

## DELIBERATION AND DISMISSAL

*David Schraub\**

### ABSTRACT

*One of the earliest steps in civil litigation is the “motion to dismiss.” Dismissal offers the opportunity to preemptively dispose of a given claim that does not present a legally judicable case or controversy prior to expending time or energy on matters like discovery or a trial. Everyday talk, of course, is not bound by such procedural rules. Yet in normal conversations we often engage in a form of discursive dismissal. When faced with discomfiting claims our instinct is not to engage in reasoned deliberation over them. Instead, we frequently brush them aside without considering their merits. By delegitimizing the claim as entirely unworthy of substantive public deliberation, we need not reason over it. Yet despite being a ubiquitous part of everyday conversation, this broader understanding of dismissal has not been independently identified or assessed.*

*Focusing on the discursive form of dismissal yields important insights into how we analyze (or fail to analyze) difficult claims—something that occurs across all deliberative forums. In this way, dismissal is not the sole or even primary province of the courts. But courts do possess one characteristic that makes them worth assessing independently: they are a site where—some of the time—deliberators have to listen. This places them on very different terrain than politicians, pundits, or everyday citizens, all of whom are relatively free to brush aside discomfiting claims at their discretion. Courts may play an important role in protecting unpopular groups not because judges are wiser, less prejudiced, or more insulated from democratic pressures, but simply because courts offer a space where—some of the time—arguments must be heard and reasons must be given.*

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\* Senior Research Fellow, California Constitution Center, and Lecturer in Law, University of California, Berkeley School of Law. This Article benefited from talks at the University of California, Berkeley, the University of Chicago, the University of Connecticut Workshop on Dominating Speech, the Loyola Constitutional Law Colloquium, Northwestern University, and the Chicago-Kent School of Law. Special thanks to K.T. Albiston, Andrew Bradt, Richard Buxbaum, Scott Cummings, Ira Ellman, Katie Eyer, Mark Gergen, Aziz Huq, David Lieberman, Rachel Ann McKinney, Jack McNulty, David Oppenheimer, Jonathan Simon, Fred Smith, Avani Mehta Sood, Sarah Song, Rachel Stern, James Tierney, and Jan Vetter for their helpful comments.

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## INTRODUCTION

In May 2004, Javad Iqbal filed suit against the United States government. His allegations were grave. One of thousands of persons picked up for questioning after the September 11 terrorist attacks, Iqbal alleged that he was subjected to continuous abuse while detained awaiting trial, abuse that stemmed directly from his racial and religious background. More importantly, Iqbal's complaint did not attribute this treatment to a few overzealous low-level field agents. He made a far more explosive allegation: that the decision to designate him and other Muslim detainees "high interest" was part of an official government policy approved at the highest levels of the American government. Among the persons Iqbal claimed were involved in the decision were Attorney General John Ashcroft and FBI Director Robert Mueller.

We never did find out whether Iqbal's allegations were true. The Supreme Court ultimately dismissed his case in *Ashcroft v. Iqbal*,<sup>1</sup> a case that "revolutionized" pleading standards in federal court.<sup>2</sup> Because the case was dismissed, it never proceeded to discovery, and so neither judges nor the public ever got the opportunity to examine or evaluate the record regarding treatment of Muslim prisoners in the aftermath of the attacks on September 11, 2001. It is possible that none of the misconduct Iqbal alleged occurred, and it is possible that if it did happen it was entirely unattributable to upper-level governmental policy. But the only fact we know is that we do not actually know one way or the other.

Dismissal, put in an abstract form, is a mechanism for disposing of claims without going through a full and complete investigation. And while formalized and codified in the *Federal Rules of Civil Procedure*, the act of dismissal can be seen in any deliberative forum where people attempt to register arguments. Whether we are inside the courtroom or standing in the public square, we necessarily face choices about whether and how to respond to claims put before us. Taken broadly, dismissal is one such response—or perhaps more aptly, non-response. As a discursive practice, we *dismiss* a proffered claim when we decide to dispense with it prior to considering its merits.

Whether in its legal or discursive form, the act of dismissal matters. On the one hand, no deliberative forum can guarantee that *every* claim is heard

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<sup>1</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>2</sup> Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337, 1337 (2010). Another case, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), is generally given revolutionary co-credit.

and *every* argument is considered. There are limits to what even diligent deliberators can reasonably take up. But at the same time, any functional system of social deliberation—from formal judicial processes to everyday discussion—presumes that participants will consider the merits of the case put before them and so, potentially, revise even passionately held beliefs. Yet people are very adept at finding reasons not to engage in this consideration precisely because it runs the risk of forcing such a reassessment. The arguments that most demand public engagement may well be the least likely to successfully get and keep our attention.

The potential wrong associated with dismissal, in short, is not that deliberative resources are scarce. It is that they are maldistributed. Instead of substantively engaging difficult questions, threatening claims will be cast as inherently implausible, made in bad faith, or outside the bounds of civilized discussion—all potential reasons why one should not have to devote time and attention to actually considering them. These claims are, in a word, dismissed.

Understood in this way, dismissal is certainly not limited to the courts. Yet courts do provide an interesting comparative lens on the matter, because they possess one very unusual characteristic: they are a location where decision-makers frequently *have to consider* whatever claims come before them. While there are certainly many arguments courts *cannot* consider, there are also many circumstances where courts *must* consider arguments that the judges would rather ignore—they must grant a hearing, they must provide reasons. This is markedly different from non-legal settings, where there is rarely anything compelling us to consider upsetting or discomfiting allegations “on their merits”—even in a biased or motivated manner. The comparative advantage of the judiciary—that it sometimes *has to listen*—offers a significant, yet often underappreciated, deliberative and epistemic virtue. Courts may play an important role in protecting unpopular groups not because judges are wiser, less prejudiced, or more insulated from democratic pressures, but simply because courts offer a space where—some of the time—arguments must be heard.

Part I of this Article outlines the concept of dismissal as both a legal and social practice. As a legal principle, the dismissal sets out *rules* for when courts can (or must) *not* evaluate a claim put before them. At the outset, this places courts in a unique deliberative position. Other deliberators in the public square—whether they be legislators, newspaper editors, or simply everyday private citizens—face virtually no restrictions one way or the other regarding what arguments they must or must not consider. Unlike judges, they are

generally free to consider any sort of argument they like. Also, unlike judges, they are generally free to not engage with any argument they find distasteful.

That judges—sometimes—are not just permitted but compelled to listen is a critical and underappreciated institutional niche occupied by the judiciary, not just compared to other political branches but over other modes of public deliberation. If, as seems likely, the sorts of claims deliberators would rather *not* consider are asymmetrically distributed—most likely to emanate from marginalized, unpopular, or minority claimants—then the judiciary may be the only forum that will genuinely consider them if only because it is the only forum where someone might be *compelled* to consider them. Yet if this is the unique deliberative virtue of the judiciary, then there is even more reason to worry about doctrinal trends (embodied in *Iqbal*) giving judges more discretion to dismiss cases. These trends erode the judiciary's comparative deliberative advantage and significantly impair the unique capacity courts possess to foster democratic conversations that might otherwise remain marginalized.

When functioning properly, judges are more likely than other deliberative actors to have to consider uncomfortable or challenging claims—ones which strike at the heart of their political, cultural, or ideological priors. But what in the abstract seems like a deliberative advantage for the judiciary also functions as a cognitive threat. Hence, Part I explores the concept of dismissal as part of a trio of “cognitive checkpoints” we use to avoid discomforting or inhospitable conclusions. The literature on motivated cognition has strongly challenged the naïve view the persons have an unmediated preference for ‘truth’ or generally appraise evidence in an unbiased fashion. Rather, persons have preferences about the beliefs they hold, and seek to preserve these views against external challenge. To this end they have several weapons in their arsenal. Much of the motivated-cognition research focuses on one particular method: how people make biased evaluations of evidence and arguments that challenge their desired worldview. But this is only part of the story. While this form of ‘evaluative’ motivated reasoning typically envisions a person who actually is grappling with the substance of an uncongenial argument (albeit in a biased fashion), often persons would prefer to sidestep that cognitively taxing process.

People can also evade reckoning with uncomfortable arguments by remaining *ignorant* of them—that is, putting themselves in a position where they are unlikely to encounter the claims in the first place. And even if they do come across a challenging claim, they can still *dismiss* it—they can use a variety of justifications to shunt the claim aside prior to engaging with it on its merits. Evaluative motivated reasoning is in reality often the move of last

resort—it is employed when an actor has not succeeded in avoiding encountering the claim in the first place and has for one reason or another been forced to engage with it substantively.

Dismissal can thus very effectively insulate cherished beliefs from reconsideration. But, as Part II explores, it also often comes attached to unique and pernicious dignitary harms imposed upon the dismissed speaker. As a social practice, dismissal can be seen as an element of what Miranda Fricker calls “epistemic injustice”—wronging someone in their “capacity as a knower.”<sup>3</sup> Fricker’s work, influential in philosophy but virtually unknown in law, concerns how we interact with one another as possessors and transmitters of knowledge. An epistemic injustice denies or demeans this essential human capacity. Dismissal very often represents such a degradation: it suggests that the claim—or claimant—is so implausible or insignificant that we need not spend any time considering it seriously.

Part III offers the practice of dismissing discrimination as a keynote example of the concept. In the social sphere, discrimination claims are often dismissed—“you’re playing the race card” is perhaps the most well-known iteration of the phenomenon—and this makes for a compelling illustration of the broader concept. At its simplest, dismissing discrimination claims is justified by the presumption that such claims are routinely leveled in bad faith and therefore need not be taken seriously. In more sophisticated guise, discrimination claims are dismissed as facially implausible by reference to deeply ingrained understandings regarding the meaning of discrimination and what facts we are willing to infer from the instances of conduct that typically prompt discrimination claims. Even as it relies upon these understandings and inferences, the act of dismissing discrimination simultaneously insulates them from challenge since the decision to dismiss is by definition a decision to refrain from further engagement on the subject. Any inadequacies or shortcomings in dominant or personal understandings of discrimination can be ignored indefinitely, as the very process which would allow them to be revealed is short-circuited by the ability to dismiss the critique out of hand.

Part IV concludes by reassessing the legal standing of dismissal as part of this wider discursive practice. This approach is a comparative institutionalist one,<sup>4</sup> although here the institutions to be compared are not just the other

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<sup>3</sup> Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* 20 (2007).

<sup>4</sup> See Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 366 (1984) (urging that law pay attention to “the *relative* strengths and weaknesses” of the different branches of government in determining how to allocate decision-making authority (emphasis added)).

branches of government but all social locations where we engage in public deliberation. Many have been skeptical of the judiciary's status as a deliberative forum because law can never represent more than a narrow subset of potential public claims of justice or injustice.<sup>5</sup> Arguments and claims—however justified or important they may be—which do not cohere to an extant and cognizable *legal* claim cannot be recognized in court.

This is all true. But there is more to the story. While legal claims are indeed limited, in the right circumstances they also can provide defined ways of pushing conversations forward. Nobody can force the newspaper to publish your column, or a senator to meet with your interest group, or a congressional committee to hold a hearing on your bill. But courts are different. Law occupies a virtually unique deliberative niche in that certain claims *must be heard*—even if they are uncomfortable, even if the relevant decision-makers would rather ignore them. And so, in considering why certain outgroups have often seemed attracted to litigation-centric strategies for social reform, the impetus may not be that judges are necessarily smarter, or kinder, or even more counter-majoritarian. The attraction of courts might simply lie in the fact that law can provide a cognitive expressway, taking certain types of claims that everyday deliberators would prefer to shunt aside and ensuring that they get some form of consideration. It does not do so perfectly, of course; and even when it does offer consideration, it provides no guarantee of victory. But just being in the space of reasons can be a significant advance for groups or claims accustomed to being dismissed out of hand.

## I. DISMISSAL, IN AND OUT OF THE COURTS

### A. *Law as a Vector of Social Conversation*

Federal Rule of Civil Procedure 12(b) gives defendants in a civil action the opportunity to dismiss a filed claim. There are several bases for doing so: the court might lack jurisdiction (personal or subject-matter), it might be the improper venue, or the claim might not “plausibly” be of the sort upon which the court can grant relief.<sup>6</sup> The motion to dismiss, in turn, is a critical gate in the litigation process because it precedes discovery.<sup>7</sup> Much of the hard,

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<sup>5</sup> See *infra* notes 19–20 and accompanying text.

<sup>6</sup> FED. R. CIV. P. 12(b); see also *Iqbal*, 556 U.S. at 662 (establishing the “plausibility” requirement for pleadings); *Twombly*, 550 U.S. at 544.

<sup>7</sup> See *Iqbal*, 556 U.S. at 678 (characterizing pleading rules as “unlock[ing] the doors of discovery”).

taxing, and expensive work of figuring out ‘what happened’ can be avoided if the court can decline to hear the case at its inception.

But what is “dismissal” as a concept? In its most abstract formulation, to dismiss an argument is to decline to consider it prior to substantive investigation.<sup>8</sup> This is the function of the motion to dismiss inside the courtroom. When a court dismisses a case due to lack of jurisdiction,<sup>9</sup> or improper venue,<sup>10</sup> or defects in the service of process,<sup>11</sup> it is not issuing a judgment on the merits of the filed claim itself—it is explaining why it need not or cannot issue such a judgment. Even dismissal for “failure to state a claim upon which relief can be granted”<sup>12</sup> does not necessarily render an ultimate decision on the substantive validity or invalidity of the claim—rather, it represents a declaration that the claim is not of the sort that is within the judicial province to address.

The question “dismissal” seeks to answer is whether and when a deliberator—in the judicial context, a court—must actually reason through a proffered complaint on its merits. The motion to dismiss under Rule 12(b) offers an opportunity to preemptively dispose of a filed claim prior to engaging in discovery. At this stage in litigation the plaintiff has only provided a pleading which contains “a short and plain statement of the claim showing that the pleader is entitled to relief”;<sup>13</sup> the question is what a plaintiff must include in this pleading in order to survive the dismissal motion.

Under this understanding, dismissal illuminates an important feature of the American judiciary. By formalizing the circumstances where courts cannot hear or consider a claim that is presented before them, the concept

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<sup>8</sup> There are, of course, several notable differences between dismissal in civil procedure and ‘dismissal’ in private conversation. For example, while a Rule 12 dismissal sometimes evades the merits of the dispute entirely (as in a standing or jurisdictional challenge), in other cases the only salient dispute is over the contours of the law and so a decision to dismiss may entail significant and searching consideration of the merits. In other circumstances, where the implausibility is primarily factual rather than legal, courts avoid further inquiry via summary judgment under Rule 56. See *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, J., concurring) (describing Rule 12 and Rule 56 as an “integrated program” for determining whether to dispense with federal claims prior to a trial).

Of course, private deliberation does not distinguish between ‘law’ (or principle) and ‘fact’, so there is no analogue for the procedural differences between Rules 12 and 56. And a dismissal on standing or jurisdiction is sometimes a closer analogue to my usage than is a 12(b)(6) dismissal. These inconsistencies hopefully do not distract from the clear parallels between dismissal as a civil procedure concept and dismissal as a practice in non-legal discourse.

<sup>9</sup> FED. R. CIV. P. 12(b)(1)–(2).

<sup>10</sup> *Id.* 12(b)(3).

<sup>11</sup> *Id.* 12(b)(4)–(5).

<sup>12</sup> *Id.* 12(b)(6).

<sup>13</sup> *Id.* 8(a)(2).

of dismissal also establishes that, if a claim does meet the criteria that make it into a justiciable case or controversy, then the parties are entitled to their day in court.<sup>14</sup> A claim which survives a motion to dismiss is a claim which, at some level, must be heard. This quality of the courts—their status as a place where decisionmakers *have to listen*—was recognized from America’s earliest days. In *Democracy in America*, Alexis de Tocqueville observed:

It is the essence of judicial power . . . not to come of itself to the assistance of those who are oppressed, but to be constantly at the disposition of the most humble among them. *However weak one supposes him, he can always force the judge to listen to his complaint and to respond to it:* that is due to the very constitution of judicial power.<sup>15</sup>

And one hundred years later, Charles Hamilton Houston explained the NAACP’s litigation-centric strategy in pursuit of African-American civil rights in similar terms: “[W]e use the courts as a medium of public discussion,” he said, “since it is the one place where we can force America to listen.”<sup>16</sup>

The judiciary is not always thought of in these terms. There is ample reason to be skeptical of the ability of judges to provide any unique deliberative insight beyond what is already present in the broader population.<sup>17</sup> Judges, after all, “come from society and thus are likely to harbor prejudices similar to those held in society at large (or at least society’s elite).”<sup>18</sup> Consequently, it is far from clear why they should be expected to possess any particular deliberative advantage unmatched by other, non-judicial actors. For their part, judges insist on reminding the public that the role of the judiciary is not to “right every wrong, suture every societal wound,

<sup>14</sup> See, e.g., *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989) (“Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred.”); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”).

<sup>15</sup> 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 668 (Harvey C. Mansfield & Delba Winthrop, eds. & trans., 2000) (1840) (emphasis added).

<sup>16</sup> Mark V. Tushnet, *The NAACP’s Legal Strategy Against Segregated Education, 1925–1950*, at 18 (1987).

<sup>17</sup> See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 949 (2011) (presenting these reasons, among others, for why many scholars believe that courts are “constrained” and litigation is an “empty promise” for social reform movements); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

<sup>18</sup> David Schraub, *Unsuspecting*, 96 B.U. L. REV. 361, 410 (2016); see also David Schraub, Comment, *The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement*, 77 U. CHI. L. REV. 1437, 1463 (2010) (“Where there is no social support for protecting a given minority, it is unclear why judges, who are part of that same society, should be expected to consistently rise above the prejudices of their times.”).

and correct every injustice.”<sup>19</sup> And even where there is a valid role for the judiciary to play in addressing a given social problem, judges can nonetheless only select from a narrow range of possible interventions—large swaths of potentially productive or useful remedies remain outside of their purview.<sup>20</sup>

Compared to the legislative branch (much less informal efforts at popular persuasion), the judiciary is by design a narrow and constrained body—one that can only redress claims through the very narrow prism afforded by established legal precedent. Many claims—even very important, very justified claims—cannot be legitimately made in the argot of the law. For this reason legal forums are often asserted to be “especially problematic” arenas for the deliberative project because of “the restrictions they impose upon admissible argument and so free dialogue.”<sup>21</sup>

These arguments are not wrong. But they are incomplete. It is true that courts are in an important respect less ‘open’ to claims than are, say, newspapers or legislators. Newspapers can publish whatever they want, there is no ‘jurisdictional’ bar that they need to account for first. Likewise, legislators are largely free to focus their attention on any cause or interest group that strikes their fancy; they are not limited in their ability to conduct hearings in the same way that a court is.<sup>22</sup> And of course, private conversation is open to any topic or debate that holds participants’ interests. But in another respect, courts possess an important advantage over other deliberative institutions. Nobody can force the newspaper to publish your column, or a senator to meet with your interest group, or a congressional committee to hold a hearing on your bill. The same freedom that allows them to listen to everything equally grants them the right to ignore anything. Indeed, this entitlement is central to the very idea of private deliberative freedom. Jürgen Habermas observes:

Private autonomy extends as far as the legal subject does not have to give others an account or give publicly acceptable reasons for her action plans. Legally granted liberties entitle one to drop out of communicative action, to refuse illocutionary obligations; they ground a privacy freed from the burden

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<sup>19</sup> Gerald E. Rosen, *The Hard Part of Judging*, 34 SUFFOLK U. L. REV. 1, 9 (2000).

<sup>20</sup> See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–57 (1978) (discussing the limited ways in which courts can truly address racial inequality in America given law’s understanding of racial discrimination through the lens of discrete perpetrators).

<sup>21</sup> John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* 71 (2000).

<sup>22</sup> Cf. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 83–88 (C. B. Macpherson ed., 1980) (1690) (discussing the “prerogative” powers of government).

of reciprocally acknowledged and mutually expected communicative freedoms.<sup>23</sup>

But judges are not free in this way. As Chief Justice Marshall observed in *Cohens v. Virginia*:

The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.<sup>24</sup>

Just as judges are limited in what they can hear, so too are they limited in what they can decline to hear. The rules of judicial dismissal (indeed, the basic fact that, unlike its private or legislative counterparts, judicial dismissal is bound by rules at all) can act to force consideration of certain claims that would otherwise go unheard. Law occupies a virtually unique deliberative niche in that certain claims *must be heard*—even if they are uncomfortable, even if the relevant decision-makers would rather ignore them.

The mere fact that—sometimes—judges have to listen is a critical and underappreciated institutional advantage of the judiciary, not just over the other political branches but over other modes of deliberation. An important part of political freedom is the ability to argue, before the relevant institutions, that one is being treated unfairly. Even in a just society “bad things happen: people get assaulted, mugged, sacked without due reason and so on. But what is crucial . . . is the victim’s ability to *contest* the wrongful treatment.”<sup>25</sup> If the “relevant institutional body” (the police, the courts, the grievance committee, etc.) does not hear—or does not fairly and impartially

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<sup>23</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to A Discourse Theory of Law and Democracy* 120 (1996).

