punishments may exacerbate the underlying causes of that behavior.<sup>291</sup>

It is also questionable whether ostracism is effective as a general deterrent (setting an example that will discourage other people from committing similar acts). Whether this works may depend on various factors, including the social position of the individual, and the perceived basis for the ostracism. Vicarious ostracism—observing others being ostracized—may be as threatening and destabilizing as being ostracized oneself.<sup>292</sup> If

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287. SANFORD KADISH, STEVEN SHULHOFER & RACHEL BARKOW, CRIMINAL LAW AND ITS PROCESSES 32–34 (11th ed., 2022) (discussing retribution and proportionality).

288. For a discussion of how courts have treated corporal punishment, see Michael P. Matthews, *Caning and the Constitution: Why the Backlash Against Crime Won't Result in the Back-Lashing of Criminals*, 14 N.Y.L.S.J. HUMAN RIGHTS 571 (1998). Corporal punishment is still permitted in schools, and it is used to an alarming degree, but it is prohibited in most states and far less common than exclusionary discipline. See U.S. Dept. of Educ., Dear Colleague Letter Calling for the Elimination of Corporal Punishment in Schools (March 24, 2023), <https://www2.ed.gov/policy/gen/guid/sectletter/230324.html>.

289. KADISH, SHULHOFER, & BARKOW, *supra* note 287, at 16–32 (discussing consequentialist justifications, including deterrence).

290. See *supra* notes 150–161, and accompanying text; see also Part III.C.

291. There is little evidence that incarceration decreases the likelihood of future criminal system involvement. See, e.g., Damon Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 CRIME & JUST. 353 (2021) (reviewing 116 studies and concluding that incarceration, if it has any effect, slightly increases the likelihood future arrest/conviction).

292. See, e.g., Yingbing Sun et al., *Vicarious Ostracism Reduces Observers' Sense of Agency*, 110 CONSCIOUSNESS & COGNITION (2023); Anna Giesen & Gerald Echterhoff, *Do I Really Feel Your Pain? Comparing the Effects of Observed and Personal Ostracism*, 44 PERS. & SOC. PSYCH. BULL. 550 (2018); Eric D. Wassermann et al., *“I Feel Your Pain”: The Effects of Observing Ostracism on the Ostracism Detection System*, 45 J. EXPERIMENTAL SOC. PSYCH. 1308 (2009).

both the ostracized and the observer are members of a stigmatized social group, and the observer attributes ostracism to prejudice against their own social group, it may threaten their own identity, as well.<sup>293</sup>

In terms of the goal of incapacitation (preventing a person from causing further harm),<sup>294</sup> it may be necessary to physically exclude or separate someone to protect other people from harm. Though ostracism may be effective and even necessary to prevent imminent harm in some contexts, this response may exacerbate the sense of alienation and estrangement that can drive “deviant” behavior.<sup>295</sup> Hence it should not be imposed gratuitously, or any more or longer than necessary to protect other people. Furthermore, it is vital to provide avenues to reintegrate the person into the community, rather than causing ongoing stigmatization and marginalization.<sup>296</sup> Ostracizing punishments may also serve an expressive function by publicly condemning the wrongdoer’s action.<sup>297</sup> But the same concerns and limitations should apply here.

Lastly, if the goal is rehabilitation, the ostracism research suggests that a more constructive response would be to take measures that establish and fortify the person’s sense of belonging and security within the

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293. For example, studies find that witnessing school suspensions leads to disengagement among students who are not themselves suspended. This effect may be particularly pronounced when students attribute suspensions to racial bias. See, e.g., Ming-Te Wang et al., *Does anyone benefit from exclusionary discipline? An exploration on the Direct and Vicarious Links Between Suspensions for Minor Infraction and Adolescents’ Academic Achievement*, 78 AM. PSYCH. 20 (2023); Juan Del Toro & Ming-Te Wang, *Vicarious Severe School Discipline Predicts Racial Disparities Among Non-Disciplined Black and White American Adolescents*, 94 CHILD DEV. 1 (2023).

294. KADISH, SHULHOFER, & BARKOW, *supra* note 287, at 27–32 (discussing incapacitation).

295. See Smart, Richman & Leary, *supra* note 221. See also Williams, *supra* note 11 (discussing how ostracism may produce more aggressive coping responses if it seems chronic or uncontrollable (i.e., irreversible)); Pfundmaier, *supra* note 204, at 8 (describing a “a negative feedback loop wherein people become more dependent on radical organizations as they are socially excluded by others outside of that group”). I do not intend to imply that radical groups, who define themselves in opposition to mainstream society and its institutions, are inherently bad—indeed they may center around valid and important critiques of oppressive and exclusionary institutions and policies. But they can also lead people to commit actions that are harmful and self-defeating, in the sense that they may injure others and lead to further ostracism in the form of suspension, expulsion, arrest and incarceration.

296. Relatedly, John Braithwaite has argued that shaming is an effective criminal sanction only if a society shames “reintegratively”—i.e., communicates that society values the person and provides clear a path to reacceptance. JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION (1989). While Braithwaite’s emphasis on integration and his critique of the U.S. system for failing to emphasize reintegration, I question whether shaming is constructive or just (i.e., proportionate) for reasons discussed above.

