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We proudly present Volume 75, Issue 1 of the Arkansas Law Review *for the benefit of all who learn and advance the law, whether judge, advocate, professor, or student. We have carefully developed these materials to elicit informed discussions and provide intellectual and practical assistance to members of the legal community.*

Arkansas Law Review Editorial Board
2021-2022

Arkansas Law Review's 75th Anniversary Remarks

University of Arkansas School of Law
Fayetteville, Arkansas
March 2022

Steve Caple*

It is an exciting time for the *Arkansas Law Review*, the School of Law, and the University of Arkansas. The journal is celebrating its 75th anniversary, the law school is approaching its 100th year of existence, and the university recently celebrated its 150th birthday.

I would be remiss if I did not also acknowledge that we are in the midst of Women's History Month, and the law school recently named its fourth consecutive female leader, Dean Alena Allen. Congratulations. Dean Cynthia Nance started that trend in 2006, and I am delighted that she is here today.

As for the *Arkansas Law Review*, it is especially close to my heart.[1] When I was a law student, I somehow pulled the wool over the eyes of the prior editorial board and was afforded the opportunity to help produce the journal.[2] That experience brought with it all of the things that you might expect—it instilled discipline, it improved my editing and writing abilities, it expanded my appreciation for research and scholarship, and it furthered my love of history and the law. However, it also brought with it something that I did not expect—a shared experience that fostered lifetime friendships. To this day, some

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* Steve Caple is the president of Unity Hunt, Inc. in Dallas, Texas, a member of the board of directors of the National Archives Foundation, and a law school committee member for Campaign Arkansas. He earned his B.A. from the University of Texas at Dallas in 1989 and his Juris Doctor, *cum laude*, from the University of Arkansas School of Law in 1993.

1. Tracey and Steve Caple recently provided a generous gift to the University of Arkansas School of Law to renovate the *Arkansas Law Review* office space.

2. Steve Caple served as the Managing Editor for the *Arkansas Law Review* from 1992 to 1993.

of my closest friends are former classmates from the editorial board.

As I was preparing my remarks for today, I re-read Allen W. Bird II's work, *The History of the Arkansas Law Review*, which was included in the celebration of the journal's 50th anniversary in 1997.[3] For those who support this institution, I highly recommend reading it. Mr. Bird's article led me to several other works, which collectively serve as a reminder of the debt of gratitude we owe to Dean Robert A. Leflar, not only for his role in legal education and the law school, but also his commitment to the law review.[4]

I had the good fortune of meeting Dean Leflar. Although his reputation preceded him, I did not fully appreciate his contributions to the *Arkansas Law Review* while I was a student in Fayetteville. To this day, he still holds the record for the most works contributed to the journal, at 38.[5] Many others have contributed to the law review, and some of those authors may surprise you. The journal has published pieces with a wide range of perspectives, from John F. Kennedy[6] to Antonin Scalia[7] to Kurt Vonnegut, Jr.,[8] just to name a few.

The evolution of the *Arkansas Law Review* over the years is impressive. When it began in 1947, it was a practical publication to address the issues that Arkansas lawyers faced in their day-to-day legal practices. By the 1990s, the journal had cultivated a more theoretical dimension. Dean Leonard Strickman noted in 1994 that the law review should have national relevance.[9] The journal has certainly fulfilled that objective today, with its works

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3. 50 ARK. L. REV. 5 (1997).

4. Dean Robert A. Leflar served as the law school dean from 1943 to 1954. His commitment to the *Arkansas Law Review* is widely commemorated. *See e.g.*, Warren E. Burger, *Leflar Testimonial*, 25 ARK. L. REV. 1 (1971); Roger J. Traynor, *The Sterling Leflar of Arkansas*, 25 ARK. L. REV. 3 (1971); J. William Fulbright, *Tribute to Robert A. Leflar*, 25 ARK. L. REV. 70 (1971); Joe C. Barrett, *Vignette of Robert A. Leflar*, 25 ARK. L. REV. 143 (1971); Richard B. McCulloch, *The Founder of the* Arkansas Law Review, 25 ARK. L. REV. 154 (1971).

5. All research on file with the *Arkansas Law Review*.

6. John F. Kennedy, *The World Around Us*, 11 ARK. L. REV. 288 (1957).

7. Antonin Scalia, *A Tribute to Chief Judge Richard Arnold*, 58 ARK. L. REV. 541 (2005).

8. Kurt Vonnegut, Jr., *Harrison Bergeron*, 44 ARK. L. REV. 927 (1991).

9. *See* Bird, *supra* note 3, at 21.

having now been cited by the United States Supreme Court and every United States Circuit Court of Appeals, other than the Federal Circuit.

I think we can all agree that the law review has an extraordinarily rich history, and it has accomplished much in its first 75 years. I am not sure if I will be around to see how much more it has achieved 75 years from now, but I am looking forward to celebrating its 100th anniversary.

In conclusion, I would like to express my appreciation to everyone who supports the *Arkansas Law Review*. Among others, that list includes the people in this room, the members and editorial board of the journal, the professors, administrators, and staff of the law school and the university, the bar membership and judiciary of this great state, and those who appreciate good legal scholarship throughout the country. Finally, I would like to specifically thank Erron and Libby Smith for establishing the Arkansas Law Review Endowment, which will take the support for the journal to a whole new level.

It is an honor to be with you today.

Erron Smith*

As we assemble today to celebrate the *Arkansas Law Review* and the Arkansas Law Review Academy, I would like to start by expressing some gratitude. First, thank you, Steve Caple, for your generosity to the law school and the law review—and for a reminder of our law review's proud history. And thank you to the law school administration and the current editorial board for making today possible. It is great to see you all here today; I see some friends I have known for years, and I see the faces of many I hope will become friends for years to come.

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* Erron Smith is the Corporate Secretary and Associate General Counsel of Walton Enterprises in Bentonville, Arkansas. Mr. Smith earned his B.A. in Political Science and Journalism, with a French minor, from the University of Arkansas in 1999. He later earned his Juris Doctor from the University of Arkansas School of Law in 2002, where he graduated first in his class and served as the Editor-in-Chief of the *Arkansas Law Review* from 2001-2002. He currently serves on the Arkansas Bar Association's Legal-Related Education Super-Committee and Law School Sub-Committee.

Those of us who have served on the editorial board know that in addition to being a great academic and scholarly honor, being a law review editor is a tremendous amount of work. Consistently producing quality content would not be possible without the support of a number of people: our distinguished faculty who provide the members of the board with hours of advice and guidance, while respecting the editorial board's independence; the law school staff who, in often unheralded ways, provide the law review with the tools that make the publication of an issue feasible; and the members of our alumni community and the Arkansas Bar Association, who generously give their time and resources to empower the editorial board to make the *Arkansas Law Review* an integral part of the Arkansas legal community.

I am, indeed, proud of the role the *Arkansas Law Review* has established over the last 75 years. Not only does the law review publish scholarship on pressing domestic and international issues, generate intriguing intellectual discussions on some of the most interesting and provocative legal topics of the day, and provide practical assistance to members of the legal community, but it also contributes to furthering the mission of the University of Arkansas by leveraging research, discovery, and creative activity to help develop solutions to the challenges we face in this State and in our nation.

I know that all of us as former members of the *Arkansas Law Review* editorial board are honored to be a part of its rich history. For me personally, my experience as Editor-in-Chief of the law review from 2001 to 2002 has proven invaluable in my journey as a lawyer, as a writer, as a leader, and as a person. Among other things, my term as Editor-in-Chief gave me an opportunity to practice one of the most difficult tasks in the legal profession: good writing in the face of often unreasonable deadlines and high expectations. It taught me about the challenges of leading a diverse team of talented women and men who work tirelessly in the pursuit of a common goal but who can inevitably find themselves in conflict; and it taught me about the challenges and importance of owning the consequences—sometimes publicly—of the decisions that leaders make.

In establishing the Arkansas Law Review Endowment and through subsequent membership in the Arkansas Law Review Academy[10], my wife Libby and I hoped our contribution might encourage other alumni who have benefited from their law review experience and who care deeply about the law review, the law school, and the Arkansas legal community—and their respective missions—to join us in supporting future editorial boards by providing the resources they need to make the *Arkansas Law Review* one of the most respected and useful law journals in the country.

Now, upon the 75th anniversary of the law review, I look back on the reflections of Dean Robert A. Leflar—the person most responsible for the establishment of the law review—upon the law review's 50th anniversary. On that occasion, Dean Leflar reminded us that a good law school needs a good law review. And he expressed pride in the work of the past editors of the law review during its first half-century of existence, especially to the extent that they advanced the law itself.

I am pleased to see where the law review is today on its 75th anniversary. I am even more excited to see where the law review will be as it reaches its centennial. Through support of the law review endowment and this Arkansas Law Review Academy, I have no doubt that we will all play a role in continuing to advance the law—and that when we reach that 100th year, this law review will continue to make us, and Dean Leflar, proud.

10. Libby and Erron Smith established the endowment in late 2019 to fully fund the general operations of the law review and to provide current members with law review alumni readily available to answer questions and consult as needed.

CAN'T WE JUST TALK ABOUT THIS FIRST?: MAKING THE CASE FOR THE USE OF DISCOVERY DEPOSITIONS IN ARKANSAS CRIMINAL CASES

Bryan Altman*

INTRODUCTION

"[T]he quest for better justice is a ceaseless quest, that the single constant for our profession is the need for continuous examination and reexamination of our premises as to what law should do to achieve better justice."[1] From time to time, it is important that we take stock of our legal surroundings and ask ourselves if our procedures are still properly serving us, or if there is need for change and improvement. In this Article, I argue that the time has come for Arkansas to provide the criminal defense bar with the affirmative power to conduct discovery depositions. Arkansas criminal defendants currently proceed largely in the dark with light only being shed on the case as the prosecutor chooses to provide material to the defense.[2]

A fair trial is a search for the truth,[3] and discovery is how we get to that truth.[4] Expanding our tools of discovery expands our

* The author thanks colleague attorney Shane Wilkinson, Wilkinson Law Firm, for his mentorship and encouragement. Additional thanks to Tiffany Murphy, Associate Dean for Academic Affairs and Professor, University of Arkansas School of Law and Matthew Bender, Clinical Professor, University of Arkansas School of Law for always being available to provide feedback and critiques and helping identify the scope of this discussion.

1. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 279 (1963).

2. *See infra* Section II.A.

3. Lopez v. United States, 373 U.S. 427, 440 (1963) ("The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant."); Estes v. Texas, 381 U.S. 532, 540 (1965) ("Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial.").

4. Brennan, *supra* note 1, at 291 ("We must remember that society's interest is equally that the innocent shall not suffer and not alone that the guilty shall not escape. Discovery,

ability to find the truth. Currently, Arkansas does not require that the State disclose witness statements, expected testimony, or police reports.[5] Rather, the law currently holds that such disclosures are made merely at the benevolence of the prosecutor.[6] The result is that criminal defendants are the only litigants in Arkansas who are forced to proceed to trial in the dark subject to surprise testimony.[7] Allowing for depositions in criminal cases will allow defense attorneys to affirmatively turn on the light and go and find the truth for themselves rather than wait for the prosecution to trickle out pieces of its investigation. If the truth is the truth, then there should be no harm in expanding the ways we can find the truth by allowing defense attorneys to be a part of the discovery process.

Part I of this Article discusses the limited federal constitutional requirements for criminal discovery. Part II provides an overview of the current Arkansas criminal discovery rules as related to the discovery of witness statements and police reports. Part III takes a brief look at the historical origins of both the Federal Rules of Criminal Procedure and the Arkansas Rules of Criminal Procedure and how those histories can inform our modern review of the rules. Part IV examines discovery practices of other states, including the thirteen states which currently allow for discovery depositions in criminal cases. Part V addresses policy arguments both in favor of and in opposition to criminal discovery depositions. Finally, Part VI provides a list of goals and objectives for what any proposed rule or legislation in Arkansas regarding criminal discovery depositions should address.

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basically a tool for truth, is the most effective device yet fashioned for the reduction of the aspect of the adversary element to a minimum.").

5. *See infra* notes 14-16 and accompanying text; Section II.A.

6. *See infra* Section II.A.

7. *See infra* Section II.A.

I. THE CONSTITUTIONAL FLOOR FOR DISCOVERY—OR LACK THEREOF

"There is no general constitutional right to discovery in criminal cases . . . ."[8] The United States Supreme Court has only recognized two express rights to criminal discovery. The first being that a defendant is entitled to receive all material exculpatory and impeachment evidence.[9] The second being that when the State permits discovery *against* the defendant, the defendant must be given reciprocal discovery rights against the State.[10] Otherwise, the "right" to pretrial discovery in criminal cases has been left to the states to "experiment[]" with as they see fit.[11] Thus, with few federal guidelines, the question becomes, what discovery rights does Arkansas currently provide?

II. THE RESTRICTED STATE OF CRIMINAL DISCOVERY IN ARKANSAS

Arkansas's written discovery rules have been categorized as existing somewhere in between the most restrictive models of "closed-file" discovery and the most liberal models of "open-file" discovery.[12] The most restrictive, textualist reading of the

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8. Weatherford v. Bursey, 429 U.S. 545, 559 (1977); Wardius v. Oregon, 412 U.S. 470, 474 (1973) ("[T]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . .").

9. Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 154 (1972) (holding material evidence relating to the credibility of a witness falls under the scope of *Brady*).

10. *See Wardius*, 412 U.S. at 472, 474 n.6, 479 (holding an Oregon law requiring the defendant to disclose his alibi witnesses without requiring the State to provide reciprocal discovery of its rebuttal witnesses to be unconstitutional and noting the "Court has [] been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial"); Williams v. Florida, 399 U.S. 78, 82 n.11 (1970) (suggesting that the constitutionality of a state's alibi-notice rule will depend on "an inquiry . . . into whether the defendant enjoys reciprocal discovery against the State").

11. *See Wardius*, 412 U.S. at 474. For a comprehensive, empirical analysis of the differences among state discovery schemes as relates to plea bargaining, see generally Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285 (2016).

12. *See* Turner & Redlich, *supra* note 11, at 303-06, app. B at 400. Professors Turner and Redlich categorized jurisdictions that do not require disclosure of witness names, witness statements, or police reports as "closed-file" systems and jurisdictions that do require disclosure of such materials as "open-file" systems. *Id.* at 303-06. Jurisdictions like

Arkansas discovery rules and statutes provides a criminal defendant with limited access to a select few pieces of the State's file.[13] Defense counsel in Arkansas does not have any "right" to receive either witness statements[14] or police reports,[15] nor does it have the power to depose witnesses to discover such information independently.[16]

A. Limited Mandatory Disclosures

Currently, the Arkansas Rules of Criminal Procedure do not require that a prosecutor disclose witness statements or expected testimony before trial.[17] However, by statute, a defendant has the right to demand the State produce "any statement" of a witness once the witness has testified on direct examination at trial.[18] The effect being that the defendant has no pre-trial discovery right to witness statements, but merely a *mid-trial* discovery right requiring cross-examinations to be concocted in the hallways of the courthouse during a recess.[19] However, if that handicapping

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Arkansas that require disclosure of some but not all of these materials were categorized as "intermediate" systems. *Id.* at app. B at 400. As noted by Turner and Redlich, Arkansas Rule of Criminal Procedure 17.1 requires discovery of witness names but not witness statements (other than those of co-defendants) or police reports. *Id.*

13. *See infra* Sections II.A.-B.

14. Thompson v. State, 322 Ark. 586, 588, 910 S.W.2d 694, 696 (1995) (holding the State is under no obligation to provide non-expert, non-exculpatory witness statements before trial).

15. While it would seem unfathomable that a defense attorney could adequately investigate his client's case without access to the relevant police reports and equally suspicious that a prosecutor would refuse to disclose such reports, it must be acknowledged that Arkansas Rule of Criminal Procedure 17.1 very plainly does not mandate discovery of police reports. *See* ARK. R. CRIM. P. 17.1; *see, e.g.*, Goodwin v. State, 263 Ark. 856, 867-68, 568 S.W.2d 3, 10 (1978) (holding the defendant was not entitled to receive non-exculpatory reports from a detective). Because the Arkansas courts routinely engage in a narrow reading of Rule 17.1, I include police reports in this discussion as another commonsense piece of discovery withheld from defense counsel with no legitimate policy justification.

16. *See infra* Section II.B.

17. *See* ARK. R. CRIM. P. 17.1.

18. ARK. CODE ANN. § 16-89-115(b) (2005) (so long as the statement relates to the subject matter of the witness's testimony).

19. *See* ARK. CODE ANN. § 16-89-115(c)(5) ("Whenever any statement is delivered to a defendant pursuant to this section, the court, in its discretion and upon application of the defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of the statement by the defendant and his or her preparation for its use in the trial.").

of defense counsel were not enough, then one could take comfort from the fact that not every "statement" from a witness is subject to disclosure under the statute. A witness "statement" is narrowly defined as "[a] written statement made by the witness and signed or otherwise adopted or approved by him" or a "substantially verbatim recital of an oral statement made by the witness to an agent of the state and recorded contemporaneously with the making of the oral statement."[20] In determining whether a statement is "substantially verbatim," the courts look to "the extent to which it conforms to the language of the witness, the length of the written statement in comparison to the length of the interview, whether quotations may be out of context, and the lapse of time between the interview and the transcription[.]"[21] The result is that witness statements are not subject to disclosure if the prosecutor or police officer interviewing the witness does not take sufficiently detailed notes.[22]

For example, in *Harper v. State*, the defendant was charged with raping and sexually assaulting his stepdaughter, K.S.[23] According to the defendant, K.S. recanted her allegations on four separate occasions to multiple individuals, including law enforcement.[24] The defendant then asked that the prosecutor produce his notes from an interview with K.S. held shortly before trial.[25] The defendant wanted the notes "to determine '[w]hat was said to make K.S. change her story, and what K.S. said prior to changing her story.'"[26] Ultimately, despite the fact that the notes included remarks outlined in quotation marks, the Arkansas Court of Appeals held that the notes were not subject to disclosure because: (1) "[t]he prosecutor stated that she 'did not write down verbatim what [K.S.] said[]'";[27] (2) there was no guarantee that

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20. ARK. CODE ANN. § 16-89-115(e).

21. Harper v. State, 2020 Ark. App. 4, at 6, 592 S.W.3d 708, 712 (internal quotation marks omitted) (quoting Winfrey v. State, 293 Ark. 342, 345, 738 S.W.2d 391, 392 (1987)).

22. *See id.* at 6-7, 592 S.W.3d at 712-13.

23. 2019 Ark. App. 163, at 1-2, 573 S.W.3d 596, 598.

24. *Harper*, 2020 Ark. App. 4, at 3, 592 S.W.3d at 711.

25. *Id.* at 3, 3 n.1, 592 S.W.3d at 711 (Harper's first trial ended in a mistrial and the interview in question occurred before the first trial).

26. *Id.* at 3, 592 S.W.3d at 711 (quoting *Harper*, 2019 Ark. App. 163, at 10, 573 S.W.3d at 602).

27. *Id.* at 4, 592 S.W.3d at 711 (quoting *Harper*, 2019 Ark. App. 163, at 10, 573 S.W.3d at 603).

the portions in quotation marks were accurate or in context;[28] and (3) the prosecutor only took three pages of notes for a two-hour interview.[29] While the holding in *Harper* may fit the specific facts of that particular case, the ultimate import of the case is that the State's burden is lessened by poor investigative work. If a prosecutor or police officer takes very thorough notes of a witness interview, then those notes should qualify as a statement under the statute.[30] However, as *Harper* illustrates, where a prosecutor or police officer fails to take notes or takes only incomplete notes of a witness interview, the defendant is left without a remedy.[31] This scheme incentivizes the State to not memorialize witness statements lest they be discoverable at trial.[32]

Alternatively, many Arkansas prosecutors elect to forego the rigid text of the codified discovery provisions and engage in open-file discovery.[33] The Arkansas Supreme Court has outlined a simple black-letter rule for open-file discovery:

> If a prosecutor's office intends to fulfill its discovery obligations by relying upon an open-file policy, it must make every practicable effort to ensure that the information and records contained in the file are complete and that the documents employed at trial are identical to the material available to the defense in the open file.[34]

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28. *Id.* at 6-7, 592 S.W.3d at 713. Despite the fact that the court did not address the inverse proposition that there is no guarantee that the quoted portions were *inaccurate*, this reasoning leads to the conclusion that statements may be withheld on the basis of poor investigative work by the State.

29. *Harper*, 2020 Ark. App. 4, at 7, 592 S.W.3d at 713.

30. *See supra* notes 20-22 and accompanying text.

31. *See Harper*, 2020 Ark. App. 4, at 5-7, 592 S.W.3d at 712-13.

32. *See* Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 586, 601 (2006) (noting that open-file policies can also incentivize police and prosecutors "to not reduce their knowledge to writing[,]" therefore excluding it from what must be disclosed).

33. *See, e.g.*, Smith v. State, 352 Ark. 92, 107, 98 S.W.3d 433, 442 (2003); Rogers v. State, 2014 Ark. App. 133, at 4, 6, 2014 WL 668207, at *2-3. Arkansas Rule of Criminal Procedure 17.2 gives prosecutors the choice to comply with discovery through an "open-file" policy by notifying defense counsel that material held by the prosecutor may be inspected. ARK. R. CRIM. P. 17.2(b). Open-file policies are often carried out by the prosecutor simply delivering his entire file to defense counsel. *See* THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 2 (2007). Note that the Arkansas courts and practitioners use a different set of definitions for "open-file" and "closed-file" than do Turner and Redlich. *See supra* note 12.

34. *Smith*, 352 Ark. at 107, 98 S.W.3d at 442.

Furthermore, "[m]erely because the prosecutor declares that the files in the case are open, it cannot be taken to mean that he has fulfilled his discovery obligations."[35] For example, a prosecutor may not cite an open file but also direct defense counsel to seek discoverable materials from other government agencies or personnel.[36]

Thus, while the black-letter rules of discovery provide for a narrow list of discoverable materials, prosecutors may relieve themselves of the burden of sifting through their files and picking which materials are actually responsive to a discovery request by simply allowing full disclosure of their case files to defense counsel.[37] Unfortunately for defense counsel in Arkansas, the Arkansas courts have seemed to reject the spirit and plain language of the rule that open-file discovery be "complete." While not yet explicitly stated, the Arkansas courts have provided dicta or holdings that lend support to the proposition that even under an "open-file policy," the State is merely obligated to make sure the open file contains the specifically enumerated materials listed in Rule 17.1 rather than actually be "complete" with *all* materials held by the State.[38]

For example, in *Hathcock v. State*, when presented with defense complaints of "surprise" testimony in a case where the State provided an open file, the State argued it "was not obligated to outline the exact course of potential testimony of its witnesses."[39] The Arkansas Supreme Court agreed and cited case law stating Rule 17.1 only obligates disclosure of witness *names* and not witness *statements*.[40] Similarly, in *Woods v. State*, the

35. Bussard v. State, 295 Ark. 72, 79-80, 747 S.W.2d 71, 75 (1988); *see also* Earl v. State, 272 Ark. 5, 13, 612 S.W.2d 98, 102 (1981) (discussing how the prosecution's open-file policy "may be a time saver for both the State and the defense; however, [] it often results in the court being unable to determine whether discovery has been complied with under the Arkansas Rules of Criminal procedure [sic].").

36. Dever v. State, 14 Ark. App. 107, 112, 685 S.W.2d 518, 520-21 (1985).

37. *See Rogers*, 2014 Ark. App. 133, at 5-6, 2014 WL 668207, at *3-4 (finding the defendant did not show that he was prejudiced by the State's failure to list a witness on the witness list as required under Rule 17.1 where the witness's name and statement were provided to the defendant in the State's open file).

38. *See* Hathcock v. State, 357 Ark. 563, 573-74, 182 S.W.3d 152, 159 (2004); Woods v. State, 323 Ark. 605, 609-10, 609 n.3, 916 S.W.2d 728, 730-31 (1996).

39. 357 Ark. at 573, 182 S.W.3d at 159.

40. *Id.*

State sought to introduce opinion testimony from a detective regarding bullet holes.[41] The State argued it had an open file but conceded that the testimony was based on conversations between the prosecutor and the detective and not contained in a police report in the "open" file.[42] Ultimately, the Arkansas Supreme Court did not reach the merits of the objection, holding it was not properly made at trial; however, the court did provide a footnote citation stating the "[s]ubstance of testimony by *witnesses* is not required under Rule 17.1."[43]

Again, while neither *Hathcock*, *Woods*, nor another case has yet to explicitly hold that an "open" file need not actually be "complete" and include witness statements, there is clearly a common thread demonstrating that the courts dismiss complaints about the adequacy of "open" files by relying on the narrow language of Rule 17.1. Because the Arkansas Appellate Courts have not yet fully articulated what it means for a file to be "open" in regard to witness statements, police reports, or surprise testimony in general, defense counsel access to witness statements and police reports may be a mere courtesy extended by the benevolence of our local prosecutors.[44]

B. Statutorily Permitted Depositions in Criminal Cases

If defense counsel does not have a firm procedural or statutory claim to discover witness statements or police reports, the question then becomes to what extent may defense counsel independently discover such material? As a threshold matter, unfortunately, one of the Arkansas defense bar's most invaluable tools, the Arkansas Freedom of Information Act ("FOIA"),[45] cannot aid in the discovery of police reports or witness statements

41. 323 Ark. at 609-10, 916 S.W.2d at 730-31.

42. *Id.*

43. *Id.* at 609 n.3, 610, 916 S.W.2d at 730-31.

44. *See generally* Prosser, *supra* note 32, at 606-07 (noting how open-file policies do not solve problems related to discovery of information not "reduced to writing").

45. ARK. CODE ANN. §§ 25-19-101—112.

included therein.[46] Police reports relating to open and ongoing criminal investigations are not discoverable under FOIA.[47]

Now, a defense attorney obviously has the freedom to contact any potential witness or police officer to see if she is willing to discuss the case. However, two problems still exist. First, we have to acknowledge that defense attorneys do not always represent popular clients, and in many cases, the most vital witnesses are actually the victims of the defendant. Witnesses may have legitimate reasons to be unwilling to talk with defense counsel.[48] Second, even if a witness does talk with defense counsel, a preservation problem arises. If the witness changes her testimony at trial from what she initially told defense counsel, how does the attorney address the discrepancy without making himself a witness in the case? While a diligent defense attorney's investigation of a case should routinely involve contacting witnesses, there is still the sober reality that witnesses are not always as free to discuss the case with defense attorneys as they are with prosecutors,[49] and an effective cross-examination is not built on a line of impeachment where the attorney is forced to pit his credibility against the witness's in front of the jury.

Then, if a defense attorney cannot obtain witness statements or police reports in a discovery request to the prosecutor, *and* he cannot obtain them through a FOIA request, *and* the witnesses are reluctant to talk with the defense attorney, can he possibly depose them to obtain their statements? To be blunt, no.

"In Arkansas, 'the right to take depositions rests upon statutory authority and in no case can the right be exercised unless

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46. In criminal investigations, witness statements in the government's possession are primarily going to have been made to law enforcement officers and therefore included in police reports.