<sup>24</sup> *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

<sup>25</sup> Miranda Fricker, *Silence and Institutional Prejudice*, in *OUT FROM THE SHADOWS: ANALYTICAL FEMINIST CONTRIBUTIONS TO TRADITIONAL PHILOSOPHY* 287, 301 (Sharon L. Crasnow & Anita M. Superson eds., 2012); see also PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 186–87 (1997) (articulating the basic features of “contestation” as an essential attribute of republican freedom); Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 *J. LEG. ANALYSIS* 227, 238–39 (2010) (articulating the contours of the “right to a hearing” consisting of “the opportunity to voice a grievance, the opportunity to be provided with a justification for a decision that impinges (or may impinge) on one’s rights, and the duty to reconsider the initial decision giving rise to the grievance”).

consider—the complaint, then this essential element of political freedom is lacking.<sup>26</sup>

When political or social deliberation functions properly, it offers a forum wherein people feel confident that the wrongs they experience will be carefully considered and reasonably redressed. This does not mean that claimants must always have their claims ultimately vindicated, but it does mean that they will be taken under consideration. To be sure, nobody can give full consideration to every potential claim or controversy. Deliberative resources are scarce; triaging is inevitable. But it is equally clear that these distributional decisions are fraught with danger. When given the opportunity to choose, deliberators will predictably focus their attention on those claims and claimants least likely to disturb or unsettle their deep-felt social or ideological priors.

Because courts offer a space where this discretion is constrained, they are uniquely advantaged vis-à-vis other deliberative institutions to offer a forum where even unpopular ideas or arguments can gain a hearing.<sup>27</sup> Put another way, what makes the judiciary different from other deliberative bodies—and potentially more open to claims of socially marginalized groups—is not that judges are especially educated, empathic, or even sensible people. Rather, it is that unlike the rest of us judges by and large do not have boundless discretion to refuse to hear claims that are facially disconcerting.

To be clear, the deliberative advantage asserted here is comparative, not absolute. Well before *Iqbal*, courts have had the capacity to dodge hearing cases they would rather not address on their merits.<sup>28</sup> Yet it remains the case that courts possess an underappreciated, peculiarly democratic function in our governmental and social system. Limited though it may be, the legal system still “provides a uniquely democratic . . . mechanism for individual

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<sup>26</sup> Fricker, *supra* note 25, at 301.

<sup>27</sup> See Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991, 999 (2006) (identifying the “right to a hearing” as the core justification for judicial review).

<sup>28</sup> See, e.g., Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961) (identifying judicial doctrines, such as standing, mootness, and jurisdiction, which assist in managing “the timing and limits of the judicial function”); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424–31 (1982) (noting the risks of the increasing “managerial” role judges have taken over the cases they hear).

A widely recognized recent case of this sort of behavior came in 2004, when the Supreme Court utilized the doctrine of “prudential standing” to overturn a 9th Circuit opinion striking down the inclusion of “under God” in the Pledge of Allegiance without addressing the issue on its merits. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004). See generally Eileen Braman, *Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision Making*, 68 J. POL. 308 (2006).

citizens to invoke public authority on their own and for their benefit.”<sup>29</sup> The average citizen cannot get an audience with the President or a meeting with their senator; they are not guaranteed a voice in the pundit box or a space in the editorial section. But every citizen has the right to walk into court and in some form receive an audience and response from an official representative of the United States government. In a world where certain types of claims and certain types of claimants are routinely and preemptively dismissed without serious engagement, that has equalizing power.

Unfortunately, a focus on the unique deliberative virtues of the judiciary also puts a worrisome gloss on recent judicial trends giving judges increased discretion to dismiss cases. These trends erode the judiciary’s comparative deliberative advantage and significantly impair the unique potential courts possess to foster democratic conversations that might otherwise remain marginalized.

### B. “*Twiqbal*” and the Problem of Plausibility Pleading

For many years, the Supreme Court’s interpretation of the rules surrounding dismissal buttressed this unique deliberative function. In 1957, the Court in *Conley v. Gibson* stated that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>30</sup> This “no set of facts” standard was the legal rule for the next fifty years, and generally maximized the ability of litigants to gain a hearing by dramatically limiting judges’ discretion to preemptively declare a claim unsuitable for judicial resolution.

Then, in the late 2000s, a pair of decisions—*Bell Atlantic Corp. v. Twombly*<sup>31</sup> and *Ashcroft v. Iqbal*<sup>32</sup>—dramatically changed the terrain. These cases tightened the pleading rules to require that plaintiffs set out allegations which “plausibly” support a legal violation.<sup>33</sup> “Plausible,” the Court held, was less than “probable,” but nonetheless demands “more than a sheer possibility

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<sup>29</sup> Frances Kahn Zemans, Legal Mobilization: The Neglected Role of the Law in the Political System, 77 AM. POL. SCI. REV. 690, 692 (1983).

<sup>30</sup> *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

<sup>31</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>32</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>33</sup> *Iqbal*, 556 U.S. at 678 (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”) (quoting *Twombly*, 550 U.S. at 570); *Twombly*, 550 U.S. at 557 (“The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”).

that a defendant has acted unlawfully.”<sup>34</sup> More specifically, the Court expressly held that simply asserting facts “consistent” with a legal violation would not suffice to establish a “plausible” case.<sup>35</sup> This repudiation of the “no set of facts” test triggered a wave of commentary regarding the “*Twigbal*” duo and its implications for civil pleading.<sup>36</sup> One common complaint was that the cases created a Catch-22: Plaintiffs “cannot state a claim because they do not have access to documents or witnesses they believe exist; and they cannot get access to those documents or witnesses without stating a claim.”<sup>37</sup> Others have protested that the process by which the Supreme Court altered the pleading rules was defective, leading to uncertainty and increased transactional costs.<sup>38</sup>

One particular concern about *Twigbal*, however, stands out: the claim that it allows judges to dispense with claims based on little more than whether they “ring true.”<sup>39</sup> While the relative lack of discretion courts had over when to hear claims placed them in a markedly different deliberative position from other social actors, the plausibility-pleading standard injected significant subjectivity into the dismissal decision that was largely absent under the prior notice-pleading rule.<sup>40</sup> In *Iqbal*, the Court conceded that “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>41</sup> But judicial “common sense” regarding

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<sup>34</sup> *Iqbal*, 556 U.S. at 678.

<sup>35</sup> *Twombly*, 550 U.S. at 565–67.

<sup>36</sup> See, e.g., Michael C. Dorf, *Iqbal and Bad Apples*, 14 LEWIS & CLARK L. REV. 217 (2010); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010); Jonah B. Gelbach, Note, *Locking the Doors to Discovery?: Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012); see also David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 120–21 (2010) (collecting and summarizing common reactions to the cases).

<sup>37</sup> Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 927 (2010).

<sup>38</sup> See Clermont & Yeazell, *supra* note 36, at 847 (“We regret the Court’s move [in *Iqbal*]— . . . not because we are certain that we lived under the ideal pleading regime, but because we are certain that a design change of this magnitude should occur only after a thorough airing of the choices.”).

<sup>39</sup> *Leading Cases*, 123 HARV. L. REV. 153, 262 (2009) (quoting Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 20, 2009, at A10).

<sup>40</sup> See Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187, 201 (2013) (“[U]nlike notice pleading, plausibility pleading is a highly subjective and ambiguous standard, which may allow implicit bias to operate against minority-group members.”).

<sup>41</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citation omitted).

what inferences are reasonable or plausible does not necessarily represent the only conclusion that a rational citizen might arrive at.<sup>42</sup>

Judges are vulnerable to the same biases as the rest of us; they are just as likely to prefer to not consider cases that carry a risk of leading to uncomfortable, disturbing, or otherwise distressing outcomes. Several empirical projects have accordingly sought to quantify whether the new pleading requirements had measurably adverse effects on plaintiffs' prospects for success.<sup>43</sup> Discrimination claims, for example, have been particularly vulnerable to increased rates of dismissal under the *Iqbal* "plausibility" regime—and as will be argued below, it is not surprising that they would fare particularly poorly as judges are given more discretion to avoid discomfoting thoughts.<sup>44</sup>

Indeed, if the worry is that plausibility-pleading is a vector through which courts can dismiss claims that might prove especially unsettling or discomfoting, it is quite possible (or should we say plausible?) that *Iqbal* itself is an example of the problem. The allegations in *Iqbal* were explosive: *Iqbal* claimed that following the September 11th attacks he and thousands of Muslim men were targeted for arrest and harsh confinement conditions solely on the basis of religion, race, and national origin.<sup>45</sup> These orders, the complaint alleged, came from top officials including Attorney General John Ashcroft and FBI Director Robert Mueller.<sup>46</sup> The Court dismissed the case, concluding that the pleadings were insufficient with respect to these high-level officials. The Court conceded that the pleadings did allege conduct that was "consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin," which would have satisfied the *Conley* standard.<sup>47</sup> "But," the Court continued, "given more likely explanations, they do not plausibly establish this purpose."<sup>48</sup> These other explanations were that any disparate impact on Muslim men stemmed

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<sup>42</sup> See Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going To Believe?* *Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009) (finding that several significant subcommunities interpreted the facts of *Scott v. Harris* in a manner that the Supreme Court concluded would be unreasonable).

<sup>43</sup> See, e.g., Gelbach, *supra* note 36, at 2276–77 (discussing multiple approaches to analyzing the effects of switching to the *Twombly/Iqbal* standard); Quintanilla, *supra* note 40, at 196 (citing studies showing that the new pleading standard has increased the dismissal rate for civil rights claims).

<sup>44</sup> See Quintanilla, *supra* note 40, at 206 ("[F]ederal district courts have increased the dismissal rate for Black plaintiffs' claims of race-based employment discrimination in ambiguous cases."); *infra* Part III.

<sup>45</sup> *Iqbal*, 556 U.S. at 669.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 681.

<sup>48</sup> *Id.*

from the Muslim background of the September 11th hijackers, and that harsh confinement conditions likewise stemmed not from their national origin or religion but rather their status as suspected terrorists.<sup>49</sup>

The allegation in *Iqbal*—that in the wake of September 11 there was a widespread and official policy, dictated from the highest levels of government, to illegally target and indefinitely confine Muslim men in restrictive “supermax” conditions—is perhaps the paradigmatic example of a discomfoting thought. Persons willing to concede that “a few bad apples” may have engaged in illegal discrimination following the World Trade Center attacks may still nonetheless be uncomfortable with the possibility that this was official Justice Department policy.<sup>50</sup> And of course, it is possible that investigation and discovery would confirm that there was no such policy and that any illegal conduct really was exceptional. But of course, it is also possible that discovery would find the opposite. The substantive result of *Iqbal* was that the judicial system managed to avoid finding out either way—and thus guarantee it would never have to grapple with the implications if *Iqbal*’s claims were, in fact, borne out.

That *Iqbal* has this effect is neither coincidental nor idiosyncratic. It fits well inside models of *motivated cognition*, wherein people—judges included—want to believe what they *want* to believe. Normally, this proceeds via slanted interpretation of received evidence—the shading of ambiguous possibilities to match the conclusion one prefers. As noted in the next section, however, a major point of vulnerability in this process is the possibility that one’s interlocutor really “has the goods” (or can uncover them in discovery) and can produce the smoking gun evidence that will force reassessment of deeply held beliefs.<sup>51</sup> Rather than take that chance, the Court in *Iqbal* simply deemed it “implausible” under the circumstances, thus negating any risk it would have to reckon with contrary evidence.

In other words, the very advantage of the judiciary identified above—that it is often compelled to hear and assess evidence when other deliberative actors are not—also functions as a cognitive threat. In practice, it means judges are more likely to encounter discomfoting or challenging claims than

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<sup>49</sup> *Id.* at 682–83.

<sup>50</sup> See Dorf, *supra* note 36, at 225 (explaining the *Iqbal* decision in terms of the Court believing that wrongful conduct, if any, was the product of a “few-bad-apples narrative” rather than systematic wrongdoing). See generally Chiraag Bains, “A Few Bad Apples”: *How the Narrative of Isolated Misconduct Distorts Civil Rights Doctrine*, 93 IND. L.J. 29, 30 (2018) (arguing that “[t]he case law has developed the way it has . . . because of the dominance of a particular narrative about civil rights violations,” which some call the “‘Few Bad Apples’ story of civil rights violations”).

<sup>51</sup> See Kunda, *infra* note 109 and accompanying text.

are other public deliberators. The following section accordingly situates dismissal as part of a continuum of motivated cognition that acts to shield deliberators from thoughts they would rather not think and conclusions they would rather not draw.

## II. THE CONTINUUM OF MOTIVATED COGNITION: THREE COGNITIVE CHECKPOINTS

People have preferences about the beliefs that they hold. That is to say, they do not simply want to know the unvarnished truth; they want to believe what they *want* to believe. And by the same token, there are also invariably thoughts they would rather sweep under the rug. “[W]e all have things we would rather avoid: things that are hard to hear, things that are difficult to accept or even to acknowledge.”<sup>52</sup> Such beliefs are often uncomfortably dissonant with our core ideologies or self-conceptions, and so people try their best to remove them from our epistemic lives.<sup>53</sup>

Motivated cognition, or motivated reasoning,<sup>54</sup> describes the “less-than-conscious tendency to reason toward one’s preferred result.”<sup>55</sup> “Everyday experience confirms that people’s judgments are often biased by their beliefs, desires, and vested interests,”<sup>56</sup> and legal scholarship has not ignored the problem. Typically, however, it has analyzed motivated cognition through one particular mechanism: biased evaluation of ambiguous situations. For example, a judge considering whether to exclude evidence from an arguably unlawful search may be influenced by the egregiousness of the underlying

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<sup>52</sup> José Medina, *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and Resistant Imaginations* 34 (2013).

<sup>53</sup> James H. Kuklinski, Paul J. Quirk, Jennifer Jerit, David Schwieder & Robert F. Rich, *Misinformation and the Currency of Democratic Citizenship*, 62 J. POL. 790, 794 (2000) (“[I]nconsistency causes dissonance. Because dissonance is uncomfortable, the individual seeks to avoid it. Better, then, to make inferences that fit one’s existing beliefs and attitudes than not.”); see also Daniel T. Gilbert Elizabeth C. Pinel, Timothy D. Wilson, Stephen J. Blumberg, & Thalia P. Wheatley, *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 J. PERSONALITY & SOC. PSYCHOL. 617, 619 (1998) (discussing our “psychological immune system” that fights against hostile information threatening to our sense of self); E. Tory Higgins, *Self-Discrepancy: A Theory Relating Self and Affect*, 94 PSYCHOL. REV. 319, 319 (1987) (“The notion that people who hold conflicting or incompatible beliefs are likely to experience discomfort has had a long history in psychology.”).

<sup>54</sup> Technically speaking, one can refer to both directionally based and accuracy-based reasoning as “motivated cognition” (either one is motivated by direction or by accuracy). See Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480–81 (1990). For purposes of this article, “motivated cognition” is considered to refer exclusively to the former.

<sup>55</sup> Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1547 (2015).

<sup>56</sup> David K. Sherman & Geoffrey L. Cohen, *Accepting Threatening Information: Self-Affirmation and the Reduction of Defensive Biases*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 119, 119 (2002).

crime; her desire to punish a particularly vicious act may slant her appraisal of the underlying legal issues.<sup>57</sup> This will be termed “evaluative motivated reasoning.”

But evaluative motivated reasoning is only part of a large continuum of motivated cognition. Biased reasoning is only necessary if one needs to consider an argument in the first place. If it can be dismissed out of hand—or is never heard in the first place—then much taxing cognitive effort can be avoided altogether. Hence, there are two prior “cognitive checkpoints” that also serve to ward off discomfiting thoughts—what will be called “ignorance” and “dismissal.” Precisely because these latter maneuvers elide the need to substantively reason at all, they can be far more effective—and far more dangerous—than their more commonly acknowledged cousin.

*Ignorance* is, as one might expect, the state of simply not knowing the challenging information. This can be purely coincidental, but it also encompasses acts or structures whereby persons are able to effectively shun sources of information which they predict will yield dissonance—for example, liberals refusing to watch Fox News while conservatives skip past MSNBC. Yet even if one does end up hearing a claim, one often can still elect not to examine, investigate, or otherwise consider its details or particulars. This is an act of *dismissal*—it parallels the civil procedure concept, which also acts to terminate (judicial) consideration of a given (legal) claim prior to the discovery process. These three mechanisms—ignorance, dismissal, and evaluative moral reasoning—are part of a continuum<sup>58</sup> of motivated cognition whereby we protect ourselves from adopting beliefs inconsistent with our priors.<sup>59</sup>

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<sup>57</sup> See Sood, *supra* note 55, at 1547 (finding experimental confirmation of this tendency); see also Jeffrey A. Segal, Avani Mehta Sood, & Benjamin Woodson, *The “Murder Scene Exception”—Myth or Reality? Empirically Testing the Influence of Crime Severity in Federal Search-and-Seizure Cases*, 105 VA. L. REV. 543, 578 (2019) (finding “suppression determinations in real search-and-seizure cases suggests that federal Courts of Appeals judges generally appear significantly less likely to exclude challenged evidence in cases involving crimes that carry higher maximum penalties as compared to lower penalties”).

<sup>58</sup> The description of motivated cognition as a continuum suggests that there are not sharp boundaries between ignorance, dismissal, and evaluative motivated reasoning. Just how much awareness moves a listener from ignorance to dismissal, or how much consideration is necessary to convert dismissal into evaluative motivated reasoning, are matters of judgment. That each may sometimes shade into the others does not significantly affect the concepts’ clarity.

<sup>59</sup> In other words, all three processes—ignorance, dismissal, and evaluative motivated reasoning—can be fit under the broader umbrella of motivated cognition. There is potential for confusion, since in the literature “motivated reasoning” and “motivated cognition” are typically used interchangeably. Avani Sood suggests that motivated cognition is the superior term because it encompasses “not only active reasoning,” (what this Article is terming evaluative motivated

To illustrate the difference between the three concepts, consider the following example. Dana believes that racial discrimination in America, particularly by authority figures, is rare and getting rarer. She is attached to this viewpoint due to various ideological and social bonds, and therefore does not like hearing about cases and circumstances which challenge her optimistic view regarding America's racial state. Josh is a person of color who claims to have been racially profiled by the police. How might Dana successfully dissipate the threat Josh's allegation poses to her worldview?

The first answer is that Dana might remain *ignorant* about the allegation altogether. Of course, there are all sorts of innocent reasons why Dana might never hear about Josh's incident—but there are also ways in which she can stack the deliberative deck.<sup>60</sup> For example, Dana might (consciously or not) think that persons of color are more likely to make discomfiting allegations of racial prejudice and therefore be less likely to socialize with members of other racial groups so as to reduce the probability that she will encounter such a claim. Beyond her set of personal acquaintances, Dana might tailor her media consumption to favor outlets which are less likely to devote attention to discrimination claims and thus are less likely to pass along Josh's story. If she successfully avoids hearing about the claim, she need not expend any additional effort rationalizing it.

Suppose, though, that Dana does become aware of Josh's claim. Maybe a friend raises Josh's complaint, or maybe his story happened to be picked up by the nightly news. Even still, it is rarely if ever the case that all the details of a given situation emerge before the recipient of the information has time to react. Though Dana now is aware of the basics of the issue—that Josh alleges he was the victim of profiling—she need not entertain it as a live possibility worthy of her time. She can also *dismiss* it as unworthy of attention—“he is just playing the race card”—and thus justify refraining from delving into the details that would ultimately ratify whether the claim was a legitimate one or not.

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reasoning) “but also more immediate forms of acquiring knowledge and understanding, such as visual perception.” Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 309 (2013). One could simply call this final step in the continuum “motivated reasoning” and the broader phenomenon “motivated cognition.” But this would be idiosyncratic, and so to avoid confusion the label “evaluative motivated reasoning” is used to distinguish it from other forms of motivated cognition which do not engage in explicit analysis of the proffered claim.

<sup>60</sup> Consider James Baldwin's searing indictment of the “innocence” of Whites in the face of ongoing racial injustice: “they have destroyed and are destroying hundreds of thousands of lives and do not know it and do not want to know it. . . . [I]t is not permissible that the authors of devastation should also be innocent. *It is the innocence which constitutes the crime.*” JAMES BALDWIN, *THE FIRE NEXT TIME* 5–6 (Modern Library ed., 1995) (emphasis added).

Despite her best efforts, however, there are circumstances where Dana might be effectively forced to take Josh's claims seriously. She might be Josh's friend (in which case accusing him of "playing the race card" would be quite rude), she might encounter Josh's case as part of the assigned reading in an academic seminar, or she might be a jury member in Josh's civil suit. In these cases, powerful norms exist which compel Dana to listen to the whole story and actually weigh the evidence presented. And this is the stage where evaluative motivated reasoning comes into play. If the case is ambiguous or the evidence unclear, Dana is likely to subtly interpret these ambiguities in ways which are consistent with her worldview. Josh *was* exceeding the speed limit (even if by only ten miles per hour), and the police officer *did* say that his demeanor was suspicious given the time and neighborhood.

Because legal theorists naturally are concerned with the success and failure of considered arguments, this last step—evaluative motivated reasoning—is often given outsized attention in the legal literature. But it is actually best thought of as the final checkpoint on a cognitive continuum that also includes ignorance and dismissal. Far from being the *sine qua non* of motivated cognition, it is often the move of last resort. Exploring how ignorance and dismissal interact with their more familiar cousin provides a richer understanding of the psychological processes which enable us to protect deeply felt beliefs from external challenges.

#### A. Ignorance

Evaluative motivated reasoning allows for people to rationalize around received information so that they do not threaten one's cultural or ideological priors. It relies on a biased appraisal of evidence—faced with a discussion about, say, gun control or global warming, persons will selectively read the arguments so as to fit within their preexisting beliefs.<sup>61</sup> In other words, this form of reasoning kicks in at the point where one is already relatively deeply enmeshed in the merits of the dispute.

