Imagining a Jurisprudence of Belonging

By Danieli Evans

Belonging is a fundamental human need, like food or water. People deprived of it have adverse physiological, emotional, and behavioral outcomes.[1] Hundreds of social science studies show that ostracism, or social exclusion, threatens people's need to belong and related needs for control, meaningful existence, and self-esteem.[2] Studies also show that ostracism triggers the same part of the brain that is activated when a person experiences physical pain.[3] Indeed, pain medications, like opioids, work to numb such "social pain" as well as physical pain.[4] Ostracism may impair self-regulation and cognitive functioning, and ostracized people may cope in ways — like withdrawal or aggression — that beget further ostracism.[5]

Though a large body of social science literature indicates that belonging is vital to functioning and wellbeing, United States constitutional jurisprudence largely overlooks the value of belonging. In recent and forthcoming work, I argue that belonging should be considered a fundamental legal value, on par with other fundamental legal values, such as equality and fairness. It follows from this that ostracism, or social exclusion, should be recognized as a significant and cognizable legal harm, and that law ought to protect people from it whenever possible.

This would be a stark change from current jurisprudence, which supports ostracism in various contexts. Consider three ways in which courts have upheld and facilitated ostracism:

DEFINING DISCRIMINATION IN TERMS OF MOTIVATION

Courts have allowed ostracism by defining discrimination in terms of the perpetrator's motives, rather than the effect of a policy.[6] Ostracism is defined by the experience of being excluded, not the reason or motivation for it. By defining discrimination in terms of motivation rather than the exclusionary or stigmatizing effect of a policy, courts have upheld various ostracizing policies, such as laws banishing unhoused people from public space,[7] zoning rules that segregate neighborhoods by income and race,[8] and segregation between and within schools.[9]

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[1] Roy Baumeister & Mark Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 *PSYCH. BULL.* 497 (1995); SUSAN T. FISKE, SOCIAL BEINGS: CORE MOTIVES IN SOCIAL PSYCHOLOGY (4TH ED. 2018); Mark Leary & Cody Cox, *Belongingness Motivation: A Mainspring of Social Action* in *HANDBOOK OF MOTIVATION SCIENCE* 27, 28 (James Shah & Wendi Gardner eds., 2008).

[2] Kipling Williams, *Ostracism*, 58 ANN. REV. PSYCH. 425 (2007).

[3] 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 (Kipling Williams et al. eds., 2005).

[4] xx

[5] Williams, *supra* note **Error! Bookmark not defined.**.

[6] See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

[7] Sara Rankin, *The Influence of Exile*, 76 MD. L. REV. 4 (2016).

[8] Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977).

[9] Milliken v. Bradley, 418 U.S. 717,804–05 (1974) (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."); San Antonio Ind. Sch. Dist. v.

EXCLUSIONARY DISCIPLINE AND PUNISHMENT

Courts have also endorsed ostracism by unquestioningly accepting the prevalent approaches to school discipline and criminal punishment. Each year, millions of students are disciplined through exclusionary measures, such as seclusion, suspension, and expulsion.[10] Likewise, the routine criminal punishments of arrest and incarceration, and the lasting, stigmatic label of a criminal record, are quintessentially ostracizing.[11] Courts regularly impose and uphold these ostracizing measures without considering that such ostracism threatens a basic need and may be as hurtful as physical violence, with potentially more lasting behavioral effects. Recognizing this should lead courts to scrutinize ostracizing punishments more — at least to ask whether they are necessary and proportionate means of achieving the goals of punishment.[12]

STRIKING DOWN ANTI-OSTRACISM POLICIES

Without recognizing the value of belonging, the U.S. Supreme Court has struck down policies designed to protect people from ostracism. Two important cases from last term illustrate this, Students for Fair Admissions v. Harvard (SFFA)[13] and 303 Creative v. Elenis.[14]

In 303 Creative, the majority held that the First Amendment protects a web designer's right to refuse to sell a wedding website to a same-gender couple, though this violated the state's anti-discrimination law.[15] The majority concluded that the web designer's First Amendment interests trumped the state's interest in protecting people from discrimination.[16] In reaching this conclusion, it failed to consider the severe harm of ostracism — that experiencing ostracism may be tantamount to experiencing physical violence.[17]

Rodriguez, 411 U.S. 1 (1973); *see also* LaToya Baldwin Clark, *Barbed Wire Fences: The Structural Violence of Education Law*, 89 U. CHI. L. REV. 499 (2021); Erika Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2384 (2021).