47. ARK. CODE ANN. § 25-19-105(b)(6) (2021) (exempting from public inspection "[u]ndisclosed investigations by law enforcement agencies of suspected criminal activity"); Martin v. Musteen, 303 Ark. 656, 660, 799 S.W.2d 540, 542 (1990) ("[I]f a law enforcement investigation remains open and ongoing it is one meant to be protected as 'undisclosed' under the act.").

48. Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1095 (2014) (noting defense counsel is free to conduct informal discovery requests of witnesses but "there is also no right to a response").

49. *See infra* note 78 and accompanying text.

the authority therefor exists.'"[50] Arkansas law currently only provides for two types of perpetuation depositions, as opposed to general discovery depositions.[51]

1. Depositions of Child Sex Offense Victims

First, prosecutors are allowed to petition the court for leave to take a videotaped deposition of any alleged victim of a sexual offense or attempted sexual offense under the age of seventeen.[52] This limited manner of deposition requires both the physical presence of the defendant and his attorney and cross-examination of the witness.[53] It is a limited tool to preserve and present the testimony of a child sex crime victim without requiring the child to testify live in a courtroom full of strangers.[54] However, this is a one-sided tool allowing the State to request the deposition in lieu of live testimony at trial—it does not give the defendant or his attorney any greater advantage in preparation as to what the testimony of the witness may be until it is already being taken on the record.

2. Depositions of Absent Material Witnesses

Second, both parties may move for permission to take a deposition of a material witness who is anticipated to be unable to testify at trial.[55] Again, this type of deposition is of no use as a discovery tool because it merely allows a defendant to *preserve* already known testimony from a witness. A defendant would seemingly only use this tool to depose one of his own witnesses. Although, perhaps, there may be the rare circumstance where this manner of deposition is invoked by the State for one of its

50. McDole v. State, 339 Ark. 391, 399, 6 S.W.3d 74, 79 (1999) (quoting Russell v. State, 269 Ark. 44, 47, 598 S.W.2d 96, 97 (1980)).

51. Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845, 856 n.82 (1995) ("Perpetuation depositions are allowed to preserve the testimony of witnesses who may be unavailable for trial."); William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451, 487 (2021) ("Discovery depositions, as their name suggests, are tools for discovering new information from or about the deponent.").

52. ARK. CODE ANN. § 16-44-203(b) (1983).

53. ARK. CODE ANN. § 16-44-203(b).

54. *See* ARK. CODE ANN. § 16-44-203(c)-(d).

55. ARK. CODE ANN. §§ 16-44-201(a), 202(a) (1979 & 2005).

witnesses, allowing the defendant to discover the witness's testimony before trial. However, even though the testimony would be discovered before trial, it would still be discovered "live" to the defense attorney during the deposition, and therefore, still fraught with all the burdens of fashioning a defense in the middle of trial.

Accordingly, Arkansas currently only allows for preservation depositions of child sex offense victims and absent material witnesses—neither of which is generally of any investigative use to the defense bar.

C. Discretionary Authority to Order Depositions Under Ark. R. Crim. P. 17.4

Although there is no mandatory authority to compel a witness deposition, the Arkansas Rules of Criminal Procedure provide a discretionary catch-all provision allowing the court to order additional discovery of "other relevant material and information upon a showing of materiality to the preparation of the defense."[56] Thus far, the Arkansas appellate courts have hinted that depositions fall under this authority but have ultimately been reluctant to accept arguments that depositions are ever actually appropriate under Rule 17.4.[57] The decisions discussing the discretionary grant of depositions are plagued by vagueness and lack any guidance to trial courts or defense counsel as to when—if ever—a deposition may be appropriate under Rule 17.4.

In *Sanders v. State*, the defense attorney requested permission to depose two out-of-state witnesses who refused to speak with him.[58] He naturally claimed their refusal to speak with him inhibited his ability to prepare for trial.[59] However, the Arkansas Supreme Court summarily rejected his argument, noting that he was allowed to cross-examine the witnesses at trial

56. ARK. R. CRIM. P. 17.4(a).

57. *See* Sanders v. State, 276 Ark. 342, 344-45, 635 S.W.2d 222, 223 (1982); Hoggard v. State, 277 Ark. 117, 120-21, 640 S.W.2d 102, 104-05 (1982); Caldwell v. State, 319 Ark. 243, 247-48, 891 S.W.2d 42, 45 (1995); Spencer v. State, 285 Ark. 339, 339-40, 686 S.W.2d 436, 437 (1985); Misskelley v. State, 323 Ark. 449, 472-73, 915 S.W.2d 702, 714 (1996).

58. 276 Ark. at 344, 635 S.W.2d at 223.

59. *Id.*

and that he did not argue that he was not provided with their statements after they testified on direct examination, pursuant to statute.[60] The court simply stated, "neither the statutes nor the rule [17.4] provides for the taking of a deposition under the circumstances present in this case."[61]

Noticeably missing from the court's analysis is what circumstances *would* warrant the taking of a deposition—especially considering the facts present of non-cooperative out-of-state witnesses.[62] Unfortunately, this theme has continued through the limited body of cases denying defense requests to conduct discovery depositions. The Arkansas Supreme Court has indirectly acknowledged this lack of clarity noting, "we said there might be some case in which a deposition might be required, but we have never been presented with such a case."[63]

However, perhaps the most egregious example of the lack of guidance from the Arkansas courts on this point comes from *Misskelley v. State*.[64] The defendant wanted to depose the officers who interrogated him as part of a broader defense strategy to suppress statements made during his interrogation.[65] The trial court "offered to make the officers available for questioning, but would not require them to submit to depositions."[66] The Arkansas Supreme Court held the trial court did not abuse its discretion with this proposal,[67] and in a vacuum, or as a matter of pragmatism, this conclusion is likely sound. If the goal is to obtain information from a witness through compulsory discovery processes, the additional procedural dressings of a stenographer and an oath at an interview to elevate it to a deposition may have

60. *Id.* at 344-45, 635 S.W.2d at 223.

61. *Id.* at 345, 635 S.W.2d at 223.

62. *See id.* at 344-45, 635 S.W.2d at 223.

63. Caldwell v. State, 319 Ark. 243, 248, 891 S.W.2d 42, 45 (1995); *see also* Hoggard v. State, 277 Ark. 117, 120-21, 640 S.W.2d 102, 104-05 (1982) ("We prefer to leave the decision . . . to the trial judges to be exercised on a case-by-case basis . . . ."); Spencer v. State, 285 Ark. 339, 339-40, 686 S.W.2d 436, 437 (1985) (citing *Hoggard* and failing to articulate any standard for when a deposition may be warranted).

64. 323 Ark. 449, 472-73, 915 S.W.2d 702, 714 (1996).

65. The defendant in *Misskelley* raised a detailed and multi-faceted argument about the voluntariness of his confession. *Id.* at 464-72, 915 S.W.2d at 710-14.

66. *Id.* at 472, 915 S.W.2d at 714.

67. *Id.* at 472-73, 915 S.W.2d at 714.

little extra value.[68] However, the grave problem with *Misskelley* is not the conclusion but, once again, the analysis—or lack thereof. The Arkansas Supreme Court stated:

> We have never held that a defendant should be allowed to depose interrogating officers. The public policy considerations alone dictate that depositions of police officers should not be taken as a matter of routine, but only in rare cases, subject to the trial court's discretion. A defendant's discovery needs are ordinarily met by the broad access given to him by the Rules of Criminal Procedure.[69]

The court readily cited "public policy considerations" as justification alone to make deposing police officers presumptively unreasonable.[70] Yet, the court failed to explain *what* public policy considerations it is referring to. This conclusion is completely devoid of any support. The court presents what appears to read as a black-letter rule without *any* supporting analysis or discussion.[71] The opinion nakedly cites "public policy considerations" and ends the conversation. Fortunately, this passage may simply be one of those obscure lines of dicta present in our case law without any real consequence because this language does not appear to have been cited or repeated in the twenty-five years since it was first published.

Thus, while Rule 17.4 theoretically supports a trial court permitting defense discovery depositions, there is no clear guidance as to what circumstances would warrant such an exercise of discretion.

D. Prosecutor's Subpoenas (read: Depositions)

Of course, criminal discovery in Arkansas is not a balanced system, as the State currently enjoys the power to conduct discovery depositions of prospective witnesses. Arkansas prosecutors are afforded the privilege of issuing what are

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68. *But see* ARK. R. EVID. 801(d)(1) (allowing the use of prior statements given at a deposition as substantive evidence for the truth of the matter asserted rather than merely as impeachment material).

69. *Misskelley*, 323 Ark. at 472-73, 915 S.W.2d at 714.

70. *See id.* at 472, 915 S.W.2d at 714.

71. *See id.* at 472-73, 915 S.W.2d at 714.

colloquially referred to as "prosecutor's subpoenas."[72] Since Arkansas allows for charge by information[73] or indictment,[74] a prosecutor's subpoena is designed as an investigative procedural equivalent to examining a witness before a grand jury.[75] However, this power to examine witnesses is actually greater than that inherent in examining a witness before a grand jury because a prosecutor may subpoena and examine a witness not only in the initial investigation of a case, but also in preparation for trial *after* charges have been filed.[76] Perhaps the most unbalanced aspect of this investigative power is that prosecutors are free to subpoena and question defense witnesses before trial.[77] In fact, doing so would actually be the most natural use of the prosecutor's subpoena—to examine the defense's witnesses—because a prosecutor ordinarily would have little need to use the formal process to question the State's witnesses.[78] Indeed, the prosecutor's subpoena is a powerful tool allowing the State to unilaterally discover the details of the defendant's defense.[79] Although not titled as "depositions," the prosecutor's subpoena allows the prosecutor to compel a witness to attend at a certain time and place and give testimony under oath.[80] That checks all

72. ARK. CODE ANN. § 16-43-212(a) (2005); Holt v. McCastlain, 357 Ark. 455, 467, 182 S.W.3d 112, 120 (2004).

73. ARK. CODE ANN. § 16-85-302 (1947).

74. ARK. CODE ANN. § 16-85-401 (1947).

75. ARK. CODE ANN. § 16-43-212(a) ("Such oath when administered by the prosecuting attorney or his or her deputy shall have the same effect as if administered by the foreman of the grand jury."); *Holt*, 357 Ark. at 467, 182 S.W.3d at 120 (noting the prosecutor's subpoena is a functional equivalent to questioning before a grand jury).

76. Todd v. State, 283 Ark. 492, 493, 678 S.W.2d 345, 346 (1984).

77. *See* Neal v. State, 320 Ark. 489, 495, 898 S.W.2d 440, 444 (1995) (no error to allow the State to subpoena and examine defense witnesses one month before trial).

78. David W. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CAL. L. REV. 56, 87, 89-90 (1961) (discussing the psychological advantage enjoyed by the State with regard to witness cooperation and how "[l]ikely the reason that one does not hear proposals to allow the [S]tate to take discovery depositions of witnesses other than defendant is that realistically there is no need of such depositions because the informal availability of witnesses to the [S]tate's interrogation is generally satisfactory").

79. *See* Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1191-92 (1960) ("Fairly clearly, pretrial discovery by the prosecution is far-reaching. And it cannot in any sense be said to be matched by what is available to the defendant or by what he can keep from the prosecution . . . .").

80. ARK. CODE ANN. § 16-43-212(a) (2005).

the boxes of a deposition,[81] and is in essence, a de facto deposition.

Simply put, in Arkansas, prosecutors can conduct discovery depositions, but defense attorneys cannot.

Let's reset the table here to collect our rules. First, the United States Constitution only mandates the discovery of exculpatory and impeachment material[82] and that the State's discovery rules be reciprocal in favor of the defendant.[83] Second, Arkansas defendants are only entitled to discover witness names and addresses but not witness statements or police reports,[84] and voluntary disclosure under open-file discovery may not necessarily broaden these requirements.[85] Third, Arkansas defendants are only entitled to receive "substantially verbatim" prior statements of witnesses in the middle of trial.[86] Fourth, Arkansas defendants are only entitled to take perpetuation depositions under narrow circumstances.[87] Fifth, Arkansas defendants may seek discretionary permission to engage in witness depositions, but the only guidance ever provided on the propriety of such depositions states that as a matter of "public policy," police officers should rarely be deposed.[88] Sixth, Arkansas prosecutors are allowed to subpoena (effectively depose) any witness, including the defendant's witnesses, and thereby discover the nature of the defense before trial.[89] Bottom line, an Arkansas defense attorney has no right to see a witness statement before trial or compel a witness to speak with him, whereas an Arkansas prosecutor can compel defense witnesses to appear for questioning and discover the nature of their prospective testimony. But wait, how does the prosecutor subpoena comply with the first rule about reciprocity?

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81. *See* ARK. R. CIV. P. 30 (a), (c) (setting out the procedures and requirements for a deposition).

82. Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 153-54 (1972).

83. *See supra* note 10 and accompanying text.

84. *See supra* notes 12-15 and accompanying text.

85. *See supra* notes 38-44 and accompanying text.

86. *See supra* notes 17-22 and accompanying text.

87. *See supra* notes 50-55 and accompanying text.

88. *See supra* notes 64-71 and accompanying text.

89. *See supra* notes 72-81 and accompanying text.

In *Wardius v. Oregon*, the United States Supreme Court held that an Oregon notice-of-alibi statute was unconstitutional in violation of the Due Process Clause of the Fourteenth Amendment because it did not provide for reciprocal discovery rights for the defendant.[90] The Oregon statute required the defendant to give the State notice of the nature of his alibi defense and the names and addresses of witnesses who would testify in support of the alibi without requiring the State to disclose rebuttal witnesses.[91] Because the defendant did not properly give the State notice of his alibi pursuant to the statue, both he and another witness were not permitted to testify as to the defendant's whereabouts, and the defendant was ultimately convicted.[92]

The Court recognized notice-of-alibi rules "are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial."[93] The Court also acknowledged that "increasing the evidence available to both parties, enhances the fairness of the adversary system."[94] Yet, this principle is currently absent from the Arkansas scheme of criminal discovery. The Court then readily distinguished the nature of the Oregon statute with the notice-of-alibi rule upheld in *Williams v. Florida*, explaining that the Florida rule was "carefully hedged with reciprocal duties requiring state disclosure to the defendant."[95] Unlike the Florida rule, the Oregon statute required the defendant to disclose the names and addresses of his alibi witnesses, but did not require the State to disclose the names and addresses of witnesses it planned to use in rebuttal.[96]

The Court's holding in *Wardius* is founded on a simple idea of reciprocity and "balance":

> Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be

90. 412 U.S. 470, 472 (1973).
91. *Id.* at 471-72, 472 n.3.
92. *Id.* at 472-73.
93. *Id.* at 473.
94. *Id.* at 474.
95. *Wardius*, 412 U.S. at 474-75 (quoting Williams v. Florida, 399 U.S. 78, 81 (1970)).
96. *Id.* at 470, 472 n.3.

> afforded, it does speak to the balance of forces between the accused and his accuser . . . . [I]n the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.[97]

The Supreme Court's language is clear and simple. Where a state imposes discovery obligations to the detriment of the defendant, due process demands he receive a reciprocal benefit from discovery against the State. The Court's reasoning is founded in both common sense and the practical reality of the logistical disparity between the State and the individual:[98] "Indeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor."[99]

Accordingly, *Wardius* says in plain language that it is "fundamentally unfair" for a defendant to be required to disclose the details of his defense without reciprocal discovery of the State's rebuttal.[100] How then, may a prosecutor subpoena and examine defense witnesses under oath, but a defense attorney may not subpoena and examine state witnesses under oath? The short answer is that the Arkansas courts have grievously erred on this point and failed to properly apply the import of *Wardius*.

The Arkansas Supreme Court first examined a complaint that the unilateral prosecutor's subpoena power violated due process under *Wardius* in *Alford v. State*.[101] The defendant in *Alford* argued it was unfair that the State was able to subpoena a witness and obtain his statement before trial whereas the defendant could only obtain a prior statement of the witness after

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97. *Id.* at 474-76 (internal citation omitted).
98. *See id.* at 475 n.9.
99. *Id.*
100. *Wardius*, 412 U.S. at 476.
101. 291 Ark. 243, 250, 724 S.W.2d 151, 155 (1987).

he testified on direct.[102] Because the witness in question was called in the defense's case-in-chief, the defendant argued the prosecutor's subpoena enhanced the State's cross-examination capabilities.[103] The Arkansas Supreme Court rejected the defendant's challenge stating that the State did not abuse its subpoena power "in an effort to obtain witnesses against the appellant or to secrete their testimony from him before trial."[104] The court summarily rejected the defendant's citation to *Wardius* by stating that the witness in question was a defense witness, and therefore, not a witness "against the appellant."[105]

The Arkansas Supreme Court next revisited this topic in *Parker v. State*, decided just a few months after *Alford*.[106] The defendant in *Parker* raised the same argument that he was denied reciprocal subpoena power over the State's witnesses when the State subpoenaed and examined his expert witness.[107] The court again summarily rejected the argument stating, "[a]s in *Alford*, the only witness subpoenaed by the [S]tate was called by the defense to testify, rather than by the prosecution, and there is no indication of abuse by the prosecutor of the subpoena power or that any testimony was hidden from Parker."[108] Again, the Arkansas Supreme Court dismissed the appeal to *Wardius* because the only witness subpoenaed was a defense witness.

A more unique claim was presented in *Armstrong v. State*, where the defendant argued that because he was not given reciprocal subpoena power, the charges against him should have been dismissed.[109] Aside from rejecting this claim based on a lack of authority for the proposition that the appropriate remedy for such a violation would be a dismissal of the charges, the Arkansas Court of Appeals went on to rely on the familiar reasoning from *Alford* and *Parker*.[110] The Court of Appeals noted that "all but one" of the subpoenaed witnesses were called by the defense

102. *Id.*
103. *Id.*
104. *Id.* at 251, 724 S.W.2d at 155.
105. *Id.* at 250-51, 724 S.W.2d at 155.
106. 292 Ark. 421, 430-31, 731 S.W.2d 756, 761 (1987).
107. *Id.* at 430-31, 731 S.W.2d at 761.
108. *Id.* at 432, 731 S.W.2d at 761.
109. 45 Ark. App. 72, 81, 871 S.W.2d 420, 426 (1994).
110. *Id.* at 82, 871 S.W.2d at 426.

rather than the State and the defendant did not claim any surprise as to the testimony of the one witness called by the State.[111]

In all three instances when the Arkansas courts have examined this issue regarding *Wardius* and the prosecutor's subpoena, the courts have failed to address both the actual substance of *Wardius* and the claims of the respective defendants.[112] The overriding theme in each opinion's brief analysis is that *Wardius* has no application when it is the defense's witnesses that are subpoenaed.[113] This emphasis on the fact that defense witnesses were subpoenaed is absolutely contradictory to the plain reading of *Wardius*. *Wardius* held it was unfair for the State to require a defendant to disclose the names of his alibi witnesses, so that the State may then interview those witnesses and prepare a rebuttal, without requiring the State to disclose the names of its rebuttal witnesses.[114] The *Wardius* Court held it was unfair to require the defendant to give up his case but remain subjected to surprise refutation by the State.[115] This is the entire point that has yet to be squarely addressed by the Arkansas courts. It is unfair for the State to have a deposition power over the defense's witnesses, to question them and learn the nature and details of the defense, while requiring the defendant to remain blind as to the State's case-in-chief.[116]

By deposing defense witnesses, a prosecutor gains not only knowledge of the defensive strategy, but also invaluable cross-examination material. If a defense witness's testimony deviates however slightly from what he previously stated under oath to the prosecutor, the prosecutor has free ammunition to shoot down the

111. *Id.*

112. *See supra* notes 101-11 and accompanying text.

113. *See supra* notes 101-11 and accompanying text.

114. Wardius v. Oregon, 412 U.S. 470, 475-76 (1973).

115. *Id.*

116. The Utah Supreme Court has indicated its agreement on this point. In *Gutierrez v. Medley*, the Utah Supreme Court held that under Utah's parallel "Subpoena Powers Act," a prosecutor could only issue subpoenas *prior* to charges formally being filed but not *after*, as is allowed in Arkansas. 972 P.2d 913, 917 (Utah 1988). Citing to *Wardius*, the court noted that if the prosecutor could issue such subpoenas, the act would be constitutionally suspect: "Furthermore, we note that had the legislature clearly stated that the Act applied after the filing of charges without adding other substantive provisions permitting a defendant to present evidence, confront the witness, and engage in reciprocal discovery, the Act might have then been of questionable constitutional validity." *Id.* at 917 n.3.

defense. More importantly, the prosecutor will likely have this information well in advance of trial, giving him plenty of time to outline and strategize his attack. Conversely, the best a defense attorney can hope for is that someone wrote down a "substantially verbatim" record of a previous statement by the witness and that he can cobble together an effective line of questioning in the halls of the courthouse before the trial resumes.[117]

While not explicitly outlined in *Alford*, *Parker*, or *Armstrong*, each opinion's reference to surprise and the subpoenaing of defense witnesses seems to suggest a misapplication of *Wardius*. The Arkansas courts seem to have rejected the *Wardius* challenges to prosecutor's subpoenas based on an improper framing of the nature of the challenges. The courts seem to frame the challenge not as a complaint that the State is able to subpoena defense witnesses, but rather, as a complaint that the defendant is unable to also subpoena his own witnesses. There is an implied reasoning in the cases that the defendant does not also need the ability to subpoena his own witnesses because he can avoid surprise by talking to his witnesses and asking them about what happened during their depositions with the prosecutor or by receiving a copy of their recorded statements. However, this misses the point. The real *Wardius* challenge is not that it is unfair for a prosecutor to subpoena a defense alibi witness without allowing the defendant to depose that same witness. The true application of *Wardius* is to say that it is unfair for the prosecutor to subpoena a defense alibi witness without allowing the defendant to equally depose the *State's* witnesses.[118] *Wardius*, at its simplest reading, holds that when the defendant has to turn over his witnesses' names, the State has to turn over its witnesses' names too.[119] Currently, the Arkansas courts have not yet squarely addressed how, under *Wardius*, the defense has to turn over its witnesses' testimony, but the State is allowed to conceal its witnesses' testimony.

Accordingly, it is my position that Arkansas's current law, which essentially allows prosecutors to conduct discovery

117. *See supra* notes 18-32 and accompanying text.
118. *See Wardius*, 412 U.S. at 471-72.
119. *Id.* at 475-76.

depositions of defense witnesses without allowing defense attorneys to conduct discovery depositions of State witnesses, is unjust, unfair, and unconstitutional under *Wardius*.

E. *McDole v. State* and a Failed Constitutional Challenge to Arkansas Criminal Discovery

The leading case in Arkansas discussing the disparity between civil litigants and criminal litigants and the use of discovery depositions is *McDole v. State*.[120] In *McDole*, the Arkansas Supreme Court rejected the argument that it violates a criminal defendant's rights to provide compulsory depositions in civil cases but not in criminal cases.[121] The court rejected the defendant's attack on multiple fronts. The court began its analysis by noting that Arkansas law only allows for depositions to preserve material testimony "but does not allow a criminal defendant to simply set up depositions at will and compel attendance as in a civil case."[122] The court emphasized the historical underpinning of this scheme, stating, "[a]pparently, this has always been the law in Arkansas."[123] The court then turned to the Compulsory Process Clause of the Arkansas Constitution[124] and provided a line of citations for three seemingly inapposite propositions: (1) that the Compulsory Process Clause does not require that *every* witness testify at trial; (2) that *specific* witnesses do not have to testify if the same facts can be established through other witnesses; and (3) that witnesses without relevant testimony are not required to testify.[125] The court then turned to "the federal side" and cited *Wardius* for the familiar proposition that there is no general constitutional right to pretrial discovery.[126] Lastly, and most relevantly, the court examined the claim that it violated the Equal Protection Clause to

120. 339 Ark. 391, 398, 6 S.W.3d 74, 79 (1999).
121. *Id.* at 400-01, 6 S.W.3d at 80-81.
122. *Id.* at 398-99, 6 S.W.3d at 79.
123. *Id.* at 399, 6 S.W.3d at 79.
124. ARK. CONST. art. 2, § 10.
125. *McDole*, 339 Ark. at 400, 6 S.W.3d at 80.
126. *Id.*

allow depositions in civil cases but not in criminal cases.[127] In rejecting this claim, the Arkansas Supreme Court stated:

> Equal protection does not require that persons be dealt with identically; it only requires that classification rest on real and not feigned differences, that the distinctions have some relevance to the purpose for which the classification is made, and that their treatment be not so disparate as to be arbitrary. The issue of equal protection involves "whether people in the same situation are being treated differently . . . ." While both criminal and civil defendants may be called litigants, they are far from similarly situated.[128]

What is missing from the court's holding is the reasoning as to exactly *why* and *how* civil and criminal litigants are differently situated to justify the disparate treatment.[129] To forego lofty metaphors or analogies about the principles of justice, it is easier to just imagine a simple hypothetical case. A man is accused of getting into a drunken brawl at a bar. He is simultaneously charged by the State with criminal battery and served a civil complaint by the alleged victim for tortious battery. The defendant is the same in both cases. Although the "plaintiff" is a separate entity in both matters, the complaining and chief witness is the same. The relevant facts and witnesses will be the same. Indeed, the testimony produced at each trial should be identical. What then, is the justification for allowing the defendant to depose the alleged victim and any bystander witnesses in the civil suit but not in the criminal case? This is the question *McDole* fails to satisfy. *McDole* reaches a conclusion but fails to explain exactly what legal alchemy takes place that presents a real and substantial policy justification to allow the same person to depose the same witnesses over the same matter to retrieve the same testimony, possibly even in the same court[130] and in front of the

127. *Id.* at 401, 6 S.W.3d at 80.

128. *Id.* at 401, 6 S.W.3d at 80-81 (internal citations omitted).

129. *See id.*

130. Arkansas Supreme Court Administrative Order 14 directs the circuit courts to establish separate divisions for criminal, civil, juvenile, probate, and domestic relations cases. Order 14. Administration of Circuit Courts, (2012). However, "[t]he designation of divisions is for the purpose of judicial administration and caseload management and is not for the purpose of subject-matter jurisdiction. The creation of divisions shall in no way limit the powers and duties of the judges to hear all matters within the jurisdiction of the circuit court." *Id.* Accordingly, civil and criminal cases may be heard in the same circuit court.

same judge,[131] for his civil suit but not his criminal suit. How does the man in our hypothetical example become "far from similarly situated" from himself?[132]

We might stereotypically imagine civil litigation as "white-collar" contract disputes between businesses and criminal litigation as "blue-collar" disputes about acts of violence. However, as a general proposition, victim-oriented behavior is equally tortious and criminal. Battery and assault are both torts and crimes.[133] Trespass is a tort and a crime.[134] Theft is a tort and a crime.[135] In fact, Arkansas law currently provides for a catch-all cause of action for any felonious behavior.[136] Under the catch-all statute, not only is the relevant evidence the same, the elements of the cause of action would also be the same, as the civil plaintiff has to prove the elements of the underlying felony.[137] So what justification is there that if a homeowner alleges residential burglary and seeks to take the defendant's money, the defendant is allowed to depose the homeowner and any other potential witnesses, but if the local prosecutor alleges residential burglary and seeks to take the defendant's liberty, the defendant must not be permitted to compel witnesses to speak with him?