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<sup>61</sup> See Dan M. Kahan, Ellen Peters, Erica Dawson & Paul Slovic, *Motivated Numeracy and Enlightened Self-Government*, 1 BEHAV. PUB. POL'Y 54, 69 (2017) (noting that individuals with higher numeracy will still reach conclusions congenial to their political outlooks, even when the data displays covariance); Dan M. Kahan, Maggie Wittlin, Ellen Peters, Paul Slovic, Lisa Larrimore Ouellette, Donald Braman & Gregory N. Mandel, *The Tragedy of the Risk-Perception Commons: Culture Conflict, Rationality Conflict, and Climate Change* 9 (Cultural Cognition Project, Working Paper No. 89), <http://ssrn.com/abstract=1871503> [hereinafter Kahan et al., *Risk-Perception Commons*] (citing evidence that two separate political groups were equally likely to hold mistaken beliefs about "scientific consensus" . . . on culturally charged risk issues such as . . . climate change, and gun control" (citation omitted)).

Hopefully, it is obvious why motivated reasoning of this sort does not account for anything close to the majority of scenarios where a given claim is not ratified by surrounding social actors. The overwhelming majority of claims are not accepted as true not because they are evaluated and discounted in a biased (or non-biased) manner, but because they are never heard at all. Most people, obviously, remain ignorant of most claims. They do not read, hear, or otherwise encounter them, and so they never have any occasion to appraise them (whether dispassionately or not).

On its own, this might not be worthy of too much concern. There are limits to the amount of information anyone can reasonably be expected to process, and so the fact that most claims will not be appraised is true only in the trivial and banal sense that a great many claims will never be given attention. This might be all that needs to be said on the subject were it the case that the distribution of heard and unheard claims was random. But this is exceptionally unlikely to be true. It is quite clear that people frequently structure their social worlds so that they are relatively unlikely to hear claims that they would rather not consider. The most obvious and well-known form this practice comes in the form of media selection—liberals do not watch Fox, conservatives avoid MSNBC.<sup>62</sup>

Hence, the first cognitive checkpoint that helps ward off thoughts we would rather not think is simply remaining ignorant about them in the first place. “Ignorance,” Sharron Sullivan and Nancy Tuana observe, “often is thought of as a gap in knowledge, as an epistemic oversight that easily could be remedied once it has been noticed. It can seem to be an accidental by-product of the limited time and resources that human beings have to investigate and understand their world.”<sup>63</sup> But ignorance can be quite conscious and volitional: we specifically construct our social spheres so as to minimize the situations where we come face-to-face with discomfiting claims. As José Medina puts it:

Active ignorance is the kind of ignorance that is capable of protecting itself, with a whole battery of defense mechanisms (psychological and political) that can make individuals and groups insensitive to certain things,

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<sup>62</sup> See generally *Americans Spending More Time Following the News*, PEW RES. CTR. (Sept. 12, 2010), <https://www.people-press.org/2010/09/12/americans-spending-more-time-following-the-news/> (providing analysis on cable news audiences in relation to demographics, including political ideology).

<sup>63</sup> Shannon Sullivan & Nancy Tuana, *Introduction to RACE AND EPISTEMOLOGIES OF IGNORANCE* 1, 1 (Shannon Sullivan & Nancy Tuana eds., 2007).

that is, numbed to certain phenomena and bodies of evidence and unable to learn in those domains.<sup>64</sup>

The Fox/MSNBC divide provides stark demonstration that ignorance is more than just an acknowledgment of the inevitable limits of our attention and cognitive resources, and can instead represent an active attempt to distribute said resources to problems amenable to our ideological or cultural desires.

Ignorance can also be an implicit or unconscious phenomenon. Consider the concept of “aversive racism,” which plays a significant role in the related literature on implicit bias.<sup>65</sup> Aversive racism generally refers to interplay between conscious egalitarian commitments and subconscious racial prejudice, resulting in the imposition of racial inequalities only when they can be justified by neutral rationales.<sup>66</sup> But the “aversive” in “aversive racism” refers to a practice of avoidance—because persons feel the dissonance between their conscious desire for egalitarianism and their subconscious prejudice, they learn to associate interracial interaction with anxiety and discomfort and so become “averse” to and avoid such engagements.<sup>67</sup> In this way, the anxiety often felt towards interracial interaction, and the ensuing self-segregation, can be seen as a form of (motivated) ignorance.<sup>68</sup>

But ignorance need not be sought out—even subconsciously—to have normative significance. It can also have a structural component that transcends anyone’s conscious or unconscious choice to avoid hearing certain types of assertions. Even absent such a decision, the sorts of claims that are likely to emerge out of the infinite din of human experience and make it onto the broader social radar screen are not randomly distributed. This is true for at least two reasons. First, the default package of socially salient issues that is immediately accessible without effort typically reflects that which is important to particular empowered classes. “Ignorance” can

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<sup>64</sup> MEDINA, *supra* note 52, at 58.

<sup>65</sup> See generally John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1 (2004) (discussing aversive racism); John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315 (2000) [hereinafter Dovidio & Gaertner, *Selection Decisions*] (presenting a study of aversive racism); Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM 61 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

<sup>66</sup> Dovidio & Gaertner, *Aversive Racism*, *supra* note 65, at 7.

<sup>67</sup> Gaertner & Dovidio, *Aversive Form*, *supra* note 65, at 36.

<sup>68</sup> See Clarissa Rile Hayward, *Responsibility and Ignorance: On Dismantling Structural Injustice*, 79 J. POL. 396 (2017) (discussing the importance of disruptive politics because it can create structural change and interrupt motivated ignorance); Charles W. Mills, *White Ignorance*, in EPISTEMOLOGIES OF IGNORANCE, *supra* note 63, at 13.

in some cases simply reflect a lack of epistemic curiosity: people accept the default offerings and feel no desire to interrogate further.<sup>69</sup> Moreover, “social stratification” often helps insulate the beneficiaries of unjust systems “from their effects; they experience all of the pleasure and see none of the pain.”<sup>70</sup> Residential segregation, narrowly focused media, and government responsiveness to the interests of certain social classes over others all contribute to an unequal distribution of claims which receive meaningful attention.

Second, even where social actors are affirmatively-engaged listeners, it still might be the case that claims favored by particular groups will be less able to be rendered intelligible and therefore will not be expressed. This is what Miranda Fricker refers to as a “hermeneutical injustice.”<sup>71</sup> A hermeneutical injustice refers to the problem whereby “relations of unequal power can skew shared hermeneutical resources” such that the perspectives of the powerful are easily expressed through normal, well-understood social narratives, while the powerless find that their understanding of their own experiences is not quite as intelligible under these standard modes of communication.<sup>72</sup> Sexual harassment, prior to the popularization of the term, is a paradigmatic example of a harm that was difficult to elucidate, even for women, not just because of overt biases but also because the relevant public knowledge for understanding it as a conceptually cohesive wrong had yet to have been developed.<sup>73</sup> Prior to the 1970s or 1980s, men could remain ignorant of the problem of sexual harassment simply because there was not yet any widely accepted language available that would render a claim of “sexual harassment” intelligible.

The practical effects of ignorance, in its systematic dimension, is to render certain types of opinions normal and others rare or aberrant—a person who very infrequently hears claims of racial profiling will find the exceptions to be, well, exceptional (even if the reason they are an exception is not their infrequency but rather that most of the other examples were unaired or

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<sup>69</sup> See MEDINA, *supra* note 52, at 33 (describing the epistemic vice resulting “from the privilege of not needing to know is a lack of curiosity about those areas of life or those social domains that one has learned to avoid or not to concern oneself with”).

<sup>70</sup> David Schraub, *Sticky Slopes*, 101 CALIF. L. REV. 1249, 1304 (2013); see also Robin DiAngelo, *White Fragility*, 3 INT’L J. CRITICAL PEDAGOGY 54, 58 (2011) (“Growing up in segregated environments[,] . . . white interests and perspectives are almost always central. An inability to see or consider significance in the perspectives of people of color results.”).

<sup>71</sup> FRICKER, *supra* note 3, at 147.

<sup>72</sup> *Id.* at 148.

<sup>73</sup> See *id.* at 149–51. See generally Catherine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979).

otherwise failed to register). And in turn, the content of the ‘normal’ or ‘typical’ opinions registered in a particular social context has an impact on what opinions are likely to be presented in the future. People do not simply blurt out any thought or claim on their mind; they are far more likely to do so when they feel their arguments are in tune with the opinions of those around them, and are far more likely to keep silent when they do not.<sup>74</sup> This reticence has a cascading effect: persons do not voice opinions they think are unpopular, further marginalizing their public salience and making it even less likely that such thoughts will gain airing in the future.<sup>75</sup> The result is what Elisabeth Noelle-Neumann calls a “spiral of silence.”<sup>76</sup> And the hermeneutical maldistribution identified by Fricker amplifies the effect: it limits the rhetorical resources available even for dissidents who are willing to buck the dominant trend. In this way, patterns of ignorance are able to replicate and sustain themselves with considerable vigor and longevity.

### B. Dismissal

Another form of suppressing—or more accurately, evading—dissonance is through dismissal. Dismissal is a species of motivated cognition in that it is a form of direction-oriented (rather than accuracy-oriented) reasoning.<sup>77</sup> But unlike evaluative motivated reasoning, which is a (biased) means for assessing the evidence of a proposition, dismissal occurs when one refuses to consider the claim at all.

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<sup>74</sup> Frances Bowen & Kate Blackmon, *Spirals of Silence: The Dynamic Effects of Diversity on Organizational Voice*, 40 J. MGMT. STUDS. 1393, 1396 (2003) (“People’s willingness to express their opinions is influenced not only by their own personal opinions, but also by their external environment, particularly what they perceive as the prevailing ‘climate of opinion’. [sic] When they are not sure that they agree with the majority, people are reluctant to express their opinions.”).

<sup>75</sup> *Id.* (“When people perceive that they share the dominant opinion they will speak out, strengthening this position, whilst those who perceive that they hold the minority opinion will become more silent, diminishing their position.” (citation omitted)); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685 (1999) (arguing that prevalent or expressed opinions have a tendency to “cascade”—they “trigger chains of individual responses that make these perceptions appear increasingly plausible through their rising availability in public discourse”).

<sup>76</sup> Elisabeth Noelle-Neumann, *The Spiral of Silence: A Theory of Public Opinion*, 24 J. COMM. 43, 44 (1974) (“The more individuals perceive these tendencies and adapt their views accordingly, the more the one faction appears to dominate and the other to be on the downgrade. Thus, the tendency of the one to speak up and the other to be silent starts off a spiraling process which increasingly establishes one opinion as the prevailing one.”). See generally ELISABETH NOELLE-NEUMANN, *THE SPIRAL OF SILENCE: PUBLIC OPINION—OUR SOCIAL SKIN* (1984).

<sup>77</sup> See Kunda, *supra* note 54, at 480–81 (“The motivated reasoning phenomena . . . fall into two major categories: those in which the motive is to arrive at an accurate conclusion, whatever it may be, and those in which the motive is to arrive at a particular, directional conclusion.”).

In other work, I have sketched the basic concept of dismissal through the case of the “bad faith” response to charges of discrimination—for example, alleging that a discrimination claimant is just “playing the race card.”<sup>78</sup> More detail on this example is provided below,<sup>79</sup> but here it suffices to note that the key attribute of the bad faith response—what makes it a form of *dismissal*—is that it dispenses with the claim without having to engage with it on its merits. To say that someone is “playing the race card” is to say that their claim is fundamentally illicit—a ploy done for tactical advantage rather than an organic attempt to advance discussion—and therefore need not be taken seriously.<sup>80</sup> This maneuver justifies refraining from engaging in reasoned deliberation over the discrimination claim, which in turn dissipates the risk that one might have to accept its validity.

In many circumstances, dismissal can be thought of as a special case of what Miranda Fricker calls a “testimonial injustice.” A testimonial injustice occurs where “prejudice on the hearer’s part causes him to give the speaker less credibility than he would otherwise have given.”<sup>81</sup> Often times the decision to dismiss is indeed tied to assessments about the claimant’s reliability that are explicitly prejudicial.<sup>82</sup> The rhetoric surrounding the “race card” claim, for example, frequently relies upon notions that marginalized persons are epistemically incredible—they lack objectivity or dispassionate neutrality compared to putatively unmarked majoritarian observers.<sup>83</sup> Calling into question the capacity of marginalized persons to make credible claims in the public sphere is an easy means of dispensing with their arguments without having to engage with their substance.

But like ignorance, dismissal can also result from structural factors that do not necessarily implicate even implicit personal biases. For example, our prior beliefs about what is likely to be relevant or useful information in carrying inquiry forward may cause us to discount particular testimonial offerings—refusing to engage with them as part of an ongoing political or

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<sup>78</sup> See generally David Schraub, *Playing with Cards: Discrimination Claims and the Charge of Bad Faith*, 42 SOC. THEORY & PRAC. 285 (2016).

<sup>79</sup> See *infra* Part III.

<sup>80</sup> Schraub, *supra* note 78, at 285.

<sup>81</sup> FRICKER, *supra* note 3, at 4; see also Schraub, *supra* note 78, at 286.

<sup>82</sup> Schraub, *supra* note 78, at 295–96.

<sup>83</sup> See *id.*; DERRICK BELL, *THE RULES OF RACIAL STANDING, IN FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM*, 109, 113 (1992) (noting that Black people speaking about racism will be viewed as “less effective witnesses than are whites . . . reflect[ing] a widespread assumption that blacks, unlike whites, cannot be objective on racial issues”). Bell also provides for an important exception: when members of marginalized groups criticize members of their own community, then their testimony will be accorded enhanced weight. *Id.* at 114–15.

social debate.<sup>84</sup> Return to Fricker’s concept of a “hermeneutical injustice,” whereby we lack the relevant language to understand a given claim as part of a generalizable or systematic experience recognized as wrong.<sup>85</sup> Fricker focuses on the knower who cannot effectively articulate her own experience. But there is a related problem for the listener who fails to adequately perceive potentially valid claims due to an overly cramped and partial account of the relevant principles. These are two sides of the same coin: the shared problem is that differing hermeneutical resources make certain types of claims (favored by certain types of persons) easy to process while rendering others opaque.<sup>86</sup>

In the discrimination context, for example, the prevailing narrative of the concept might cast discrimination as something extreme (Nazi- or Klan-like) or rare.<sup>87</sup> If this is how discrimination is understood, then a discrimination claim which lacks these characteristics (for example, complaining about microaggressions or paternalism) might feel discordant or ridiculous even by one who does not believe that the claimant’s class should generally have their credibility discounted. Such listeners would justify brushing this sort of discrimination claim aside because it refers to something too minor, or to something that would implicate too many people, to be properly labeled “discrimination.”<sup>88</sup>

It is hopefully clear how these two bases for dismissal—the testimonial and the hermeneutical—can end up reinforcing one another and further foster harmful attitudes and practices towards marginalized persons. If marginalized persons regularly level claims which feel groundless because

<sup>84</sup> Christopher Hookway, *Some Varieties of Epistemic Injustice: Reflections on Fricker*, 7 *EPISTEME* 151, 157–58 (2010) (“There could be a form of injustice related to assertion and testimony that consisted, not in a silencing refusal to take the testimony to be true or expressing knowledge, but in a refusal to take seriously the ability of the agent to provide information that is relevant in the current context.”).

<sup>85</sup> See FRICKER, *supra* note 3, at 147–51 and accompanying text.

<sup>86</sup> See DRYZEK, *supra* note 21, at 70–71 (contending that political argument “involves communication in the terms set by the powerful, who almost by definition are those best able to articulate their arguments in terms of the dominative speech culture of a society”).

<sup>87</sup> Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 *RUTGERS L. REV.* 903, 948 (2003) (“The dominant perception of a ‘racist’ is only the most extreme example—a person who rabidly hates, often to the point of violence, persons from other racialized groups.”).

<sup>88</sup> See, e.g., *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (rejecting an early attempt to bring suit on a sexual harassment theory because “holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another”); David Hirsh, *Struggles Over the Boundaries of Legitimate Discourse: Antizionism, Bad-Faith Allegations and The Livingstone Formulation*, in 5 *GLOBAL ANTI-SEMITISM: A CRISIS OF MODERNITY* 89, 89 (Charles Asher Small ed., 2013) (recounting a conversation with a Dutch friend who asserted that “in the Netherlands one would not characterise [sic] [the play *Seven Jewish Children*] as anti-Semitic” because “[a]fter the Holocaust the word ‘antisemitic’ was too strong”); see also *infra* Part IV.C.1.

they fall into a hermeneutical gap, it is easy to arrive at the mistaken belief that these persons simply lack a reasoned or “objective” view of the relevant facts or principles and can therefore be discounted. Likewise, to the extent that marginalized persons are most likely to perceive a lacuna in the dominant understanding of important social norms, a testimonial injustice which preemptively discredits minority perspectives makes it more difficult for their observations to receive fair consideration or for their understandings to be incorporated in publicly intelligible conceptions of the relevant principles.

Other scholars have recognized that people often act to pre-screen extant claims on criteria which have little to do with claim’s substantive merits. In discussing their idea of a psychological “immune system,” Daniel Gilbert and his colleagues present a very simple example: the decision to “dismiss[,] as a rule[,] all remarks that begin with ‘[y]ou drooling imbecile.’”<sup>89</sup> This dismissal is done as a substitution for actually engaging with the substantive merits of the remark (which, given the introduction, are likely to be hurtful or at least unsettling). Eileen Braman has made the important contribution of connecting this phenomenon to legal behavior: her research found that decisions regarding “threshold” legal questions like standing were significantly influenced by study participants’ views of the underlying claim (at least in ambiguous cases with no controlling legal precedent).<sup>90</sup> Even though standing decisions nominally are wholly apart from the substantive merits of a legal case, there is a greater propensity to dismiss cases on standing grounds when doing so will forestall having to consider a potentially hostile claim on its merits.

Like all forms of motivated cognition, it is easy to think of dismissal in purely negative, even opportunistic terms. So it is important to stress that, just as with ignorance, dismissal begins from a simple and important truth: there are many demands upon our cognitive facilities throughout the day, and we must prioritize what areas receive our attention. “The quantity and variety of social stimulation available at any time is vastly greater than a person can process or even attend to. Therefore, individuals are necessarily selective in what they notice, learn, remember, or infer in any situation.”<sup>91</sup> Gilbert’s ‘drooling imbecile’ example perhaps provides a fine case of a circumstance where dismissal may be perfectly appropriate.<sup>92</sup>

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<sup>89</sup> Gilbert et al., *supra* note 53, at 619.

<sup>90</sup> Braman, *supra* note 28, at 315.

<sup>91</sup> Hazel Markus, *Self-Schemata and Processing Information about the Self*, 35 J. PERSON. & SOC. PSYCH. 63, 63 (1977).

<sup>92</sup> See *supra* note 89 and accompanying text.

Yet it is evident why discursive dismissal carries significant potential for abuse. Most obviously, what sorts of claims strike us as facially implausible will depend greatly on our past experiences, and hence social stratification can yield wide gaps in what sorts of statements seem reasonable versus farcical even amongst well-meaning deliberators.<sup>93</sup> Persons who occupy epistemically privileged positions—who are unused to having their cognitive authority questioned or whose social appraisals are generally accorded respect—may be ill-equipped to critically reconsider their instincts in response to unfamiliar challenges.<sup>94</sup> And when we reckon with the fact that people also have motivated reasons for preferring to grapple with certain sorts of claims while ignoring others, the problem intensifies further still.<sup>95</sup> Dismissal is motivationally useful because it obviates the need to consider arguments or evidence that might be brought to bear in favor of threatening claims. Structuring our thought-processes such that claim-classes likely to be discomfiting are coded as facially implausible or ludicrous allows for potentially dissonant claims to be headed off without having to do the hard cognitive work of actually reasoning around the merits of the case.

Moreover, if we are refraining from considering a given claim solely because we need to triage scarce deliberative resources, then we have no grounds to speak to the potential validity of the claim. We should, as Fricker observes, reserve judgment on its merit until such time as it can be given proper attention.<sup>96</sup> The fact that dismissal so frequently comes attached to evaluative statements about the claimant (through terms like ‘bad faith,’ ‘implausible,’ ‘playing the race card’ and so on), however, suggests that more is going on than dispassionate attempts at prioritization.

And while anyone is capable of dismissal, it carries particular potency when conjoined with social power. One of the more important attributes of power, after all, is that “you can opt not to listen. And you do so with

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<sup>93</sup> See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1106–17 (2008) (providing empirical evidence supporting significant gaps in how White and Black people, and men and women, perceive potential cases of discrimination); David R. Maines, *Information Pools and Racialized Narrative Structures*, 40 SOC. Q. 317, 317–26 (1999) (explaining that social stratification causes White and Black people to draw from different “pools” in terms of where they get background information).

<sup>94</sup> See MEDINA, *supra* note 52, at 30 (discussing the problem of being “epistemically spoiled”); see also JOHN STUART MILL, ON LIBERTY 17 (Elizabeth Rapaport ed., 1978) (1859) (expressing disdain for “princes, or others who are accustomed to unlimited deference” because such persons are not habituated to considering challenging perspectives and therefore are effectively unable to acknowledge their own fallibility).

<sup>95</sup> See Robinson, *supra* note 93, at 1124 (noting that “an individual’s social position shapes his willingness to pursue information about a particular topic.”).

<sup>96</sup> FRICKER, *supra* note 3, at 172.

impunity.”<sup>97</sup> Persons with power can often unilaterally set the conceptual boundaries of a given conversation, and thereby “preemptively silence” perspectives which might—if given due consideration—present an effective challenge.<sup>98</sup> By contrast, a position of vulnerability makes it more likely “that one will need to attend to what others are likely to notice”<sup>99</sup>—while marginalized persons certainly can (under the right circumstances) argue against the principles or assertions of the dominant classes, they are rarely in a position to simply wave them aside outright.<sup>100</sup> At the same time, persons holding epistemic power—who are in a privileged position to articulate what counts as valid knowledge and who are considered to be a valid exponents of potential claims—have every incentive to preserve their advantaged status.<sup>101</sup> Dismissing marginalized or alternative perspectives helps preserve this epistemic primacy.