297. KADISH, SCHULHOFER, & BARKOW, *supra* note 287, at 45 (discussing expressive theories).

community.<sup>298</sup> One example of an intervention that may have the potential to do this is the restorative justice model: Under a restorative justice model, when a person commits harm, authorities do not exclude or stigmatize them, but rather, authorities include them in a restorative conference with the harmed party and other members of the community, where they discuss the harm they caused, what they can do to make the harmed party whole, and what caused them to commit the harm.<sup>299</sup> In its ideal form, restorative justice would develop understanding and connection between the harm-doer, the harmed, and the community, and work to repair social bonds between all parties.<sup>300</sup> Consistent with the ostracism literature, studies suggest that restorative justice can be more effective than carceral punishments in changing behavior.<sup>301</sup>

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298. The discussion in Parts II.C.4 and III suggests that much behavior society labels as “deviant” or “anti-social” may be a normal, universal, and self-protective responses to experiences of social exclusion. If much “deviant” behavior is ultimately an effort to fortify the threatened need to belong, ostracizing punishments may exacerbate the cause of this “deviant” behavior, rather than ameliorate it. See sources cited *supra* notes 150-161, and accompanying discussion; *supra* Part III.C. See also, RIOS, *supra* note 9, at 103, 161-64 (describing the political consciousness of criminalized boys, explaining that “many of their actions, subcultures, and worldviews were developed in opposition to punitive social control,” and that “embracing the positive aspects of this resistance, teaching young people how to use it to navigate in mainstream institutions” is essential to empowering them to “become productive citizens”).

299. For background on restorative justice, see generally Sujatha Baliga, *A Different Path for Confronting Sexual Assault*, VOX (Oct. 10, 2018), <https://www.vox.com/first-person/2018/10/10/17953016/what-is-restorative-justice-definition-questions-circle>; DANIELLE SERED, UNTIL WE RECKON (2021); M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123 (2016); and Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WISC. L. REV. 114.

300. Not all programs that use the label “restorative justice” actually live up to its ideals. Many programs in the U.S. use the label “restorative justice,” but they operate within the architecture and logic of the carceral system, and they share many of the carceral system’s punitive, stigmatizing, and ostracizing dynamics. See, e.g., González, *supra* note 299; Hanan, *supra* note 299; Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 761-62 (2000).

301. See, e.g., YOTAM SHEM-TOV ET AL., CAL POL’Y LAB, THE IMPACTS OF THE MAKE-IT-RIGHT PROGRAM ON RECIDIVISM (Jan. 27, 2022), <https://www.capolicylab.org/wp-content/uploads/2022/05/Impacts-of-the-Make-it-Right-Program-on-Recidivism.pdf> (randomized control trial finding that, among youth facing serious felony charges, those who participated in the restorative program were 44% less likely to be rearrested within 6 months, 33% less likely to be arrested within one year, and 32% less likely to be arrested after four years); Brief of School Discipline Professors as Amici Curiae in support of Respondents, *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180 (2021), 2021 WL 1253606, \*23-\*29 (summarizing and citing research on the efficacy of positive behavioral intervention and support, and restorative practices, and noting, for example, that Denver public schools saw a 47% decrease in suspensions after implementing a restorative justice program,

But there are limits to how much restorative justice can do to support peoples' sense of belonging when it operates against the background of extreme social and economic inequality and exclusion.<sup>302</sup> Hence, an even more fundamental measure for cultivating peoples' sense of belonging and security would be to ensure that everyone has access to the core social institutions that determine a person's participation and status in society. This is a central premise of the community safety agenda put forth by the Movement for Black Lives and abolitionist movement.<sup>303</sup> It also echoes an argument that progressive leaders have long made for "social citizenship": That to meaningfully guarantee full citizenship, the state must include all people in the social institutions that determine a person's participation and respect in society.<sup>304</sup>

## V. CONCLUSION

I named and described the phenomenon of institutionalized ostracism—when government institutions exclude, reject, or neglect people under circumstances that threaten their sense of belonging. I drew from social science literature to explain why this institutionalized ostracism is so hurtful, and how it can cause cycles of deviant labeling and social exclusion. Finally, I identified and critiqued several ways in which current jurisprudence supports and facilitates institutionalized ostracism. Then I made some preliminary suggestions as to how jurisprudence ought to consider the harm of ostracism. The broadest and most transformative implication of this discussion is that our jurisprudence ought to recognize belonging as a fundamental legal value, one that is integral to equal opportunity and equal citizenship.

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and the Oakland Unified School District in California decreased suspensions by 87 percent by implementing a restorative justice pilot program in a middle school).

302. Restorative justice alone cannot correct or make up for persistent marginalization in other areas of social life such as homelessness, chronic unemployment, or exclusion from decent educational opportunities, that may make someone feel alienated or ostracized from mainstream society. For a related discussion about procedural justice and police reform, see Bell, *Legal Estrangement*, *supra* note 155, at 2114–26 (discussing "structural exclusion" as one cause of legal estrangement).

303. See, e.g., M4BL, ESSIE JUSTICE GROUP, CIVIL RIGHTS CORPS, COLOR OF CHANGE, AND BLACK LIVES MATTER, A ROADMAP TO COMMUNITY SAFETY: A GUIDE FOR STATE LAWMAKERS (Oct. 2021), <https://breatheact.org/wp-content/uploads/2021/10/State-Policy-Guide.pdf>; see also, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); VITALE, *supra* note 165165.

304. Forbath, *supra* note 121, at 4 (1999) ("[T]he guarantee of equal citizenship entail[s] decent work, a measure of economic autonomy and democracy, and social provision for 'all Americans.'"). See also sources cited *supra* note 242.