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131. Administrative Order 14 states, "[c]ases in a subject-matter division may be exclusively assigned to particular judges, but such assignment shall not preclude judges from hearing cases of any other subject-matter division." *Id.* Indeed, in rural circuits with only one judge, every type of case would have to go in front of the same judge.

132. There is an inherent paradox when comparing the scope of civil and criminal discovery and the respective stakes of each proceeding. *See* Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 25 (2015) ("If the civil *plaintiff*, who seeks primarily the payment of money, must share his evidence in advance of a trial, then surely the *prosecutor*, who seeks the defendant's loss of liberty or life, ought to suffer the same obligations.").

133. Ark. Model Jury Instr., Civil AMI 418 (tort of battery); Ark. Model Jury Instr., Civil AMI 417 (tort of assault); ARK. CODE ANN. §§ 5-13-201—207 (crimes of battery and assault).

134. Barrows/Thompson, LLC v. HB Ven II, LP, 2020 Ark. App. 208, at 20, 599 S.W.3d 637, 649 (listing elements of tort of trespass); ARK. CODE ANN. § 5-39-203 (2021) (crime of trespass).

135. Ark. Model Jury Instr., Civil AMI 425 (tort of conversion); ARK. CODE ANN. § 5-36-103 (2021) (crime of theft).

136. ARK. CODE ANN. § 16-118-107(a)(1) (2011) ("Any person injured or damaged by reason of conduct of another person that would constitute a felony under Arkansas law may file a civil action to recover damages based on the conduct.").

137. ARK. CODE ANN. § 16-118-107(a)(1)-(2).

Underlying the conclusion in *McDole* is the recognition that "this has always been the law in Arkansas."[138] *McDole* reaches a conclusion that civil and criminal litigants are different because we say they are, but it does not answer the question—*why* do we say they are different? The reality is that the historical support for denying criminal discovery depositions in Arkansas rests on shaky ground and reluctance to change rather than concrete policy.

III. HISTORICAL ORIGINS OF CRIMINAL PROCEDURE

In our modern legal landscape, we accept as a matter of course, the distinction between civil procedure and criminal procedure. This unquestionable tenet surely led to the conclusion in *McDole* that civil litigants and criminal litigants are "far from similarly situated."[139] However, while it may be the natural position today that criminal discovery and civil discovery are different, there is no satisfactory answer as to "why" they must be so different. As this section explores, criminal discovery is only in the limited position it is in today because of a historical desire to favor efficient prosecution of the guilty rather than protection of the innocent, a lack of organized input from the defense bar during the drafting of the modern rules, and a lasting reluctance to update our shared standards of justice.

The Federal Rules of Criminal Procedure have been largely influential on the states,[140] and prior to the adoption of the Arkansas Rules of Criminal Procedure, the Arkansas courts often turned to the federal rules for guidance.[141] For that reason, I begin with a discussion of the history of the Federal Rules of Criminal

138. McDole v. State, 339 Ark. 391, 399, 6 S.W.3d 74, 79 (1999).

139. *Id.* at 401, 6 S.W.3d at 81.

140. Meyn, *supra* note 48, at 1103-04; Turner & Redlich, *supra* note 11, at 303 (categorizing jurisdictions that restrict criminal discovery as following the federal discovery scheme).

141. *See, e.g.*, Lane v. State, 217 Ark. 428, 429, 230 S.W.2d 480, 480 (1950) (citing Fed. R. Crim. P. 46(a)(2) "as illustrative of the reason of our conclusion" in a case involving bail on appeal); Cabbiness v. State, 241 Ark. 898, 900-02, 410 S.W.2d 867, 869-70 (1967) (citing Fed. R. Crim. P. 41(e) in holding it was reversible error for a trial court to hear a suppression motion in the presence of the jury).

Procedure and then turn to a corollary discussion of the history of the Arkansas Rules of Criminal Procedure.

A. Reformation of Common Law Criminal Procedure in Federal Courts

For centuries, under the common law, civil and criminal procedure operated in parallel to each other, judged by the same standards.[142] However, as Professor Ion Meyn reports in his detailed account of the adoption of the Federal Rules of Criminal Procedure, the modern schism between civil and criminal procedure was a concerted effort driven in part by ineloquent prejudices and a lack of representation from defense counsel.[143]

In the early part of the twentieth century, civil procedure underwent a fundamental transformation from the two-stage process of formulaic, technical pleading and a subsequent trial by surprise to an entirely new phase of litigation called discovery in search of factual transparency.[144] The United States Supreme Court heaped praise upon the "innovations" of the expanded discovery procedures stating:

> Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.
>
> . . .
>
> Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be

142. Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 701 (2017).

143. *Id.* at 727-34. Professor Meyn identifies the forces that he contends influenced the ultimate rejection of the civil reforms for federal criminal procedure as: (1) the strong pro-prosecutor agenda represented by certain members of the committee and a lack of any balancing concerted representation from the defense bar and (2) a historical resistance to change and progressivism in favor of the accused. *Id.* at 727-32.

144. *Id.* at 705-06.

> compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.[145]

The reforms were widely accepted and praised, and initially, scholars noted their expectations that the same procedural rules could apply in criminal cases.[146]

In fact, when the United States Supreme Court and Congress turned their attention to promulgating a counterpart set of rules for criminal procedure, the first draft of the Federal Rules of Criminal Procedure adopted the civil discovery rules almost entirely.[147] For instance, the first draft included "depositions, document requests, physical and mental examinations, and requests for admission."[148] Unfortunately, such proposals were met with skepticism, seemingly born not out of reason, but rather, out of the antiquated notion that because we have never done this before, we should not do it now.[149] Professor Meyn's accounting provides a familiar but disappointing line of argument among the committee members: one member argued that depositions make sense in a civil case because you want to find out what the other side is going to say at trial, and another member replied, "that is the trouble. I think you have the idea of civil practice injected into the criminal procedure. To . . . go into the other side's case to examine anybody . . . before trial . . . is a thing you would never think of in a criminal case."[150] This reasoning persists today and is just as unsatisfying. The objection to depositions was merely "that is not the way we do it." If that same logic carried the day when the Federal Rules of Civil Procedure were being considered, then nothing would have ever changed. While we once did not have depositions in civil cases, we eventually saw the wisdom in the better practice of revealing all relevant information during discovery.[151]

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145. Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947).

146. Meyn, *supra* note 142, at 709.

147. *Id.* at 706, 720.

148. *Id.* at 720.

149. *See id.* at 712-13.

150. *Id.* at 721.

151. Professor Meyn notes, "Over 50 years ago, the United States Supreme Court stated, '[m]utual knowledge of all the relevant facts *gathered by both parties* is essential to proper litigation.' [Yet, c]riminal law has been spared of this wisdom." Meyn, *supra* note 48, at 1140 (emphasis added) (quoting Hickman v. Taylor, 329 U.S. 495, 507 (1947)).

As Professor Meyn accounts, the ultimate decision to leave criminal procedure steeped in vestiges of the common law rather than adopt the wisdom of the civil procedure reform is due largely to one pro-prosecutor committee member's "force of personality" shoving the conversation in one direction[152] and the lack of representation from the defense bar during the discussions to effectively push back.[153] The committee members with criminal litigation experience were almost exclusively prosecutors.[154] With a strong prosecutorial-centered agenda represented at the meetings without an equally concerted agenda on behalf of the defense, the resulting rules skewed heavily in favor of the prosecution.[155] The resulting "reform" was merely to adopt the civil reforms that eased the prosecution's burden, such as relaxed pleading standards, and reject the civil reforms meant to protect the defendant and improve transparency and accuracy, such as formalized discovery procedures.[156]

Not surprisingly, the Supreme Court rejected the committee's first request to distribute a draft to the public because the committee failed to provide a clear rationale for the rules.[157] The truth was, many members of the committee operated under the belief that "criminal law was just different."[158] It was not until later that the leading personality of the committee elaborated that

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152. Meyn, *supra* note 142, at 736. Professor Meyn's article is full of many examples of untenable positions of the Committee's Secretary, Alexander Holtzoff, an Assistant Attorney General. *Id.* at 707-08. Meyn's article repeatedly provides accounts of Holtzoff doing his best to preserve prosecutorial discretion and power and voicing stern opposition to any proposed rules that would slow the criminal justice system. *Id.* at 714-17, 719, 727, 734-35. For example, one of the more egregious positions held by Holtzoff was his approval of three-day dockets in rural courts where, essentially, indictments are on Mondays, pleas are on Tuesdays, and trials are on Wednesdays. *Id.* at 716-17. Holtzoff incredulously argued that it was to a defendant's benefit to be indicted on a Monday and convicted on a Tuesday. *Id.* at 717. Meyn notes, "even today, reading from a flat transcript, Holtzoff flies off the page as relentless." *Id.* at 727.

153. *Id.* at 728-29 (only two members of the committee noted any experience in criminal defense).

154. *Id.* at 728.

155. *Id.* at 724.

156. Meyn, *supra* note 142, at 725-26, 734 ("Led by Holtzoff, the reform of criminal procedure integrated civil rules that increased efficiency, like notice pleading and liberalized joinder, but rejected countermeasures designed to ensure accuracy, like judicial intervention and discovery tools.").

157. *Id.* at 732-33.

158. *Id.* at 733.

the rules were driven by his "tough on crime" philosophy[159] rather than a search for efficiency and truth, as was the rationale for civil procedure reform.

Accordingly, when first up for consideration, the starting point for the Federal Rules of Criminal Procedure was to largely mirror the Federal Rules of Civil Procedure, especially with regard to a robust, formal phase of discovery.[160] However, resistance to change and ineloquent fears of "delay" carried the moment and largely preserved the status quo for criminal litigants, except where benefits for the prosecution could be gained.[161] It cannot be emphasized enough that the affirmative decision to leave criminal trials in the dark was not born out of reasoned policy, but rather, tough on crime sentiments and intuitions that criminal trials are "just different."

B. Origins of the Arkansas Rules of Criminal Procedure

There are also lessons to be learned from the history of the Arkansas Rules of Criminal Procedure. Mainly, we should remind ourselves what standards guided our initial drafting of the rules and what interests were most represented during the process.

In 1971, three workshops were engaged to study the American Bar Association's "Minimum Standards for the Administration of Criminal Justice" and criminal procedure in Arkansas.[162] The procedural committee of the Arkansas Criminal Code Revision Commission set out to draft a codified set of rules

159. *Id.* at 733-34 (quoting Alexander Holtzoff, *Reform of Federal Criminal Procedure*, 12 GEO. WASH. L. REV. 119, 121 (1944)) (Holtzoff believed formulating the Rules of Criminal Procedure, "[i]n a larger sense . . . must necessarily crystallize a philosophy of administration of criminal justice . . . . [I]t must be conducive to a simple, effective, and expeditious prosecution of crimes. Perpetrators of crimes must be detected, apprehended and punished. The conviction of the guilty must not be unduly delayed. Criminals should not go unwhipped of justice because of technicalities having no connection with the merits of the accusation. The protection of the law-abiding citizen from the ravages of the criminal is one of the principal functions of government. Any form of criminal procedure that unnecessarily hampers and unduly hinders the successful fulfillment of this duty must be discarded or radically changed.").

160. *Id.* at 698, 705, 720.

161. *See supra* notes 152-56 and accompanying text.

162. *In re* Ark. Crim. Code Revision Comm'n, 259 Ark. 863, 863, 530 S.W.2d 672, 672 (1975).

of criminal procedure for the state.[163] The procedural committee was guided by four goals: "(1) substitution of simple comprehensible language for archaic, verbose phraseology; (2) elimination of procedural practices which are redundant, needless or inconsistent; (3) realignment of procedural rules with constitutional requirements; and (4) development of a fairer, more efficient criminal justice process."[164] While worded differently, these original cornerstones are also reflected in the text of the rules.[165]

In 1971, as this work was first being undertaken, we turned to the American Bar Association's Standards as our guiding light.[166] In 1970, the ABA Standards did not recommend discovery depositions concluding that, on balance, the costs of depositions outweighed what were thought to be marginal benefits.[167] However, the ABA's position has evolved, and today, the ABA's "Standards for Criminal Justice: Discovery" currently calls for allowing both parties to conduct discovery depositions upon leave of court "to prevent unjust surprise at trial."[168] The ABA currently recommends that depositions be allowed upon a showing that the current information or materials disclosed do not adequately apprise the party of the witness's knowledge to prevent surprise at trial and the witness has refused to cooperate in giving a voluntary statement to the moving party.[169] Although, as argued in Part VI *infra*, discovery standards should go even further,[170] the ABA Standards at least recognize some use of discovery depositions in criminal cases. Nothing has changed in Arkansas's personal experience as a state since 1971 that says we

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163. *Id.* at 863, 530 S.W.2d at 673.

164. Petition for Promulgation of Rules of Criminal Procedure at 1, *In re Ark. Crim. Code Revision Comm'n*, 259 Ark. 863, 530 S.W.2d 672 (No. 74-345).

165. ARK. R. CRIM. P. 1.3 ("These rules are intended to provide for a just, speedy determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public interest.").

166. *In re Ark. Crim. Code Revision Comm'n*, 259 Ark. at 863, 530 S.W.2d at 672.

167. John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?*, 16 FLA. ST. U. L. REV. 675, 678-79 (1988).

168. ABA STANDARDS FOR CRIM. JUST.: DISCOVERY, STANDARD 11-5.2 (AM. BAR ASS'N 2020).

169. *Id.* at 11-5.2(a)(ii)-(iii).

170. *See infra* Part VI.

should no longer pay any heed to the suggestions of the ABA. The ABA's Standards served us in 1971, and they can still serve us today.

Moreover, similar to the circumstances of the drafting of the Federal Rules of Criminal Procedure, it appears that prosecutorial interests were more zealously represented than the interests of the defense bar in crafting the Arkansas Rules of Criminal Procedure, at least as public comment was involved. While the Arkansas Prosecuting Attorneys' Association ("APAA") filed various petitions and briefs offering suggestions to the rules, there were no corresponding petitions from any organizations representing the Arkansas defense bar.[171] Most notable is the now flipped position once held by Arkansas prosecutors. In 1975, the United States Supreme Court decided *United States v. Nobles*, which gave a somewhat unremarkable holding that a federal trial court did not abuse its discretion by requiring the defense to provide the prosecution with limited portions of a private investigator's report for specific impeachment material regarding the investigator's conversations with key prosecution witnesses.[172] However, the APAA took that case-specific holding and argued it led to a broader proposition: "It is clear as a matter of federal constitutional law, defendants can constitutionally be compelled to disclose their defenses, their witnesses *and expected testimony*."[173] In 1975, the Arkansas prosecution bar was arguing that the defense should have to disclose the expected testimony of their witnesses. However, any cursory review of contemporary discovery litigation will reveal the prosecution's current vehement objections to revealing the expected testimony of its witnesses.[174] Of course, the APAA's lobbying for defense witness statements was unnecessary because prosecutors have

171. *See* Case Docket, *In re Ark. Crim. Code Revision Comm'n*, 259 Ark. 863, 530 S.W.2d 672 (No. 74-345).

172. Supplemental Brief at 1, *In re Ark. Crim. Code Revision Comm'n*, 259 Ark. 863, 530 S.W.2d 672 (No. 74-345).

173. *Id.* at 2 (emphasis added).

174. *See, e.g.*, Thompson v. State, 322 Ark. 586, 588, 910 S.W.2d 694, 696 (1995) (agreeing with the State that the State is under no obligation to provide non-expert witness statements before trial).

long enjoyed the ability to essentially depose defense witnesses.[175]

Looking at the formulation of our discovery rules in Arkansas tells us a couple of things. It reminds us of the goals of fairness and protection of the individual we ought to seek in our ongoing refinement of the rules. It reminds us that we once looked to the ABA Standards for guidance, and we would be well served to keep those same standards in mind today. It reminds us that there was not an equal organized effort to shape the rules by the defense bar as there was by the prosecution, so we should be mindful of what agendas may have tilted the scales at inception. Lastly, it reminds us that there has long been a shared interest by both sides of criminal litigation for valid reasons to discover the anticipated testimony of witnesses. Neither the prosecution nor the defense stands to benefit from surprise at trial, but currently, our rules only seek to protect the prosecution.

IV. PRACTICES AND LESSONS IN OTHER STATES

Because criminal discovery is largely left to the states,[176] it is helpful to see what other jurisdictions are doing in their experiments and what practices might be adopted here in Arkansas.

A. States that Allow Passive Discovery of Witness Statements and Police Reports

A nationwide survey of criminal discovery rules found that currently thirty-four states allow for discovery of witness statements and eighteen states allow for discovery of police reports.[177] However, the list is actually broader than the black-letter rules would indicate. For instance, Iowa and Nebraska do not provide for discovery of witness statements or police reports, and Missouri, Vermont, Indiana, North Dakota, Montana, and Washington all do not provide for discovery of police reports.[178]

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175. *See supra* Section II.D.
176. *See supra* note 11 and accompanying text.
177. Turner & Redlich, *supra* note 11, at app. B at 400-08.
178. *Id.* at app. B at 401-08.

However, as discussed further below, these eight states all allow for defense discovery depositions, which would presumptively allow for discovery of the same information.[179] Similarly, Iowa also requires that when the prosecutor proceeds by information, the defense be given "a full and fair statement of [a witness's] expected testimony."[180] Conversely, while Louisiana allows for discovery of witness statements, it only compels disclosure "immediately prior to the opening statement at trial,"[181] which is only marginally better than the Arkansas mid-trial statute,[182] and therefore, easily discounted. By including the deposition states and excluding Louisiana because of the insufficient timing, it can be said that thirty-five states effectively allow for discovery of witness statements and twenty-six states effectively allow for discovery of police reports.[183] Accordingly, a super-majority of the states require discovery of witness statements, and slightly more than a simple majority require discovery of police reports. Arkansas's restrictive criminal discovery scheme is in the minority on both counts.

B. States that Allow Affirmative Defense Discovery Depositions

In total, thirteen states currently allow for discovery depositions in criminal cases.[184] Seven states allow for depositions as a matter of right and six states require court approval.[185] Vermont, Florida, Indiana, Missouri, Iowa, North Dakota, and New Mexico all allow defense attorneys to conduct discovery depositions as a matter of right without prior court

179. *See infra* Section IV.B.

180. Turner & Redlich, *supra* note 11, at app. B at 402 n.412 (quoting IOWA R. CRIM. P. 2.5(3)).

181. *See* LA. CODE CRIM. PROC. ANN. art. 716(D)(2) (2014) (stating that the "[S]tate need not provide the defendant any written or recorded statement of its witnesses until immediately prior to the opening statement at trial").

182. *See supra* notes 18-19 and accompanying text.

183. In 1990, Justice William Brennan reported that only fourteen states permitted discovery of witness statements as of right, and another eight states permitted such discovery upon leave of court. Brennan, *supra* note 1, at 10-11. This illustrates the reality that across America there has been a trend to increase criminal discovery.

184. *See infra* notes 186-89.

185. *See infra* notes 186-87.

approval.[186] New Hampshire, Texas, Arizona, Nebraska, Montana, and Washington all allow for discovery depositions upon leave of the court for good cause.[187] These jurisdictions generally allow for depositions when a defendant can show a deposition is necessary to avoid surprise testimony[188] or because the witness refuses to voluntarily speak with defense counsel.[189]

While Indiana has the broadest rule, stating in its entirety, "[t]he [S]tate and the defendant may take and use depositions of witnesses in accordance with the Indiana Rules of Trial Procedure,"[190] the other jurisdictions contain various restrictions on the use of depositions, even when available as of right. For example, Vermont and Florida both limit the use of depositions as of right to felony prosecutions and require the defendant to show "good cause" for a deposition in a misdemeanor prosecution.[191] Florida even provides for further categorization,

186. VT. R. CRIM. P. 15(a); FLA. R. CRIM. P. 3.220(h)(1); IND. CODE § 35-37-4-3 (1981); MO. SUP. CT. R. 25.12(a); IOWA R. CRIM. P. 2.13(1); N.D. R. CRIM. P. 15(a); N.M. R. CRIM. P. DIST. CT. 5-503(B). Technically, the New Mexico rule only allows for depositions if the parties agree or upon court order "to prevent injustice," and the commentary to the rule indicates the right is therefore "limited to the situation where the person will be unable or unwilling to attend the trial or a hearing." N.M. R. CRIM. P. DIST. CT. 5-503(B)(2), *commentary*. However, a separate portion of the same rule allows for defendants to subpoena witnesses to give "[s]tatements." N.M. R. CRIM. P. DIST. CT. 5-503(A). One scholar has noted that the rule effectively allows for a less formal version of a deposition: "In New Mexico, parties may issue a pretrial subpoena and take a recorded statement—an affordable 'dirty deposition' subject to wide use, more cost-effective than a traditional deposition, and a tool that demonstrates how innovations to formal investigatory tools might respond to concerns particular to the criminal justice system." Meyn, *supra* note 48, at 1110. New Mexico also gives defendants the same ability to subpoena witnesses for interviews for low-level offenses in front of metropolitan or magistrate courts. N.M. R. CRIM. P. METRO. CT. 7-504(C)(1); N.M. R. CRIM. P. MAGIS. CT. 6-504(D). For these reasons, I include New Mexico among the jurisdictions that allows for discovery depositions as a matter of right.

187. N.H. REV. STAT. ANN. § 517:13(II)(b) (2004); TEX. CODE CRIM. PROC. ANN. art. 39.02 (West 2005); ARIZ. R. CRIM. P. 15.3(a); NEB. REV. STAT. § 29-1917(1) (2020); MONT. CODE ANN. § 46-15-201(1)(c) (1993); WASH. SUPER. CT. CRIM. R. 4.6(a).

188. *See, e.g.*, N.H. REV. STAT. ANN. § 517:13(II)(b) (allowing depositions "[t]o ensure a fair trial, avoid surprise or for other good cause shown").

189. *See, e.g.*, ARIZ. R. CRIM. P. 15.3(a)(2) (allowing a deposition where a witness's testimony is material or necessary for preparation of the defense, the witness was not previously examined at a preliminary hearing, and the witness "will not cooperate in granting a personal interview"); WASH. SUPER. CT. CRIM. R. 4.6(a)(2) (allowing depositions where "a witness refuses to discuss the case with either counsel and the witness's testimony is material and necessary").

190. IND. CODE § 35-37-4-3.

191. VT. R. CRIM. P. 15(e)(4); FLA. R. CRIM. P. 3.220(h)(1)(D).

allowing for unilateral depositions of certain types of witnesses, such as eyewitnesses, investigating officers, or expert witnesses, but requires leave of court to depose other, less substantial witnesses.[192] However, Vermont and Florida both prohibit deposing law enforcement officers who engage in only minor "ministerial" roles or whom the prosecution does not intend to call at trial.[193]

Also, in an effort to curb witness intimidation, Vermont, Florida, Missouri, and Arizona all place restrictions on the physical presence of the defendant at the deposition.[194] Conversely, North Dakota allows defendants to be present except when they are in custody, where they must obtain leave of court.[195] Relatedly, while many of the states have broad catch-all language regarding protective orders to prevent embarrassment or harassment,[196] Vermont, Florida, and New Hampshire all have explicit provisions concerning the depositions of children or other sensitive witnesses. Vermont creates a presumption that children

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192. FLA. R. CRIM. P. 3.220(h)(1)(A) (allowing for unilateral deposition of "Category A" witnesses); FLA. R. CRIM. P. 3.220(h)(1)(B) (requiring leave of court to depose "Category B" witnesses). Category A witnesses include:

> (1) eye witnesses, (2) alibi witnesses and rebuttal to alibi witnesses, (3) witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant, which shall be separately identified within this category, (4) investigating officers, (5) witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged, (6) child hearsay witnesses, (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify, and (8) informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried.

FLA. R. CRIM. P. 3.220(b)(1)(A)(i).

193. VT. R. CRIM. P. 15(e)(3)(A); FLA. R. CRIM. P. 3.220(b)(1)(A)(iii) (defining Category C witnesses as those "who performed only ministerial functions or whom the prosecutor does not intend to call at trial and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense"); FLA. R. CRIM. P. 3.220 (h)(1)(C) (prohibiting depositions of Category C witnesses).

194. VT. R. CRIM. P. 15(b); FLA. R. CRIM. P. 3.220(h)(7); MO. SUP. CT. R. 25.12(c); ARIZ. R. CRIM. P. 15.3(a)(2), (e) (excluding the defendant's right to be present at a discovery deposition of a witness that would not previously cooperate in granting a personal interview).

195. N.D. R. CRIM. P. 15(f)(1).

196. *See, e.g.*, N.D. R. CRIM. P. 15(a)(4) (providing for the court to address concerns of annoyance, embarrassment, oppression, or burden to the deponent by disallowing the deposition or otherwise limiting the scope and manner of the deposition).

sex-crime victims should not be deposed[197] and the depositions of children and other sensitive witnesses should generally be reached through careful agreement of the parties or intervention by the court.[198] Florida's rule offers the simple solution of having the depositions of children and sensitive witnesses be video recorded or conducted in front of the trial judge or a special magistrate,[199] presumptively to reduce the odds that a defendant or his counsel would seek to intimidate the witness. However, New Hampshire provides the simplest scheme, prohibiting deposing any person under the age of sixteen.[200] Relatedly, though not limited to children, North Dakota and Arizona give *all* alleged victims the right to refuse to submit to a deposition by the defendant.[201]

There is plenty of variation among how these states have chosen to execute criminal discovery depositions, but one conclusion is clear: these states have all decided that the interest in increasing fairness and factual transparency in criminal litigation outweighs the concerns of delay or bad faith on behalf of defendants.[202] Furthermore, the varied schemes adopted by the states shows us that there are numerous ways to address any concerns of abuse of the deposition process rather than simply prohibiting the practice entirely. Most importantly, these states show us that the fears of doomsday opponents of criminal depositions are not realistic. These states have all allowed defense discovery depositions and they have not yet fallen into a void of chaos and misery. They continue to operate and thrive in spite of providing criminal defendants a fairer process.

V. POLICY ARGUMENTS

For over sixty years, scholars and jurists—no less than Supreme Court Justice William Brennan—have called for the use

197. VT. R. CRIM. P. 15(e)(5).
198. VT. R. CRIM. P. 15(f)(2).
199. FLA. R. CRIM. P. 3.220(h)(4).
200. N.H. REV. STAT. ANN. § 517:13(V) (2003).
201. N.D. R. CRIM. P.15(a)(5); ARIZ. R. CRIM. P. 39(b)(12).
202. *See* H. Morley Swingle, *Depositions in Criminal Cases in Missouri*, 60 J. MO. BAR 128, 134 (2004) (noting that despite the financial burdens of depositions, neither Florida nor Missouri have yet to discard criminal depositions).

of depositions in criminal cases.[203] The use of depositions in criminal cases would have tremendous benefits. Discovery depositions would aid the search for truth by bringing relevant facts to light and they would do so in a more expedient manner. Depositions would enhance the fairness of our adversarial system by treating the defense and the prosecution as truly equal opponents, thereby improving defense counsel's ability to provide effective representation and enhancing our faith in the legitimacy of case outcomes. Lastly, depositions would give defense counsel an affirmative role to play in pre-trial discovery rather than his current role as a passive participant receiving curated disclosures from the prosecution's investigation.