### C. (*The Limits of*) *Evaluative Motivated Reasoning*

The structure and importance of evaluative motivated reasoning in legal decision-making has been analyzed in great detail elsewhere,<sup>102</sup> so no more than a basic sketch will be given here. Instead the focus is on how, despite the outsized attention paid to it in the legal literature, this particular form of motivated cognition is only a partial, and in some ways unideal, solution to the threat posed by a discomfiting allegation. The purpose is not to discount evaluative motivated reasoning as an important phenomenon, but rather to situate it as one part of a broader continuum of cognitive practices.

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<sup>97</sup> Feminist Discourse, Moral Values, and the Law—A Conversation: The 1984 James McCormick Mitchell Lecture, 34 BUFF. L. REV. 11, 62 (1985).

<sup>98</sup> Eric Reitan, *Rape as an Essentially Contested Concept*, 16 HYPATIA 43, 50 (2001) (“[I]f any one party has the power to unilaterally determine the conceptual framework that will be used in assessing a normative problem, that party will be able to preemptively silence certain dissenting voices.”).

<sup>99</sup> Gaile Pohlhaus Jr., Relational Knowing and Epistemic Injustice: Toward a Theory of Willful Hermeneutical Ignorance, 27 HYPATIA 715, 721 (2012).

<sup>100</sup> MEDINA, *supra* note 52, at 44 (noting that marginalized persons are often forced to understand and consider seriously the perspectives of dominant groups as a condition of social survival).

<sup>101</sup> See *infra* Part IV.C.2 (noting the benefits of adopting “epistemically self-privileg[ing]” frames of knowledge).

<sup>102</sup> See, e.g., Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Criminalization Goals*, 100 CALIF. L. REV. 1313, 1345 (2012) (exploring “outcome-driven perceptions of harm in the context of the long-debated role of harm in criminal regulation”); Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 2 (2011) (arguing that constitutional decision-making is the “focus of status competition among groups whose members are unconsciously motivated to fit perceptions of the Court’s decisions to their values”); Sood, *supra* note 55 (discussing the exclusionary rule). See generally Sood, *supra* note 59 (reviewing the literature on motivated cognition in legal judgments).

Evaluative motivated reasoning describes “the unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs.”<sup>103</sup> It refers to how we process received information. We *see* the protest, we *listen* to the witness. In this, it differs significantly from both ignorance and dismissal. In an ignorance scenario, of course, there is no received information to be processed—the listener is unaware that the relevant charge has been made. And in a dismissal case, the listener has elected to refrain from receiving most of the relevant information—they are eliminating the allegation as a valid or worthy hypothesis prior to engaging with it on its merits.

Focusing on the biased appraisal of received evidence, evaluative motivated reasoning understates how biases affect not just how we process information, but how we make initial decisions regarding what sort of information is worthy of our attention. One recent study used visual-attention trackers to see how people observed videos documenting physical altercations between members of an outgroup and the police.<sup>104</sup> It found that persons devoted more of their visual attention to the party they were predisposed to see as the wrongdoer (so persons hostile to the police looked more at the police; those with negative attitudes towards the outgroup looked more at the civilian).<sup>105</sup> Reacting to the study, which he labeled “the runaway winner in the contest for ‘coolest study of the year,’” Dan Kahan wrote:

Before reading this study, I would have assumed the effect of cultural cognition was generated in the process of recollection: that people were fitting bits and pieces of recalled images onto narrative templates featuring police force and the like[.]

But [these] findings suggest the dynamic that generates opposing perceptions in these cases commences much earlier, *before* the subjects even take in the visual images.

The identity-protective impressions people form originate in a kind of biased sampling: by training their attention on the actor who they have the greatest stake in identifying as the wrongdoer, people are . . . prospecting in that portion of the visual landscape most likely to contain veins of data that fit their preconceptions.<sup>106</sup>

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<sup>103</sup> Kahan, *supra* note 102, at 19.

<sup>104</sup> See generally Yael Granot, Emily Balcetis, Kristin E. Schneider & Tom R. Tyler, Justice is Not Blind: Visual Attention Exaggerates Effects of Group Identification on Legal Punishment, 143 J. EXP. PSYCH. 2196 (2014).

<sup>105</sup> *Id.* at 2205.

<sup>106</sup> Dan Kahan, *What “Bodycams” Can and Can’t Be Expected To Do... Plus Coolest Study of the Year*, CULTURAL COGNITION PROJECT (Dec. 25, 2014, 1:16 PM), <http://www.culturalcognition.net/blog/2014/12/25/what-bodycams-can-and-cant-be-expected-to-do-plus-coolest-st.html>.

In other words, what made the study so fascinating was that it revealed just how early in the deliberative life-cycle motivational concerns came into play. They did not only affect how people reasoned through received information, they also played a dramatic role in determining what sort of information people elected to focus on in the first place.

To be sure, the assumption that persons have received and are analyzing (albeit in a biased manner) substantial information is a valid one in certain contexts. A juror in a civil or criminal case feels obligated (one hopes) to pay close attention to the statements of a witness. A student in a classroom feels obligated (one hopes) to consider the assigned readings carefully. And it is likely that laboratory settings, where there are a variety of explicit means and implicit norms encouraging participants to pay close attention to whatever project they have been assigned, emphasize the salience of this particular mode of reasoning. Laboratories, classrooms, and courtrooms are special cases where we have strong social and cultural pressure to pay attention to information. If while serving on a jury a witness upsets us, we cannot simply change the channel. For the most part, however, this is an exception and not the rule. Nothing normally forces us to pay any attention to claims we would rather not consider.

Meanwhile, evaluative motivated reasoning has several drawbacks that limit its usefulness as a means of avoiding discomfiting conclusions. First, it is cognitively taxing. It requires the subject to fully engage in the social question in order to construct a reasonable-seeming interpretation that coheres to their prior beliefs. This “requires cognitive resources to carry through.”<sup>107</sup> Motivated reasoning is in fact positively correlated with cognitive ability—persons with more cognitive resources are better able to rationalize towards the results they want.<sup>108</sup> This makes it a risky proposition in situations where cognitive resources may be drained.

Second, motivated cognition is not always reliable. Evaluative motivated reasoning is not infinitely elastic; it only works if sufficient evidence exists to support a favorable outcome. “[P]eople motivated to arrive at a particular

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<sup>107</sup> Neeru Paharia, Kathleen D. Vohs, & Rohit Deshpandé, *Sweatshop Labor is Wrong Unless the Shoes are Cute: Cognition Can Both Help and Hurt Moral Motivated Reasoning*, 121 *ORG. BEHAV. & HUMAN DEC. PROCESSES* 81, 87 (2013) (finding that persons “under cognitive load were less able to endorse the use of sweatshop labor than if they were not under cognitive load”).

<sup>108</sup> See, e.g., Dries Trippas, Simon J. Handley & Michael F. Verde, *Fluency and Belief Bias in Deductive Reasoning: New Indices for Old Effects*, 5 *FRONTIERS PSYCH.* 631, at p.6 (2014) (finding that “higher cognitive ability . . . leads to increased motivated reasoning”); Kahan et al., *Risk-Perception Commons*, *supra* note 61, at 9 (finding that scientific literacy increases the divergence in opinions over controversial scientific questions because greater facility with technical reasoning enables persons to more easily construct desirable-yet-plausible conclusions).

conclusion attempt to be rational and to construct a justification of their desired conclusion that would persuade a dispassionate observer. They draw the desired conclusion only if they can muster up the evidence necessary to support it.”<sup>109</sup> But at the outset of a conversation, the existence of such ambiguous evidence cannot be guaranteed—sometimes one’s interlocutor really has the goods. In that case, a person would still be left to reckon with the dissonance.

Dismissal and ignorance circumvent these risks. One need not expend effort reasoning around a given claim, nor incur any serious risk that it will prove impossible to credibly reject for non-motivated reasons, if it is never heard or dismissed out of hand. For these reasons, it is likely that motivated cognition in its evaluative form is perhaps the barrier of last resort—it emerges in those relatively rare circumstances where we are forced to hear and substantively reckon with arguments that promote thoughts we would rather not think.

### III. THE HARMS OF DISMISSAL

While each of these three cognitive checkpoints interlock to ward off unamenable claims, the remainder of this Article primarily focuses on the particular problem of dismissal. Practically speaking, dismissal impacts a wide range of potential social claims without an immediately obvious form of resolution. The fix for ignorance is relatively straight-forward (if not always easy to implement): publicize the claim. Beyond that, in general a person who has successfully remained ignorant of an unamenable claim will not be in an adjudicative position with respect to it. In an informal context (for example, participation in public debate), the act of partaking in discussion about an issue presupposes that one has at least heard of it. Likewise in a formal context (e.g., a lawsuit or official complaint), by definition once that claim has been placed on the relevant docket the first checkpoint has been overcome—the respondent is on notice that there is a claim in play, and now must elect how to deal with it.<sup>110</sup>

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<sup>109</sup> Kunda, *supra* note 54, at 482–83.

<sup>110</sup> This is, I admit, too simple. A broad claim can make its way onto a judicial docket even as the adjudicators remain ignorant of certain localized knowledge or inferences important to the proper disposition of the case. Depending on the particularities of the case, there may be no legally cognizable pathway for communicating this knowledge unto the judges and so they may maintain an effective “ignorance” regarding it even as they are forced, in some sense, to “consider” the case itself. Cf. David Schraub, Torgerson’s *Twilight: The Antidiscrimination Jurisprudence of Judge Diana E. Murphy*, 103 MINN. L. REV. 65, 76–77 (2018). But I cannot pursue that point further here.

The problems posed by evaluative motivated reasoning are not as easy to resolve, but they also do not cover large swaths of deliberative activity. Outside of a few specialized social contexts—a laboratory, a jury box, a classroom—nobody can force us to actually fully deliberate on topics we would rather dismiss. In day-to-day life, much of the important action comes when we consider which claims are worthy of deliberative attention and which are not. This determination necessarily occurs prior to having much of the substantive content that would ultimately decide whether the claim in question is true or false. Indeed, one of the more dangerous attributes of dismissal is its peculiarly self-insulating character.<sup>111</sup> Unlike motivated cognition, which can be overcome given sufficiently weighty evidence, dismissal operates a step earlier in the discursive process by refusing to admit certain classes of evidence at all. Consequently, it largely lacks the boundaries of plausibility that rein in motivated cognition.

Consider a case of dismissal which relies on the “poisoning the well” fallacy, whereby a person’s group membership makes them and their claims inherently untrustworthy.<sup>112</sup> This rejoinder blocks the consideration of any assertion that could be made, “no matter how good it is, or how much it [is] based on good evidence.”<sup>113</sup> “It is thus no wonder that so many prominent negative stereotypes key in on the supposed unreliability of the targeted group—devious and conspiring Jews, irrational and emotional women, simple and unsophisticated blacks.”<sup>114</sup>

This illustrates a further problem associated with dismissal: it often comes attached to some particularly pernicious dignitary harms not shared by its two playmates. Neither ignorance nor evaluative motivated reasoning makes explicit any negative attitudes about the person whose allegations are going unheeded. But dismissal is different. In order to reject a known claim *prior* to substantive evaluation, dismissal frequently requires explicit negative

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<sup>111</sup> Cf. Schraub, *supra* note 78, at 286 (“[P]rejudice yields the injustice, and simultaneously wards off complaints aimed at attacking the prejudice.”).

<sup>112</sup> See Douglas N. Walton, *Poisoning the Well*, 20 ARGUMENTATION 273, 275 (2006) (describing, as the paradigmatic case of the fallacy, the claim by Charles Kingsley that “Cardinal Newman’s claims were not [to] be trusted because, as a . . . Catholic[,] . . . Newman’s first loyalty was not to the truth”).

<sup>113</sup> *Id.* at 276.

<sup>114</sup> Schraub, *supra* note 78, at 295–96 (citing Linda Martin Alcoff, *On Judging Epistemic Credibility*, in ENGENDERING RATIONALITIES 53, 61 n.32 (Nancy Tuana & Sandra Morgan eds., 2001) (“Peasants, slaves, women, children, Jews, and many other nonelites were said to be liars or simply incapable of distinguishing justified beliefs from falsehoods. Women were too irrational, peasants too ignorant, children too immature, and Jews too cunning.”)).

assertions regarding the claimant—that they are uncredible, untrustworthy, paranoid, or delusional.<sup>115</sup>

This, of course, is a dignitary harm all on its own—it undermines a person’s status as a “knower,” the sort of person who can possess and transmit useful knowledge, which is an inherent wrong.<sup>116</sup> But it comes attached to further secondary wrongs. Dismissal necessarily impacts the “epistemic confidence” of the targeted group, whose instincts regarding their own experience are taken to be so transparently ludicrous that they need not even be given a hearing.<sup>117</sup> “When you find yourself in a situation in which you seem to be the only one to feel the dissonance between received understanding and your own intimated sense of a given experience, it tends to knock your faith in your own ability to make sense of the world.”<sup>118</sup> Importantly, the rhetoric that supports dismissal typically goes beyond alleging that the target is simply “wrong or mistaken.” Rather, it presents her as “being in no condition to judge whether she is wrong or mistaken. The accusations are about the target’s basic rational competence—her ability to get facts right, to deliberate, her basic evaluative competencies and ability to react appropriately: her independent standing as a deliberator and moral agent.”<sup>119</sup> At the extreme, this message can be so internalized that the target entirely loses confidence that her felt experiences or instincts bear any correlation to an objective reality; and so she refrains from articulating them altogether. At this stage, dismissal can loop back around into ignorance—if a targeted group does not believe that its thoughts (or particular categories of thoughts) are rational ones worthy of being aired in the public sphere, it is unlikely to present them at all in the first place.

Indeed, dismissal is dangerous precisely because of how easily it can move “up the ladder” to exacerbate the problem of ignorance. Earlier, this Article identified two mechanisms through which ignorance can self-replicate—that is, how the relative dearth of claims making a given assertion renders it less

<sup>115</sup> See Schraub, *supra* note 78, at 295–96; Kate Abramson, *Turning Up the Lights on Gaslighting*, 28 PHIL. PERSP. 1, 5 (2014) (“[I]t’s important to consider the variety of ways . . . women are dismissed—e.g. ‘too sensitive’, ‘paranoid’, ‘crazy’ ‘prude’ or the peculiarly existentialist dismissal of ‘bad faith’.”).

<sup>116</sup> FRICKER, *supra* note 3, at 44.

<sup>117</sup> *Id.* at 163.

<sup>118</sup> *Id.* at 163; see also Noelle-Neumann, *supra* note 76, at 44 (contending that when a particular opinion seems to be rare, adherents will find themselves uncertain and may become reticent to express their views; “the more this appears to be so, the more uncertain he will become of himself, and the less he will be inclined to express his opinion”).

<sup>119</sup> Abramson, *supra* note 115, at 8. Abramson and Fricker both recount a passage in Simone de Beauvoir’s diary where, after a long-ranging discussion with Jean-Paul Sartre, she was left so dispirited in her reasoning that she said, “I’m no longer sure what I think, or even if I think at all.” *Id.* at 4; FRICKER, *supra* note 3, at 50.

likely that such claims will be aired in the future. The first, associated with Fricker, is the idea of a hermeneutical injustice—the maldistribution of interpretative resources which make it harder for outgroups to describe their situations in recognizable and socially compelling ways.<sup>120</sup> The second, elucidated by Noelle-Neumann, is the “spiral of silence” where people are more comfortable expressing common views and more reticent to express rare ones.<sup>121</sup> Dismissal can feed into both mechanisms. The rhetoric of dismissal tends to present the interpretive frames proffered by the claimant as illegitimate and the testimonial offerings of the claimant as irrational. The former contributes to the hermeneutical gap by limiting the array of social presentations seen as valid; the latter promotes the spiral of silence by converting an unpopular opinion into a wholesale indictment of the speaker’s deliberative capacity.

Dismissal thus has significant negative consequences with respect to its impact on the target. But it also breaches a more general obligation that comes attached to our status as democratic deliberators: our duty to listen. Democratic citizenship does not require universal agreement on contested issues. But it does require that we commit to giving each other’s claims a fair hearing and due consideration.<sup>122</sup> Public conversation and debate is the primary arena we have for engaging in such consideration. Unlike “the privacy and anonymity of the ballot box,” where “we have no chance to review our own judgments against what others have to say,” the purpose of public argument is precisely to at least provide the opportunity to “revise and reconsider our positions.”<sup>123</sup> Dismissal—the decision to decline to listen—circumvents that process.

It is important to note that dismissal is a problem that stands separate from whether the underlying claim ultimately has merit. Of course, dismissal entails declining to substantively address an extant claim, and that implies that certain claims that should be ratified will instead be ignored. But even if a given claim should—after due consideration—be rejected, it would still be problematic if the claimant was in fact never given the opportunity to

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<sup>120</sup> See *supra* notes 71–73 and accompanying text.

<sup>121</sup> See *supra* notes 74–76 and accompanying text.

<sup>122</sup> Brandon Morgan-Olsen, *A Duty to Listen: Epistemic Obligations and Public Deliberation*, 39 SOC. THEORY & PRAC. 185, 188 (2013) (“There is no conduit from a citizen’s lips to the exercise of political power save the ears of others, and to fail to listen fair-mindedly in the public square can thereby represent a failure to acknowledge another’s status as citizen.”); see also IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 24 (2000) (arguing that rational political discussion requires that participants enter into the conversation with the goal—not guarantee—of agreement).

<sup>123</sup> ANNE PHILLIPS, THE POLITICS OF PRESENCE 150 (1995); see also Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. REV. 582, 611–13 (2014).

receive such consideration.<sup>124</sup> Much of the public outrage over the Trayvon Martin killing, for example, arose not only because of the actual death of a young Black teenager but because the police initially did not arrest his shooter, instead seeming to instantly credit George Zimmerman's claim of self-defense.<sup>125</sup> Even if one thinks that the evidence that was ultimately produced was insufficient to prove Zimmerman guilty beyond a reasonable doubt, the initial failure to seriously investigate it as a potential homicide—to effectively dismiss the possibility that it was a murder—is hard to square with any commitment to epistemic equality and is a wrong in and of itself. On that front, it is noteworthy how many of the most significant Black Lives Matter protests commenced because of the perception that authorities were not even initiating a serious investigation into racist violence against Black men and women. Ahmaud Arbery's case surged to public prominence when a local prosecutor declined to recommend charges against his killers, concluding that the shooters had attempted a "perfectly legal" citizen's arrest of Arbery as a burglary suspect.<sup>126</sup> As this article went to press, citizens and activists continued to demand justice for Breonna Taylor, emphasizing that no officer had yet been charged months after Taylor was killed during a nighttime "no-knock" raid at her house.<sup>127</sup> A significant motivator of the "Black Lives Matter" movement, it seems, is not just about the specific outcomes of individual cases but also a more general sense that allegations of violence against Black persons are systematically dismissed as valid candidates for investigation.<sup>128</sup>

The confidence that one's contributions to the debate were given due consideration, even if the outcome is unfavorable, matters. Tom Tyler's work on "procedural justice" amasses powerful evidence that people place

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<sup>124</sup> See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 666 (1978) ("Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome . . ."); Harel & Kahana, *supra* note 25, at 238–39 (articulating the right of a judicial hearing that is "valued independently of the merit of the decision likely to be generated at the end of this process").

<sup>125</sup> See, e.g., Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1558 (2013) (noting that "[t]he failure of the Sanford police department to arrest Zimmerman" after he asserted he acted in self-defense "created a firestorm of protests").

<sup>126</sup> See Erik Ortiz, *Were Pursuit and Killing of Ahmaud Arbery 'Perfectly Legal'? It's Not That Simple*, NBC NEWS (May 13, 2020), <https://www.nbcnews.com/news/us-news/was-pursuit-killing-ahmaud-arbery-perfectly-legal-it-s-not-n1205581>.

<sup>127</sup> Josh Wood, *Breonna Taylor Killing: Call for Justice Intensifies after Months of Frustration*, GUARDIAN (July 26, 2020), <https://www.theguardian.com/us-news/2020/jul/26/breonna-taylor-killing-justice-louisville-kentucky>.

<sup>128</sup> See David Schraub & Joel Sati, *Epistemic Injustice in Collecting and Appraising Evidence*, in *THE ROUTLEDGE COMPANION TO EVIDENCE* (Maria Lasonen-Aarnio & Clayton Littlejohn eds.) (forthcoming 2021).

considerable independent weight on the knowledge that their voices were heard, even where they know they did not affect the ultimate conclusion.<sup>129</sup> It follows that people will experience an injustice when their attempts to enter into social conversation are systematically rebuffed; and they do not conflate this treatment with considered disagreement regarding the merits of their position even though the tangible outcomes might be identical. There is, in other words, a significant and morally salient distinction between rejecting a claim because after serious consideration we conclude it is untenable, and rejecting a claim because we conclude the person bringing it simply is not worthy of our attention (even if the underlying facts of the claim are the same).<sup>130</sup> Dismissal implicates the latter set of concerns; the problem of dismissal is not that of ill-formed or even biased appraisal of the merits of a given controversy, but the failure to even acknowledge the controversy as a legitimate entrant into public conversation.

The ideal theory response to dismissal might seem to be a demand that all claims in all contexts be given full, fair, and charitable review. Unfortunately, we do not live in an ideal world, and in particular we lack the surfeit of deliberative resources that would allow us to give every single proffered claim this sort of full hearing.<sup>131</sup> What are our deliberative obligations given these limitations?