[10] 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),

[11] As the Ninth Circuit put it: "[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." U.S. v. Gementera, 379 F.3d 596, 599 (9th Cir. 2004).

[12] For instance, the U.S. Supreme 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 (2001). Lower courts have upheld arrests of a seventh-grade student for "fake burping" in class, A.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. Washington Metro. Area Transit Auth., 386 F.3d 1148, 1156 (D.C. Cir. 2004). See also Couture v. Bd. of Educ. of Albuquerque Pub. Sch., 535 F.3d 1243, 1253 (10th Cir. 2008) (upholding the detention of 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); J.H. ex rel. J.P. v. Bernalillo Cnty., 806 F.3d 1255, 1257 (10th Cir. 2015) (upholding the arrest of an eleven-year old student with disabilities for kicking a teacher); Ebonie S. v. Pueblo Sch. Dist. 60, 695 F.3d 1051, 1055 (10th Cir. 2012) (locking a kinder-gardener with significant disabilities in a restraining desk that prevented them from moving).

[13] 600 U.S. 181 (2023).

[14] 600 U.S. 570 (2023).

[15] *303 Creative*, 600 U.S. 570 (2023).

[16] *Id.* at 591-92.

[17] Justice Sotomayor's dissent alluded to this, observing that ostracism "is among the most distressing feelings that can be felt by our social species." *303 Creative*, 600 U.S. at 608 (Sotomayor, J., dissenting).

Recognizing this suggests that the state's interest in protecting people from ostracism may be as compelling as its interest in protecting people from physical violence (or threats thereof), which is not protected by the First Amendment.[18]

In SFFA, a majority held that race-conscious admissions policies at Harvard University and the University of North Carolina (UNC) violate the Title VI of the Civil Rights Act and the Equal Protection Clause of the 14th Amendment.[19] The majority reasoned that the educational benefits of diversity are "not sufficiently coherent" to satisfy strict scrutiny.[20] In dismissing the educational benefits of diversity, the court failed to recognize that belonging is integral to well-being and thriving, and that students who experience ostracism have less opportunity to thrive and succeed in the domain. As the District Court in the UNC case observed, members of historically marginalized and underrepresented groups report "feeling isolated, ostracized, stereotyped and viewed as tokens."[21]

A jurisprudence that recognized the fundamental importance of belonging would recognize that diversity-oriented policies are integral to remedying this institutionalized ostracism and the hostile (and unfair) educational environment that it creates.[22] Because ostracism inflicts pain and suffering comparable to physical violence, this interest should be as compelling as protecting people from physical violence — an interest the Supreme Court has recognized as compelling.

Creating a humane and just society, where all people have fair opportunities to thrive, requires doing more than protecting equal rights or formal equality of opportunity; it requires a jurisprudence more attuned to the need to belong and the harm of ostracism or social exclusion.

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[18] 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.").

[19] 600 U.S. 181 (2023).

[20] *Id.* at 214-15 (2023). The benefits that the Court considered 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. *Id.*

[21] As the district court in the UNC case observed, "minority students at the university still report being confronted with racial epithets, as well as feeling isolated, ostracized, stereotyped and viewed as tokens." Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 567 F. Supp. 3d 580, 667 (M.D.N.C. 2021); *see also* 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.").

[22] For similar arguments focused on addressing racial isolation, see, e.g., Jonathan Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity* , *in* 2019 UTAH LAW REVIEW 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).