While opponents to depositions have historically raised concerns of perjury or witness intimidation as reasons to forego the practice,[204] those concerns are not borne out by any empirical foundation. More importantly, rather than allowing generalized fears to control the approach, such concerns of abuse of the process can and should be readily addressed by the trial court on a case-by-case basis.

A. Depositions Aid the Search for the Truth

It is a fundamental tenet of the law that the truest, most just outcomes are best achieved by encouraging rather than restraining relevant evidence.[205] "The admission of every light which reason and experience can supply for the discovery of truth, and the rejection of that only which serves not to guide but to bewilder

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203. *See generally* Brennan, *supra* note 1 (calling for the extension of civil pre-trial discovery to criminal cases); Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1192-93 (1960).

204. *See generally* discussion *infra* Sections V.C.-D.

205. Taylor v. Illinois, 484 U.S. 400, 408-09 (1988) (citing United States v. Nixon, 418 U.S. 683, 709 (1974)) ("We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.").

and mislead, is the great principle that ought to be the foundation of every system of evidence."[206] A criminal trial "is a quest for truth."[207]

The Arkansas Supreme Court has already recognized that essential to the quest for truth is the need for defense counsel to have access to witnesses with relevant information:

> A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. The current tendency in the criminal law is in the direction of discovery of the facts before trial and elimination of surprise at trial . . . . In a criminal case, the district attorney should not hesitate to show his entire file to the defendant. It is not the primary duty of the district attorney to convict a defendant. It is his primary duty to see that the defendant has a fair trial, that justice be done.[208]

The court's language originates from the D.C. Circuit Court of Appeals in *Gregory v. United States*, where the court held that it was unlawful for the prosecution to instruct witnesses not to speak with anyone, which obstructed defense counsel.[209] The court noted, "[w]itnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them."[210] Without free access to the witnesses, the defense could not evaluate what the witnesses would testify to or

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206. Heard v. Farmers' Bank of Hardy, 174 Ark. 194, 206, 295 S.W. 38, 43 (1927) ("But to exclude relevant evidence by any positive and arbitrary rule must be not only absurd in a scientific view, but, what is worse, frequently productive of absolute injustice. It may safely be laid down that the less the process of inquiry is fettered by rules and restraints, founded on supposed considerations of policy and convenience, the more certain and efficacious will it be in its operation. Formerly the very means devised for the discovery of truth and advancement of justice were not unfrequently perverted to the purposes of injustice, and made the instruments of the most grievous and cruel oppression.").

207. Birchett v. State, 289 Ark. 16, 20, 708 S.W.2d 625, 627 (1986) (quoting State v. Manus, 597 P.2d 280, 288 (N.M. 1979)); David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 494-95 (1992) (citing WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 33 (2d ed. 1982)).

208. *Birchett*, 289 Ark. at 20, 708 S.W.2d at 627 (internal citations omitted).

209. *Id.*; Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966).

210. *Gregory*, 369 F.2d at 188.

"how firm they were in their testimony."[211] Limiting a defendant's access to witnesses is inherently prejudicial because, as the United States Supreme Court and "[c]ommon sense" tell us, interviewing potential witnesses is a routine part of criminal defense.[212]

Depositions would allow defense counsel to fill in the gaps of the prosecutor's file by deposing police officers and witnesses. Officers and witnesses are human. They are not perfect archivists and we can blamelessly expect them to omit relevant information from time to time. An investigating officer could be deposed to fill in the gaps for what he may have left out of his report, such as steps in the investigation he did not think were of significance. Also, to the extent any witness statement is voluntarily provided in discovery to the defense, a witness can only answer the questions asked of her. A deposition would allow the defense attorney to ask follow-up questions to gain a more complete understanding of the case. Also, oftentimes, police reports contain merely the officer's secondhand account of what the witness told him. Depositions would allow for defense counsel to test the accuracy of the reporting officer's information. More importantly, if the prosecutor fails to disclose *any* witness statements, resting on the protections of Rule 17.1,[213] then depositions would allow the defense counsel to learn *anything* about the case he is defending aside from the limited facts in the information.

Additionally, depositions could facilitate the plea-bargaining process by more speedily revealing the strengths and weaknesses of the case.[214] Broad pre-plea discovery in general can reduce disputes among the parties and speed up the negotiating process.[215] Another advantage to be gained is that

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211. *Id.* at 189.

212. Montoya, *supra* note 51, at 851 ("Common sense would suggest, and trial advocacy experts agree, that the pretrial interrogation of a potential witness is an essential prerequisite to calling the witness at trial."); Taylor v. Illinois, 484 U.S. 400, 415-16 (1988) ("Routine preparation involves location and interrogation of potential witnesses . . . .").

213. *See supra* notes 17-19 and accompanying text; ARK. R. CRIM. P. 17.1.

214. Prosser, *supra* note 32, at 612-13; *see also* Meyn, *supra* note 48, at 1091-92 (noting how civil discovery works to empower both litigants to equally assess liability during the pre-trial phase).

215. *See* Turner & Redlich, *supra* note 11, at 290-91.

providing defense counsel with the ability to depose witnesses would actually reduce the prosecutor's burden.[216] Arkansas case law routinely cites the standards that a defendant cannot rely on the State's file as a substitution for his own investigation[217] and that under an open-file scheme, the defense attorney bears the burden of checking the file for new material.[218] Allowing the defense to conduct depositions fits squarely within those standards. Depositions would allow defense counsel to build his own file rather than rely on the State's. Instead of the defendant crafting specific discovery requests asking about what a witness did or did not say, the defendant could simply go ask the witness himself. Allowing defense depositions would reduce the defendant's reliance on the prosecutor for information.

Ultimately, the civil practice has long recognized the utility in deposing adverse witnesses.[219] Prosecutors also enjoy that benefit.[220] Currently, the criminal defendant is the only litigant in Arkansas who does not have the power to conduct discovery depositions. He is the only litigant who is subjected against his will to a "quest for truth" but his search must be done blindfolded.

B. Depositions Increase Trust in the Criminal Process

Additionally, investigating and interviewing witnesses falls squarely under the umbrella of defense counsel's obligation to provide "effective" assistance of counsel.[221] The Eighth Circuit

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216. One criticism of open-file discovery is that it places an administrative burden on prosecutors and law enforcement to compile the information. *Id.* at 311.

217. *See, e.g.*, Thomerson v. State, 274 Ark. 17, 20, 621 S.W.2d 690, 692 (1981) ("A defendant in a criminal case cannot rely upon discovery as a total substitute for his own investigation.").

218. *See, e.g.*, Findley v. State, 64 Ark. App. 291, 297, 984 S.W.2d 454, 457 (1998) (holding the trial court did not abuse its discretion in finding no discovery violation occurred when defense counsel and the prosecutor disagreed as to whether and when certain exhibits offered at trial were contained in the State's open file because there was no assurance that the defense attorney had checked the State's file sixty days before trial).

219. *See generally supra* notes 143-50 and accompanying text.

220. *See supra* Section II.D.

221. Montoya, *supra* note 51, at 862; Strickland v. Washington, 466 U.S. 668, 686 (1984). For a discussion of why broad pre-trial discovery should be encouraged and analyzed under the doctrine of effective assistance of counsel, see generally Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097 (2004).

has squarely rejected the notion that the decision of whether or not to interview a witness is a matter of trial strategy, instead stating squarely, "Counsel has '*a duty* . . . to investigate all witnesses who allegedly possessed knowledge concerning [the defendant's] guilt or innocence.'"[222] Moreover, the entire rationale behind requiring "effective" assistance of defense counsel and adequate pre-trial investigation is to ensure the legitimacy of the outcome of the case.[223] Currently, the defense bar is confounded by a legal paradox. Defense counsel has a legal and ethical duty to vigorously investigate his client's case, but he has no tools to fulfill this duty.[224] A defendant has the right to subpoena a witness to attend at trial, but he does not have the right to first subpoena and examine that witness before the trial to ascertain his testimony.[225]

Cross-examination is often lauded as a "crucible"[226] and ultimately the greatest truth-seeking device known to our justice system,[227] but such claims are mere rhetoric when viewed in light of the fact that members of the Arkansas defense bar are being asked to conduct cross-examinations with one arm tied behind their backs. Cross-examination is only useful to the extent that the examining party has access to relevant information with sufficient time to prepare to properly utilize it.[228]

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222. Henderson v. Sargent, 926 F.2d 706, 711 (8th Cir. 1991) (emphasis added) (quoting Lawrence v. Armontrout, 900 F.2d 127, 130 (8th Cir. 1990)).

223. Roberts, *supra* note 221, at 1104-05 ("[T]he right to effective assistance advances the same goal as that of the criminal justice system more generally: fairness within the adversary process, with the ultimate objective that the guilty are convicted and the innocent are acquitted."); *Strickland*, 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

224. *See* Prosser, *supra* note 32, at 591 ("It would be anomalous to impose a duty to investigate, on one hand, and on the other to make a real investigation impossible to conduct.").

225. *See* Montoya, *supra* note 51, at 866-67.

226. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 61 (2004).

227. Watkins v. Sowders, 449 U.S. 341, 349 (1981) ("[U]nder our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth."); *id.* at 349 n.4 ("As Professor Wigmore put it, '[cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth.'") (quoting 5 JOHN HENRY WIGMORE, EVIDENCE § 1367, at 32 (rev. 1974)).

228. Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 472 (1998); Prosser, *supra* note 32, at 579 ("[R]ules that do not allow discovery

> Cross-examination is designed to cement, not uncover, a narrative. Trial does not provide the optimum forum to refresh a witness' recollection, a process that can result in long periods of silence as a witness reviews documents. Trial is in part a public spectacle, roles have already been assigned, the script finalized. If a defendant has not adequately investigated the incident by the eve of trial, it is too late for defendant. He will lose.[229]

As far as crucibles go, a system of cross-examination where the examiner only has a short time to prepare immediately after the witness testifies on direct examination and where the examiner has no power to submit the witness to an interview of any sort prior to trial to glean any information about the boundaries of her testimony seems like a pretty comfortable "crucible."

Furthermore, it should not be a controversial claim to point out that limited discovery encourages wrongful convictions and unfair punishments.[230] More specifically, because we currently operate in a system of plea bargaining,[231] we have to acknowledge that the defense bar's ability to provide effective representation and advice during the negotiation process is directly restricted by limited discovery.[232] The criminal defense bar currently assumes the daunting task of negotiating with the State under a system of "information asymmetry"—meaning the defense is forced to

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of the prior statements of government witnesses until after the direct examination of those witnesses curtail the ability of counsel to conduct an investigation based on the contents of the statements, and to effectively impeach the witnesses with inconsistencies."); *see also* J. Thomas Sullivan, Brady-*Based Prosecutorial Misconduct Claims,* Buckley*, and the Arkansas* Coram Nobis *Remedy*, 64 ARK. L. REV. 561, 562-563 (2011) ("Often missed in the *Brady* analysis is the impact that suppression of favorable evidence can have on trial counsel's ability to effectively represent the defendant at trial, yet *Brady* claims are not analyzed in terms of the Sixth Amendment effective-assistance guarantee. Defense counsel can hardly develop appropriate strategic or tactical options without having access to favorable evidence.").

229. Meyn, *supra* note 48, at 1134.

230. Prosser, *supra* note 32, at 549-50.

231. Missouri v. Frye, 566 U.S. 134, 144 (2012) ("[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.") (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)); Lafler v. Cooper, 566 U.S. 156, 157 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

232. Prosser, *supra* note 32, at 558-61; Baer, *supra* note 132, at 25 ("[C]riminal discovery's information asymmetry severely undermines the integrity and reliability of the plea-bargaining process.").

negotiate based on what facts the prosecutor chooses to reveal and what he chooses to conceal.[233] Most importantly, asymmetrical plea-bargaining encourages factually innocent defendants to accept plea offers.[234] Innocent defendants, being generally more risk averse than guilty defendants, are much more susceptible to the pressures of the plea bargaining process where they are faced with the impossible choice between pleading guilty to a crime they did not commit or risking the steeper penalties if found guilty at a trial.[235]

One of the justifications given for limiting the scope of *Brady* litigation and overall criminal discovery is a focus on the adversarial nature between the prosecution and the defense.[236] However, this reasoning is self-defeating. After all, if we want the criminal justice system to be "adversarial" and we want cross-examinations to be "crucibles" designed to elicit the truth, should we not enhance the armaments of each side?[237] This is the reasoning in civil discovery. Civil procedure allows for broad discovery through a multitude of different mechanisms, including subpoenas, depositions, interrogatories, and requests for production.[238] The reason for enhancing and broadening civil discovery was the recognition that proper litigation is best served by full revelation of all relevant facts and not by surprise and ambush at trial.[239] Again, if we want the criminal justice system to be adversarial and we believe that such adversariality is our best means of ensuring that the truth is ferreted out, the guilty are convicted, and the innocent go free, then why are we asking members of the defense bar to rise to the fight with one arm tied

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233. *See* Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 40-41 (2014); Meyn, *supra* note 48, at 1091-92 ("A criminal defendant, having no discretion to compel pretrial discovery and permitted but a keyhole view of the State's evidence, is the only litigant relegated to darkness.").

234. Turner & Redlich, *supra* note 11, 289-90.

235. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2495 (2004).

236. Prosser, *supra* note 32, at 564; Montoya, *supra* note 51, at 876.

237. *See* Montoya, *supra* note 51, at 874-78 (arguing empowering defense fact-gathering powers under the Compulsory Process Clause will enhance the adversarial nature of criminal litigation).

238. ARK. R. CIV. P. 26-36.

239. Prosser, *supra* note 32, at 581 (citing Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947)).

behind their backs?[240] Allowing defense depositions would increase the amount of relevant information available to both sides before trial, therefore enhancing the fairness and functionality of our adversarial trial system.[241] If we can trust that a defense attorney had all the necessary tools at his disposal, his client's guilt can more confidently be viewed as the result of the truth rather than the result of the weight of the system.

C. Fears of Perjury

One of the historic arguments against allowing depositions as well as broadening criminal discovery in general is that it will lead to perjury.[242] The argument goes that if the defendant is aware of the nature of the prosecution's case, he will fabricate evidence to conjure a defense.[243] However, this argument is essentially outdated fearmongering, as the exact same concerns of perjury were raised and ultimately proven unfounded when civil discovery was reformed and broadened in the early twentieth century.[244] Moreover, this argument erroneously assumes that all criminal defendants are corrupt bad guys[245] and all prosecutors and police are honest good guys.[246] It is flawed to assume that depositions will lead defendants to commit perjury while ignoring

240. *See* Meyn, *supra* note 48, at 1095 ("These asymmetrical privileges to information create a dynamic unique to criminal law. The prosecutor assesses the particular facts that executive agents forward to her, releases facts she determines a defendant should view, and adjudicates the dispute through a plea offer that is supported by facts she selects. Though a criminal defendant has no structurally assigned role in the investigation, he is subjected to an adversarial process. If the integrity of the adversarial system depends on testing the pretrial conclusion made by the executive in its investigation, the failure to create the conditions for a counter-investigation undermines that integrity.").

241. *See* Daniel S. McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 CARDOZO L. REV. 59, 69-70 (2017) (arguing broad discovery in general improves the adversary system).

242. Brennan, *supra* note 1, at 289; Roberts, *supra* note 221, at 1151.

243. Brennan, *supra* note 1, at 289.

244. *See* Roberts, *supra* note 221, at 1151; Brennan, *supra* note 1, at 291.

245. *See* Prosser, *supra* note 32, at 583 ("While those who object to broad discovery rarely openly acknowledge that they presume that the accused are guilty, the reasons that have been advanced for denying, delaying, or limiting discovery clearly reflect that presumption."); *see also* Brennan, *supra* note 1, at 287 (arguing limiting pre-trial discovery disregards and jeopardizes the presumption of innocence).

246. *See* Prosser, *supra* note 32, at 583-84.

a recorded history of police and prosecutors committing or suborning perjury.[247]

More importantly, this argument does a disservice to members of our defense bar who are bound by the same rules of ethics as any other lawyer.[248] It is a baseless and insulting conclusion that implies these members are inherently dishonest and untrustworthy. If the fear that defense attorneys would allow their clients to fabricate evidence and present perjury holds any weight, then it must also be said that the defense bar in its entirety must immediately be disbarred. If defense attorneys present such a dangerous risk to the inherent fairness of our justice system, they have no right to continue practicing law lest they wreak more havoc and fraud on the courts.

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247. Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 221 (2000) ("Police perjury has become very common in brutality cases, primarily because of the pressures an officer receives from his colleagues. Police perjury is a widely known problem in the legal system, but it is almost impossible to define the scope and depth to which it occurs."); Gabriel J. Chin & Scott C. Wells, *The* "*Blue Wall of Silence*" *as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 234 (1998) ("[I]n New York, 'the practice of police falsification . . . is so common in certain precincts that it has spawned its own word: "testilying."'") (quoting REPORT OF THE COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT 36 (1994)); Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 358 (1994) ("In criminal cases, the proclivity of prosecutors to tolerate police perjury is widely acknowledged."); Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 348 (2005) ("The anecdotal evidence suggests that prosecutors often ignore manifestations of police corruption."); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 272-77 (2017) (providing several anecdotal examples of reported police perjury). Recently, here in Arkansas, the Little Rock Police Department has been caught filing false affidavits to obtain search warrants. Hannah Grabenstein, *Lawsuit: Little Rock Police Lied to Conduct Drug Raids*, AP NEWS (Oct. 15, 2018), [https://perma.cc/4AAS-HJUW]. One affidavit stated that three officers saw an informant walk up to the door of an apartment and make a controlled purchase of cocaine. *Id.* However, the resident's security footage showed that he was not even home at the time, and nobody ever opened the door for the informant. *Id.* Nevertheless, the Little Rock Police filed the affidavit (committing perjury) and violently executed the search warrant using explosives to gain entry into the apartment. *Id.*

248. Brennan, *supra* note 1, at 291-92.

D. Fears of Witness Intimidation

Another common argument against criminal depositions is the concern that they may be used to intimidate or harass victims and witnesses, especially the vulnerable ones, such as children.[249] However, this overgeneralized fear is likely the result of circular logic or a "feedback loop" rather than actual experiences of such abuse.[250] In a traditionally restrictive jurisdiction, denying a criminal defendant discovery tools reinforces a perception of the defendant as dangerous, lawless, and untrustworthy.[251] A survey of Virginia and North Carolina prosecutors provides an excellent example of this process. In Virginia, a restrictive closed-file discovery state, roughly forty-seven percent of prosecutors were concerned that open-file discovery encourages witness intimidation or manipulation.[252] Conversely, in North Carolina, a state with broader open-file discovery, only ten percent of prosecutors shared this concern.[253] This is the feedback loop. The rules of the system inform our expectations of what a "just" system should look like and thereby undermines the legitimacy of alternatives.[254]

Yet, notably, fears of witness intimidation and manipulation are not unique to the criminal case. If a rape victim also sues her rapist, she can be deposed in the civil suit, and the experience is surely just as nerve-wracking. There is nothing per se in the law that says certain subject matters excuse a witness from a deposition. There is no legal alchemy that makes a witness immune to pressures from the deposition process simply because the case title on the transcript designates the matter as civil rather than criminal. After all, in our example, the defendant is an

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249. *Id.* at 289; Ortman, *supra* note 51, at 501-02.

250. *See* Meyn, *supra* note 48, at 1822-23 (describing how criminal discovery rules create feedback loops of expectations based on what the rules say is permissible).

251. *Id.*

252. Turner & Redlich, *supra* note 11, at 297, 359.

253. *Id.* at 359.

254. *See* Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392, 1413-14 (2000) ("[T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.") (quoting Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984)).

alleged rapist either way. There is no logical explanation as to how our hypothetical rapist presents such a generalized fear of intimidation in the criminal case to bar depositions, yet he retains the right to depose the victim in the civil suit. Case stylings do not impact human emotion.

E. Fears of High Costs

Perhaps the most salient objection to criminal discovery depositions is the concern that they will simply present too great of a financial and administrative burden.[255] After all, subpoenas will have to be served, witnesses will need to be compensated for their time, police officers will have to take time away from regular duties, stenographers will need to be paid, and transcripts will need to be prepared. However, there are two problems with this concern.

First, we cannot be so prideful to think that Arkansas is the only state with an interest in balancing the budget. The thirteen aforementioned states have all made the policy decision that the benefits of discovery depositions justify the accompanying costs.[256] For example, on two occasions, the Florida deposition practice came under heavy attack for its costs, but both times the system prevailed with the recognition that the depositions provide too great of a contribution to the fairness and efficacy of the criminal justice system as a whole.[257]

Relatedly, "[t]hat something isn't free tells us virtually nothing about whether it is worthwhile."[258] The issue here is whether depositions will increase the accuracy and fairness of our criminal system. If better justice is the benefit of the bargain, then the incident costs are wholly justified.[259] Over sixty years ago, the United States Supreme Court recognized, "[t]here can be no equal justice where the kind of trial a man gets depends on the

255. Ortman, *supra* note 51, at 496-97.

256. *See* discussion *supra* Section IV.B.; *see, e.g.*, Swingle, *supra* note 202, at 134 (noting that despite the financial burdens, neither Florida nor Missouri have yet to discard criminal depositions).

257. Ortman, *supra* note 51, at 497-98.

258. *Id.* at 496.

259. *See* Prosser, *supra* note 32, at 613.

amount of money he has."[260] There is certainly room for pragmatism, and it is incontrovertible that resources are not infinite. However, we cannot let money entirely dictate the justice we merit out. Otherwise, we have to ask if we are comfortable assigning a dollar value to a person's liberty.

F. Any Fears Should Govern Exceptions, Not the Rule

Fears of perjury, witness intimidation, or other misconduct should guide how we handle exceptions and not the rule. Rather than closing off the discovery of the truth to the innocent defendant and honest defense counsel because of perceived fears of the guilty and the unethical, we should reframe the procedure. Rather than have the defendant plead why he should be allowed to investigate his case, we should open the doors to discovery and put the burden on the prosecution to articulate specific concerns as to why the doors should be closed or left only ajar.[261] As discussed above, other states have already found numerous mechanisms, ranging from detailed to broad, to handle case-specific restrictions on depositions to curb case-specific concerns of abuse.[262] This is the pattern in civil procedure where we allow discovery but reserve the court's authority to issue protective orders to maintain the integrity of the process.[263] There is no reason such a system cannot be expected to work just as well in criminal cases. "The possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair means of clearing himself."[264]

VI. PROPOSALS FOR NEW LEGISLATION/RULES

Based on the foregoing arguments in favor of allowing defense discovery depositions in criminal cases and the lack of

260. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

261. *See* Prosser, *supra* note 32, at 595-96 (arguing the State should carry the burden of showing the need for a protective order to limit discovery).

262. *See supra* Section IV.B.

263. *See* ARK. R. CIV. P. 26(c).

264. Brennan, *supra* note 1, at 291 (quoting 6 JOHN HENRY WIGMORE, EVIDENCE § 1863, at 488 (3d ed. 1940)).

any empirical-based policy rationale to keep Arkansas in the minority of jurisdictions favoring criminal trials by surprise, I recommend that the Arkansas Supreme Court amend the Arkansas Rules of Criminal Procedure to provide for defense discovery depositions.[265] The burden of drafting a properly worded amendment to the rules is best left to the Arkansas Supreme Court Committee on Criminal Practice. Therefore, I will simply provide a list of goals I believe any proposed rule should aim to achieve.

First, depositions should be permitted to be conducted as a matter of right rather than by leave of court. Any concerns of abuse of the process and delay caused by unnecessary depositions ignores the fact that defense attorneys have their own schedules to keep. The defense bar is no more interested in wasting time than the State is. This is particularly true of our overburdened public defenders who do not have the luxury of time to waste on needless inquisitions. Because a defense attorney should only be expected to resort to a deposition when it is truly needed, requiring prior court approval would only serve to delay the proceedings.

Second, defendants not in custody should be permitted to be present at the deposition absent a showing of good cause by the State as to why the defendant's presence would be prejudicial to the State or the witness. Our criminal justice system operates on a right to confront one's accusers.[266] It admittedly takes courage to stand in front of one's abuser, but it also takes courage to lie while staring a man in the eye.[267] A witness will have to give his testimony in front of the defendant at trial anyway, so absent particularized concerns raised by the State, the defendant's presence at the deposition should be permitted. Relatedly, defendants in custody should be permitted to appear via video or telephone. Just because an individual cannot afford bail does not mean that should be held against him for depositions.

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265. The same reforms could also be achieved through the Arkansas Legislature.

266. U.S. CONST. amend. VI, cl. 5.

267. Coy v. Iowa, 487 U.S. 1012, 1019 (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' In the former context, even if the lie is told, it will often be told less convincingly.").

Third, depositions of children should be permitted with leave of court. Rather than a whole cloth prohibition of depositions of children, defendants should have to first establish a particularized need to depose the child, for example, by providing what information is being sought and explaining how the current discovery materials fail to cover such information. Of course, children should be permitted to have parents or an ad litem present. By having the trial court approve the deposition, the court can address any concerns for the child's best interests and impose any restrictions necessary as to the scope and manner of the deposition.

Fourth, alleged victims should not be given a right to refuse a deposition. While it may be harrowing for a victim to be deposed by his abuser, confrontation takes courage. Any legitimate concerns of intimidation, harassment, or embarrassment could easily be remedied by a motion from the State to restrict or remove the defendant's presence at the deposition rather than disallowing the deposition altogether. Victims should certainly be allowed to be accompanied by the prosecutor and an advocate for emotional support. Victims should also be allowed to have independent counsel present.

Fifth, subpoenaed witnesses should be compensated for their time in the same manner as currently done under Arkansas Rule of Civil Procedure 45(e).[268] However, any witness should only be subjected to being deposed one time. In the case of codefendants, the examination time of any individual witness should be shared amongst the codefendants.[269] The State should bear the expenses for indigent defendants, including compensation for witnesses, the costs of having a stenographer or videographer present, and the costs of having transcripts prepared.

Sixth, aside from alleged victims, prosecutors should not be permitted as a matter of right to sit in on depositions unless a reciprocal right is given to defense counsel to sit in on prosecutor subpoenas. If the goal is to truly open up criminal discovery, then

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268. ARK. R. CIV. P. 45(e) (providing that witnesses shall be paid $30 a day for their attendance and $0.25 per mile for travel from the witness's residence to the place of the deposition).

269. *See, e.g.*, VT. R. CRIM. P. 15(e)(1)-(2).

depositions could certainly be conducted similar to civil depositions with both parties present.[270] However, unless prosecutors are willing to invite defense attorneys to sit in on their depositions, it is unfair to ask defense attorneys to save a seat for prosecutors.

Seventh, any witness deposed should be permitted to be represented by independent counsel.[271] Such counsel's interference with the deposition should be restricted to the same manner of opposition and witness counseling currently permitted in civil depositions.[272]

Eighth, depositions should be permitted in both felony and misdemeanor cases. While we might think of misdemeanors as "petty" and therefore deserving of less procedure, the reality is that the vast majority (roughly eighty percent) of our criminal dockets are misdemeanor offenses.[273] More importantly, although misdemeanors are "petty" compared to felonies, misdemeanor convictions still carry many of the same collateral consequences as felony convictions, ranging from employment discrimination, restricted voting rights, loss of public benefits, and other general stigmatization.[274] The need to protect innocents and increase transparency to promote the legitimacy of the process is just as significant for misdemeanor cases as with felony cases.