Most obviously, those claims that are left aside due to the inability to devote proper attention to them still cannot be justly rejected. We can only (and should only) reserve judgment on them until such time as they are able to be given their due consideration.<sup>132</sup> This may mean that judgment on certain claims are deferred more-or-less indefinitely; this is an injustice, but a lesser one (and a more unavoidable one) than outright rejecting them without providing reasoned argument.

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<sup>129</sup> See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 149 (2006) (finding that people do not need to know that their contribution affected the outcome for them to consider the outcome legitimate, but they do need to know that their contribution was considered).

<sup>130</sup> Cf. David Hirsh, *Accusations of Malicious Intent in Debates about the Palestine-Israel Conflict and about Anti-Semitism: The Livingstone Formulation, 'Playing the Antisemitism Card' and Contesting the Boundaries of Antiracist Discourse*, 1 *TRANSVERSAL* 47, 47–48 (2010) (distinguishing between “those who are accused of employing antisemitic discourse and who respond in a measured and rational way to such accusations in a good faith effort to relate to the concern, and to refute it” and those who refuse outright “to engage with the issue of antisemitism”).

<sup>131</sup> See Mark E. Warren, *Deliberative Democracy and Authority*, 90 *AM. POL. SCI. REV.* 46, 57–58 (1996) (noting that there will always be limits on the amount of time and attention persons can devote to particular issues); MEDINA, *supra* note 52, at 33 (“[O]nly a superhuman knower could be always ready to embark on every possible discovery journey that comes her way.”).

<sup>132</sup> See *supra* note 96 and accompanying text.

More concretely, recognizing the particular biases in dismissal suggests that we should expend considerable effort in ensuring that the claims that we do consider come from a diverse and representative cross-sample of the community. Recall that the wrong of both dismissal and ignorance is less the inescapable fact that not every claim will be considered and more the maldistribution of deliberative expenditures to favor the sorts of claims which are amenable to dominant social groups.<sup>133</sup> Consequently, political deliberation should take special attention towards ensuring that marginalized perspectives are given opportunity to voice their claims.<sup>134</sup> As Fricker observes, the key virtue that needs to be brought to bear to correct testimonial injustices is the possession of “reflexive critical awareness of the likely presence of prejudice.”<sup>135</sup> We should, in other words, be especially alert in circumstances where it seems more likely that prejudice, implicit bias, hermeneutical gaps, or other like malfunctions are in play and are the tail wagging the dismissal dog. Deliberative scarcity can justify not considering every claim in the aggregate, but it cannot justify the motivational slant that makes dismissal so dangerous—and dismissing discrimination so appealing.

#### IV. DISMISSING DISCRIMINATION

Dismissal is a pervasive phenomenon. It is a temptation that exists any time one has a strong preference in favor of maintaining a given belief and there are low costs to refusing to consider alternatives. This Part focuses on the dismissal of discrimination claims as a particularly illustrative example. Its target is not exclusively legal discrimination claims, though it is notable that such claims fare notoriously poorly in the courts,<sup>136</sup> and it suggests that “dismissal” can explain some judicial reticence around expanding legal

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<sup>133</sup> See *supra* notes 61–62, 91 and accompanying text.

<sup>134</sup> See YOUNG, *supra* note 122, at 136–46. Young’s analysis of the concept of “perspective”—which focuses on the fact that people are “differently positioned” and therefore “have different experience, history, and social knowledge derived from that positioning,” is informative. *Id.* at 136. Particularly relevant is her observation that perspective places the focus on what helps create the set of questions and assumptions from which we begin to reason, rather than the specific content that we ultimately arrive at once the deliberative process concludes. *Id.* at 137–39.

<sup>135</sup> FRICKER, *supra* note 3, at 91 (“When the hearer suspects prejudice in her credibility judgment . . . she should shift intellectual gear out of spontaneous, unreflective mode and into active critical reflection in order to identify how far the suspected prejudice has influenced her judgment.”).

<sup>136</sup> See, e.g., SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW (2017); Quintanilla, *supra* note 40; Victor D. Quintanilla, *Beyond Common Sense: A Social-Psychological Study of Iqbal’s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011); Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555 (2001).

discrimination protections.<sup>137</sup> But the legal treatment of discrimination is situated within a broader deliberative ecosystem that also attends to how we respond to such claims socially and politically—rhetorical maneuvers and political justifications standing alongside formalized doctrine.<sup>138</sup>

Discrimination is an evocative case of discursive dismissal for several reasons. To begin, the psychological literature exploring how people maintain prejudiced belief structures is particularly robust and easy to grapple with. More importantly, discrimination claims provide a familiar example of dismissal in practice: charging claimants with “playing the race card.” The “race card” response (or its equivalents as applied to other forms of discrimination) is a means of declaring that the discrimination claim has been leveled in bad faith; hence, the discussion need not proceed any further. In this way, allegations of racism, sexism, antisemitism, and the like are routinely brushed aside as implausible on their face.

After providing a brief sketch of the familiar “race card” response as an example of dismissal, this Part provides an account of its utility under an aversive racism model. It then explains how persons construct the meaning of “discrimination” in ways which normalize its dismissal, even as they purport to affirm the serious moral wrongfulness of engaging in identity-based prejudice. Two mechanisms—heightening the “seriousness” of a discrimination charge in order to reduce its scope, and hinging a valid finding of discrimination on the existence of conscious, volitional discriminatory intent—are well-entrenched in legal and social argument and do much to facilitate dismissing discrimination in both domains.

#### A. *“The Race Card” and Other Methods of Dismissing Discrimination*

A common, even ubiquitous, response to claims of discrimination is to assert that they have been leveled in bad faith. In the context of race relations this challenge usually means accusing the claimant of “playing the race card”; that is, alleging that they brought up the prospect of racial discrimination not because of “a credible (or perhaps even sincere) belief that unfair or unequal treatment has occurred,” but rather merely as a ploy to illicitly gain public sympathy or private reward.<sup>139</sup> Constructed in this way, the racism charge can be reasonably dismissed—one need not spend time grappling with an obviously incredible or dishonest argument. Recognizing

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<sup>137</sup> See *infra* notes 193–214.

<sup>138</sup> See BELL, *supra* note 83, at 111 (using the metaphor of legal standing to attack the practice “in the world generally” of declining to accord legitimacy to Black perspectives regarding race).

<sup>139</sup> See Schraub, *supra* note 78, at 285.

this problem, scholars have sought to present evidence of discrimination in ways that they think will evade the “race card” riposte and demand substantive engagement.<sup>140</sup> These efforts have generally been unsuccessful.<sup>141</sup>

As David Wilkins observes, the “race card” objection is a pervasive retort that can be used to dismiss virtually any racially inflected topic of conversation.<sup>142</sup> For example, conservative critics rapidly deployed this trope against President Barack Obama and Attorney General Eric Holder for even relatively mild acknowledgements of the intersection between race and police violence. Holder’s statement that “I understand that mistrust” that many people of color harbor towards the police,<sup>143</sup> and his affirmation that “President Obama is keenly interested in how majority white police departments in communities like Ferguson treat black youths,” led to the furious headline “Obama Administration Plays Race Card in Ferguson.”<sup>144</sup> Rep. Steve King, a Republican from Iowa, said that Ferguson was being beset upon by “race hustlers” seeking to “monetize” the tragedy. Among this group he included the President, the Attorney General, St. Louis-area Representative William Lacy Clay, and the Congressional Black Caucus. With respect to the latter, King contended that “they’re always looking to place the race card. They’re always looking to divide people down that line.

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<sup>140</sup> See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CALIF. L. REV. 1063, 1117 (2006) (“Unwarranted discrimination exists here and now: it can be documented through scientific methods that cannot be dismissed as hyperbole or playing the ‘race card.’”); Rachel Lyon, *Media, Race, Crime, and Punishment: Re-Framing Stereotypes In Crime and Human Rights Issues*, 58 DEPAUL L. REV. 741, 758 (2009) (“With an African American in the White House, the ‘issue’ of having a skewed, racialized justice system is more likely to be addressed, or at least not dismissed as ‘the race card.’”).

<sup>141</sup> See Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 341 (1997) (“Experience has shown that preconceptions about discrimination are remarkably resilient to empirical proof.”); Camille A. Nelson, *Racial Paradox and Eclipse: Obama as a Balm for What Ails Us*, 86 DENV. U. L. REV. 743, 769 (2009) (quoting Geraldine Ferraro as complaining that “Obama’s playing the race card throughout the campaign and no one [is] calling him for it”).

<sup>142</sup> David B. Wilkins, *The New Social Engineers in the Age of Obama: Black Corporate Lawyers and the Making of the First Black President*, 53 HOW. L.J. 557, 636 (2010) (observing that “any attempt to discuss race—no matter how justified or accurate—is too often dismissed as ‘playing the race card’”).

<sup>143</sup> See Arit John, *Eric Holder Almost Gives the Ferguson Race Speech Obama Couldn’t*, YAHOO! NEWS (Aug. 20, 2014), <http://news.yahoo.com/eric-holder-almost-gives-ferguson-race-speech-obama-215409787.html>.

<sup>144</sup> *Obama Administration Plays Race Card in Ferguson*, JUDICIAL WATCH (Aug. 22, 2014), <http://www.judicialwatch.org/press-room/weekly-updates/obama-administration-plays-race-card-ferguson/>.

And I have friends in that caucus. I get along with them personally, but their agenda is to play the race card.”<sup>145</sup>

Absent from these contentions is any substantive reply to specific allegations of racial injustice. They instead fulminate generally against the facial illegitimacy of raising the issue at all, divorced entirely from the merits or infirmities of particular claims or circumstances. Perhaps the apex of this trope, then, was a 2009 column in which Peter Wehner preemptively announced that, if President Obama’s poll numbers were to drop, “be prepared for the ‘race card’ to be played.” And not only was Wehner sure that racism charges would be made, he also could pass advance judgment on their veracity: “the charges will be . . . transparently false.”<sup>146</sup> Here was a particularly naked articulation of the general practice: it is not *specific* complaints of racism that are wrong (for specific reasons); all complaints of racism, even those not yet made, can be assumed to be wrong because their core characteristic is that they are deployed in bad faith.

While the “race card” trope is the most rhetorically familiar, similar refrains can be easily found applied against other discrimination charges. The video game industry, for example, was rocked by charges of endemic sexism embodied by the experiences of critic Anita Sarkeesian. Sarkeesian, whose web series ‘Tropes vs. Women in Video Games’ explored sexist elements in prominent products, was subjected to a vicious series of attacks, bomb threats, promises of rape, and a video game titled “Beat Up Anita Sarkeesian.”<sup>147</sup> Even still, some industry members held that Sarkeesian was being dishonest in using the “trump card” of sexism.<sup>148</sup> “Sexism,” columnist

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<sup>145</sup> Tom Kludt, *Steve King Goes Off About Ferguson and the Congressional Black Caucus*, TALKING POINTS MEMO (Aug. 21, 2014, 4:57 PM), <http://talkingpointsmemo.com/livewire/steve-king-ferguson-congressional-black-caucus>.

<sup>146</sup> Peter Wehner, *Four Safe Bets about Obama*, COMMENTARY (Jan. 30, 2009), <https://www.commentarymagazine.com/american-society/four-safe-bets-about-obama/>.

<sup>147</sup> See Nina Liss-Schultz, *This Woman Was Threatened With Rape After Calling Out Sexist Video Games—and Then Something Inspiring Happened*, MOTHERJONES (May 30, 2014), <https://www.motherjones.com/media/2014/05/pop-culture-anita-sarkeesian-video-games-sexism-tropes-online-harassment-feminist> (exploring the backlash against Anita Sarkeesian for highlighting the sexism in video games); Soraya Nadia McDonald, *Gaming Vlogger Anita Sarkeesian is Forced from Home After Receiving Harrowing Death Threats*, WASH. POST (Aug. 29, 2014, 5:23 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2014/08/29/gaming-vlogger-anita-sarkeesian-is-forced-from-home-after-receiving-harrowing-death-threats/> (discussing the magnitude of threats against Sarkeesian, which forced her to call the police and leave her home).

<sup>148</sup> Ryan Carroll, *“Gamergate” is an Accountability Problem, Not a Sexism One*, MODVIVE (Sept. 1, 2014), <http://www.modvive.com/2014/09/01/gamergate-accountability-problem-sexism-one/> [<https://web.archive.org/web/20150904161911/http://www.modvive.com/2014/09/01/gamergate-accountability-problem-sexism-one/>] (criticizing the notion that threats against Sarkeesian are sexist) (on file with the University of Pennsylvania Journal of Constitutional Law).

Ryan Carroll complained, “is a shortcut. An ‘I win’ button.”<sup>149</sup> He argued that “too often these words are used as accusations, as a way to shut out opposing viewpoints. And eventually, these words will lose their meaning.”<sup>150</sup>

Discourse about antisemitism moves to similar beats. After London Mayor Ken Livingstone called a Jewish newspaper reporter a “German war criminal” and likened him to a “concentration camp guard,”<sup>151</sup> he defiantly refused to apologize because “[f]or far too long the accusation of antisemitism has been used against anyone who is critical of the policies of the Israeli government.”<sup>152</sup> Even though the exchange with the Jewish reporter was not actually related to Israel (Livingstone was angry that the reporter had sought to interview him following a party), he in effect contended that the allegation of antisemitism in any context should be presumed to be a backdoor effort to stifle criticism of Israeli policies.<sup>153</sup> This assertion—that “antisemitism” typically is forwarded as a bad-faith smokescreen targeting critics of Israel—has become such a ubiquitous means of dismissing antisemitism allegations that it has become known as ‘The Livingstone Formulation.’<sup>154</sup>

Nor, unfortunately, is this mode of response limited to crass columnists or rough politicians. No less of an eminent authority that Jürgen Habermas has indulged in a similar theme. Reacting to an essay by Peter Goodrich which criticized Habermas “for elaborating a notion of the ideal speech situation that was not inclusive of Talmudic or other diasporic or outsider traditions,”<sup>155</sup> Habermas declared, “I quit reading Goodrich’s essay at the place where, vaguely referring to my *Philosophical Discourse of Modernity*, he accused me of defending modernity ‘against the irrationalists, the conservatives, the postmodernists, the heretics, the nomads and the outsiders, the jews.’ Anyone who suspects me of antisemitism hardly expects a response

<sup>149</sup> *Id.* Unprompted, Carroll also hastened to add that “the same goes for racism.” *Id.*

<sup>150</sup> *Id.* (analogizing Sarkeesian to the “boy who cried wolf”).

<sup>151</sup> Hugh Muir, *Livingstone Faces Inquiry Over Nazi Guard Jibe at Jewish Reporter*, *GUARDIAN* (Feb. 11, 2005, 8:25 PM EST), <https://www.theguardian.com/media/2005/feb/12/pressandpublishing.londonpolitics> (internal citations omitted).

<sup>152</sup> Ken Livingstone, *An Attack on Voters’ Rights*, *GUARDIAN* (Mar. 1, 2006, 3:29 AM EST), <https://www.theguardian.com/politics/2006/mar/01/society.london>.

<sup>153</sup> *Id.*

<sup>154</sup> Hirsh, *supra* note 88, at 91 (“It is a rhetorical device that enables the user to refuse to engage with the charge made, a mirror that bounces back a counter-charge of dishonest Jewish (or ‘Zionist’) conspiracy to a charge of antisemitism.”); see also DAVID HIRSH, *CONTEMPORARY LEFT ANTISEMITISM* 11–39 (2018) (discussing the Livingstone Formulation).

<sup>155</sup> Peter Goodrich, *Europe in America: Grammatology, Legal Studies, and the Politics of Transmission*, 101 *COLUM. L. REV.* 2033, 2063 (2001).

...”<sup>156</sup> And indeed, that was that—“[t]hat is all he says. This puts an end to conversation”—even though Goodrich denied that he was calling Habermas antisemitic at all.<sup>157</sup>

What draws these examples together? All of them react to specific (or anticipated) claims of discriminatory behavior. And clearly, they evince disagreement with the underlying substantive claims (of racism, sexism, or antisemitism). But none of these statements addresses the charges on their merits. Rather, they suggest that the very invocation of the issue in the first place is illegitimate; an intentional effort to shut down conversation or browbeat one’s opponents into submission. These qualities justify not a refutation, but the failure to even attempt one.

The authors of these arguments are effectively arguing, not why the claim is wrong, but why the claim can go unaddressed. The purported concern of Black leaders over police violence was taken to be a smokescreen for more illicit motives—publicity, popular appeal, or even profit. Carroll’s statement presents a similar theme: for women to describe a constant barrage of rape threats as “sexism” is in his view fundamentally dishonest. Allegations of sexism are taken to be inherently suspect since they (supposedly) give women an automatic “I win’ button” over ongoing social controversies. Likewise, Mayor Livingstone’s comment is a general assertion that claims of antisemitism should not be taken seriously, as they are merely tools “used” to disparage those critical of Israel. And Habermas and Wehner present no adornment at all—the former simply refused to accept the legitimacy of the conversation once (he perceived) he was accused of antisemitism, the latter preemptively announced that any prospective claim of racism during the course of the Obama presidency would be “transparently false.”<sup>158</sup>

These assertions are not dependent on the specific substance of a particular claim of prejudice or discrimination. They do not purport to refute the claims on their merits; they do not tell us why calling a Jewish reporter a Nazi is not antisemitic or why threatening to brutally assault a woman is not misogynistic. Indeed, while they purport to be responsive to a particular claim of racism, sexism, or antisemitism, they provide a much wider-ranging indictment that encompasses and purports to problematize racism, sexism, and antisemitism claims as a class. The particular content is

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<sup>156</sup> Jürgen Habermas, *Reply to Symposium Participants, Benjamin N. Cardozo School of Law*, in *HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES* 381, 382 n.7 (Michel Rosenfeld & Andrew Arato eds., 1998) (quoting Peter Goodrich, *Habermas and the Postal Rule*, 17 *CARDOZO L. REV.* 1457, 1458 (1996) (citations omitted)).

<sup>157</sup> Goodrich, *supra* note 155, at 2063.

<sup>158</sup> See *supra* notes 146–156 and accompanying text.

irrelevant; in fact, each of the statements at issue above could be leveled without knowing anything about the substance of the initial discrimination claim.<sup>159</sup>

In short, the “card” response is primarily a form of dismissing discrimination claims. Its purpose is not to illuminate the specific controversy presented by the discrimination claimant, much less provide a substantive refutation. Rather, it is to justify a decision to (in Habermas’ words) “quit reading.” Presenting discrimination claims as a presumptively illegitimate mode of argument, the “bad faith” or “card” response means that one can evade having to actually reckon with the substantive merits of the claimants’ position.<sup>160</sup>

### B. *Why Dismiss Discrimination?*

Beginning in the 1960s, psychologist Melvin Lerner began exploring the idea of a “just-world hypothesis”—a general belief that the world is a fair place where people get what they deserve.<sup>161</sup> This belief is strongly motivated, however, and when events transpire that suggest the appearance of injustice—particularly widespread, ingrained, or systematic injustice—it is often easier to recalibrate one’s understanding of justice than to admit the existence of a very unjust world.<sup>162</sup> The general belief that the world is a just place colors social judgments, making people resistant to inferences of injustice.<sup>163</sup>

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<sup>159</sup> See Schraub, *supra* note 78, at 287–88.

<sup>160</sup> See *supra* notes 146–156 and accompanying text.

<sup>161</sup> See Melvin J. Lerner & Carolyn H. Simmons, *Observer’s Reaction to the “Innocent Victim”*: *Compassion or Rejection?*, 4 J. PERSONALITY & SOC. PSYCHOL. 203 (1966) (discussing the results of study which found observers of a suffering victim will reject and devalue that victim in order to satisfy the “observers’ need to believe in a just world”); see also Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 419–20 (2006) (“Lerner’s results powerfully illustrate two ways in which individuals cope when witnessing suffering: we stop the injustice, or we justify it by conceiving of the victim as a person who actually ‘deserves’ to suffer.”); Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030, 1031–32 (1978) (analyzing Lerner’s just world hypothesis test and stating that the findings have been replicated with “diverse populations”).

<sup>162</sup> See Hanson & Hanson, *supra* note 161, at 420 (“[I]t is not justice that we crave so much as the perception of justice. And that craving can often be satisfied far more easily by changing our perception of the victims than by acknowledging and addressing the underlying unfairness.” (emphasis in original)).

<sup>163</sup> See Melvin J. Lerner, *The Justice Motive: Where Social Psychologists Found It, How They Lost It, and Why They May Not Find It Again*, 7 PERSONALITY & SOC. PSYCHOL. REV. 388, 388 (2003) (“[T]he ‘just world’ research indicated that the desire to believe that people get what they deserve influences . . . social judgments . . .” (citations omitted)); Robbie M. Sutton & Karen M. Douglas, *Justice for All, or Just for Me? More Evidence of the Importance of the Self-Other Distinction in Just-World Beliefs*, 39 PERSONALITY & INDIVIDUAL DIFFERENCES 637, 638 (2005) (observing that the benefits of just

Obviously, a claim of discrimination is a claim of injustice and therefore a threat to the belief in a just world. Such claims rest uncomfortably with dominant sentiments characterizing social inequality as rare, aberrational, or a thing of the past. Considerable survey evidence suggests that White people are quite committed to the belief that racial inequities are a minimal feature of contemporary American life.<sup>164</sup> This belief makes perfect sense from a motivational standpoint—believing that racism retains considerable potency suggests that the current social position of White people may be undeserved, whereas concluding that racism has disappeared functionally ratifies any tangible advantages White persons possess as the product of merit or desert. But the more one hears allegations of ongoing racial injustice, the harder it is to ignore the possibility that such injustices are more than the rare exception.<sup>165</sup> Consequently, the ability to systematically dismiss discrimination claims as frivolous, insincere, misguided, or made in bad faith dissipates the threat posed by such claims and allows the broader belief in social egalitarianism to proceed unimpaired.<sup>166</sup>

While this “just world” account would explain the propensity to dismiss any account of widespread or systematic injustice, discrimination discourse has particular characteristics which make dismissal especially appealing.

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world theory “motivate individuals to defend it against contradictory evidence, thereby minimising the injustices they see happening to others”).

<sup>164</sup> See, e.g., Dan Balz & Scott Clement, *On Racial Issues, America is Divided Both Black and White and Red and Blue*, WASH. POST (Dec. 27, 2014), [https://www.washingtonpost.com/politics/on-racial-issues-america-is-divided-both-black-and-white-and-red-and-blue/2014/12/26/3d2964c8-8d12-11e4-a085-34e9b9f09a58\\_story.html](https://www.washingtonpost.com/politics/on-racial-issues-america-is-divided-both-black-and-white-and-red-and-blue/2014/12/26/3d2964c8-8d12-11e4-a085-34e9b9f09a58_story.html) (relaying polls showing wide disparities between white and non-white perceptions of the criminal justice system); Lindsey Cook, *Blacks and Whites See Race Issues Differently*, U.S. NEWS (Dec. 15, 2014, 3:14 PM), <https://www.usnews.com/news/blogs/data-mine/2014/12/15/blacks-and-whites-see-race-issues-differently> (noting wide gaps in how Black people and White people assess racial equality in job, educational, and housing opportunities). As this Article went to press, the police killing of George Floyd and high-profile protests against other instances of state violence against Black Americans have precipitated a significant shift in White perspectives on the prevalence of racism. See Carrie Dann, *Poll: More Voters Acknowledge Symptoms of Racism but Disagree about its Causes*, NBC NEWS (July 21, 2020), <https://www.nbcnews.com/politics/meet-the-press/poll-more-voters-acknowledge-symptoms-racism-disagree-about-its-causes-n1234363>. But it is too early to tell whether this will translate into a long-term change in attitudes, or whether White opinions on this subject will eventually regress back to their historical mean.

<sup>165</sup> See Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1306 (2012) (“For obvious reasons, discrimination—particularly if it is perceived to be common or systematic—calls into question the veracity of meritocratic belief systems.”); cf. Schraub, *supra* note 18, at 402 (noting that while the system can characterize a few situations where systematic injustice requires heightened judicial intervention as “isolated . . . aberrations of an otherwise just system[,] [i]f there are too many, though, the entire foundation of our constitutional democracy is called into question”).

<sup>166</sup> See Schraub, *supra* note 78, at 290.

Persons who hold inegalitarian beliefs often nonetheless consciously seek to avoid expressing them. This may result because they feel external social pressure to behave in a non-prejudiced fashion (though internally they do not themselves endorse those values). But it also may occur because they have genuine egalitarian commitments which motivate them to suppress prejudiced beliefs or behaviors.<sup>167</sup> Yet “unmanifested unconscious racist feelings do not go away when rejected; rather, they are reformulated, disguised, and adorned with trappings of logic and reason, in order to survive the scrutiny of the conscious mind.”<sup>168</sup>

It is no revelation to say that race is an uncomfortable topic of discourse. People often say they view race as a “minefield” or that one has to “walk on eggshells” while discussing it.<sup>169</sup> “Race is a tense terrain, where we often try to hide crucial truths from ourselves”;<sup>170</sup> it is “defined as an illegitimate topic for conversation.”<sup>171</sup> When persons are put in a position where they are expected to directly confront and discuss discrimination claims, they often evince exceptional anxiety, nervousness, anger, or fear.<sup>172</sup> For example, in the fall of 2014 *The Daily Show* filmed a segment where they interviewed fans of the Washington Redskins football team who defended the name against charges that it was a racial slur. During the initial stages of the interview, the fans simply deflected the charge: “We kept telling him that we felt the name

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<sup>167</sup> See, e.g., Ziva Kunda & Steven J. Spencer, When Do Stereotypes Come to Mind and When Do They Color Judgment? A Goal-Based Theoretical Framework for Stereotype Activation and Application, 129 PSYCH. BULL. 522, 524 (2003) (“[M]otivation to avoid prejudice may stem from an internally driven desire to maintain an egalitarian identity or from an externally driven desire to comply with egalitarian social norms.” (citations omitted)); E. Ashby Plant & Patricia G. Devine, Internal and External Motivation to Respond Without Prejudice, 75 J. PERSONALITY & SOC. PSYCHOL., 811, 812 (1998) (discussing the difference between internal and external motivations for suppressing prejudiced behavior).

<sup>168</sup> Edward Patrick Boyle, Note, It’s Not Easy Bein’ Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis, 46 VAND. L. REV. 937, 944 (1993) (footnote omitted).

<sup>169</sup> See, e.g., Cheryl L. Wade, *Attempting To Discuss Race in Business and Corporate Law Courses and Seminars*, 77 ST. JOHN’S L. REV. 901, 905 (2003) (“Race and racism are complex issues that are perforated with minefields that few Americans are able to negotiate.” (footnote omitted)); Jennifer L. Pierce, “Racing for Innocence”: Whiteness, Corporate Culture, and the Backlash Against Affirmative Action, 26 QUALITATIVE SOC. 53, 60 (2003) (quoting a white attorney who felt he was “walking around on egg shells” when speaking about race-related issues).

<sup>170</sup> Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal, at x (1992).

<sup>171</sup> Woody Doane, *Rethinking Whiteness Studies*, in WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM 3, 13 (Ashley “Woody” Doane & Eduardo Bonilla-Silva eds., 2003).

<sup>172</sup> See DiAngelo, *supra* note 70, at 54 (describing how White persons faced with “racial stress” often exhibit “a range of defensive moves” ranging from “anger, fear, and guilt” to simply “leaving the stress-inducing situation”).

honored Native Americans.”<sup>173</sup> But several hours into the interview, the fans were confronted by a group of Native American activists who contended that the name was in fact racist and offensive. Placed in a situation where they would be expected to hear and process genuine arguments from affected persons regarding the potential racism of “Redskins,” the fans reacted with extreme distress. One contended that “It was disingenuous. The Native Americans accused me of things that were so wrong. I felt in danger. I didn’t consent to that. I am going to be defamed.”<sup>174</sup> She stormed out of the room and attempted to file a police report. Another fan was upset because he claimed the producers had assured him there would not be “a cross-panel discussion” with the Native Americans.<sup>175</sup> While he understood that Native American participants would contribute to the *Daily Show* segment, he did not expect that he would have to confront their argument on a personal level.<sup>176</sup>

This is a particularly striking example of a presumably uncontroversial point: being implicated in a claim of discrimination is uncomfortable. Being forced to defend oneself against such a claim is even more uncomfortable. Claims of discrimination create dissonance between conscious self-conception (as non-racist) and others’ assertions regarding how one should behave. The resultant anxiety creates a negative association surrounding these sorts of interactions—we do not like the people who typically prompt these feelings of agitation. This creates a feedback loop where negative attitudes about the group are reinforced. Importantly, this negative appraisal of the claimant does not depend on the claim being false—“legitimate claims of racism also antagonize and alienate those who are accused.”<sup>177</sup>

Hence, when everyday persons consider how to think about race (or other similar identities), they will favor conceptions that are “informative, but also

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<sup>173</sup> Ian Shapira, *The Daily Show Springs Tense Showdown with Native Americans on Redskins Fans*, WASH. POST (Sept. 19, 2014), [http://www.washingtonpost.com/local/the-daily-show-springs-showdown-with-native-americans-on-redskins-fans/2014/09/19/c6c5f936-3f73-11e4-b03f-de718edeb92f\\_story.html](http://www.washingtonpost.com/local/the-daily-show-springs-showdown-with-native-americans-on-redskins-fans/2014/09/19/c6c5f936-3f73-11e4-b03f-de718edeb92f_story.html).

<sup>174</sup> Id.

<sup>175</sup> Id.

<sup>176</sup> After years of pressure, the Washington team announced in 2020 that the name would be retired. As this article went to press the new name has not yet been selected. See Les Carpenter, *Washington’s NFL Team to Retire Redskins Name, Following Sponsor Pressure and Calls for Change*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/sports/2020/07/13/redskins-change-name-announcement/>

<sup>177</sup> Julie C. Suk, *Race Without Cards?*, 1 STAN. J. C.R. & C.L. 111, 116 (2009) (reviewing FORD, *infra* note 182). This antagonism can result even in the clearest of cases. See Michael J. Bazylar, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601, 626 n.89 (1999) (citing a Swiss Government report which “found that anti-Semitism in Switzerland had grown as a result of the claims made against the Swiss banks and other Swiss institutions by World War II Jewish survivors”).

nonthreatening.”<sup>178</sup> The ultimate goal underlying most people’s theories of racism is to “allow them to maintain a safe distance from any appearance of personal bias.”<sup>179</sup> Dismissal is one mechanism creating such “safe distance”—if a claim of bias can be brushed off as inherently ridiculous, then no more work needs to be done to reinforce the preferred unbiased image of the self.

### C. *How Discrimination is Dismissed*

The “card” retort provides the paradigm case of dismissal, and the previous section demonstrates why that response is so valuable. But what specific rationales do people use to justify dismissing discrimination? Sometimes, the rationale is predicated on explicit statements deriding the credibility of the affected group as epistemic agents—these claims are just what you would expect from *those* people.<sup>180</sup> Such portrayals were discussed above as cases of testimonial injustice, wherein bias against the speaker prevents their discursive contributions from receiving due consideration.<sup>181</sup> But often the rationale actually relies on hidden normative appraisals about what discrimination does and does not entail that render wide swathes of claims either unintelligible or superficially implausible. The problem is not with the appraisals themselves (though they might have problems); so long as persons adopting these appraisals are willing to engage in a meta-debate about their validity, the issue is not one of *dismissal*. But frequently they are not, and instead these particular and contestable understandings of discrimination are wielded as a tool to avoid having a substantive conversation about the merits of the particular claim.

#### 1. *Heightened Seriousness, Reduced Scope*

One common objection registered against discrimination claims is that they seek to exploit the moral seriousness of discrimination—the grave

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<sup>178</sup> Samuel R. Sommers & Michael I. Norton, *Lay Theories About White Racists: What Constitutes Racism (and What Doesn’t)*, 9 GROUP PROCESS & INTERGROUP REL. 117, 119 (2006).

<sup>179</sup> Id.

<sup>180</sup> For example, Caryl Churchill dismissed Howard Jacobson’s contention that her play, *Seven Jewish Children*, was antisemitic by calling that claim, “the usual tactic.” Caryl Churchill, *My Play Is Not Anti-Semitic*, in *Letters: Jacobson on Gaza*, INDEPENDENT (Feb. 21, 2009, 1:00 AM), <http://www.independent.co.uk/voices/letters/letters-jacobson-on-gaza-1628191.html> (responding to Howard Jacobson, Opinion, *Let’s See the ‘Criticism’ of Israel for What It Really Is*, INDEPENDENT (Feb. 18, 2009, 1:00 AM), <http://www.independent.co.uk/voices/commentators/howard-jacobson/howard-jacobson-lets-see-the-criticism-of-israel-for-what-it-really-is-1624827.html>).

<sup>181</sup> See *supra* notes 81–83 and accompanying text.

wrongfulness of racism, sexism, antisemitism, etc.—for wrongs which are far more mundane. For example, Richard Thompson Ford contends that claims of racial bias or prejudice can be an illegitimate argumentative tactic because they unfairly summon the specter of an extreme evil—conscious, malign racial antipathy of the form associated with the Jim Crow South—and attribute it willy-nilly to contemporary persons who almost certainly lack such an attitude.<sup>182</sup>

I have suggested before that there may be an inverse correlation between how people perceive the “severity” of a norm (how wrong is racial discrimination?) and its “scope” (what behaviors are encompassed under the ambit of “racial discrimination”).<sup>183</sup> For example, if “discrimination” means something as egregiously terrible as Jim Crow America, then people will be reticent to include relatively commonplace or ambiguous situations under the term’s domain. The practice of dismissal suggests that this dynamic can be deliberately harnessed for tactical ends. By framing the charge of discrimination in severe terms, it can be waved aside as inherently ridiculous when applied to anything but the most overt and uncontroversial instances of the wrong.<sup>184</sup> This, in turn, allows one to evade considering other, more realistic potential connections between everyday challenged conduct and racial wrongdoing.

In this light, it is notable that the *charge* of “playing the race card” is not leveled only against claims of overt, conscious racial hostility. Indeed, one of the more interesting facets of “race card” discourse is how it is deployed even where the initial claimant seems to accept that the target is not the modern-day incarnate of George Wallace.<sup>185</sup> Many articulations of racism seek not

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<sup>182</sup> See RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 58–59 (2008). Ford’s argument is essentially one of the “persuasive definition,” first articulated by Charles Stevenson, wherein people capitalize on the emotive content of a particular term (like “racism”) while altering its conceptual content to fit a new substantive agenda. See generally Charles Leslie Stevenson, *Persuasive Definitions*, 47 *MIND* 331, 331 (1938) (showing that “[a] persuasive definition[,] . . . which gives a new conceptual meaning to a familiar word without substantially changing its emotive meaning,” can lead to important philosophical confusions when there is widespread failure to recognize these definitions as persuasive definitions, which can be analogized to racism (internal quotation marks omitted)).

<sup>183</sup> See, e.g., Schraub, *supra* note 78, at 290 (hypothesizing that “there is an inverse relationship between how people perceive the severity of an ambiguous norm and how they perceive its scope”); Schraub, *supra* note 70, at 1300–01 (showing that opposing racism has become a universal moral norm but there is not a universal understanding or definition of racism).

<sup>184</sup> See, e.g., Schraub, *supra* note 78, at 291.

<sup>185</sup> See Suk, *supra* note 177, at 117 (using the 2008 U.S. presidential election as an example of inadvertent racial hostility—noting that then-Senator Obama accused McCain of igniting “Americans’ subconscious fear of electing the nation’s first black president,” which McCain in turn described as playing the race card).

to uncover cases of extreme evil but rather ordinary failures of the sort that it is perfectly reasonable to associate with normal individuals. Yet persons respond to these relatively mundane claims of racial injustice by converting them into extraordinary declarations about the depraved hearts of everyday Americans. Doing so allows the respondent to then pivot to an aggrieved protest against the extreme and disproportionate charge that so obviously outstrips whatever minor misstep may have been made.

The conservative response to the Obama Administration's statements on Ferguson are keenly illustrative—despite the relatively measured character of the latter, they were quickly reframed as extraordinary declarations of widespread culpability in a deliberate project of racist domination.<sup>186</sup> Indeed, the allure of the “‘race card’ card” is such that it emerges even when the declarants do not mention race at all. For example, when Eric Holder complained about uncivil attacks against himself and the President (without mentioning race), *Washington Post* columnist Kathleen Parker saw through the ruse: “True, Holder didn’t say anything specifically racial — he’s far too smart for that — but aren’t we too smart to believe race isn’t what he meant?”<sup>187</sup> She inferred that Holder was calling his critics racial bigots so that she could airily dismiss the insinuation that his critics were racial bigots.

In discussions over sexual violence, this dynamic is if anything even more pronounced. As Kate Manne writes: “We assure ourselves that real rapists will appear on our radars either as devils, decked out with horns and pitchforks, or else as monsters—that is, as creepy and ghoulish creatures. Monsters are unintelligible, uncanny, and they are outwardly frightening.”<sup>188</sup> But, she continues, what is actually “frightening about rapists is partly the lack of identifying marks and features, beyond the fact that they are by far more likely to be men. Rapists are human, all too human, and they are very much among us. The idea of rapists as monsters exonerates by caricature.”<sup>189</sup>

In her book, *Real Rape*, Susan Estrich says that “the law’s abhorrence of the rapist in stranger cases . . . has been matched only by its distrust of the victim who claims to have been raped by a friend or neighbor or acquaintance.”<sup>190</sup> But it is more than just a match: the abhorrence is what

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<sup>186</sup> See *supra* notes 143–145 and accompanying text.

<sup>187</sup> Kathleen Parker, *Erasing the Race Card*, WASH. POST (April 15, 2014), [http://www.washingtonpost.com/opinions/kathleen-parker-erasing-the-race-card/2014/04/15/5d774e9e-c4da-11e3-b195-dd0c1174052c\\_story.html](http://www.washingtonpost.com/opinions/kathleen-parker-erasing-the-race-card/2014/04/15/5d774e9e-c4da-11e3-b195-dd0c1174052c_story.html).

<sup>188</sup> Kate Manne, *Down Girl: The Logic of Misogyny* 199 (2017).

<sup>189</sup> *Id.*

<sup>190</sup> Susan Estrich, *Real Rape* 4 (1987).

constitutes the mistrust. The abhorrence of rape is, in a real sense, what allows or even demands the mistrust of the vast majority of rape victims. It is for this reason that men who have a stake in contesting an accusation of rape, or in opposing an expansion of laws criminalizing sexual assault, will often be the most invested in declaring that such crimes represent “serious accusations.”<sup>191</sup> Rape, they tell us quite earnestly, is a monstrous crime. And as a monstrous crime, it cannot apply in circumstances that feel distinctively human and recognizable—or committed by persons who are occupying positions and inhabit identities that seem normally human. This discourse focuses obsessively on cases involving “grey areas”—supposedly unclear signals, the “mature for her age” minor under the age of consent, intoxication, cases where no force was used, seduction versus coercion, and the line between “mere” unenthusiasm and explicit lack of consent. These are cases involving perpetrators who present more complicated postures than unbridled, violent, bestial lust. Their conduct is presented as judgment calls where one can imagine ordinary individuals—not abhorrent, not monstrous—falling on the wrong side of the line. But rape’s abhorrent character goes hand-in-hand with its aberrational status—the conceptual boundaries of rape and sexual violence are delineated precisely by that which is *not* ordinary or a matter of “judgment.”

The problem is that once you shear off all the cases that are plausibly “ordinary,” you have written out the vast majority of rape cases. At that point, “rape” cannot do any more than idiosyncratic work. All the cases of sexual violence which fall outside of the most stereotypically monstrous form—date rape, spousal rape, cases involving intoxication, cases that lack outward markers of physical force or resistance—will systematically be excluded from the term. And that exclusion is no accident—it is functional, a mechanism of ensuring that many if not most cases of sexual violence and exploitation are rendered unnamable and immunized from most forms of social (to say nothing of legal) redress. Manne therefore states bluntly: “That misogynist violence and sexual assault are generally perpetrated by

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<sup>191</sup> See, e.g., Chris Huffman, Opinion, *The Dangers of False Allegations*, CROOKSTON TIMES (Oct. 25, 2018, 10:49 AM), <https://www.crookstontimes.com/opinion/20181025/letter-dangers-of-false-allegations> (“You see, rape is a serious matter. Not only is it a crime, but it is life destroying and morally destitute. Accusing someone of this, particularly in a small community, can destroy a reputation.”); Peter Wood, *The Meaning of Sex*, WEEKLY STANDARD (May 4, 2015, 12:00 AM), <https://www.washingtonexaminer.com/weekly-standard/the-meaning-of-sex> (“Let me repeat: Actual rape is a serious crime which calls for the serious response of law enforcement. The gravity of that crime, however, is obscured by rhetoric that treats other kinds of sexual encounters as though they were rape.”).

unremarkable, non-monstrous-seeming people must be accepted if things are to improve in this arena . . . .”<sup>192</sup>

This strategy—elevating the moral seriousness of discrimination claims as a defensive move to delegitimize their applicability in specific cases—has also found a home in the judiciary’s interpretation of the Equal Protection Clause. In *City of Cleburne v. Cleburne Living Center*, for example, the Supreme Court addressed whether classifications discriminating against the disabled should receive heightened judicial scrutiny (akin to that provided for racial or gender classifications).<sup>193</sup> The Court expressed concern that providing such protections to the disabled would make it “difficult to find a principled way to distinguish a variety of other groups” which desired similar protections, e.g., “the aging, . . . the mentally ill, and the infirm.”<sup>194</sup> Granting that the disabled do suffer from at least some degree of political powerlessness and prejudice, the Court nonetheless fretted that “much economic and social legislation would [also] be suspect” under any rationale which could justify heightened protection in this case.<sup>195</sup> In *McCleskey v. Kemp*, the Court faced a similar dilemma when presented with rigorous statistical evidence demonstrating racial disparities in the imposition of capital punishment.<sup>196</sup> Noting that similar arguments could be made against the entire project of criminal sentencing, the Court refused to consider the defendant’s argument that aggregate proof of discriminatory application was a rationale for reversing his death sentence.<sup>197</sup> Allowing a sentence to be overturned because of general statistical proof of discriminatory practice “throws into serious question the principles that underlie our entire criminal justice system”<sup>198</sup>—a position the dissent characterized as “a fear of too much justice.”<sup>199</sup>

To be clear, there *are* legitimate reasons for the judiciary to tread lightly when it elects to substitute its own judgment for those of democratically accountable bodies.<sup>200</sup> Kenji Yoshino is undoubtedly correct that there are

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<sup>192</sup> MANNE, *supra* note 188, at 211.

<sup>193</sup> 473 U.S. 432 (1985).

<sup>194</sup> *Id.* at 445–46.

<sup>195</sup> *Id.* at 445.

<sup>196</sup> 481 U.S. 279 (1987).

<sup>197</sup> *Id.* at 314–15.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 339 (Brennan, J., dissenting).