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270. *See* ARK. R. CIV. P. 30.

271. *See* Ortman, *supra* note 51, at 488 (noting prosecutors do not represent witnesses or victims, so independent counsel may be warranted in some circumstances).

272. *See* ARK. R. CIV. P. 30(d).

273. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1063 (2015) (noting there are approximately ten million misdemeanor cases filed every year in the U.S. compared to 2.3 million felony cases, misdemeanors make up roughly eighty percent of state dockets, and they are typically the entry point into the criminal justice system for most Americans); *see also* ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIM. DEF. LAWS., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), [https://perma.cc/2Q4Y-D92X] (estimating approximately 10.5 million misdemeanors were prosecuted in 2006); Mahoney v. Derrick, 2022 Ark. 27, at 10, 2022 WL 404182, at *5 (Hudson, J., concurring) ("Moreover, our district courts are often the only interaction that the public has with the judiciary. Therefore, it is critical that we are mindful of the practices and procedures in district courts that may undermine public confidence in the administration of fair and impartial justice.").

274. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1323-27 (2012); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 297-303 (2011).

CONCLUSION

The law and our notions of what justice and fairness require evolve over time. The history of criminal procedure is a clear picture of a slow but steady march toward equity and protection of the accused.[275] Not everything in the law is as it always was. The right to appointed counsel, now the cornerstone of criminal defense, once had to be fought for.[276] The right to be informed of *Miranda* warnings before being interrogated once had to be fought for.[277] The right to not have phone calls eavesdropped on by the government once had to be fought for.[278] Arkansas has its own specific history of recognizing additional protections against the State beyond what the Federal Constitution requires. Arkansas has recognized the right to be informed of the right to refuse consent to entry into the home,[279] the right to be protected from nighttime knock-and-talks by officers,[280] the right to be free from pre-textual arrests,[281] and the right to not have a vehicle on private property searched without a warrant absent exigent circumstances.[282] These few examples illustrate that Arkansas is

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275. *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1642 (2005).

276. *Id.*; *see, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

277. Miranda v. Arizona, 384 U.S. 436 (1966).

278. Katz v. United States, 389 U.S. 347 (1967).

279. State v. Brown, 356 Ark. 460, 474, 156 S.W.3d 722, 732 (2004).

280. *See* Griffin v. State, 347 Ark. 788, 800, 67 S.W.3d 582, 590 (2002) (finding an illegal search occurred when officers stealthily approached a defendant's basement door in the nighttime with flashlights and inspected the premises, noting there is "no authority for a 'knock and *search*' doctrine holding that after knocking, it is permissible to begin a warrantless search before anyone comes to the door"); Rikard v. State, 354 Ark. 345, 353, 123 S.W.3d 114, 118 (2003) (citing *Griffin* with a parenthetical explanation stating "nighttime incursions on a defendant's curtilage [are] illegal under Art. 2, § 15, of [the] Arkansas Constitution"); *see also* Keenom v. State, 349 Ark. 381, 396-97, 80 S.W.3d 743, 753 (2002) (Brown, J., dissenting) (differentiating the protections afforded by the Arkansas Constitution and caselaw from those afforded under the Fourth Amendment, noting that the Arkansas Supreme Court "has shown a sensitivity to abuses caused by nighttime searches," yet "federal jurisprudence does not require the exigent circumstances for a nighttime search warrant set out in [Arkansas] Rule 13.2, much less that those exigent circumstances be required for a nighttime knock-and-talk").

281. State v. Sullivan, 348 Ark. 647, 652, 74 S.W.3d 215, 218 (2002).

282. ARK. R. CRIM. P. 14.1(a)(iii). The United States Supreme Court has only ever stated in a plurality opinion that officers may not search an automobile on private property without a warrant absent exigent circumstances beyond the inherent mobility of the vehicle

no stranger to redefining the boundaries of criminal process as our shared understanding of fairness and justice evolves. "Law's evolution is never done, and for every improvement made there is another reform that is overdue."[283]

There is no reason our criminal procedure has to be written in stone, forever unyielding to progress. The time has come to ask if our current procedures are still the best means of achieving our guiding principles of increasing transparency and fairness and protecting the individual against the awesome power of the State. If we truly aim to discover the truth, then let Arkansas defense attorneys do just that—discover it. Let us achieve "better justice."[284]

itself. *See* Coolidge v. New Hampshire, 403 U.S. 443, 460-62 (1971). The Arkansas Rules clearly agree with the plurality and provide Arkansans with this additional protection.

283. Brennan, *supra* note 183, at 2.

284. Brennan, *supra* note 1, at 279.

TIMING LEGAL PARENTHOOD

Noy Naaman*

INTRODUCTION

When does a parent become a parent? While the literature on Assisted Reproductive Technology ("ART") has explored the question, *who is a parent?* scholars in the field have paid less attention to the question "*when* should the parental status be formalized?"[1] Is it at birth? Is it when a judicial order confers that legal status on an individual? Or, has the legal status of parenthood begun to develop during the time the individual has spent initiating the parental process and consolidated at the child's birth? Yet, these questions have critical legal and practical implications. The following scenarios illustrate how lacunae in the legal frameworks that govern the formalization of the parental relationship leave individuals, whose self-identity as parents (or parents-to-be) is established, but whose parental status is legally inchoate, vulnerable to conflicts arising in the law's blind-spots.

Judith and Barbara, a same-sex couple, conceived through an anonymous sperm donation. While Judith, the birth mother, was legally recognized as such in the delivery room, Barbara had to apply for a post-birth judicial order. Only after a court hearing and an inspection process conducted by welfare officers, which was expected to take a few months, would the law—assuming a

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1. *Assisted Reproductive Technology (ART)*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 8, 2019), [https://perma.cc/PY7P-6HDC] (last visited Nov. 15, 2021); *see infra* notes 37-38.

favorable outcome—recognize Barbara as the child's mother. Shortly after the birth, however, Judith and Barbara separated. What parental rights, if any, can Barbara claim?

Ben, a single man and a senior associate at a law firm, decided to become a parent through transnational surrogacy. When Ben told his employer about his decision and the pre-birth arrangements involved in the process, including that he might need to take some time away from work, Ben's employer told him that his promotion to a junior partner might be deferred. What legal recourse, if any, does Ben have against his employer?

Jessica and David, a different-sex couple, conceived with the assistance of Kelly, a surrogate. During week thirty-two of her pregnancy, Kelly suffered a stillbirth as a result of medical malpractice. While the hospital compensated Kelly for her loss, it denied recovery to Jessica and David for their emotional distress, simply because neither of them carried the fetus. What damages, if any, can Jessica and David seek?

A common theme that emerges from these hypothetical scenarios is uncertainty about what it means to *become* a parent. Although each of the individuals has embarked upon the journey toward parenthood, they have very different statuses in the eyes of the law.[2] In this Article, I examine the question of how the process of *becoming* a parent is counted by the law.

To pursue this inquiry, I theorize and problematize the tension between the *construction* of the self and legal identification.[3] This tension, termed here "temporal discrepancy," refers to the gap between how a person identifies himself and how the law accounts for that identification in the context of *becoming* a parent.[4] I argue that this gap places certain individuals in a vulnerable position within the family and beyond. I focus on two forms of temporal discrepancy: the first concerns a scenario occurring *after* a child is born, when an individual self-identifies as a parent, but the law has yet to formalize the parental status, such as in the first hypothetical above.[5] The second, illustrated

2. *Infra* Section II.A.

3. *See infra* text accompanying notes 52-64.

4. *See infra* text accompanying notes 47-48.

5. *See infra* text accompanying notes 76-86. There are circumstances in which a person may be considered a parent as a matter of law before a court has declared him as such. In

by the second and third hypotheticals above, involves a scenario occurring *before* a child's birth, when an individual self-identifies as a parent-to-be—a status of *becoming* that may be rich in meaning and laden with practical and emotional implications but that is legally overlooked.[6] After analyzing this gap, I consider how the law could be restructured to alleviate the effects of temporal discrepancy on parents and parents-to-be.[7]

This Article proceeds in three parts. Part I develops this Article's theoretical framework by looking to queer literature on time, which elucidates how time orients our embodiments in accordance with (hetero)normative logic and considers what alternatives to this operation (and understanding) of time might look or feel like.[8] Inspired by this literature, I develop the concept of temporal discrepancy and mobilize it for analyzing the research question of this Article.[9]

Part II focuses on the first form of temporal discrepancy, represented by the first gap occurring *after* birth.[10] I review the contingency of this tension in the context of parental identification,[11] mostly involving same-sex couples, in which the parental status is formalized at a remote moment in time after birth, but especially in relation to the biological parent's partner in cases of ART.[12] Then, I set out a taxonomy for understanding the crippling effects of that tension.[13] Finally, I evaluate regulatory avenues for ensuring that parental status vests as close

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this scenario, the judicial order issued after the child's birth will become effective *retroactively* from the child's birth. Such a person, nonetheless, may be placed in a vulnerable position. *See infra* note 134.

6. *See infra* text accompanying notes 214-27.

7. *See* discussion *infra* Sections II.C, III.B.

8. *See infra* Part I.

9. *See infra* text accompanying notes 41-48.

10. *See infra* Part II.

11. *See infra* text accompanying notes 71-85. The term "contingency" is used to express how certain tension becomes to be what it is. For the use of this term, see VALERIE ROHY, CHANCES ARE: CONTINGENCY, QUEER THEORY, AND AMERICAN LITERATURE 2-8 (2019).

12. *See generally* Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 76-82 (2017) (discussing marital presumption, consent to a spouse's use of ART, and adoption as options for formalizing after-birth legal parentage for nonbiological parents).

13. *See infra* Section II.B.

as possible to the child's birth and conclude with a set of considerations for lawmakers.[14] While this Article is not the first to advocate for at-birth parental determination, it offers a novel theoretical underpinning for the position grounded in the individual's evolving self-identification—and thus new support for the findings of other scholars. Indeed, the justifications underlying the recognition or denial of rights are significant, as "different frameworks of analysis cannot reach the 'same result.'"[15]

Part III focuses on the second form of temporal discrepancy, represented by the second gap occurring *before* birth.[16] I assess *whether* and *how* the law should recognize the process of becoming a parent.[17] This part is divided into two sections to address the separate components of this inquiry. Section A discusses *whether* the law can recognize the indeterminate self-identification as a parent-to-be.[18] Conferring parent-to-be legal status before birth is in tension with the notion that parental status comes into existence at the moment of the child's birth.[19] I show that it is eminently possible for the law to recognize the fluid status of parent-to-be, and that several of the concerns that might explain its failure to do so are misguided.[20] Section B then explores *how* the law should recognize the process of becoming a parent.[21] I consider the kinds of conflicts that may arise during the process of becoming a parent and show that while the law addresses certain implications of becoming a parent, its reach is underinclusive.[22] Indeed, I show that by reducing the concept of becoming a parent to its purely biological (and chiefly gestational) elements, the law leaves anticipated parents in a peculiarly vulnerable position.[23] Accordingly, I suggest

14. *See infra* Section II.C.

15. Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 DUKE J. GENDER L. & POL'Y 1, 36 (2009) (citing Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1878-87 (1987)).

16. *See infra* Part III.

17. *See* discussion *infra* Sections III.A, III.B.

18. *See infra* Section III.A.

19. *See infra* text accompanying notes 181-94.

20. *See infra* text accompanying notes 197-213.

21. *See infra* Section III.B.

22. *See infra* text accompanying notes 228-43.

23. *See infra* Section III.B.2.

cultivating a more inclusive legal understanding that embraces the construction, rather than merely the (post-birth) existence, of the parental status and incorporates the relational elements of becoming a parent, such as social burdens, emotional involvement, and human investments.

Two notes before presenting the Article's theoretical basis. The first relates to methodology. This Article assesses the broad-scale occurrence of temporal discrepancy by engaging with three terrains: family, employment, and medical malpractice.[24] While articulating detailed policy proposals in each of these domains is beyond the Article's scope, I discuss how the law could be restructured and subsequently developed by policymakers in accordance with the doctrines of each.[25] To render my analysis more concrete, I glean support from existing laws in different jurisdictions, including U.S. states, Canadian provinces, and Israel.[26] While I do not purport to offer a traditional comparative legal analysis, I hope that the comparative nature of this Article can assist policymakers across the globe in making laws more attentive to the needs of various individuals in their process of becoming parents.

The second note is on terminology. I use the term "anticipated parent" in lieu of the common terms "intended parent" and "prospective parent." The term "anticipated parent" designates becoming a parent that this Article offers to elucidate. I use the term "social parent" in lieu of "non-biological parent" to avoid affirming terms derived from the bio-normative positions that I seek to de-naturalize.[27] Finally, I use the term "gestational party" instead of "pregnant mother" to reflect that transgender men and non-binary people also give birth.[28]

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24. *See infra* Section III.B.1, III.B.2.

25. *See infra* Section II.C and notes 247-54, 283-301 and accompanying text.

26. *See infra* notes 73-86, 103-14,124, 132-179, 228-9, 238-48, 258, 283-300, and accompanying text.

27. *See* Joanna Radbord, *Same-Sex Parents and the Law*, 33 WINDSOR REV. LEGAL & SOC. ISSUES 1, 6 (2013).

28. *Id.* at 1; *Preparing for Pregnancy as a Non-Binary Person*, FAM. EQUAL., [https://perma.cc/5HNK-WPJ9] (last visited Nov. 18, 2021).

I. THE THEORETICAL FOUNDATION

This part lays down the theoretical framework of *temporal discrepancy* that will accompany us throughout the Article. After situating this Article's contribution within the legal scholarship,[29] I will turn specifically to queer literature on time and explain how this body of work informs my theoretical framework.[30] Finally, I discuss how my framework both rests on and enriches the current writing on legal identities.[31]

Legal scholars have ventured into the territory of time. While some scholars have considered generally how the law shapes perceptions of time as a historical, cultural, or political construct,[32] or how temporal logics are utilized to allocate rights,[33] others have considered the construction of time in specific fields, e.g., human rights,[34] criminal law,[35] and private law.[36] Despite these growing conversations about time and the law, the relation between time and the formation of legal identities, specifically the legal status of parenthood, remains largely unexamined.[37] Further, though most of the legal literature

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29. *See infra* text accompanying notes 32-39.

30. *See infra* text accompanying notes 40-48.

31. *See infra* text accompanying notes 49-64.

32. *E.g.*, Carol J. Greenhouse, *Just in Time: Temporality and Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1631 (1989); Rebecca R. French, *Time in the Law*, 72 U. COLO. L. REV. 663, 664-72 (2001).

33. Liaquat Ali Khan, *Temporality of Law*, 40 MCGEORGE L. REV. 55, 56-57 (2009); Frederic Bloom, *The Law's Clock*, 104 GEO. L.J. 1, 2-3 (2015).

34. *See* Orna Ben-Naftali et al., *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551, 554-55 (2005); Yofi Tirosh, *The Right to Be Fat*, 12 YALE J. HEALTH POL'Y L. & ETHICS 264, 301-02 (2012); Kathryn McNeilly, *Are Rights Out of Time?: International Human Rights Law, Temporality, and Radical Social Change*, 28 SOC. & LEGAL STUD. 817, 817 (2019).

35. *See* Jonathan Goldberg-Hiller & David T. Johnson, *Time and Punishment*, 31 QUINNIPIAC L. REV. 621, 622 (2013).

36. *See* Emily Grabham, *Doing Things with Time: Flexibility, Adaptability, and Elasticity in UK Equality Cases*, 26 CAN. J.L. & SOC'Y 485, 485-86 (2011); *see also* Sarah Keenan, *Making Land Liquid: On Time and Title Registration*, *in* LAW AND TIME 145, 157 (Siân M. Beynon-Jones & Emily Grabham, eds., 2019).

37. *See* John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights,* 66 N.Y.U. L. REV. 353, 358 (1991) ("[T]he parental rights of the intended parents should be legally recognized from the time of conception."); Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J. L. & FEMINISM 210, 211-12, 229-30 (2012) [hereinafter Purvis, *Intended Parents*] (discussing how parental intent is used in determining at what point in time parents are legally identified); Courtney

on ART focuses on "who is a parent?" less attention is paid to *when* the parental status should be formalized[38] and *how* the process of becoming a parent is influenced by a particular logic of time.[39] This Article aims to fill that academic gap by giving these questions much-needed theoretical attention. The value of queer theory on time to our conversation will become clear below.

Queer scholarship on time calls attention to how time is organized in accordance with the logic of (hetero)normativity, which features principles such as linearity, capitalist accumulation, and productivity, and is represented by (hetero)normative models of lives.[40] In so doing, this scholarship prompts us (1) to consider how non-normative embodiments that are out of social sync are marginalized and oppressed, and (2) to assess how self-identifications or embodiments that move beyond and against the normative and ostensibly objective and universal

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G. Joslin, *(Not) Just Surrogacy*, 109 CAL L. REV. 401, 439-442 (2021) [hereinafter Joslin, *(Not) Just Surrogacy*] (assessing the option of establishing the parental status before the child's birth in surrogacy arrangements).

38. *Id.* at 210, 214-5 (pointing to the gap between the legal principles of parentage determination that look backward in time and the perception of people undergoing ART who seek to "manifest their intent to become parents with a forward-looking temporal perspective, before a child is conceived and born."). While Purvis's analysis views the discrepancy between legal principles and self-perceptions in terms of *directions*, my analysis focuses on the discrepancy between the *construction* of self-identification and legal identification.

39. For scholarship that theorizes the significance of the period of pregnancy for women, see Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C. L. L. REV. 329, 331-32 (2010); *see also* Siân M. Beynon-Jones, *Timing is Everything: The Demarcation of 'Later' Abortions in Scotland*, 42 SOC. STUD. SCI. 53, 53 (2012). My analysis is distinct from this scholarship in that it focuses on both the gestational and relational elements of becoming a parent, while these scholars focus mostly on the former. *See also* Kaiponanea T. Matsumura, *Binding Future Selves*, 75 LA. L. REV. 71, 77, 119 (2014) (assessing why the person's earlier commitment (the "earlier self") does not bind the person's will at the time of enforcement (the "later self") in the context of agreements pertaining to affairs of surrogacy and embryos). While Matsumura's analysis focuses on two decisive moments, the earlier and later selves, I focus on a broader period of time during which the self as a parent develops.

40. This logic has been articulated in similar, though not identical, manners, by theories, such as Lee Edelman in his concept of "reproductive futurism[,]" Jack Halberstam in his concept of "repro-time[,]" and Elizabeth Freeman in her concept of "chrononormativity[.]" LEE EDELMAN, NO FUTURE: QUEER THEORY AND THE DEATH DRIVE 2 (Michèle Aina Barale, et al. eds., 2004); JACK HALBERSTAM, IN A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES 5, 10 (José Esteban Muñoz & Ann Pellegrini eds., 2005) [hereinafter HALBERSTAM, IN A QUEER TIME]; ELIZABETH FREEMAN, TIME BINDS: QUEER TEMPORALITIES, QUEER HISTORIES 3 (2010).

logic of time offer creative possibilities for understanding and experiencing time.[41]

This stance is prominent in Jack Halberstam's work, which urges its readers to explore lives that *break* from heterosexual life narratives, such as "bourgeois reproduction" and family,[42] and instead evolve from childhood in a trajectory that Kathryn Stockton describes as "growing sideways."[43] Edelman also addresses that break, exhorting us to remove ourselves from political thinking about the future, which he laments as misleading, and to embrace a nihilistic sensibility that rejects investment in any future-oriented optimism.[44] As opposed to Edelman, José Muñoz offers a constructive view of time by presenting the internal mode of "not yet here."[45] This encourages the subject to think about time in an untimely manner, beyond the linear relationship between past, present, and future, thus allowing the subject to liberate himself from the disciplining effects of time and to engage with a utopian vision that embraces unpredictable possibilities.[46] Viewed as a whole, queer writing demonstrates how individuals can live beyond, and in spite of, the rigid boundaries of time, elucidating the concept I term "*temporal discrepancy*."[47]

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41. Elizabeth Freeman, *Introduction*, 13 GLQ 159, 159-160 (2007).

42. HALBERSTAM, IN A QUEER TIME, *supra* note 40, at 6; JUDITH HALBERSTAM, THE QUEER ART OF FAILURE 70 (2011).

43. KATHRYN BOND STOCKTON, THE QUEER CHILD, OR GROWING SIDEWAYS IN THE TWENTIETH CENTURY 11 (Michèle Aina Barale, et al. eds., 2009).

44. EDELMAN, *supra* note 40, at 4, 14, 30-31. This sensibility is further echoed in the psychoanalytic writing on the practice of barebacking among gay men—which advances a perspective on the future that health is imperative, resists the desire to live longer, and expresses a disdain for the institutional rhythm of progress and breeding. *See* TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING 66 (2009); LEO BERSANI & ADAM PHILLIPS, INTIMACIES 45-46, 114, 122 (2008).

45. JOSÉ ESTEBAN MUÑOZ, CRUISING UTOPIA: THE THEN AND THERE OF QUEER FUTURITY 22 (José Esteban & Ann Perregrini, eds., 2009).

46. *Id.* at 22-23, 194 n.7.

47. I am mindful that some of the views expressed in these writings, specifically the disdain for breeding (*see generally* EDELMAN, NO FUTURE, *supra* note 40), the utopian visions of an unpredictable future (MUÑOZ *supra* note 45, at 21-23) and suicidal ideology (BERSANI & PHILLIPS, *supra* note 44, at 35; DEAN, *supra* note 44, at 66), are at odds with procreative objectives and concerns for the stability and integrity of non-normative families. However, I draw on this writing as it explicitly unpacks how non-normative kinships are repressed by institutional forms of time, exemplifying what I identify as temporal discrepancy, and because of their potential to exhort us thinking differently on time.

Temporal discrepancy is the gap between how an individual identifies or perceives himself (the *internal* sphere) and how that identification or embodiment is counted by norms (the *institutional* sphere). It occurs at moments in time when an individual's lived experience is out of sync with the events that society perceives—and the law recognizes—as milestones. Mobilizing this understanding of time as governing certain embodiments into the context of legal parenthood expands the assertation that family kinship itself is an instrument of subject formation that differentiates subjects.[48] Careful attention to the relation between time and subjectification is thus needed to ensure the law is on track with notions of social justice.

This suggested theoretical framework builds also on the literature of legal identities. Legal identities are formed by practices that confer a legal status upon an individual who claims an identity.[49] Practices, such as documentary actions (e.g., signing paperwork) or ceremonial actions (e.g., weddings), effectuate what Jessica Clarke theorizes as the moment of "*formalization*."[50] At that moment, the law actualizes the self-identification of the individual, representing the moment when people first experience their identities as "real."[51] This Article concerns moments during which the legal and self-identifications are out of sync because the *construction* of the self-identification in relation to a particular status begins or completes before its formalization.[52] While Clarke comprehensively analyzes the risks and benefits resulting from the formalization of legal identities, she does not tackle the period of time that I am concerned with, namely, the period before the moment of formalization.[53] Viewing Clarke's observations through the lens of queer theories on time can enrich her analysis, as they clear space for thinking about *becoming* in non-traditional ways, which are not necessarily inherent in an institutional logic of time.[54]

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48. Judith Butler, *Is Kinship Always Already Heterosexual?*, 13 FEM. CULT. STUD. 14, 31-32 (2002).

49. Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747, 755-56 (2015).

50. *Id.* at 753, 756 (emphasis added).

51. *Id.* at 806.

52. *See infra* Parts II-III.

53. *See* Clarke, *supra* note 49, at 750-54.

54. *See infra* notes 308-09 and accompanying text.

I focus on two forms of temporal discrepancy: post-birth temporal discrepancy and pre-birth temporal discrepancy. The first refers to a gap in time in which an individual's self-identification is established, but the legal identification is still "to-be."[55] That legal status is still "to-be" because the law has yet to confer a legal status on the individual.[56] In the context of parenthood, such a discrepancy appears at birth and is sustained afterward when the parental status of the anticipated social parent is yet to be formalized.[57] The second form of temporal discrepancy refers to the moments at which an individual's self-identification is still developing.[58] That period can be viewed as a trajectory of "becoming" throughout which the self-identification fluctuates, or moves on a spectrum between a certain starting point and a designated position, which is invisible from a legal perspective.[59] This invisibility produces a discrepancy between the development of self-identification and the stagnation of legal identification.[60] In the context of parenthood, such a gap occurs before birth when an individual perceives himself as a parent-to-be, but his "to-be" status—i.e., the dynamic mode of becoming a parent—does not fit neatly into any legally cognizable category.[61] The similarity between the two scenarios is that both produce a discrepancy between the temporality of the internal sphere (the self-identification) and that of the external sphere (the legal identification).[62] In the first scenario, however, the discrepancy is grounded in the difference between the "already there" self-identification and the "to-be" legal-identification, while in the second, the discrepancy lies in the gap between the "to-be" self-identification and the ambiguous legal identification.[63] In other words, in the first scenario, the

55. *See* discussion *infra* Part II.
56. *See infra* notes 75-84 and accompanying text.
57. *See infra* notes 75-84 and accompanying text.
58. *See* discussion *infra* Part III.
59. *See infra* notes 181-94, 214-27 and accompanying text.
60. *See infra* notes 193-94 and accompanying text.
61. *See* discussion *infra* Section III.A.
62. *See infra* notes 188-94 and accompanying text.
63. *See infra* notes 78-84 and accompanying text.

legal identification is the "to-be," while in the second, it is the self-identification itself that is "to-be."[64]

II. POST-BIRTH TEMPORAL DISCREPANCY

The birth of a child legally signifies "the birth of a parent."[65] If the child is conceived by sex-based conception, the parental status of the biological parent(s) is formalized through registration, which usually occurs immediately after the child's birth.[66] By contrast, in cases of ART, e.g., sperm donation or surrogacy, the status may not be formalized until several months (if not years) after the birth, resulting in a temporal discrepancy between the self and legal identifications.[67] This part analyzes this discrepancy in three sections: the first outlines its contours;[68] the second examines its implications;[69] and the third evaluates the regulatory avenues needed to mitigate these implications.[70]

A. The Contours of Temporal Discrepancy

When, and to what degree, does a parent experience temporal discrepancy? Reviewing the laws in various jurisdictions illustrates that the answer is contingent on three

64. The forms of temporal discrepancy I discuss here are not exhaustive of all circumstances in which temporal discrepancy between self and legal identification might exist. In relation to parenthood, there are two forms of temporal discrepancy that mirror the forms outlined here. One form occurs after birth. Take, for example, a woman who gives birth and is legally considered a mother but refuses to embrace motherhood and rejects that legal identification. The second form happens before birth, as in the example of a pregnant woman who does not regard herself as an anticipated parent but may be legally recognized as such and thus entitled to special rights by virtue of her future parental status.

65. *See* Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. WOMEN'S L.J. 119, 120 (2018) [hereinafter Blecher-Prigat, *Conceiving Parents*].