<sup>200</sup> This rationale has stronger force in the *Cleburne* tiered-scrutiny context, where the courts are determining whether to invalidate legislative classifications, than in the *McCleskey* criminal law context. Disparities in sentencing, at least when not the product of legislatively-enacted sentencing ranges, are largely endogenous to the judiciary and thus do not substantially implicate democratic legitimacy problems.

practical limits to the number of instances where courts can aggressively intervene in democratic policymaking.<sup>201</sup> But his precise choice of verbiage is interesting: “the Court can never give heightened scrutiny to classifications of, say, twenty groups without diluting the meaning of that scrutiny.”<sup>202</sup> The verb “diluting” is a suggestive choice: serious problems must be scarce; if the judiciary intervenes too often, it necessarily implies that the problems it is attacking are not particularly dangerous.

Perhaps the most striking examples of this dynamic can be found in the gay marriage context. In his dissenting opinion in *United States v. Windsor*,<sup>203</sup> Chief Justice Roberts emphasized that same-sex marriage bans had long been thought to be “essential” to the definition of marriage and that the Defense of Marriage Act enjoyed wide support in Congress (earning 342 votes in the House and 85 in the Senate, not to mention the President’s signature).<sup>204</sup> These factors should have made the Court reticent to “tar the political branches with the brush of bigotry.”<sup>205</sup> Justice Alito registered the same complaint: the plaintiffs in *Windsor* “ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. . . . Acceptance of the argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.”<sup>206</sup>

Judge Jeffrey Sutton’s opinion in *DeBoer v. Snyder* might be the most devoted to the theme.<sup>207</sup> *DeBoer* was the first federal appellate opinion after *Windsor* to uphold a state gay marriage ban,<sup>208</sup> and Judge Sutton focused on the commonality of anti-gay marriage sentiment as a reason to reject a constitutional finding of animus. He noted the history: the laws simply “codified a long-existing, widely held social norm already reflected in state law.”<sup>209</sup> He relied on raw numbers: “The number of people who supported

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<sup>201</sup> Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 762 (2011)

<sup>202</sup> *Id.*

<sup>203</sup> 570 U.S. 744 (2013) (striking down portions of the Defense of Marriage Act).

<sup>204</sup> *Id.* at 776 (Roberts, C.J., dissenting).

<sup>205</sup> *Id.* Chief Justice Roberts returned to this theme when objecting to the majority’s due process analysis in *Obergefell v. Hodges*. 135 S. Ct. 2584, 2624 (2015) (Roberts, C.J., dissenting) (quoting *Schuette v. BAMN*, 134 S. Ct. 1623, 1637 (2014) (“It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.”)).

<sup>206</sup> *Windsor*, 570 U.S. at 813 (Alito, J., dissenting).

<sup>207</sup> 772 F.3d 388 (6th Cir. 2014).

<sup>208</sup> See Erik Eckholm, *Court Upholds Marriage Bans in Four States*, N.Y. TIMES (Nov. 6, 2014), <https://www.nytimes.com/2014/11/07/us/appeals-court-upholds-same-sex-marriage-ban.html>.

<sup>209</sup> *DeBoer*, 772 F.3d at 408.

each initiative—Michigan (2.7 million), Kentucky (1.2 million), Ohio (3.3 million), and Tennessee (1.4 million)—was large and surely diverse.”<sup>210</sup> And he explicitly blurred those facts regarding commonality with a normative assessment of the enactor’s motives: “[T]he decision to place the definition of marriage in a State’s constitution [was not] unusual, nor did it otherwise convey the kind of malice or unthinking prejudice the Constitution prohibits. Nineteen States did the same thing during that period.”<sup>211</sup> Given the breadth of support, Judge Sutton concluded, it would be “unfair to paint the proponents of the measures as a monolithic group of hate-mongers.”<sup>212</sup>

All three judges are making a similar rhetorical move—actually, two rhetorical moves. On the one hand, they elevate the moral seriousness of a decision to strike down gay marriage bans—it entails, they say, labeling gay marriage opponents “bigots,” “irrational,” and “hate-mongers.” On the other hand, they observe that opposition to gay marriage has been the norm throughout most of American history and still enjoys considerable support today. They suggest that it is implausible to assert that such large quantities of Americans can justly be described in such vitriolic terms.<sup>213</sup> One immediately senses the trap: if declaring a law unconstitutional as an equal-protection violation means “tar[ring] the political branches with the brush of bigotry,”<sup>214</sup> and it is implausible to declare that wide swaths of Americans are bigoted, then it follows that nothing (or at least, nothing outside of truly idiosyncratic local enactments) is an equal-protection violation.

It is therefore unsurprising that only those supporting the constitutionality of bans on gay marriage—such as the dissenters in *Windsor* and the majority in *DeBoer*—ever use the words “bigot” or “hate-monger” to characterize gay-marriage opponents.<sup>215</sup> Framing the expressive content of a validated claim of legal discrimination in such explosive terms is a *defensive* move meant to weaken the intuitive plausibility of the claim. To support an equal-protection violation is to be a moral monster, it is implausible that

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<sup>210</sup> *Id.* at 409.

<sup>211</sup> *Id.* at 408.

<sup>212</sup> *Id.* at 410.

<sup>213</sup> Cf. George Tsai, *An Error Theory for Liberal Universalism*, 21 J. POL. PHIL. 305, 311 (2013) (contending that moral explanations which rely on believing that virtually everyone is “stupid or wicked or something along those lines” just “lack[] the ring of truth”).

<sup>214</sup> *Windsor*, 570 U.S. at 776 (Roberts, C.J., dissenting).

<sup>215</sup> See, e.g., *id.* at 813 (Alito, J., dissenting) (arguing that according heightened scrutiny to laws which restrict marriage to heterosexual couples “cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools”); *DeBoer*, 772 F.3d at 410 (“It is . . . unfair to paint the proponents of the measures as a monolithic group of hate-mongers.”); *Hernandez v. Robles*, 7 N.Y.3d 338, 361 (N.Y. 2006) (“A court should not lightly conclude that everyone who held this belief [against gay marriage] was irrational, ignorant or bigoted.”).

many Americans are monstrous, hence, an equal-protection claim challenging widely supported conduct is inherently implausible and can be rejected.<sup>216</sup>

This argument has resonance outside of the courts as well. For example, some have urged that claims of discrimination be made only in the most clear-cut cases, so as not to exhaust the patience of the broader community.<sup>217</sup> Ford worries that:

The good-natured humanitarian who listens attentively to the first claim of social injustice will become an impatient curmudgeon after multiple similar admonishments. . . . The growing number of social groups making claims to civil rights protection threatens the political and practical viability of civil rights for those who need them most.<sup>218</sup>

Latent in this concern is the belief that presenting discrimination as a regular facet of life—something that exists in normal or ambiguous situations and not just obvious forms of rabid hatred—is to discount its seriousness.<sup>219</sup> This belief justifies preemptively dismissing many discrimination claims that are not overt or unambiguous on both definitional and tactical grounds. In this way, the very rhetoric that seems to take discrimination claims “seriously”—viewing them as exceedingly grave violations of the norms of democratic life—acts to insulate many such cases from substantive public review.

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<sup>216</sup> See Schraub, *supra* note 78, at 290.

<sup>217</sup> See, e.g., FORD, *supra* note 182, at 339 (worrying that if too many believe that the “serious charge of racism has become a ploy used for undeserved advantage, the antiracist goodwill we currently enjoy may give way to a pervasive attitude of cynical indifference”); STEPHEN WALT & JOHN MEARSHEIMER, *THE ISRAEL LOBBY AND U.S. FOREIGN POLICY* 196 (2007) (claiming that the “blurring” of “true anti-Semitism . . . makes it harder to fight true bigotry”); Peter Wallsten, *Center for American Progress, Group Tied to Obama, Under Fire from Israel Advocates*, WASH. POST (Jan. 19, 2012), [https://www.washingtonpost.com/politics/center-for-america-progress-group-tied-to-obama-accused-of-anti-semitic-language/2012/01/17/gIQAcHXAQ\\_story.html](https://www.washingtonpost.com/politics/center-for-america-progress-group-tied-to-obama-accused-of-anti-semitic-language/2012/01/17/gIQAcHXAQ_story.html) (quoting J Street President Jeremy Ben-Ami as urging Jews to “tread lightly” around accusations of antisemitism because otherwise “people won’t take you seriously”).

<sup>218</sup> FORD, *supra* note 182, at 176.

<sup>219</sup> From another angle, David Oppenheimer promotes his concept of “negligent discrimination” precisely because it detaches the concept of “discrimination” from one of “moral wrongfulness” and therefore expands the class of cases where a victim of discrimination can gain redress. David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 970–71 (1992); see also Freeman, *supra* note 20, at 1052–53 (distinguishing between the “victim” perspective on anti-discrimination law, which focuses on the material conditions experienced by members of the underclass, and the “perpetrator” perspective, which focuses on the inappropriate conduct of those accused of engaging in illegitimate discrimination).

## 2. *Intentionality and Epistemic Privilege*

One wide-spread understanding of “discrimination” is that an action is discriminatory if and only if it results from conscious and intentional bias against a particular group.<sup>220</sup> In law, this conception is operationalized as a requirement of discriminatory *intent*: a plaintiff alleging discrimination must demonstrate that the alleged discriminator acted due to some sort of illicit animus against a protected identity characteristic.<sup>221</sup> The intentionality requirement can and has been criticized for being unduly narrow—failing to include both implicit biases that commonly characterize aversive racism as well as structural barriers to equality that minority members might face.<sup>222</sup> There is, however, a less-recognized role this definition plays in enabling the dismissal of discrimination claims. By placing the key facts underlying a discrimination claim in the minds of those accused, this understanding of discrimination places the respondents in an epistemically privileged position vis-à-vis the claimant.

“Epistemic privilege” generally refers to the claim that certain individuals possess a particular standpoint which is not just different but advantageous vis-à-vis other perspectives on reality.<sup>223</sup> The enlightenment model accorded

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<sup>220</sup> See, e.g., Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477, 480 (2007) (critiquing a “narrow” view “that treats discrimination as a wrong perpetrated by a discriminator who acts self-consciously and irrationally”); Eyer, *supra* note 165, at 1300 (“Perhaps the most striking finding of psychology scholars . . . is that the intent of the perpetrator is a critical determinant of observers’ willingness to make attributions to discrimination.”); FORD, *supra* note 182, at 180 (“Most people think unlawful discrimination is a decision *motivated* by animus or bias”).

<sup>221</sup> See, e.g., Texas Dept. of Community Affairs v. Burdine, 450 U. S. 248, 253 (1981) (“The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”); Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (concluding that a governmental action must be taken “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group” to constitute an equal protection violation).

<sup>222</sup> See Freeman, *supra* note 20, at 1054–55 (arguing that the focus on identifying a discrete perpetrator harboring discriminatory animus is predicated on a need to declare most actors “innocent” and thus not liable for bearing the burden of rectifying allegedly discriminatory conduct); Oppenheimer, *supra* note 219, at 916 (“If whites are frequently unaware of their own racism, a theory of employment discrimination that focuses on an intent to discriminate provides no remedy for most discrimination.”).

<sup>223</sup> See, e.g., SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE? THINKING FROM WOMEN’S LIVES 121 (1991) (asserting that marginalized persons will typically carry a standpoint which is “less partial and less distorted” than competing social outlooks); Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523, 556 (1996) (“Arguably, those on the bottom might possess an epistemic privilege resulting from a kind of dual vision: They are able to compare prevailing, legitimating ideologies with the realities of their lives, and thereby reveal injustices that would otherwise remain invisible to others.”). For a skeptical, albeit sympathetic, view, see Bat-Ami Bar On, *Marginality and Epistemic Privilege*, in FEMINIST EPISTEMOLOGIES 83 (Linda Alcoff & Elizabeth Potter eds., 1993).

epistemic privilege as a class to persons with formal academic training, who utilize the scientific method, and who in general stand as objective, “unmarked” observers.<sup>224</sup> Feminist philosophers turned this model on its head and asserted that oppressed persons occupied an epistemically privileged position because (among other reasons) they could draw on both their social knowledge of pervasive dominant norms as well as their personal (but socially-suppressed) knowledge derived from their experience as oppressed.<sup>225</sup> Others express skepticism regarding whether any group of persons should be considered to possess epistemic privilege as a general matter.<sup>226</sup>

But whether or not we believe that there is a class of epistemically privileged persons generally, it seems evident and inescapable that particular models of understanding a given social phenomenon privilege the outlook of certain people in certain situations. With respect to the question “what emotion is Jane feeling right now,” Jane is in an epistemically privileged position compared to most, if not all, other observers to articulate the right answer.<sup>227</sup> Certainly, this does not imply that Jane is generally epistemically privileged in her response to any question—her authority stems instead from the specific context governing how we observe, assess, and understand emotions. Nor does this necessarily mean Jane’s vocalized response to the question is unimpeachable—she may be lying. It does not even demand that her (sincere) appraisal is correct—she might be confused. It is possible that in some circumstances a trained therapist, given time and proper equipment, could come up with a “better” answer to the question than Jane would. Nonetheless, it is generally the case that Jane’s articulation of what Jane is feeling will be given greater credence than competing opinions proffered by others. Hence, if we believe that the decisive question governing the answer

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<sup>224</sup> See Marianne Janack, *Standpoint Epistemology Without the “Standpoint”?: An Examination of Epistemic Privilege and Epistemic Authority*, 12 *HYPATIA* 125, 133–34 (1997) (“One is supposed to have epistemic privilege . . . because of one’s knowledge situation.”); Bar On, *supra* note 223, at 85–88.

<sup>225</sup> Janack, *supra* note 224, at 126 (concluding that “while theories developed by members of dominant groups will reflect only the interests and values of those groups, theories developed by the oppressed will encompass a broader array of interests and experiences”); see also Pohlhaus Jr., *supra* note 99, at 721 (asserting that “the epistemic resources developed from marginalized situatedness will be suited to more of the experienced world in general” and such “marginally situated knowers . . . develop epistemic resources more adequate for making sense of more parts of the experienced world”).

<sup>226</sup> See Bar On, *supra* note 223, at 97.

<sup>227</sup> See Donald Davidson, *First Person Authority*, 38 *DIALECTICA* 101, 101 (1984) (“When a speaker avers that he has a belief, hope, desire or intention, there is a presumption that he is not mistaken . . .”); John Heil, *Privileged Access*, 97 *MIND* 238, 238 (1988) (“I know my own states of mind immediately and with confidence. You may discover what I am thinking, of course, but you are liable to err in your assessment of my thoughts in ways that I cannot.”).

to a given moral controversy is “what emotion is Jane feeling,” then Jane is an epistemically privileged position with respect to how we assess that controversy. More broadly, the possession of epistemic privilege in any particular case depends on what is believed to establish the truth of a proposition as an initial matter in specific situations.<sup>228</sup> A person in a privileged position under one model may be viewed with suspicion and mistrust under another.

The intentionalist model of discrimination is epistemically self-privileging. By this I mean that, under the intentionalist model, whether an action constitutes “discrimination” depends on information or appraisals that the subject of the discrimination claim (the person who allegedly is acting in a discriminatory fashion) is in a privileged position to be able to assess. And an epistemically self-privileging theory of discrimination greatly enables the practice of dismissal. David Hirsh describes the mechanics in characteristically lucid fashion when discussing the dismissal of antisemitism (though the logic applies to other “-ism” claims as well). Persons confronted with the charge of antisemitism:

find it easier to look within themselves and to find they are not intentionally antisemitic, indeed they are opponents of antisemitism. Intimate access to the object of inquiry yields an apparently clear result and seems to make it unnecessary for the antiracist to look any further . . . .<sup>229</sup>

Once it is “clear” that the label is false, it is perfectly reasonable to dismiss the claim without additional consideration. What more do we need to know? But this move assumes that a particular, narrow definition of antisemitism—one confined to conscious antipathy towards Jews—occupies the field.<sup>230</sup> Giving such a definition this type of pre-deliberative primacy is not the conclusion of an open discussion but a gatekeeper standing athwart its commencement.

Intentionalist theories of discrimination—whereby one only is implicated in “discrimination” if that is one’s intention or purpose—hinge on epistemically self-privileging factual assessments. To be sure, one could argue the contrary—we might believe that people are unreliable appraisers of their own mental states, particularly if we factor in subconscious prejudices. Indeed, this potential counterargument may also explain the

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<sup>228</sup> See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 202–03 (1990) (“Epistemological choices about who to trust, what to believe, and why something is true . . . tap the fundamental question of which versions of truth will prevail and shape thought and action.”).

<sup>229</sup> Hirsh, *supra* note 88, at 91.

<sup>230</sup> See *id.* (noting that this posture implicitly dismisses the possibility of antisemitism that exists beyond individual conscious hostile attitudes).

resistance to incorporating subconscious theories of discrimination—they undermine one of the primary, if unstated, “advantages” of conscious theories of discrimination (namely, that they put those accused of discrimination in a position of epistemic privilege from where they can easily dismiss the allegation).<sup>231</sup>

Nonetheless, the idea that “access to one’s own mental states is infallible and incorrigible” runs deep and is easily accepted as a baseline assumption.<sup>232</sup> Having adopted this view, a discrimination claim easily be brushed off—one hears the charge, quickly checks one’s own mental state, and concludes that one is not harboring malign attitudes towards the supposed victim. From that conclusion, it follows that the discrimination claim is obviously unsubstantiated and can be dismissed. None of this requires any sort of engagement with any evidence or argument the claimant might otherwise bring to bear. This is preferable to relying on motivated cognition because it is less cognitively taxing and eliminates the possibility that sufficiently strong evidence will force them to admit the existence of prejudice or discrimination.<sup>233</sup> Through this mechanism, the theory is self-insulating—since it is adopted because of its utility in avoiding critical reflection regarding discrimination, it is implemented in such a way as to negate the necessity of such reflection.

At one level, this method of dismissing discrimination claims might seem to have less purchase in the courtroom, since third-party judges lack direct access to the mental states of the alleged discriminator and so cannot rely on them to dispose of claims.<sup>234</sup> That is, it does them no good to look into their *own* minds and judge themselves innocent, since they are judging someone

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<sup>231</sup> Compare Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1080 (2006) (challenging the validity of implicit bias measures because they supposedly do not “tap[] into racial attitudes—at least attitudes in the commonsense view that the attitudes imply an evaluative preference that, when brought to people’s attention, they endorse and are even prepared to justify under appropriate conditions”), with R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1186–87 (2006) (noting that criticisms of implicit bias measures often rest on normative disagreements regarding the meaning of discrimination rather than scientific objections).

<sup>232</sup> Heil, *supra* note 227, at 238; see also Quentin Skinner, *Motives, Intentions, and the Interpretation of Texts*, in MEANING & CONTEXT: QUENTIN SKINNER AND HIS CRITICS 68, at 76–77 (James Tully ed., 1988) (“It is true that any agent is obviously in a privileged position when characterizing his own intentions and actions. It follows that it must always be dangerous, and ought perhaps to be unusual, for a critic to override a writer’s own explicit statements on this point.”).

<sup>233</sup> See Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1030 (1988) (suggesting that the requirement of conscious discriminatory intent exists so that we can “reject[] civil rights claims that threaten . . . [White] *psyches*” (emphasis in original) (citations omitted)).

<sup>234</sup> See *supra* notes 227–228 and accompanying text.

else's mindset. In practice, however, the intentionality requirement plays an important role in enabling the early dismissal of discrimination cases.

For starters, sometimes judges *can* look into their own minds as a proxy for the mindset of the alleged discriminator—if, for example, they have engaged in similar conduct or spoken similar words as that which is alleged to provide proof of discriminatory motive. Assuming, as seems likely, that the judge does not view him or herself as harboring discriminatory animus,<sup>235</sup> they will likewise be reticent to conclude that identical acts by another party suffices to make out such proof.<sup>236</sup>

The gay marriage cases almost certainly provide an example.<sup>237</sup> Several of the conservative judges who voted against concluding that gay marriage bans evinced anti-gay animus stressed how common sentiment opposing gay marriage has been in the United States. That general demographic observation makes it overwhelmingly likely that at least some of those judges themselves opposed gay marriage, or at least did so in the recent past. Nonetheless, those judges almost certainly did not conceive of themselves as harboring discriminatory animus against LGBT persons by virtue of adopting that position—that is, they can (or they think they can) use their own experience as proof that an anti-gay motive is not a necessary condition for opposing gay marriage. So when the plaintiffs argued that support for such policies is properly attributed to unlawful animus, judges who themselves have backed those laws could dismiss the inference—after all, the judges have first-hand knowledge (under the intentionalist framework of understanding discrimination, at least) that some proponents of gay marriage bans are wholly innocent of the charge.

But even where there is not a direct parallel between the judge's state of mind and the defendant's, there remains a more mundane problem: the

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<sup>235</sup> Cf. Laurie T. O'Brien, Christian S. Crandall, April Horstman-Reser, Ruth Warner, AnGelica Alsbrooks & Alison Blodom, *But I'm No Bigot: How Prejudiced White Americans Maintain Unprejudiced Self-Images*, 40 J. APP. SOC. PSYCHOL. 917 (2010) (exploring the "paradox" of how White Americans can possess racial prejudice yet maintain a self-conception as unprejudiced).

<sup>236</sup> This is one of several circumstances where a deliberative actor might have an incentive not just to defend themselves from charges of discrimination, but defend others like them as well. See Susan Condor, Lia Figgou, Jackie Abell, Stephen Gibson & Clifford Stevenson, *'They're Not Racist . . .'* *Prejudice Denial, Mitigation and Suppression in Dialogue*, 45 BRIT. J. SOC. PSYCHOL. 441, 442–43 (2006) (internal quotation marks omitted) (quoting Teun A. van Dijk, *Discourse and the Denial of Racism*, 3 DISCOURSE & SOC'Y 87, 89 (1992)) (noting that "social actors may, on occasion, attempt to deny prejudice on behalf of groups to which they belong" because they "resent being perceived as racists," both as individuals and members of society).

<sup>237</sup> See *supra* notes 203–214 and accompanying text.

plaintiff carries the burden of proving discriminatory intent,<sup>238</sup> but it is the defendant who is in an epistemically privileged position regarding that critical fact. Just as there is a healthy presumption of deference to our hypothetical Jane regarding her own articulation of her emotional state, so too is it understandable for judges to presume at the outset that a person alleged to have engaged in discrimination has more reliable access to their own state of mind than does the person making the allegation.<sup>239</sup> Yet discrimination case plaintiffs must virtually always convince judges of the opposite—that their second-hand assessment of the mindset of the defendant is more reliable than a first-hand declaration. Absent cases where the plaintiff is fortuitous enough to have direct indications of discriminatory animus, it is far from clear what sort of evidence could definitively show that the defendant thought something he or she denies thinking.<sup>240</sup> And so again, the intentionalist requirement of discrimination may predispose judges to believe that discrimination claims simply do not “ring true.”<sup>241</sup>

These problems, of course, track with more general criticisms of the intentionalist model.<sup>242</sup> That said, the concern being articulated here rests not on the substance of intentionalist theories of discrimination, but the discourse-suppressing practices they enable. There might also be substantive problems with intentionalist models, but the danger this Section is focusing on is that, through dismissal, they enable us to avoid reasoned consideration of other conceptions of discrimination. An intentionalist theory of discrimination need not suppress debate over competing theories if it is adopted as a starting position and its adherents recognize that it must be

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<sup>238</sup> *Burdine*, 450 U.S. at 253 (citation omitted) (“The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”); see also Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Perogative and Privacy*, 105 *YALE L.J.* 2117, 2189 (1996) (citations omitted) (citing *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) (commenting that plaintiffs must show “a state of mind akin to malice” in order to prove discriminatory intent).

<sup>239</sup> As Robert Bone put it, one reason that discrimination cases suffer under *Iqbal* is that “mental states are notoriously hard to prove.” Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 *NOTRE DAME L. REV.* 849, 877 (2010).

<sup>240</sup> *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 534 (1993) (Souter, J., dissenting) (noting that in cases where the plaintiffs lacks “the good luck to have direct evidence of discriminatory intent” there lies “the practical question of how the plaintiff without such direct evidence can meet” their burden of proof).

<sup>241</sup> See *Leading Cases*, *supra* note 39, at 262.

<sup>242</sup> See Oppenheimer, *supra* note 219, at 916 (“If whites are frequently unaware of their own racism, a theory of employment discrimination that focuses on an intent to discriminate provides no remedy for most discrimination.”); Freeman, *supra* note 20, at 1054–55 (arguing that the focus on identifying a discrete perpetrator harboring discriminatory animus is predicated on a need to declare most actors “innocent[]” and thus not liable for bearing the burden of rectifying allegedly discriminatory conduct).

defended when challenged.<sup>243</sup> That commitment (to defend the theory against challengers) would preclude this type of dismissal of discrimination claims because the subject would have to recognize the possibility that the claim is being made on an alternative set of assumptions. The ensuing conversation would interrogate the competing assumptions—and it may, ultimately, affirm the superiority of the intentionalist model.<sup>244</sup> But opening the theory up to such challenge would deprive it of much dissonance-reduction utility. And the fact that those who believe in an intentionalist theory of discrimination rarely, in practice, seem willing to subject it to this sort of meta-debate suggests that it is the theory's ability to suppress debate, rather than any substantive theoretical coherency, that provides the root of its appeal.

#### V. BYPASSING DISMISSAL: LAW AS A COGNITIVE EXPRESSWAY

Law is but one of many channels through which a given social controversy might be argued.<sup>245</sup> While the preceding analysis has certainly engaged in specifically legal questions, it has also cast its net more widely to consider other vectors of social discourse where dismissal circumvents or obstructs important public debates. But law is not just another forum for civil discourse. It has certain specific characteristics which suggest it occupies a crucial niche in the deliberative ecosystem. This final Part accordingly offers a comparative institutionalist account of how dismissal operates in legal versus non-legal arenas. Certain features of the legal system make it uniquely well-positioned to overcome the problem of dismissal—at least some of the time—and push important public conversations forward.

This may seem counterintuitive. In many circumstances, after all, legal institutions seem to amplify the problems of dismissal. Whereas in private

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<sup>243</sup> See MICHAEL WILLIAMS, PROBLEMS OF KNOWLEDGE: A CRITICAL INTRODUCTION TO EPISTEMOLOGY 25 (2001) (discussing Robert Brandom's theory of "default" entitlements which form the basis for epistemic justification, but which we adopt with the proviso that they will be defended if challenged) (internal quotation marks omitted); Kristina Rolin, *The Bias Paradox in Feminist Standpoint Epistemology*, 3 EPISTEME 125, 129 (2006) ("[D]efault assumptions are adopted with a commitment to defend them when they are challenged with contrary evidence or other arguments.").

<sup>244</sup> See Ben Kotzee, *Poisoning the Well and Epistemic Privilege*, 24 ARGUMENTATION 265, 276–79 (2010) (arguing that a claim of epistemic privilege is not inherently invalid so long as the claimant admits the legitimacy of, and is willing to partake in, a meta-debate regarding the validity of that claim).

<sup>245</sup> See generally Catherine R. Albiston, Lauren B. Edelman & Joy Milligan, *The Dispute Tree and the Legal Forest*, 10 ANN. REV. L. & SOC. SCI. 105, 106–09 (2014) (noting that dispute resolution is not a pyramid where initial claims are progressively winnowed down until a rump remainder receive legal adjudication, but rather a tree whereby different disputes take different paths towards resolution).

conversation we are free to explore any thoughts or claims which catch our fancy, legal concepts must be sufficiently clear such that citizens have considerable *advance* warning regarding what sorts of behaviors are permissible or not, and must have a broad enough base of popular support to be enacted into positive law. Consequently, law by necessity will often exclude many types of claims which do not fit inside preexisting doctrinal boxes. This is what Robert Cover famously referred to as law's "jurispathic" quality.<sup>246</sup> Law can only accommodate a small sliver of the potential understandings which might animate a given conception of rights, justice, or the good. Bound by the need for order and predictability, it must "kill" other potential sources of legal understanding.<sup>247</sup> The (civil procedure) tool of dismissal in many ways operates to screen out those claims which—whatever their merits as an abstract notion of justice—do not fall inside the relatively narrow borders of accepted legal doctrine.

Yet there is a less-remarked-upon, but equally important, advantage that law provides. Law offers a unique opportunity to circumvent the problem of dismissal because—for those claims which *do* fit inside the proper templates—courts must generally hear the cases presented to them. While pundits, politicians, or everyday people are free to consider any claims they like, they are rarely obligated to do so. The unabridged freedom of the private sphere which allows any claim to be heard also allows any claim to be ignored. If a person responds to an uncomfortable assertion by dismissing it out of hand, there is rarely anything their interlocutor can do to force the issue.

What law provides against dismissal is a demarcated path through which certain claims, framed within preset and (relatively) stable borders, are entitled to be heard. When Robert Bolt described law as "a causeway upon which, so long as he keeps to it, a citizen may walk safely,"<sup>248</sup> this is not what he meant—but the metaphor resonates. Law may not recognize certain forms of discrimination and people may find discrimination claims distasteful generally, but an employment discrimination claim that dutifully follows the borders of *McDonnell-Douglas* will at the very least make it to summary judgment.<sup>249</sup> As a consequence, law can offer an expressway past the first

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<sup>246</sup> Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983).

<sup>247</sup> *Id.* at 53.

<sup>248</sup> Robert Bolt, *A Man For All Seasons* 92 (Heinemann ed., 1960).

<sup>249</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973) (articulating the "prima facie case" that must be made demonstrating employment discrimination, with the employer then obliged "to articulate some legitimate, nondiscriminatory reason" for its decision and the plaintiff

two cognitive checkpoints. Unlike everyday conversation, a legal claim that adheres to certain preset conventions generally *has to be heard*—a court cannot shunt it aside simply because it is inconvenient or uncomfortable.

The ability to even present an issue as one worthy of debate matters.<sup>250</sup> And just as the inability to articulate a given claim in legal language can render it infirm even outside the courtroom, the fact that a claim has legal resonance comes with legitimizing force. When Catherine MacKinnon identified the importance of law recognizing the concept of sexual harassment, she did not focus on the tangible remedies that might result from a winning suit. What was more important was that women “have been given a forum, legitimacy to speak, authority to make claims”—only after this litany did she conclude with “and an avenue for *possible* relief.”<sup>251</sup> An important element of oppression is often its denial that the disenfranchised group even has the right to present claims.<sup>252</sup> A judicial forum can be a rare arena where those claims must be given at least the trappings of reasoned analysis.

Arguments favoring an enhanced judicial role in the protection of minority groups typically focus on how judges are relatively insulated from popular pressure and prejudices which promote discriminatory legislation.<sup>253</sup> This position immediately runs into trouble, as it is by no means clear that

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then required to point to evidence challenging that rationale as a pretext for discrimination). *But see* Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709 (2007) (citation omitted) (suggesting that judicial “dislike of or discomfort with certain claims—whether employment discrimination, sexual harassment, or Family Medical Leave Act cases,” has prompted judges to be disproportionately willing to dispense of such cases at the summary judgment stage).

<sup>250</sup> See IRIS MARION YOUNG, *Communication and the Other: Beyond Deliberative Democracy*, in INTERSECTING VOICES: DILEMMAS OF GENDER, POLITICAL PHILOSOPHY, AND POLICY 60, 71 (1997) (“In a discussion situation in which different people with different aims, values, and interests seek to solve collective problems justly, it is not enough to make assertions and give reasons. One must also be heard.”); ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 109 (1989) (arguing that the principle of effective democratic participation includes giving each citizen “adequate and equal opportunities for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another”).

<sup>251</sup> CATHERINE MACKINNON, *Sexual Harassment: Its First Decade in Court*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 104 (1987) (emphasis added).

<sup>252</sup> *Cf.* *Dred Scott v. Sandford*, 60 U.S. 393, 405 (1857) (concluding that descendants of enslaved Africans, even if they are acknowledged as citizens of a state, nonetheless would not be citizens of the United States and therefore would not be “entitled to sue as such in one of its courts”); HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (1994) (“The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective.”).

<sup>253</sup> *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (promoting heightened judicial scrutiny in circumstances where laws target “discrete and insular minorities” burdened by prejudice in the political system).

courts are *systematically* more likely to be sympathetic to the interests of dispossessed groups than are the democratic branches.<sup>254</sup> There is, after all, something a bit odd about responding to the problem of minority dispossession by delegating the issue to a body that is whiter, maler, straighter, richer, and older than the American electorate writ large. Moreover, there is a more general paradox identified above: if judges are unlikely to differ significantly from popular conceptions of key political issues, how can they possess any significant advantage as reformers vis-à-vis democratic or social actors?

The focus on dismissal identifies a specific institutional advantage of judges that cuts through this Gordian Knot.<sup>255</sup> It is plausible—indeed it seems likely—that two otherwise similarly situated deliberators will reach differing conclusions over a contentious issue if one is forced to provide reasons for their position and another is not. Judges do not necessarily reason *differently* than everyday people, but they are forced to reason *more often*, particularly in politically or emotionally fraught situations. Judges may be most likely to give due accord to marginalized voices, not because they are especially moral, wise, or insulated from democratic pressures, but simply because the norms of their position often force them to engage in an argument where others do not have to.

Consider the rapid evolution of Americans' views on same-sex marriage.<sup>256</sup> For many years, the prospect of gay marriage could be dismissed as radical, extreme, a non-starter, ludicrous—all responses that do not require any serious engagement of the issue on its merits. But courts are limited in their ability to resort to *those* sorts of responses. Nominally, a court cannot dismiss a complaint on the grounds that it is “a non-starter.” They need to provide logically and legally cognizable reasons. Now to be sure, the

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<sup>254</sup> See Jeremy Waldron, *The Core of the Case Against Judicial Review* 115 YALE L.J. 1346, 1404–05 (2006) (noting how the “argument for judicial review depends on a particular assumption about the distribution of support for the minority’s rights. The sympathy is assumed to be strongest among political elites.”); Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1148–49 (2006) (criticizing as “empirically questionable” the notion that “judges remain better suited to decide matters of principle due to their comparative institutional competences” supposedly stemming from their “political insulation”); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 783 (2001) (“Inasmuch as judging is choice, the conclusions drawn from psychological research on human judgment and choice likely apply to judges as well.” (internal quotations and citations omitted)).

<sup>255</sup> See *supra* Part I.A.

<sup>256</sup> See *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (May 14, 2019), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/> (documenting a thirty-point swing in favor of gay marriage between 2004 and 2019).

evaluative aspect of motivated cognition gives judges plenty of opportunities to turn aside novel or unpopular claims even while purporting to deal with them on their merits.<sup>257</sup> And losing “on the merits” can come with significant dignitary harms too, particularly where the proffered reasons are themselves biased or demeaning towards the claimant.<sup>258</sup> Getting past the first two cognitive checkpoints clearly is not everything. But it is not nothing either. Being in the realm where one’s opponents have to provide reasons against your claim is, for many groups, a significant and meaningful advance.

And just as a dismissed or avoided claim can lead to a “spiral of silence” further marginalizing its proponents,<sup>259</sup> where law successfully places an issue on social radar screens it can have a cascading effect on public attitudes. Once gay marriage broke through with legal victories<sup>260</sup> it became correspondingly more difficult in public discussion to simply dismiss the concept outright. The early judicial decisions affirming gay marriage did not end the debate, but they did signal that a debate must be had.<sup>261</sup> And being in the realm of substantive debate is a much better place for gay marriage advocates to be than they were when the issue could be tossed aside as one of fringe radicals. Meanwhile, as people start to rethink the issue (or really, think critically about it for the first time), they can reason from and rely on the signals provided by the instigating legal decisions.<sup>262</sup>

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<sup>257</sup> Not to mention the obvious point that, sometimes, marginalized groups nonetheless simply are wrong on the merits of their claims. See Waldron, *supra* note 254, at 1398 (“People—including members of topical minorities—do not necessarily have the rights they think they have. They may be wrong about the rights they have; the majority may be right.”).

<sup>258</sup> See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 92–93 (1990) (describing the negative effects of bringing a discrimination claim that “define some people as different, and inferior, in light of the norm” (citation omitted)).

<sup>259</sup> See Noelle-Neumann, *supra* note 76; see also *supra* notes 119–121 and accompanying text.

<sup>260</sup> See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (holding a law that prohibited same-sex marriage *per se* unconstitutional under the equal protection clause of the Hawaii Constitution); *Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941, 969 (Mass. 2003) (“We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”).

<sup>261</sup> See, e.g., Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 *DRAKE L. REV.* 861, 871 (2006) (“[I]t may one day be said that *Baehr* and *Goodridge* started a process that culminated in same-sex couples securing widespread relationship protections, whether through marriage or civil union.”).

<sup>262</sup> See David Schraub, *The Perils and Promise of the Holder Memo*, 2012 *CARDOZO L. REV. DE NOVO* 187, 201 (2012) (“[H]igh-profile legal discussions, particularly when instigated by known political actors who can serve as effective opinion leaders, become part of the larger cocktail of considerations voters use to assess a given social question.”).

Even claims which lose in the courts can have a salutary effect in promoting important social conversations.<sup>263</sup> Sometimes legal decisions spark public conversations leading to formal amendments to the relevant legal regimes. The Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire*, limiting the timeframe for workers to bring suit over discriminatory pay, was met with great public outrage and a swift statutory reversal.<sup>264</sup> But even where it results in no legal modifications, a losing claim can nonetheless have important social ramifications. When the Iowa Supreme Court held in 2013 that a male employer's decision to fire a female subordinate for being too sexually attractive was not illegal sex discrimination,<sup>265</sup> much of the public outrage did not take the form of technical quibbles with the Court's legal analysis but rather with the harmful nature of such a rule as a broader moral principle.<sup>266</sup> The writers of these critiques seemed to view the decision of the court as the definitive, socially sanctioned answer to the question "is firing a woman because she is supposedly too 'desirable' to her male supervisor justifiable as a matter of gender equality," and if they were right then the

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<sup>263</sup> See NeJaime, *supra* note 17, at 954 (citations omitted) (noting that, even among scholars who believe that *Brown* failed to directly make a significant dent in segregation, some nonetheless credit it for "fueling a powerful social movement by raising consciousness, driving fundraising, legitimizing a cause, and influencing other state actors"); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1867 (1987) (noting the importance of "even those claims that lose, or have lost in the past, if they continue to represent claims that muster people's hopes and articulate their continuing efforts to persuade").

<sup>264</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628–29 (2007) (requiring that a plaintiff with a sex discrimination claim file an EEOC complaint within 180 days of the alleged violation because "current effects alone cannot breathe life into prior, uncharged discrimination"), *abrogated by Lilly Ledbetter Fair Pay Act of 2009*, Pub. L. No. 111-2, 123 Stat. 5, 6 (2009) (recognizing that an "unlawful employment practice occurs . . . when an individual is *affected* by application of a discriminatory compensation decision or other practice" (emphasis added)).

<sup>265</sup> *Nelson v. James H. Knight DDS*, 834 N.W.2d 64 (Iowa 2013) (holding that terminating a female employee because of her appearance, while unfair, does not amount to illegal gender discrimination).

<sup>266</sup> See, e.g., Jessica Valenti, *Asking for It*, NATION (Jan. 11, 2013), <http://www.thenation.com/asking-it> ("When this dentist in Iowa can fire his assistant for turning him on—even though she's done absolutely nothing wrong—the message again is that it's *men's* ability to work that's important."); Doug Barry, *Iowa Supreme Court Says It Was 'Totally Cool' for a Dentist To Fire His 'Irresistibly Attractive' Female Employee*, JEZEBEL (Dec. 22, 2012, 12:00 PM), <http://jezebel.com/iowa-supreme-court-says-it-was-totally-cool-for-a-denti-5970736> (criticizing the paradoxical nature of the *Knight* decision's failure to recognize gender discrimination in the face of purportedly straightforward evidence to the contrary).

Of course, this is not to say that there is not space to argue that the decision was legally wrong, or that the decision was legally correct and that the law should be changed. But the point is that the decision was taken by many to entail not just the court's legal judgment on the meaning of the relevant anti-discrimination statutes, but also a considered moral judgment on gender relations that was taken to be normatively dangerous. *But see Nelson*, 834 N.W.2d at 73 (stating that the relevant question was not whether "a jury could find that Dr. Knight treated Nelson badly," but rather whether the alleged facts constituted unlawful discrimination).

decision is depressing indeed.<sup>267</sup> But the public reaction to the decision—largely critical and incredulous—is at least as important as the formal legal outcome. The legal proceedings placed this sort of behavior in public conversation, and the general consensus that emerged seemed to be that such an action is wrong. Identifying and articulating that consensus has value regardless of the formal legal disposition of the case. Thirty, forty, fifty years ago, it is unlikely that behavior like this would have ever even made it onto the social radar screen. Courts provided a vector for that social conversation to happen, and the results outside the courtroom were overwhelmingly positive.

### CONCLUSION

Everyone comes to the table with certain value commitments; everyone comes to the table seeking to suppress certain thoughts they would rather not think. In its most explored facet, motivated cognition deals with a very specific instantiation of this instinct: biased appraisals of received evidence. But often times, this is not the most common or most effective defensive strategy. We can construct our social world to avoid hearing certain types of claims. And, more dangerously, we can create conditions where we feel justified in dismissing certain claims—refusing to even consider them substantively on their merits. When abused, dismissal breaches our duty to listen to our fellows and does not respect members of marginalized communities as epistemic agents.

As institutions, law and the courts sit in an interesting position vis-à-vis dismissal. On the one hand, law is limited in its ability to address novel claims because law is by design a limited instrument. A significant purpose of law is precisely to winnow down the theoretically infinite array of claims a litigant might make into a much narrower and more manageable set that are known in advance. Yet within those boundaries, law also offers significant opportunities. If a claim can be framed within the four corners of a recognized legal doctrine, courts are uniquely situated in public dialogue because they cannot simply refuse to listen. They cannot “dismiss” a claim simply because it is discomfiting or disconcerting, politically unpopular or a “non-starter.” They have to give reasons. And while that is not the end of the game, it is for many groups and many claims the beginning of broader

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<sup>267</sup> See, e.g., Valenti, *supra* note 266; Joseph Diebold, *Iowa Supreme Court: It's Okay To Fire A Woman For Being Too Attractive*, THINKPROGRESS (July 12, 2013), <https://thinkprogress.org/iowa-supreme-court-its-ok-to-fire-a-woman-for-being-too-attractive-d022b15121e7/>.

social conversation that otherwise might have been avoided or dismissed outright.

The linkage between legal and discursive dismissal is more than just a comparative exercise, however. Legal scholarship frequently asks what other disciplines—economics, psychology, philosophy—have to teach us about law. This Article suggests that law has something to teach us about the ethics of our everyday discursive interactions. Deeply embedded in legal culture are a series of important deliberative norms that make fair argument and adjudication possible. These include the right of all sides to present arguments, the importance of fairly weighing evidence, and the obligation to take seriously even uncomfortable claims. In a political climate where many Americans worry that we are becoming epistemically siloed—stuck in like-minded bubbles, unwilling or unable to even contemplate arguments from communities foreign to our own—these virtues often feel in short supply. The focus on dismissal—the legal concept analyzed as a discursive practice—can help point the way to more expansive and more just modes of interacting across political and cultural difference. In this way, legal thinking is valuable not simply as a means of securing formal rights and remedies at the end of a filed case. The lessons of the law can also inform our everyday deliberative practices, pushing us to be less close-minded, less arrogant, less partisan—less dismissive—towards the ordinary hard thoughts that a functioning democratic citizen must force herself to think.