66. Shohreh Davoodi, *More Than a Piece of Paper: Same-Sex Parents and Their Adopted Children Are Entitled to Equal Protection in the Realm of Birth Certificates*, 90 CHI.-KENT L. REV. 703, 707 (2015) (stating that the birth certificate certifies parenthood); *see also infra* notes 72-75 and accompanying text.

67. See *infra* notes 76-86 and accompanying text.

68. *See infra* Section II.A.

69. *See infra* Section II.B.

70. *See infra* Section II.C.

factors: the method of conception, the sex of the parents, and their marital status.[71] I survey the operation of these factors.

When a birth results from a *sexual union*, the default rule under Anglo-American law is that the woman who bears the child is the mother.[72] The woman's husband will be considered as the legal parent already at the birth, either based on marital presumption,[73] or on his genetic relation to the child.[74] If the parties are not married, the parental status of the birth parent's partner may be contingent on a written form provided soon after the birth, if not already at the hospital, declaring that the partner is the legal parent.[75]

If the child is conceived through anonymous *sperm donation*, the formalization of parental status may depend on the parties' sexes and their marital status.[76] In the case of married,

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71. My purpose is not to provide a comparative analysis of parentage determination, which is beyond the scope of this Article, but instead to exemplify the various factors that may determine the occurrence of temporal discrepancy.

72. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMPAR. L. (SUPPLEMENT ISSUE) 125, 127 (2006) [hereinafter Meyer, *Parenthood*].

73. In the United States, historically, the woman's husband has been deemed the parent, regardless of whether he is the child's genetic parent, even when proof exists that the husband is not the biological father, and this presumption remains the most common way of establishing parentage of the husband. *See* Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1658-59 (2015) [hereinafter Baker, *Legitimate Families*]; Douglas NeJaime, *The Nature of Parenthood*, 123 YALE L.J. 2260, 2266 (2017) [hereinafter NeJaime, *Nature*]. That presumption is also common in Canada and England. *See* Wanda Wiegers, *Fatherhood and Misattributed Genetic Paternity in Family Law*, 36 QUEEN'S L.J. 623, 640 (2011); Gillian R. Chadwick, *Legitimating the Transnational Family*, 42 HARV. J.L. & GENDER 257, 280 (2019).

74. Even in these jurisdictions (like in Israel), in practice, the law infers biological paternity through marital presumption. Noy Naaman, Ayelet Blecher-Prigat, Ruth Zafran, *Parenthood Based on Relationship: Dual Motherhood as a Case Study*, 36 TEL-AVIV U. L. REV. (Iyunei Mishpat) (forthcoming) (Hebrew), available at [https://perma.cc/99QV-2BFC] (last visited Feb. 21, 2022).

75. In the United States, the unmarried partner of the birth mother can become the legal father of the child through a voluntary acknowledgement of paternity ("VAP"). The VAP procedure is generally limited to identifying the man alleged to be the child's genetic father (though some states' VAP forms are silent as to the genetic relationship between the male signatory and the child), and the mother needs to declare that she was not married to anyone when the child was born or at any time during the 300 days prior to the birth. *See* Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 70, 72 (2010); *Paternity/Parentage Establishment*, DEL. HEALTH & SOC. SERVS., [https://perma.cc/776S-KJRR] (last visited Nov. 20, 2021).

76. NeJaime, *Nature, supra* note 73, at 2296-97.

different-sex couples, when the wife gives birth to a child conceived through artificial insemination by an anonymous sperm donor, in many jurisdictions, the husband is automatically registered as the father by virtue of the marital presumption.[77] If the parents are unmarried, however, the formalization process varies; in certain jurisdictions, parentage may be attributed to the male partner through automatic registration by virtue of his quasi-marital relationship with the birth mother[78] or consent to raise the child with the biological mother,[79] while in others, the partner must invoke post-birth judicial procedures to be legally recognized as the father,[80] or live with the newborn for some amount of time, resulting in temporal discrepancy between the establishment of the self as a parent and the law's recognition of the parent as such.[81] In the case of *same-sex couples*, while in

77. Meyer, *Parenthood, supra* note 72, at 134.

78. The laws in British Columbia, Ontario, Saskatchewan adopted this scheme. *See* Family Law Act, S.B.C. 2011, c 25, § 27 (Can.); All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), S.O. 2016, c 23, § 8 (Can.); The Children's Law Act, S.S. 2020, c 2, § 60 (Can.). In these jurisdictions, the statutes apply equally to all couples regardless of their sexual orientation.

79. In British Columbia, for example, see Family Law Act, S.B.C. 2011, c 25, § 30(b) (Can.). In Ontario for example, see All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment) S.O. 2016, c 23, § 9 (Can.). In Saskatchewan, see The Children's Law Act, S.S. 2020, c 2, § 61 (4)(b) (Can.). In the United States, as a matter of law, only "[i]n a few states, nonbiological intended parents are authorized to establish parentage through a voluntary acknowledgment of parentage." *See* Douglas NeJaime, *Who Is a Parent*?, 43 FAM. ADVOC. 6, 8-9 (2021). In *practice*, however, the couple can easily bypass this procedure. Specifically, though the paternity form requires the birth mother and the putative father to attest that the male partner is the genetic father, and though in certain jurisdictions they do so under penalty of perjury, the form is not scrutinized, and there is no practical means for inquiring into the use of sperm donation. For further reading on the place of biology in establishing legal parenthood through the execution of a VAP, see Baker, *Legitimate Families*, *supra* note 73, at 1686-87; Jeffrey A. Parness, *Faithful Parents: Choice of Childcare Parentage Laws*, 70 MERCER L. REV. 325, 345 (2019).

80. As for states in the United States which adopted this scheme, see NeJaime, *Nature, supra* note 73, at 2296-97, 2297 n.182, 2370-72. This is also the case in Israel. *See* Noy Naaman, *Israel: Judicial Parental Order as a Means of Recognizing Same-Sex Parenthood*, *in* 2021 INTERNATIONAL SURVEY OF FAMILY LAW 273 (Margaret Brinig ed., 2021) [hereinafter Naaman, *Parental Order*]; PROFESSIONAL COMMITTEE TO REVIEW CRITERIA FOR THE ISSUANCE OF THE JUDICIAL PARENTAL ORDER (INTER-MINISTERIAL COMMITTEE), [https://perma.cc/QRW6-Z7R3] (last visited Nov. 21, 2021) [hereinafter INTER-MINISTERIAL COMMITTEE GUIDELINES]. In *practice*, however, different-sex couple can easily bypass this procedure. *See supra* note 79; *cf.* Noy Naaman, *The Paradox of same-sex Parentage Equality*, 100(1) WASH. U.L. REV. (forthcoming 2022).

81. Under the Uniform Parentage Act ("UPA"), for example, a parental status may vest in the biological parent's partner after two years of cohabitation, but it also furthers the goal

some jurisdictions, the marital (or quasi-marital) presumption is applied to formalize the parental status of the same-sex partner immediately upon the birth,[82] in other jurisdictions, the parentage is established through post-birth judicial procedures, resulting in a formalization of the status that occurs remotely in time from the birth.[83]

Temporal discrepancy can also occur in the context of *surrogacy*. The duration of that discrepancy depends on the governing legal framework. In some jurisdictions, the parental status of the anticipated parents is formalized only after the issuance of a post-birth parental order that may be granted remotely in time after birth.[84] In others, by contrast, the anticipated parents are already registered as such by the time of the birth, either through pre-birth (judicial or administrative) procedure,[85] or by marital presumption applied at the birth,[86] preventing any temporal discrepancy.

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of establishing parentage quickly and with certainty. *See* UNIF. PARENTAGE ACT § 204(a)(2) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017).

82. In the United States, see COURTNEY G. JOSLIN ET AL., LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILY LAW, § 3:5, at 173 (2021); Nejaime, *Nature, supra* note 73, at 2294, 2339, 2363-66. In the United States, the UPA revised the VAP process so that it can be used to establish the parental status of a "presumed parent" other than the "genetic father" or "intended parent[.]" UNIF. PARENTAGE ACT § 301 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017). Similarly, some states include a gender-neutral VAP system in cases of ART. Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE J.L & FEMINISM 589, 604 (2018). While the establishment of the parental status in such cases *does not* occur automatically on the moment the child is born, it allows establishing parentage immediately after the birth without the need to undergo a court proceeding, a process that could render the discrepancy between the construction of the self and of legal identification more perceptible. *Id.* at 605.

83. The law as it exists in Israel is an illustrative example for this scheme. Naaman, *Parental Order*, *supra* note 80, at 273.

84. In Israel, for example, same-sex couples, are subject to post-birth procedures, which may take several months. If the couple fails to fulfill the criteria for parental orders, they may be navigated to a second-parent adoption, which can take several years. *Id.* at 272-75.

85. *See infra* notes 135-146 and accompanying text.

86. The New York appellate court recently applied the marital presumption to the biological father's same-sex spouse where the child was born via surrogacy during the marriage. *See In re* Maria-Irene D., 153 A.D.3d 1203, 1205 (N.Y. App. Div. 2017).

B. The Implications of Temporal Discrepancy

In this section, I explore three types of temporal discrepancies that are created when the formalization of the parental status occurs remotely in time after the birth. The first, *inner* sphere, implicates the self-continuity of the parent;[87] the second, *interpersonal* sphere, involves the familial dynamic;[88] and the third, *collective* sphere, refers to the relationship among families.[89] By highlighting the crippling effects in each sphere caused by delays in the formalization of the parental relationship, I illustrate how the law deploys time to police and oppress the becoming of non-normative families.

1. The Inner Sphere

The inner sphere refers to the *construction* of an individual's self-identification. Temporal discrepancy affects the inner sphere by disrupting the development of an individual's self-identification as an anticipated parent—that is, the state of a constant self-continuity beginning at the moment of a mutual decision to conceive, continuing through fertilization and impregnation, and becoming complete at the birth.[90] The discontinuity between the self and legal-identifications adversely affects the individual's self-determination in a manner that may be particularly significant given the importance of parental status in shaping our personhood.[91]

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87. *See infra* Section II.B.1.

88. *See infra* Section II.B.2.

89. *See infra* Section II.B.3.

90. This account does not apply to unplanned or unwanted pregnancies, which are outside the scope of this Article. This account does not ignore the presumption that *after* the birth, the self-identification of a person as a parent constantly shapes throughout his life.

91. John A. Robertson, *Liberalism and the Limits of Procreative Liberty: A Response to My Critics*, 52 WASH. & LEE L. REV. 233, 236 (1995); Harry Brighouse & Adam Swift, *Parents' Rights and the Value of the Family*, 117 ETHICS 80, 91-95 (2006). For further reading on identity formation of same-sex families, Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 L. & SOC'Y REV. 285, 286-87 (2002); Irene Padavic & Jonniann Butterfield, *Mothers, Fathers, and "Mathers": Negotiating a Lesbian Co-parental Identity*, 25 GENDER & SOC'Y 176, 181-82 (2011). Abbie E. Goldberg et al., *Why Parenthood, and Why Now? Gay Men's Motivations for Pursuing Parenthood*, 61 FAM. RELS. 157, 160 (2012).

The theory of narrative identity illuminates my argument regarding the effects of temporal discrepancy. This theory regards the formation of an individual's identity as occurring through narrative: a story about oneself that one tells oneself and others.[92] That story allows the individual to develop a self-perception as a "well-defined character[,]"[93] creating a "sense of meaning[] that unfold[s] in and through time."[94] That is, the formation of an individual's identity is suffused with the life-narrative he builds.

The theory of narrative identity is relevant for its emphasis on the role of *continuity* in the process of forming the self-narrative. Continuity allows an individual to anticipate and control his narrative[95] and facilitates the capability to pursue his goals and become the person he wishes to be,[96] enabling him to "function as [an] intentional agent[]."[97] Psychological scholars maintain that self-continuity is intertwined with cultural contingencies, namely that the realization of the self is informed by how temporality is "represented within the symbolic web of . . . culture."[98] From that point of view, one can perceive how delaying the legal recognition of parental status until well after birth, the moment that culturally signifies the birth of parenthood, interferes with the organic dynamic of self-continuity and impedes an individual's ability to experience his self-identification as "real[.]"[99]

Studies of same-sex families offer additional insights into how temporal discrepancy can interfere with individual narrative formation. Studies on lesbian couples, for example, reveal that

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92. Paul Ricoeur, *Narrative Identity*, 35 PHIL. TODAY 73, 77 (1991); MARYA SCHECHTMAN, THE CONSTITUTION OF SELVES 93-95 (1996).

93. *Id.*; SCHECHTMAN, *supra* note 92, at 97.

94. Peter Brooks, *The Law as Narrative and Rhetoric*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 14 (Peter Brooks & Paul Gewirtz, eds., 1996).

95. *See* Martha Minow, *Stories in Law*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 94, at 33.

96. *See* DAVID DEGRAZIA, HUMAN IDENTITY AND BIOETHICS 80 (2005).

97. Russell Spears, *Commenting on Continuity: A View from Social Psychology*, *in* SELF CONTINUITY: INDIVIDUAL AND COLLECTIVE PERSPECTIVES 251, 254 (Fabio Sani ed., 2008).

98. Romin W. Tafarodi, *Toward a Cultural Phenomenology of Personal Identity, in* SELF CONTINUITY: INDIVIDUAL AND COLLECTIVE PERSPECTIVES, *supra* note 97, at 33.

99. Clarke, *supra* note 49, at 753.

the lack of official recognition may lead the social mother to experience high levels of stress and uncertainty while negotiating her maternal identity with herself.[100] This perceived limitation on self-determination is reinforced in everyday interactions with third parties in which the social mother is deprived of the right to operate on behalf of her child.[101] Other recent studies illustrate how impeding the recognition of the social parent forces the family to operate in an environment marked by "confusion and social apprehension" and to adopt strategies to anticipate and defuse potential conflicts.[102]

2. The Interpersonal Sphere

The interpersonal sphere refers to the dynamic within the family, namely the relationship between the parents and the child (the *vertical* relationship) and the relationship between the parents (the *horizontal* relationship). Scholars over the past two decades have demonstrated that legal recognition allows parents to fulfill their parental responsibilities without obstruction and ensure the stability, security, and continuity of the parent-child relationship,[103] which is important for the child's ability to achieve self-fulfillment and form other meaningful relationships

100. *See, e.g.*, Michele M. McKelvey, *The Other Mother: A Narrative Analysis of the Postpartum Experiences of Nonbirth Lesbian Mothers*, 37 ADVANCES NURSING SCI. 101, 101-02 (2014); Danuta M. Wojnar & Amy Katzenmeyer, *Experiences of Preconception, Pregnancy, and New Motherhood for Lesbian Nonbiological Mothers*, 43 J. OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING 50, 59 (2014); ALONA PELEG, LESBIAN MOTHERHOOD IN ISRAEL 132-34 (Stavit Sinai ed., 2020) (Isr.).

101. *See* McKelvey, *supra* note 100, at 112-13; Wojnar & Katzenmeyer, *supra* note 100, at 53-55, 58-59; PELEG, *supra* note 100, at 132-34.

102. Alison Gash & Judith Raiskin, *Parenting Without Protection: How Legal Status Ambiguity Affects Lesbian and Gay Parenthood*, 43 L. & SOC. INQUIRY 82, 84, 112 (2018). These strategies include carrying documented proof of parentage or creating a narrative that children can use when their familial status is questioned. *Id.*; Emily Kazyak et al., *Law and Family Formation Among LGBQ-Parent Families*, 56 FAM. CT. REV. 364, 368 (2018).

103. JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 111–119 (2000) (discussing the benefits of stability in child-parent relationships); ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 15-20, 45-47 (2004) (discussing benefits of continuity of care for children and society); Wanda Wiegers, *Assisted Conception and Equality of Familial Status in Parentage Law*, 28 CANADIAN J. FAM. L. 147, 149 (2012).

in life.[104] Legal recognition also allows both parent and child to benefit from an array of financial safeguards, such as employment benefits, insurance, and inheritance.[105] Delaying or impeding parental recognition, therefore, disadvantages parents and children both emotionally and financially.[106]

Furthermore, by not recognizing the social parent upon birth, the law carves out a hierarchy between the biological parent and the social parent in relation to the child.[107] The social parent experiences the tangible effects of this hierarchy when he or she is subjected to an inspection process by a multitude of institutional actors including judges, state attorneys, and, sometimes, welfare officers.[108] The judicial process, especially when it operates after the birth, inherently treats the social parental bond as an artificial or inauthentic kinship that is subject to intrusive scrutiny.[109]

Some jurisdictions perpetuate that hierarchy even after official recognition by refusing to correct the birth certificate so that it lists the social parent's name.[110] As a public record of facts

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104. Ya'ir Ronen, *Redefining the Child's Right to Identity*, 18 INT'L J. L., POL'Y & FAM. 147, 154 (2004) (discussing the importance of these relationships to the child's sense of belonging); *see also* Angela Campbell, *Conceiving Parents Through Law,* 21 INT'L J. L. POL'Y & FAM. 242, 265 (2007) (emphasizing that the legal recognition of the social parent fosters the child's self-awareness, dignity and belonging within his community); Alison Bird, *Legal Parenthood and the Recognition of Alternative Family Forms in Canada*, 60 U. N.B. L. J. 264, 285 (2010) (criticizing Canadian courts for ignoring "the symbolic importance of legal recognition to a child's sense of identity").

105. Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 346-47 (2002); Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL'Y REV. 31, 32 (2010) [hereinafter Joslin, *Travel Insurance*].

106. *See* Jacobs, *supra* note 105, at 346-47; Joslin, *Travel Insurance*, *supra* note 105, at 32.

107. *See also infra* text accompanying notes 115-18.

108. *See also infra* text accompanying notes 115-18.

109. *See also infra* text accompanying notes 115-18.

110. In Israel, for example, when a same-sex female couple conceives through anonymous sperm donation, only the biological parent's name is listed on the birth certificate. *See* Ilan Lior, *Israel Defies Ruling to Register Same-Sex Parents on Children's Birth Certificates*, HAARETZ (Apr. 10, 2018), [https://perma.cc/U8V6-XGY6] (last visited Nov. 22, 2021). By contrast, numerous jurisdictions in the United States and Canada allow both parents in same-sex families to be listed on the birth certificate. *See* Elizabeth J. Samuels, *An Immodest Proposal for Birth Registration in Donor-Assisted Reproduction, in the Interest of Science and Human Rights*, 48 N.M. L. REV. 416, 428-29 (2018); Fiona Kelly,

that define how we present ourselves to the world, the certificate of birth registration begins the life story of who we are; in that sense, it is constitutive of our identities and of our family life narratives, especially insofar as it identifies our parents.[111] From a practical standpoint, the birth certificate is also what most people rely on to provide evidence of parental status when dealing with schools, health-care providers, state-provided services, border crossings, and other third parties.[112] The fact that this document is required for a wide range of activities and services underscores its importance.[113] Therefore, the absence of the social parent's name from that public, yet very personal, document routinely erases that parent in day-to-day interactions. The omission of a parent from the birth certificate could have substantial adverse effects. In cases of medical emergencies, for example, the social parent may be deprived of the right to make any decision or to be involved in a child's medical care.[114]

The derogatory effect of this hierarchy is especially salient when viewed alongside social research concerning same-sex families. Studies have reported on maternal jealousy within lesbian families in which only one parent has a biological link to the child,[115] as well as a power imbalance between the mothers concerning the ability to make decisions regarding their children.[116] By delaying or impeding the legal recognition of the social parent, and by creating, through the birth certificate, a hierarchy with legal and practical significance based on biological

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(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families, 40 OTTAWA L. REV. 185, 192 (2008).

111. Anna Marie D'Ginto, Comment, *The Birth Certificate Solution: Ensuring the Interstate Recognition of Same-Sex Parentage*, 167 U. PA. L. REV. 975, 1001-02 (2019).

112. Davoodi, *supra* note 66, at 708; D'Ginto, *supra* note 111, at 1002.

113. D'Ginto, *supra* note 111, at 1002.

114. *Id.* For further reading on other harms inflicted on families who lack birth certificates accurately reflecting their child's legal parentage, see Motion for Leave to File Brief of Amicus Curiae Family Law Professors in Support of Petitioners and Brief of Amici Curiae in Support of Petitioners at 9-17, Pavan v. Smith, 137 S. Ct. 2075 (2017) (No. 16-992).

115. Suzanne Pelka, *Sharing Motherhood: Maternal Jealousy Among Lesbian Co-Mothers*, 56 J. HOMOSEXUALITY 195, 196 (2009); Claudia Ciano-Boyce & Lynn Shelley-Sireci, *Who Is Mommy Tonight? Lesbian Parenting Issues*, 43 J. HOMOSEXUALITY 1, 10-11 (2002).

116. *See* McKelvey, *supra* note 100 at 108; Wojnar & Katzenmeyer, *supra* note 100, at 58-59.

differences, the law entrenches or even exacerbates these internal conflicts within families. This outcome produces a paradox: precisely in those families that depart from the heteronormative model premised on biological kinship, and that rely on alternative procreative arrangements due to the biological constraints of same-sex reproduction,[117] biology becomes the key factor shaping their dynamic.[118] Rather than perpetuate this negative dynamic, the law should facilitate familial stability for the benefit of all family members.

Such a hierarchy between biological and social parenthood becomes all the more apparent in cases of dissolution that occur before the social parent's parental status is formalized. In such scenarios, temporal discrepancy may situate the social parent in a vulnerable position by providing an unjust advantage to the biological parent, who might seek to deny him custodial, visitation, or other rights with respect to the child.[119] In the absence of a legally recognized parent-child relationship, the social parent may find himself barred from making decisions relating to the child.[120] Conversely, a social parent may disclaim responsibility for the child more easily than the biological parent, leaving the child with the support of only the latter.[121] Instead of facilitating these imbalances, we should expect the law to place both parents on equal footing as soon as possible after birth.

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117. Scholars have long discussed how intent—rather than biology—has a meaningful role in the family arrangements of same-sex kinship. *See, e.g.*, Tarsh Bates, *The Queer Temporality of CandidaHomo Biotechnocultures*, 34 AUSTRALIAN FEMINIST STUDS. 25, 33 (2019). This is not to say that biology plays no role at all in same-sex families, but for same-sex couples, biological kinship may be less significant than for different-sex couples. For the opposite view, see Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1083 (2016) (discussing the importance for gay people of a genetic parental bond). This is also the case in Israel, see Noy Naaman, *Bordering Legal Parenthood*, 33(2) YALE J.L. & HUMAN. SECTION (forthcoming 2022).

118. *See, e.g.*, Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L. J. 459, 475-76 (1990).

119. As Nancy Polikoff wrote more than three decades ago, without formalizing the child-parent relationship, a person "may even be found without standing to challenge parental custody." *Id.* at 471-73; Kelly, *supra* note 110, at 191 nn.17, 20 (referring to Canadian cases in which, during this waiting period, the biological mother refused to consent to the social mother adopting her child).

120. *See* Polikoff, *supra* note 118, at 471.

121. *See id.*

Challenges to the social parent's relationship to the child may also arise in the event the biological parent dies before the social parent's parental status is formalized. In such circumstances, there is no guarantee that the social parent would be allowed to continue to raise the child.[122] "One can . . . readily envision the potential conflict[s] between" the social parent and the parents or other kin of the deceased biological parent, who may feel entitled to take over the parental role and either adopt the child or become the child's legal guardians.[123]

3. The Collective Sphere

The third sphere, the collective, refers to relationships among different families. Temporal discrepancy in this context produces systematic differences between different-sex couples who conceive via sexual intercourse and whose parental status is characterized by "natural" temporal congruence and same-sex couples for whom the status of one or both parents is established remotely in time from the birth.[124] Recognizing only biological parents at the child's birth puts same-sex couples at a disadvantage relative to different-sex couples.[125] That difference "countenance[s] a second-class status" for the children of same-sex couples whose familial stability, and emotional and financial

122. Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 468 (2012).

123. Ruth Zafran, *More Than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple—The Israeli View*, 9 GEO. J. GENDER & L. 115, 137 n.117 (2008). If the biological parent sets up a guardianship clause in his will naming his partner as caregiver in the event of his death, this may address these concerns.

124. In certain jurisdictions, the conferral of the nonmarital genetic father's parentage does not occur automatically. *See supra* note 82; *see also* Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1187 (2010) [hereinafter Joslin, Protecting Children(?)]. However, in these cases, the parental recognition occurs via a simple procedure of signing a form at the hospital, immediately after the child's birth, and without the need to undergo a court proceeding, a process that could render the discrepancy between the construction of the self and of legal identification more perceptible. Parness & Townsend, *supra* note 75, at 57.

125. *See* D'Ginto, *supra* note 111, at 1001-02.

security are impaired as compared to the children of "traditional families."[126]

As noted above, temporal discrepancy in the context of procreation through ART does not affect same-sex couples exclusively.[127] Nevertheless, this group is disproportionately impacted given that most same-sex couples cannot conceive a child genetically related to both parents.[128] In jurisdictions that limit the marital presumption or VAPs (available for unmarried couples) to different-sex couples, the law creates systematic differences between different-sex couples and lesbian couples who conceive through sperm donation.[129] The disadvantageous treatment of lesbian couples comes sharply into focus by comparison with either unmarried male partners of biological mothers, who may be designated as the child's father without evidence that he is in fact the biological father,[130] or male spouses of biological mothers who may be designated as the child's father through the marital presumption, even in the face of evidence that he is not in fact the child's biological father.[131]

Viewing these three spheres together illustrates that the moment of formalization affects a parent's self-authorship as well as familial stability, emotional bonds, and financial safeguards. These elements set forth the very conditions under which family arrangements can be formed, be sustained, and flourish. Impeding parental recognition, therefore, is particularly harmful to the *becoming* of families.

C. Bridging the Gap

Equipped with the foregoing observations about the adverse implications of temporal discrepancy, we now turn to evaluate the

126. Nancy Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 225-26 (2009).

127. *See supra* Section II.A.

128. Indeed, in some circumstances, the parties in same-sex couples are both biologically related to the offspring. Take, for example, female same-sex couples who conceive a child via reciprocal in-vitro fertilization, in which one woman gestates the embryo and the other provides the ovum.

129. *See* Parness & Townsend, *supra* note 75, at 64, 72, 80.

130. *See supra* note 79.

131. *See supra* note 73.

avenues that can prevent or mitigate them. This section discusses both judicial[132] and non-judicial procedures.[133]

1. Judicial Involvement[134]

The first solution is *pre-birth legal preparation*, which is to say, to initiate a pre-birth procedure so that the judicial order can be granted as close as possible to the birth to file the form of VAP prior to birth.[135] This procedure can be invoked starting as early as the moment of conception, or at a later point, which may be relevant in situations where the intent is constructed during pregnancy.[136] This process does not confer that status during pregnancy, nor does it provide authority over the fetus or the pregnant party's body.[137] Far from doing so, it ensures that the establishment of legal identification occurs at the same time as, or as close as possible to, the child's birth.[138]

This procedure has several advantages. It ensures clarity and stability in the childcare relationship that will begin immediately at birth and acknowledges the emotional involvement of both parents. It may also be helpful in cases of dissolutions that occur before the post-birth order is granted by foreclosing disputes

132. *See infra* Section II.C.1.

133. *See infra* Section II.C.2.

134. Another avenue for addressing the implications discussed above is to apply the parental order so that it becomes effective retroactively from the moment the child is born. The benefit of this avenue is that from the moment the order is applied, the parental status, and all the benefits and responsibilities derived from that status, is vested on the anticipated parent. *See* Naaman, *Parental Order*, *supra* note 80, at 281. That solution, however, is by nature an ex-post facto remedy, and thus does not prevent the occurrence of temporal discrepancy and its effects, among them the disruption of self-continuity (especially in cases when the birth certificate is not revised to list the social parent's name), the impediment of financial safeguards, and the peculiar vulnerability of the family in the event of tragedy (e.g., dissolutions or the death of one of the parents) occurring before the judicial issuance.

135. *See* Katherine Farese, *The Bun's in the Oven, Now What?: How Pre-Birth Orders Promote Clarity in Surrogacy Law*, 23 U.C. DAVIS J. JUV. L. & POL'Y 25, 59 (2019).

136. Israeli law, for example, recently allows parties conceiving via sperm donation to submit an application for a parental order sixty days prior to the birth. *See* FamA 9182/18 John Does v. The General Attorney, Nevo Legal Database (June 6, 2020) (Isr.). In other jurisdictions, e.g., Florida and Minnesota, the anticipated parents can prepare the paperwork ahead of time and even file the case before the birth, and the court will grant the actual order after the birth. *See* Michelle Keeyes, *ART in the Courts: Establishing Parentage of ART Conceived Children (Part 2)*, 15 WHITTIER J. CHILD & FAM. ADVOC. 189, 192 (2016).

137. Purvis, *Intended Parents*, *supra* note 37, at 250.

138. *Id.* at 248.

around the existence or validity of the former couple's mutual consent to conceive the child.[139] Such a procedure can offer protections for both the parents and the child. For example, pre-birth procedures can offset efforts by a biological parent to deny her former partner custodial or visitation rights despite their mutual intent to have a child and their mutual responsibility for the child's future.[140] Similarly, pre-birth procedures can foreclose efforts by a social parent to disclaim responsibility for the child and leave the child with the support of only the biological parent, contrary to the former couple's agreement.[141] That process can also be used as a proxy for consent to raise the child together.[142] Finally, assigning future parental status to the anticipated parent in cases of same-sex couples undergoing ART matches the legal implications applied to sex-based reproduction, in which after the conception the genetic parent cannot deny responsibilities in relation to the child.[143]

The second solution is a *pre-birth legal determination* of the parental status, i.e., pre-birth orders, that will be effective at birth.[144] Under this possibility, the parties sign a parenthood agreement and, after reviewing it, a court issues an order confirming the anticipated parents as the eventual child's legal parents.[145] This model, in addition to the advantages of pre-birth

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139. The reason for concern is that intent can be imprecise and difficult to express, and even when there is a written agreement, there may still be disputes concerning the scope or validity of the agreement. *See id.* at 249; Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 274-75 & nn.145-46 (2019) [hereinafter Feinberg, *Restructuring Rebuttal*].

140. *See* Purvis, *Intended Parents*, *supra* note 37, at 251.

141. *See id.*

142. *See id.* at 249.

143. *See id.* at 250.

144. In the United States, several jurisdictions have adopted this model. *See, e.g.*, CAL. FAM. CODE § 7962(f)(2) (West 2019); 750 ILL. COMP. STAT. 47/35(a) (2016); ME. STAT. tit. 19-a, § 1934(1)(B) (2016); NEV. REV. STAT. ANN. § 126.720(4) (2017); N.H. REV. STAT. ANN. § 168-B:12(I) (2015); N.J. STAT. ANN. § 9:17-67(a), (f)-(g) (2018); N.Y. FAM. LAW § 581-203(b), (d) (McKinney 2020); 15 R.I. GEN. LAWS § 15-8.1-804(a) (2020); VT. STAT. ANN. tit. 15C, § 804(a)(1) (2019); WASH. REV. CODE § 26.26A.750(1)(a) (2018); D.C. CODE § 16-408(a), (e) (2017); *see also* UNIF. PARENTAGE ACT § 811(a) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017). For further reading on this model—that is, the date upon which the order becomes effective, see Joslin, *(Not) Just Surrogacy*, *supra* note 37, at 439-40.

145. Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 633-34 & n.3 (2005).

preparation discussed above, allows the parents to be listed on the child's birth certificate immediately after birth and resolves insurance coverage affairs.[146]

A pre-birth order, however, raises tangible concerns in surrogacy because that order may divest the surrogate of parental rights to the eventual child before the birth.[147] This outcome raises a concern that the surrogate may not be able to truly consent to relinquish her future parental status before birth.[148] However, this concern can be mitigated by simply subjecting the parental determination to a waiting period, thereby balancing the certainty of the anticipated parents and ensuring autonomy for the surrogate.[149] Moreover, a pre-birth order should not interfere with the gestational party's autonomy over her body during the period of pregnancy.[150] For example, if the anticipated parents have second thoughts regarding the pregnancy, they could not force the surrogate to have an abortion, nor would they have any right to withdraw their status as parents.[151] Conversely, if the surrogate has second thoughts regarding the pregnancy and decides to have an abortion, the anticipated parents would be unable to prevent her from doing so.[152] This method can also benefit the surrogate as it assures her that the anticipated parents, provided that they comply with the statutory requirements, will take responsibility for the child after his birth.[153]

Another potential concern is that the fetus would be legally understood as a person if parentage is assigned before the child's birth.[154] However, if the order becomes effective only *after* the

146. *Id.* at 634-35; Farese, *supra* note 135, at 59.

147. Purvis, *Intended Parents*, *supra* note 37, at 235-37.

148. Conor Cory, Note, *Access and Exploitation: Can Gay Men and Feminists Agree on Surrogacy Policy?*, 23 GEO. J. ON POVERTY L. & POL'Y 133, 136, 146-47 (2015).

149. *See id.* at 148-49. This could be applicable only if the order becomes effective after the child's birth. Note that currently there are jurisdictions, such as Illinois, in which the order is effective immediately even if issued prior the child's birth. *See* 750 ILL. COMP. STAT. 47/35(a) (2016). The author does not advocate for establishing a status of parentage before the child's birth. See, in this regard, *infra* notes 201-04 and accompanying text.

150. *See* Joslin, (*Not) Just Surrogacy*, *supra* note 37, at 441.

151. Purvis, *Intended Parents*, *supra* note 37, at 250.

152. *Id.*

153. Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1120-21 (2014).

154. Joslin, *(Not) Just Surrogacy*, *supra* note 37, at 459.

child's birth, such a concern, to some extent, is alleviated, because parentage has yet to be established.[155] The problem is not with the option for a pre-birth order per se, but with "what those orders say and do[.]"[156]

Pre-birth procedures, either pre-birth preparation or determination, while laudable, are still inadequate resolutions. From a procedural aspect, court adjudications can easily become an invasive and frustrating process involving multiple state actors such as welfare agencies, state attorneys, and judges.[157] These procedures may also be subject to delays both on behalf of the administrative agencies reviewing the application for the order and the courts authorized to issue the order.[158] In emergency scenarios, such as those occurring in the era of COVID-19, this concern becomes more tangible, as we may anticipate further delays—either on behalf of the parties who cannot attend hearings or on behalf of judges—impeding the issuance of the order.[159] From a substantive aspect, individuals who are unaware of the possibility of initiating the process before birth (or who do not have sufficient resources for attaining this knowledge) may not take advantage of this resolution.[160] Hence, judicial procedure as a condition for assigning parentage produces a gap between disadvantaged and wealthy individuals, impeding substantial equality between the formation of families on the grounds of socio-economic status. This gap should encourage us to consider more efficient and simpler methods for formalizing parentage status, which do not involve court adjudication. The ensuing part surveys such methods.

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155. *See id.* at 38.

156. *Id.* at 442.

157. *See* Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2063-64 (2014).

158. *See, e.g.*, Purvis, *Intended Parents*, *supra* note 37, at 244-45.

159. *See Court Operations During COVID-19: 50-State Resources*, JUSTIA, [https://perma.cc/VYM5-FQSV] (last visited Nov. 23, 2021).

160. This concern is pronounced in cases of females conceiving via sperm donation and less in surrogacy. In surrogacy, the anticipated parents are accompanied by an attorney. Snyder & Byrn, *supra* note 145, at 633-34.

2. Non-Judicial Involvement

One possibility for attributing parentage without judicial intervention is based on pre-birth agreement which is taken into effect at the child's birth.[161] In jurisdictions that have adopted this model, such as Illinois,[162] British Columbia,[163] and Ontario,[164] if the statutory requirements—such as conducting a written contract and using independent legal representation—are fulfilled, the anticipated parents are registered as parents with the relevant authorities immediately or soon after the birth.[165] Under such laws, judicial intervention is not required as a matter of course but may be invoked in the event of a later dispute.[166]

Another possibility is a presumption of joint parenthood based on couplehood. It has long been considered appropriate to infer paternity from a couple's relationship—as evidenced by laws incorporating a marital presumption—laws that have recently extended beyond the traditional heteronormative model of marriage.[167] Certain scholars, then, offer to move forward and include couplehood as a basis for the presumption of joint parenthood.[168] This model frees the law from heteronormative notions that are grounded exclusively in marriage,[169] and

161. This possibility has been advocated by various scholars. *See* Joslin, *Protecting Children(?*), *supra* note 124, at 1221; Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64 BUFF. L. REV. 465, 466-67 (2016). For further reading on the advantages of establishing parenthood based on pre-birth agreement, see Yehezkel Margalit, *Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents*, 12 WHITTIER J. CHILD & FAM. ADVOC. 39, 58-60 (2013).

162. 410 ILL. COMP. STAT. 535/12 (2017); *Surrogacy*, ILL. DEP'T OF PUB. HEALTH, [https://perma.cc/RK4E-USJH] (last visited Nov. 23, 2021).

163. Family Law Act, S.B.C. 2011, c. 25, § 29 (Can.).

164. All Families Are Equal Act, S.O. 2016, c. 23, § 10(3) (Can.).

165. *See* 410 ILL. COMP. STAT. 535/12; All Families Are Equal Act, S.O. 2016, c. 23, §§ 10–11 (Can.).

166. *See* 410 ILL. COMP. STAT. 535/12(7); Family Law Act, S.B.C. 2011, c. 25, § 31(1) (Can.); All Families Are Equal Act, S.O. 2016, c. 23, §§ 10(6), 11, 13 (Can.).

167. *See supra* notes 72-79 and accompanying text.

168. *See* Blecher-Prigat, *Conceiving Parents*, *supra* note 65, at 155. To date, this model has been implemented in three Canadian provinces. *See supra* note 78.

169. Blecher-Prigat, *Conceiving Parents*, *supra* note 65, at 121. That presumption, therefore, circumvents legal limitations related to law that might have unwanted side-effects on the parentage regime. Take, for example, a jurisdiction like Israel that is dominated by religious law, and that does not authorize same-sex marriage (but that registers such marriages conducted in other jurisdictions by virtue of private international law). Ayelet Blecher-Prigat & Noy Naaman, *The Abolition of Legal Marriage in Israel as a Potential*

promotes stability and predictability at a low cost, as it does not involve judicial discretion.[170]

While developing a particular implementation strategy is beyond the scope of this Article, I conclude this section by synthesizing three sets of questions that policymakers should consider in relation to the suggested presumption. The *first* relates to the meaning of the relationship on which the presumption is grounded: what factors will determine couplehood?[171] Must the couple be sharing a household?[172] If so, for how long?[173] Must the couple maintain a sexual commitment?[174] What moment in time will determine whether the parties are in a relationship: the moment of birth or of conception?[175] The *second* concerns the rights of third parties. How should the presumption be applied when there are multiple potential parents?[176] Who will receive priority among these potential parents in jurisdictions that do not recognize more than two parents?[177] The *third* concerns scenarios involving a lack of

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Queer-Religious Project, *in* QUEER AND RELIGIOUS ALLIANCES: FRIENDSHIP IN FAMILY LAW AND BEYOND (Nausica Palazzo & Jeff Redding eds., forthcoming 2022) (manuscript at 2-4).

170. *See* Aviel, *supra* note 157, at 2009 n.9.

171. *See, e.g.*, *infra* note 173.

172. *See, e.g.*, *infra* note 173.

173. In Ontario, e.g., the All Families Are Equal Act requires a conjugal relationship without specifying a minimum duration. *See* All Families Are Equal Act, S.O. 2016, c. 23, §§ 1, 8 (Can.) (defining spouse as "the person to whom a person is married or with whom the person is living in a conjugal relationship outside marriage"). In Saskatchewan, by contrast, the Children's Law Act requires a conjugal relationship of at least two years before the moment of conception. *See* Children's Law Act, S.S. 2020, c. 2, §§ 55, 60, (defining spouse as "legally married spouse of a person or a person with whom that person has cohabited as spouses continuously for a period of not less than 2 years").

174. One could assert that a commitment is not contingent on monogamy. *See* Edward Stein, *Adultery, Infidelity, and Consensual Non-Monogamy*, 55 WAKE FOREST L. REV. 147, 168-69 (2020). This seems to be highly relevant in cases of gay men undergoing surrogacy, as they disproportionately choose to maintain sexually non-exclusive relationships while still committed to one another. *See, e.g.*, Colleen H. Hoff & Sean C. Beougher, *Sexual Agreements Among Gay Male Couples*, 39 ARCHIVES OF SEXUAL BEHAV. 774, 774 (2010).

175. For example, in Ontario, British Columbia, and Saskatchewan, the focus of the presumption in cases of sperm donation is the moment of conception. *See* All Families Are Equal Act, S.O. 2016, c. 23, § 8(3) (Can.); Family Law Act, S.B.C. 2011, c. 25, § 27(3) (Can.); Children's Law Act, S.S. 2020, c. 2, § 60 (Can.).

176. *See* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U.L. REV. 227, 230-31 (2006).

177. In surrogacy, recognizing the parental status of the anticipated parents at birth requires either ignoring the parental status of the surrogate or recognizing more than two

consent to raise the child. Can the couple decide in advance that the presumption will not be applied?[178] Under what circumstances, if any, can one party change his mind?[179]

III. PRE-BIRTH TEMPORAL DISCREPANCY

The birth of a child legally signifies the birth of parenthood.[180] Self-identification as a parent, however, may develop much earlier, as an ongoing process, producing an indeterminate identity as a "parent-to-be" whose legal implications are unclear.[181] The tension between how an individual perceives the process of becoming a parent and grows into that identification, and how that process is viewed by the law, was classified as the second form of temporal discrepancy.[182] This part focuses on this doctrinal tension, examining *whether* and *how* the law could moderate its implications.

A. The Contours of Temporal Discrepancy

Can the law acknowledge the process of becoming a parent? I argue that it is eminently possible to recognize this fluid process and that of the numerous considerations that might explain its current failure to do so, several are misguided.

Legal scholars have long investigated how time systematically infuses the law.[183] Among them is Liaquat Ali Khan, who offers the distinction between two elements, "points in time" and "durations" of time.[184] Khan builds on these

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parents (assuming that the law grants parental status to women based on the act of giving birth). One way to approach this tension is to craft a rule requiring a post-birth waiting period before that presumption becomes effective. *Cf.* NeJaime, *Nature, supra* note 73, at 2340; Feinberg, *Restructuring Rebuttal*, *supra* note 139, at 244 n.8.

178. *See* All Families Are Equal Act, S.O. 2016, c. 23, § 8(3) (Can.); Family Law Act, S.B.C. 2011, c. 25, § 27(3) (Can.); Children's Law Act, S.S. 2020, c. 2, § 60(3) (Can.).

179. One can readily envision scenarios in which the presumption should not apply due to lack of mutual consent to raise the child together. *See* All Families Are Equal Act, S.O. 2016, c. 23, § 8(3) (Can.); Family Law Act, S.B.C. 2011, c. 25, § 27(3) (Can.); Children's Law Act, S.S. 2020, c. 2, § 60(3) (Can.).

180. Blecher-Prigat, *Conceiving Parents*, *supra* note 65, at 120.

181. *See id.* at 151; *see also* discussion *supra* Section II.B.1.

182. *See supra* notes 58-61 and accompanying text.

183. *See supra* notes 32-36 and accompanying text.

184. Khan, *supra* note 33, at 63.

elements to develop two other principles that are relevant to my analysis.[185] The first, "time trigger[,]" elaborates on the first element, a point in time, and refers to the moment that activates or ends rights and obligations.[186] The second principle features the second element, duration of time, and shows that this element can be either definite or indefinite.[187]

I argue that the distinction between these principles can explain the occurrence of temporal discrepancy. While the construction of the *legal identification* as a parent is captured by the principle of time-trigger, the construction of *self-identification* may occur over a duration of time. Specifically, the time-trigger of the *legal identification* is the moment a child is born, as that is the moment at which the legal responsibilities and entitlements inherent in the parental status initiate.[188] Self-identification, by contrast, like other human dynamics, is not always confined to a specific point in time but develops organically and gradually. The temporality of the human dynamic can be expressed as a duration of time that can be either definite or indefinite.[189] The *construction* of self-identification is definite when that process has a starting point and an ending point.[190] For example, it may begin at the moment of the decision to conceive and end at the moment of the birth.[191] Together, both points describe a definite timeframe. But the duration of the development of self-identification can also be indefinite; this is when self-identification commences somewhere after or prior to the moment of conception and emerges gradually, along a spectrum.[192] That

185. *Id.* at 58.

186. *Id.* at 87.

187. *Id.* at 65-68 (noting that a provision that ceases to exist at a specified date is an example of a legal principle characterized by a definite duration of time, and the concept of "reasonable time" is an example of a legal principle characterized by an indefinite duration of time).

188. *See* Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 421, 435-36, 463 (2013).

189. *See* Khan, *supra* note 33, at 65-69.

190. *See id.* at 65.

191. *See id.*

192. *See id.* at 67. Compare this with the critique of the requirement for pre-conception *intention* as a condition for parental determination. That intention, as Ayelet Blecher-Prigat highlights, "does not emerge as a momentary event, but rather is a process that evolves and develops over time." *See* Blecher-Prigat, *Conceiving Parents*, *supra* note 65, at 151; *see*

spectrum, however, remains ignored from a legal perspective.[193] The disparity between the development of the legal identification, on the one hand, and the construction of self-identification, on the other, constitutes the second form of temporal discrepancy.[194]

Indeed, the doctrinal analysis of temporality provides a plausible explanation for the occurrence of temporal discrepancy;[195] however, I believe that this explanation wrongly describes temporal discrepancy as an inevitable phenomenon. To better understand that temporal tension, I offer to shift the gaze toward the political considerations that shape its occurrence.

As a new infant depends on others for his survival, there is a clear public interest in assigning responsibility for the infant to an adult who can take care of his needs immediately upon his birth.[196] Would this interest not be better served if the anticipated parents were legally recognized as such *before* the birth? Why, then, do so many legal regimes use birth as the triggering event for creating the legal status of parenthood?[197] I outline two explanations below, each grounded in political-cultural considerations.

The first explanation reflects an interest in protecting the self-determination of the party who carries the fetus.[198] This consideration can be divided into two interrelated concerns. The first is that recognizing the legal status of the parent-to-be might equate prenatal life with actual life.[199] Once the law formalizes the legal status of the anticipated parent as such, the argument

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also Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL'Y & L. 623, 661 (2012) (stating that "[w]hether that intent existed, and whether it was demonstrated through particular understandings and conduct, would seem to be more important than its precise timing (i.e., whether it was manifested before or after conception)."). My analysis extends beyond that critique and encompasses other relational elements underlying the process of becoming a parent that slip under the radar of the law. See *infra* notes 220-24 and accompanying text.

193. *See supra* notes 58-61 and accompanying text.

194. *See supra* notes 58-61 and accompanying text.

195. *See supra* notes 188-94 and accompanying text.

196. Laufer-Ukeles & Blecher-Prigat, *supra* note 188, at 463-64.

197. *Id.* at 421, 435-36, 463.

198. Joslin, *(Not) Just Surrogacy*, *supra* note 37, at 457, 459; *see supra* notes 150-52 and accompanying text.

199. Joslin, *(Not) Just Surrogacy*, *supra* note 37, at 408.

goes, it equally accords legal status to the fetus as a child-to-be.[200] Granting legal existence to the fetus, however, plays into anti-abortion rhetoric at odds with women's right to self-determination.[201] For that reason, it comes as no surprise that pro-choice advocates focus on the moment of birth as the outset of a woman's relational status to the fetus.[202] The second concern involves the relationship between the gestational party and the anticipated parents, which becomes apparent in the context of surrogacy and pre-birth orders.[203] This line of concern focuses on the possibility that recognizing a legal status of "parent-to-be" might be construed as granting such parties abortion-related rights that would limit the self-determination of pregnant women.[204]

However, recognizing the period at which a parent is anticipating parenthood is not the same as recognizing parental status, nor does it endow this status with the same rights to which a parent is entitled.[205] As I will illustrate in the next section, the implications of becoming a parent are separate from questions regarding when a fetus is deemed to become a person and do not inherently grant legal rights to the fetus.[206] Understanding that the process of becoming a parent can be legally recognized without acknowledging the personhood of the fetus and without infringing on the gestational party's self-determination diminishes these concerns.[207]

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200. *Id.* at 408, 441-42.

201. This concern has been evident within the debate around the Missing Angel Act in the United States, which authorizes grieving parents to request from the state a birth certificate for a stillborn child. With this in mind, Carol Sanger posits that the stakes of recognizing that emotional suffering of the grieving parents, the (lost) to-be-parents, "may take on a life of its own" by granting benefits to the grieving parent in the year of the birth. Carol Sanger, *"The Birth of Death": Stillborn Birth Certificates and the Problem for Law*, 100 CAL. L. REV. 269, 306-08 (2012). Doing so, Sanger cautions, equates prenatal life with life of a born baby, playing into the trap of those who advocate for criminalizing abortions. *Id.* This concern has been raised in relation to pre-birth orders that establish the parental status of the intended parents in surrogacy prior to the birth. *See* Joslin, *(Not) Just Surrogacy*, *supra* note 37, at 441.

202. Pamela Laufer-Ukeles, *The Disembodied Womb: Pregnancy, Informed Consent, and Surrogate Motherhood*, 43 N.C. J. INT'L L. 96, 102 (2018).

203. Cory, *supra* note 148, at 144-45.

204. Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 522-24 (2017).

205. *See infra* Sections III.B.1, III.B.2.

206. *See infra* Section III.B.

207. Cory, *supra* note 148, at 144-45.

A second explanation for why the creation of the legal status of parenthood is tethered to the moment of the child's birth is grounded in cultural beliefs surrounding childbearing.[208] According to the Jewish tradition, for instance, taking certain actions before a birth, including having baby showers, revealing a baby's intended name, and buying clothes or preparing a room for the baby, should be postponed until the birth to avoid "bad luck."[209] This belief reflects the broader idea rooted in the Jewish tradition that celebrating something we anticipate before it happens might cause the "evil eye" (*ayin hara)*.[210] This line of thought runs through the regulation of parental orders in Israel, specifically in the Attorney General's approach when opposing petitions to provide pre-birth orders,[211] and in a recent report issued by a government-appointed task force that assesses the circumstances under which a parental order can be issued.[212]

However, ignoring the process of becoming a parent in the name of such cultural beliefs is problematic in the context of today's technologically sophisticated environment.[213] As I explain below, the law can recognize that an individual is anticipating parenthood without taking any direct action concerning the eventual child or granting legal rights to the fetus as a separate entity.

B. Bridging the Gap

How, and for what purpose, can the law recognize the process of becoming a parent? To pursue this inquiry, I focus on

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208. *See, e.g.*, Yael Hashiloni-Dolev, *The Effect of Jewish-Israeli Family Ideology on Policy Regarding Reproductive Technologies*, *in* BIOETHICS AND BIOPOLITICS IN ISRAEL: SOCIO-LEGAL, POLITICAL, AND EMPIRICAL ANALYSIS (Hagai Boas, et., eds., 2018).

209. *See* Jennifer Saranow Schultz, *Miscarriage, Superstition and the Jewish Baby Shower*, N.Y. TIMES (Feb. 21, 2014, 11:01 AM), [https://perma.cc/W545-2QBY] (last visited Nov. 24, 2021). The Jewish belief is in contrast with the Christian notion of conferring early status as a person. Hashiloni-Dolev, *supra* note 208, at 124-25.

210. Rabbi Philip Sherman, *Why Don't Many Jewish Couples Have Baby Showers or Buy Things for Their Baby Ahead of Time?* JEWISHBOSTON (Aug. 20, 2013), [https://perma.cc/H3KN-LJY3] (last visited Nov. 24, 2021).

211. That opposition was represented in their response to the appeal submitted to the Supreme Court in FamA 9182/18 John Does v. The General Attorney (June 6, 2020), Nevo Legal Database (Isr.).

212. INTER-MINISTERIAL COMMITTEE GUIDELINES, *supra* note 80, at 30-31.

213. Sherman, *supra* note 210.

two terrains in which temporal discrepancy occurring before birth emerges; in each, I identify various ways in which questions of parentage arise *prior* to the moment of the birth, assess how the failure to recognize the process of becoming a parent inflicts harm on that person, and consider how an inclusive vision of becoming a parent might look. Far from offering a full prescription, I hope that my analysis can be used as a stepping stone for thinking more seriously about the law in a way that promotes accountability for such harms.

Let's begin with the two elements of the suggested vision. The first concerns the *timeframe* of becoming a parent. The process of becoming a parent is oriented by several events transpiring during the process of conceiving and carrying a child to term; the birth is only one constitutive, though crucial, event in that process.[214] Such understanding may become more apparent in cases of ART, where the trajectory to parenthood could take years, especially if that process involves experience of conception-related difficulties and can be challenging and time-consuming.[215] The way individuals perceive themselves as becoming parents, therefore, may not be forged abruptly at their child's birth, but may instead develop gradually and become complete at the birth.[216] That is, the birth completes, rather than establishes, this process.[217] Accordingly, I propose that this period of time should be considered in disputes relating to parenthood.[218]

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214. *See supra* Section III.A.

215. Gash & Raiskin, *supra* note 102, at 97, 99.

216. *See* Blecher-Prigat, *Conceiving Parents*, *supra* note 65, at 151; *see also supra* Section III.A.

217. *See supra* Section III.A.

218. One question, which will accompany us throughout the ensued discussion and should be considered further, is *when* exactly this process initiates. There are several possibilities—the moment of a mutual consent to conceive, the moment of initial conception (sperm meets egg), the moment of fertilization (an embryo forms), the moment of implantation (the embryo successfully implants in the wall of the uterus), or somewhere after that point during pregnancy. It seems that the significance of determining the moment at which this process initiates varies in accordance with specific legal aspects. For assisted reproduction purposes, questions such as the following arise: if one consented to the assisted reproduction after the pregnancy occurred, might one be able to change one's mind? And, if this happens, does the withdrawal depend on the approval of the other party? Also, what if one consents, but then later seeks to withdraw consent and does so *prior* to transfer and conception? Is it then possible that one might still be held to be a parent of the resulting

The second element concerns the *content* of that timeframe. The process of becoming a parent is not confined to events with biological elements, such as sexual intercourse, conception, or the delivery of the child.[219] The process also encompasses relational elements, such as the mutual decision to conceive and raise a child, multiple forms of work associated with the process of becoming a parent—like adopting behavioral patterns needed to prepare for the parental role and developing a social network to facilitate the adjustment to the new role of a parent[220]—and special arrangements involved in ART procedure,[221] such as aspects of the decision-making processes, e.g., whom of the two women would carry and bear the child,[222] or whom of the two men would supply the sperm to impregnate the egg donor,[223] researching medical options and legal constraints, finding a clinic for the reproductive procedure, meeting an egg or sperm donor, meeting physicians or surrogacy agency staff for in-vitro fertilization, selecting a surrogacy agency, choosing a prospective surrogate and establishing meaningful relationship with her,[224] and undertaking legal actions involved in that process, such as negotiating the agreements involved.[225] All such elements, in the eyes of the anticipated parent, contribute to the child's birth and shape his selfhood as a parent, which he experiences as an ongoing process rather than as something fixed or static.[226]

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child? In the United States, for example, the 2017 UPA allows the intended party in surrogacy to change its mind before an embryo transfer. UNIF. PARENTAGE ACT § 808(a) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017); *see also* Dara E. Purvis, *Expectant Fathers, Abortion, and Embryos*, 43 J.L. MED. & ETHICS 330, 330, 335 (2015).

219. David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309, 325-30 (2019).

220. *Id.* at 327-30.

221. Gash & Raiskin, *supra* note 102, at 104; Darren Rosenblum et al., *Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 207, 208-17 (2010).

222. For the complexity of this aspect, see Abbie E. Goldberg, *The Transition to Parenthood for Lesbian Couples*, 2 J. GLBT FAM. STUD. 13, 24-25 (2006).

223. Dana Berkowitz, *Gay Men and Surrogacy*, *in* LGBT-PARENT FAMILIES: INNOVATIONS IN RESEARCH & IMPLICATIONS FOR PRACTICE 76 (Abbie E. Goldberg & Katherine R. Allen eds., 2013).

224. Elly Teman & Zsuzsa Berend, *Surrogate Non-Motherhood: Israeli and US Surrogates Speak about Kinship and Parenthood*, 25 ANTHROPOLOGY & MED. 296, 300, 308 (2018).

225. *Id.* at 299.

226. Compare with the literature of legal embodiment. *See, e.g.*, Ruth Fletcher et al., *Legal Embodiment: Analysing the Body of Healthcare Law* 16 MED. L. REV. 321, 335-44

Accordingly, one may view both the biological and relational elements as constituting the parental status.[227] That understanding, in turn, produces a need to consider how the law could be more responsive to the experience of becoming a parent.

I should clarify that I do not suggest that the anticipated parent should be legally recognized as a parent before the child's birth or that anticipated parents should have parental rights before the birth. Instead, I propose that the law should acknowledge the process of *becoming* both through the body and the self and should reflect both the physical implications of that process and its relational elements, though without neglecting the gestational-related concerns discussed above. In the following sections, I examine two terrains that exemplify pre-birth temporal discrepancy and consider how the implementation of my vision might look.

1. Work-Family Conflicts

In various jurisdictions, the law provides employment entitlements based on parental status, such as paternity leave and protections against discrimination based on parental status, regardless of who carried the fetus or has a genetic relationship to the child.[228] When it comes to the period of pregnancy, however, the law generally provides special rights only to the pregnant woman.[229] This is out of the recognition that pregnancy, a condition unique to women, entails peculiar physical and social implications.[230] Pregnant women, for example, are more likely to face employment discrimination based on the assumption that

(2008) (stressing the subjective, intersubjective, material, and symbolic dimensions of embodiment, and how these dimensions do, and should, inform the law).

227. Some scholars argue that the embodiments of becoming a parent extend beyond identity-constituting and involve also relationship-constituting. Alison Reiheld, *"The Event That Was Nothing": Miscarriage as a Liminal Event*, 46 J. SOC. PHIL. 9, 11 (2015).

228. *See* 29 C.F.R. § 825.120 (2018).

229. When the law does provide the anticipated father with benefits relating to pregnancy, though, it is mostly when it is necessary for him to care for his pregnant partner. See, e.g., the Family and Medical Leave Act in the United States which provides benefits relating to pregnancy to an anticipated father only when necessary "to care for a pregnant spouse . . . ." *See* 29 C.F.R. § 825.120(a)(5) (2018).

230. Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as It Approaches Full Term*, 52 IDAHO L. REV. 825, 848-49 (2016).

they will soon be missing work due to their caregiving responsibilities.[231]

The process of becoming a parent, nonetheless, involves human investments that do not flow directly from its gestational elements, such as attending prenatal appointments and learning how to care for an infant.[232] Additionally, the process may provoke physiological or psychological effects unrelated to carrying the fetus, such as antenatal depression among anticipated fathers due to worries about being a parent.[233] These investments and implications are overlooked by the law, however, exemplifying what I theorize as one type of temporal discrepancy.[234]

The implications of this oversight are palpable in two categories of employment conflicts, both of which are peculiar to couples in which neither party is pregnant, e.g., couples (same- or different-sex), or single individuals who have children through surrogacy. The *first category* involves adverse employment actions based on the parent-to-be *status*.[235] In a scenario in which an employer's decision not to hire a (non-pregnant) prospective employee or not to promote a current (non-pregnant) employee based on that employee's status as an anticipated parent, the employee may find himself without a cause of action under anti-discrimination laws.[236] For example, when a single man is anticipating becoming a parent by surrogacy, the employer might assume that he is not a dependable employee because of potential future obligations reducing his investment in work, especially after the birth.[237] Because, in the classic scenario, this assumption

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231. Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty*, 112 AM. J. SOCIO. 1297, 1297 (2007); Caroline Gatrell, *Managing the Maternal Body: A Comprehensive Review and Transdisciplinary Analysis*, 13 INT'L J. MGMT. REVS. 97, 98-100 (2011).

232. Fontana & Schoenbaum, *supra* note 219, at 327-30.

233. *Id.* at 337.

234. *See supra* Section III.A.

235. *See infra* text accompanying notes 253-54.

236. *See infra* text accompanying notes 253-54.

237. There is a presumption that employers prefer anticipated fathers as compared to men who do not expect children out of the assumption that anticipated fathers increase their breadwinning efforts. *See* Fontana & Shoenbaum, *supra* note 219, at 348 & n.241 (citing Shelly Lundberg & Elaina Rose, *Parenthood and the Earnings of Married Men and Women*, 7 LAB. ECON. 689, 705-06 (2000)). However, that may not be true in cases of a gay couple

typically disadvantages pregnant women, anti-discrimination statutes contemplate recourse for adverse actions taken against pregnant employees.[238] Single men, gay couples, and other non-gestational parents, however, may be considered outside the scope of such statutes' protections.[239]

The *second* category involves adverse employment actions based on the *conduct* of the anticipated parent, such as disciplining an employee for being absent from work to attend a prenatal appointment or ultrasound test of the surrogate or any other pre-birth caregiving responsibilities.[240] Such actions may not give rise to an actionable claim of discrimination, since the law generally does not consider non-gestational anticipated parents to be within the scope of individuals entitled to invoke statutory protections.[241] By contrast, an anticipated gestational mother may have a cause of action in the same scenario.[242] Giving legal rights only to the prebirth care-work of a pregnant person is normatively problematic, especially once we realize that people undergoing ART have particular prebirth arrangements that may require their absence from work.[243]

These two categories of conflicts illustrate that during the period of pregnancy—or even earlier, while conducting fertility treatments—certain employees may be subject to adverse employment actions based on their status or efforts as parents-to-be, but lack legal remedies to redress them.[244] Scholars argue that

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conceiving through surrogacy given the assumption that the employee will be more likely to be absent to fulfill his parental responsibilities.

238. Courts in the United States have held that Title VII and the Pregnancy Discrimination Act ("PDA") "prohibit[] an employer from discriminating against a woman 'because of her capacity to become pregnant.'" *See, e.g.*, Kocak v. Cmty. Health Partners, 400 F.3d 466, 469 (6th Cir. 2005) (quoting Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, Inc., 499 U.S. 187, 206 (1991)).

239. *See* Fontana & Shoenbaum, *supra* note 219, at 338.

240. For a discussion of the antagonism directed toward male caregiving embedded in the workplace, see Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 257, 265-69 (2013).

241. *See, e.g.*, 42 U.S.C. § 2000e(k).

242. For example, the United States PDA, which amended Title VII to protect against pregnancy discrimination, covers only women. *See* 42 U.S.C. § 2000e(k).

243. *See In Vitro Fertilization (IVF)*, MAYO CLINIC (Sept. 10, 2021), [https://perma.cc/8934-X52G] (last visited Nov. 24, 2021).

244. *See, e.g.*, 42 U.S.C. § 2000e(k).

this vulnerability lies in the fact that pregnancy is sexualized—i.e., that issues arising during pregnancy are framed as issues pertaining exclusively to women—and, therefore, the implications of pregnancy that are independent of the pregnant body are invisible to the law.[245] Following this line of thought, I suggest thinking about these conflicts through the lens of *becoming* a parent. That is, rather than focusing on pregnancy per se, we should consider how the period of gestation incorporates both biological and relational elements.[246] By disentangling the implications of becoming a parent from those that relate to the physician condition of pregnancy, I do not aim to trivialize the risks of pregnancy for the gestational party, nor to obscure how pregnancy has been used to justify the oppression of women. Rather to clear space for thinking how the law could be responsive to the nuanced needs of all anticipated parents, including those of the non-gestational anticipated parents.

Two ways emerge for implementing such a vision in practice. The first, as David Fontana and Naomi Schoenbaum offer, is to provide to non-gestational anticipated parents the same entitlements that pregnant women receive when the entitlements are designed to address non-biological prebirth care and commitments.[247] These may include, for example, the right to be absent from work to attend prenatal obstetrician appointments.[248] While employers cannot ask for evidence of the appointment, employers may ask for a declaration of the time and date of the appointment and of the employee's relationship with the person undergoing treatment.[249] This avenue would ensure that the non-gestational parents could engage in pre-birth work without the risk of adverse employment consequences.[250] It would also

245. Fontana & Schoenbaum, *supra* note 219, 311-13.

246. *See supra* text accompanying notes 217-27.

247. *See supra* text accompanying notes 217-27; Fontana & Schoenbaum, *supra* note 219, at 324, 336, 338, 354.

248. For example, the UK created a sex-neutral paid prenatal leave program allowing the non-gestational party to be absent from work to attend a number of prenatal appointments. *See* Department for Business, Innovation & Skills & Jo Swinson, *Press Release: New Right for Fathers and Partners to Attend Antenatal Appointments*, GOV.UK (Oct. 2, 2014), [https://perma.cc/8ZCP-DKVQ] (last visited Nov. 24, 2021).

249. *Id.*

250. *See* Fontana & Schoenbaum, *supra* note 219, at 339-40, 366.

encourage early development of the emotional bond between parent and child, which may be weaker when the anticipated parent does not carry the fetus, by facilitating the involvement of the anticipated parents in the process of becoming a parent.[251] Finally, fostering the non-gestational party's involvement can strengthen the relationship between parents so that they can effectively co-parent the child.[252]

Another avenue to further consider is providing protection against employment discrimination based on the employee's status of parent-to-be. Just as employment laws prohibit *discrimination* against an employee based on parental status after the child's birth (regardless of the employee's gestational or genetic tie to the child), the law could extend those protections to the pre-birth period.[253] Specifically, the law could recognize "anticipated parents" as a protected class under current regimes or enact separate restrictions to prevent employers from terminating employees based on their status of becoming parents. These protections could be triggered, for example, by the employee's initiation of fertility treatments, at the moment the employee shares his intention to do so with the employer, or when the employee informs the employer about the pregnancy of their future child—namely, when the employee becomes vulnerable to biases concerning his future commitment to the workplace. This avenue, however, requires careful consideration of who falls within the class of anticipated parents,[254] and necessitates a determination of how it could operate in such a manner which does not unduly burden employers.

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251. *Id.* at 345.

252. This outcome is vital for marriage-like relationships that lack the institutional support for the commitment that marriage enjoys. *See* Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 562-64 (2007).

253. The Human Rights Code, RSO 1990, c H-19, s 5 (provincial statute prohibiting employment discrimination in Ontario) is an illustrative scheme that could implement these avenue. This statute provides protections against discrimination on the ground of family status. It might be worth observing that nothing necessarily prevents a tribunal from interpreting this protected ground under the Ontario Human Rights Code in a way that extends protection back in time to cover the context of pregnancy. I am indebted to Kerry Rittich for this observation.

254. One way could be those who are or who might be determined to be parents at the moment of the child's birth.

2. Reproductive Malpractice

Reproductive malpractice resulting in pregnancy loss provides another manifestation of temporal discrepancy. As these disputes arise at the moment tortious conduct suddenly disrupts the process of becoming a parent, they exemplify the relationship between the "to-be" self—specifically its liminal character[255]—and the law's (ex-post) acknowledgment of that status or liminal event.[256] This section examines how a broader vision of becoming a parent can be implemented to address such disputes. To pursue my inquiry, I consider compensation-based schemes for intangible harms, under the laws of the United States and Israel, though my analysis could be applicable to other jurisdictions as well, given that the inquiry under consideration transcends jurisdictional boundaries.[257]

Jurisdictions in the United States vary in terms of the scope of the right to recovery they recognize for intangible harms arising out of tortious pregnancy loss.[258] Most jurisdictions provide legal recourse for such harms only if the plaintiff suffers a physical injury.[259] Accordingly, non-gestational parties typically have no legal claim for malpractice resulting in a miscarriage or stillbirth.[260] Courts in the United States that have permitted legal recovery for a non-gestational parent have limited

255. Reiheld, *supra* note 227, at 9-12.

256. *Id.* at 17.

257. I do not purport to offer a doctrinal analysis. For a comprehensive overview of the statutes and judicial cases in the United States, see, e.g., Jill Wieber Lens, *Tort Law's Devaluation of Stillbirth*, 19 NEV. L.J. 955, 987-92 (2019).

258. It was only in 2004, for example, in the case of *Broadnax v. Gonzalez*, that the New York Court of Appeals permitted the gestational plaintiff, the grieving anticipated mother, to recover for emotional anguish resulting from miscarriage (or stillbirth) caused by medical malpractice even though she did not suffer any physical injuries. See, 809 N.E.2d 645, 648-49 (N.Y. 2004). The court clarified that this recourse is not applicable to the father, and commentators have argued that this view is grounded "on the inseparable and completely intertwined relationship between the mother and the fetus." Alicia A. Ellis, Note, *Better Late Than Never: New York Finally Closes the "Gap" in Recovery Permitted for Negligent Infliction of Emotional Distress in Prenatal Medical Malpractice Cases*, 80 ST. JOHN'S L. REV. 725, 750 (2006).

259. For a critique of this legal principle, see generally DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW (2019).

260. Jill Lens shows that only a few courts have recognized a claim by the father. *See* Lens, *supra* note 257, at 987.

liability to circumstances in which that parent witnessed the conduct causing the physical injury or the plaintiff's own physical safety was at risk.[261] The reluctance to compensate a non-gestational party for other intangible harms incident to pregnancy loss reinforces the notion that becoming a parent is essentially a gestational process.

This reductionist understanding of parenthood-to-be is normatively problematic. Research has shown that both gestational and non-gestational parents experience emotional suffering in the event of pregnancy loss due to psychological factors involved in pregnancy.[262] The psychologist Anna Brandon, for example, demonstrated that developing a prenatal attachment during pregnancy can transpire *regardless* of the anticipated parent's sex.[263] The research of Nathaniel Wagner on anticipated parents who lost their fetus showed that "men suffer loss in much the same way as women and that culture is the primary factor leading to the demonstrated difference in response . . . ."[264] Likewise, an Irish study that examined the emotional impact of miscarriage on men found that men are inclined to hide their emotions so that they would be perceived as strong for their partners.[265] Overall, this research demonstrates that there is a need to approach this experience from a perspective that denaturalizes the link between the psychological and gestational experiences of becoming a parent.

One could envision intangible injuries in this context as those involving the disruption of the self-authorship,[266] the loss of

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261. *Id.* at 988.

262. *See, e.g.*, Nathaniel J. Wagner et al., *Fathers' Lived Experiences of Miscarriage*, 26 FAM. J.: COUNSELING & THERAPY FOR COUPLES & FAMS. 193, 193, 195-96, 198 (2018); Anna R. Brandon et al., *A History of the Theory of Prenatal Attachment*, J. PRENATAL & PERINATAL PSYCH. & HEALTH 201, 213 (2009).

263. Brandon et al., *supra* note 262, at 210-11.

264. Nathaniel J. Wagner et al., *supra* note 262, at 193.

265. McDonald, *Men's Feelings Ignored Over Miscarriages*, SUNDAY TIMES (Aug. 15, 2004, 1:00 AM), [https://perma.cc/5RQX-V9K5] (last visited Nov. 25, 2021).

266. Such an argument can be supported by studies highlighting how the prenatal period becomes a driving force that leads to the development of the paternal identity. *See* Catarina Silva et al., *Transition to Fatherhood in the Prenatal Period: A Qualitative Study*, 26 CIÊNCIA & SAÚDE COLETIVA 465, 466-70 (2021); Hongjian Cao et al., *Identity Transformation During the Transition to Parenthood Among Same-Sex Couples: An Ecological, Stress-Strategy-Adaptation Perspective*, 8 J. FAM. THEORY & REV. 30, 30 (2016). In this regard, Dov Fox offers to think about the intangible harm caused to the

possibility,[267] the expectations for becoming a parent,[268] or the linear process of "relationship-constituting[,]"[269] all of which resonate with the notion of being invested in "physical . . . human . . . and social capital . . . ."[270] This investment includes various elements, such as accumulating goods needed to care for the eventual child, forming social networks necessary for the pregnancy or the eventual child, or other activities involved in developing the identity of a future parent.[271] Focusing on these elements—all of which are shared by the gestational *and* the non-gestational anticipated parents—highlights the shortcomings of regimes that limit the scope of non-gestational parties' recourse for intangible losses.[272]

That limitation, furthermore, raises a paradox in surrogacy. Though the surrogate is likely to be compensated for her emotional distress, the *actual* anticipated parents' distress over the loss of the eventual child may remain uncompensated.[273] Certainly, pregnancy loss entails a penetrating emotional loss.[274] This has been shown to be true even for surrogates who disclaim any attachment to the fetus, and regardless of the level of fetal development or whether the surrogate suffers a physical injury.[275] Yet the anticipated parents are at least as susceptible as the

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anticipated parent in similar events of reproductive malpractice, e.g., the loss of frozen embryos caused by the fertility clinic, as "[t]he disruption of family planning" because the tortfeasor's actions invade "the control individuals have over their reproductive lives[,]" and cause the loss of "people's legitimate expectations to exercise a reasonable measure of control over decisions about having children." *See* Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 159, 172, 210-11 (2017).

267. Julia Frost et al., *The Loss of Possibility: Scientisation of Death and the Special Case of Early Miscarriage*, 29 SOCIO. HEALTH & ILLNESS 1003, 1013 (2007).

268. *See* Erica Richards, Note, *Loss of Potential Parenthood as a Statutory Solution to the Conflict Between Wrongful Death Remedies and* Roe v. Wade, 63 WASH. & LEE L. REV. 809, 812-13 (2006).

269. *See* Reiheld, *supra* note 227,at 11.

270. Fontana & Schoenbaum, *supra* note 219, at 327.

271. *Id.* at 327-30.

272. *See id.* at 327-28, 330.

273. Lens, *supra* note 257, at 976 n.154.

274. Zsuzsa Berend, *Surrogate Losses: Understandings of Pregnancy Loss and Assisted Reproduction Among Surrogate Mothers*, 24 MED. ANTHROPOLOGY Q. 240, 242 (2010).

275. *See id.* at 242-44, 253 (framing the surrogate's harm as a failure to deliver the promised "gift of life" and a loss of both "the . . . 'journey' and the dream of fully belonging to the surrogate community" and "the [anticipated parents'] trust and appreciation").

surrogate to mental anguish in the event of pregnancy loss, though they may experience their grief differently.[276]

Tort law is one means by which private parties pursue reparation for their injuries.[277] Grounding legal recovery for intangible harms associated with tortious pregnancy loss exclusively on the gestational bond is at odds with modern family structures and technological innovations that disentangle biology from the responsibility of raising a child.[278] Moreover, its gestational focus produces a systematic distinction between couples who conceive with the assistance of a surrogate and other couples.[279] These observations underscore the need for tort law to evolve to reflect modern realities, compensate all anticipated parents who suffer emotional injuries as a result of tortious conduct, and redress systematic inequalities.

Critics of this view will undoubtedly argue that once we begin to consider according non-gestational parties legal rights and remedies in relation to pregnancy loss, we open the door to claims by such parties that would restrict women's reproductive right to abortion.[280] Certainly, that is a tangible concern. Nevertheless, there are at least two reasons to believe that abortion rights and my vision could coexist.[281] First, while my suggested view contemplates compensation for *tortious* conduct resulting in the loss of pregnancy, "[a]bortion is a voluntary termination of pregnancy."[282] Second, my suggested view does not create any rights for the unborn child, but instead, it aims to provide recovery to the grieving individuals for their emotional pain stemming from the loss of pregnancy and of the relationship with their desired (unborn) child.

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276. *See generally* Christa Craven and Elizabeth Peel, *Stories of Grief and Hope: Queer Experiences of Reproductive Loss*, *in* QUEERING MOTHERHOOD: NARRATIVE AND THEORETICAL PERSPECTIVES (Margaret F. Gibson, ed., 2014).

277. RESTATEMENT (SECOND) OF TORTS § 901 (AM. L. INST. 1979).

278. *See* Lens, *supra* note 257, at 987.

279. *See id.* at 976 n.154.

280. *See* Sanger, *supra* note 201, at 305; Rita M. Dunaway, *The Personhood Strategy: A State's Prerogative to Take Back Abortion Law*, 47 WILLAMETTE L. REV. 327, 327 (2011).

281. *Cf.* Lens, *supra* note 257, at 1009-12 (positing that a tort recognition of stillbirth is consistent with abortion rights).

282. *Id.* at 1006.

The Israeli regulatory regime illustrates how challenges to gestation-based distinctions can channel a more inclusive vision of becoming a parent. The Israeli Supreme Court in *Levy v. Shaare Zedek Medical Center* ("*Levi*") paved the way for a regulatory scheme that allows anticipated non-gestational parents to recover for intangible harms associated with tortious pregnancy-related injuries.[283] *Levi* involved a prenatal injury when a fetus "died" in utero as a result of the hospital's negligence.[284] The court ruled that both the anticipated mother and the anticipated father could be compensated for their emotional harm.[285] All three judges held that the anticipated mother was a *direct* victim due to her role in the act of giving birth, during which the damage was caused.[286] But the judges were split as to whether the anticipated father, who was exposed to the anticipated mother's injury, should be classified as a *direct* victim or a *secondary* victim.[287]

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283. *See* CivA 754/05 Levy v. Shaare Zedek Med. Ctr., 218(2) PD 218, 255 (2007) (Isr.).

284. *Id.* at 218, 234, 249.

285. *Id.* at 251, 258. It should be emphasized that this recovery is separate from the legal recourse available to the gestational parent in relation to the physical experience of her pregnancy loss. *See id.* at 246-49 (noting that direct victims who suffer *tangible* injuries may recover damages notwithstanding the restrictions Israeli courts apply to indirect victims seeking reparations for *intangible* injuries). Under earlier Israeli Supreme Court precedent, a person who suffers emotional harm as a consequence of severe bodily injury negligently caused to a close relative can recover only if the emotional harm is severe and provokes substantial mental consequences. *See* LCivA 444/87 Alsoucha v. Estate of Dehan, 44(3) PD 397, 433-36 (1990) (Isr.). Specifically, that emotional harm must amount "to a mental disease (psychosis) or a mental disturbance (neurosis) involving a considerable amount of disability . . . ." *Levi*, 218(2) PD at 244. However, that decision left room for flexibility in applying the criteria. *Alsoucha*, 44(3) PD at 432. The Court in *Levi* decided that the circumstances under consideration justified flexibility and thus ruled that the anticipated father was entitled to compensation for his emotional harm, notwithstanding the absence of a serious emotional disability. *Levi*, 218(2) PD at 252-53, 255.

286. *Levi*, 218(2) PD at 246, 249, 262, 265. It is worth noting that while the majority agreed with the trial court's classification of the anticipated mother as a direct victim, it remarked that the anticipated mother was not harmed "in the usual sense[,]" as the emotional distress she suffered resulted from "the death of another—the [fetus] that was in her womb." *Id.* at 246, 249. Indeed, the court opined that the obvious connection between the anticipated mother and the fetus created a layer of complexity that placed her "on both sides of the dividing line between a secondary victim and a [direct] victim, with one foot on each side." *Id.* at 249. The court ultimately determined that the anticipated mother could recover damages regardless of her classification. *Id.* at 270 (Joubran J., concurring).

287. *Id.* at 250, 262 (Hayut, J., concurring in part and dissenting in part), 266 (Joubran, J., concurring).

The majority opinion held that the anticipated father was a *secondary* victim, reasoning that the injury he suffered derived solely from his exposure to the tortious conduct that directly injured the anticipated mother.[288] The majority acknowledged the emotional involvement of the father in the process of conceiving the fetus, emphasizing, for example, his "torment involved in the lengthy and exhausting fertility treatments, the keen anticipation of the child that was about to be born[,] and the bitter pain . . . ."[289] In the majority's view, however, that involvement did not make the anticipated father a direct victim, but it nevertheless justified compensating him for his emotional harm, although he did not suffer the severe mental consequences required by previous legal precedents.[290]

By contrast, the minority opinion of Justice Hayut concluded that the anticipated father should be regarded as a *direct* victim, reasoning that he experienced a direct loss as the anticipated parent of the eventual child.[291] Hayut stressed that the process of conceiving a child is "the result of a partnership and a joint physical and emotional effort of the spouses as parents . . . ."[292] That substantive involvement, in Hayut's view, justifies treating an anticipated father as a primary victim.[293] That approach embraces a both/and view of parenthood, which incorporates *both* biological *and* relational elements, while acknowledging the central and crucial role of the pregnancy experienced by women

288. *Levi*, 218(2) PD at 250 (majority opinion), 267 (Joubran J., concurring) ("[T]he emotional damage that he suffered derived from his identification with the suffering that the mother experienced and from his being a full partner on an emotional level in the birth process.").

289. *Id.* at 266-67 (Joubran, J., concurring).

290. *Id.* at 255 (majority opinion), 267 (Joubran J., concurring).

291. *Id.* at 263 (Hayut, J., concurring in part and dissenting in part) ("Admittedly, from a purely physical viewpoint, the mother naturally has a major role in the process as the person carrying the [fetus] in her womb and as the person from whose womb the [fetus] emerges into the world. But this does not, in my opinion, detract from the extent of the father's emotional and psychological involvement in the process (except in cases where such involvement does not exist for one reason or another).").

292. *Id.*

293. *Levi*, 218(2) PD at 263 (Hayut J., concurring in part and dissenting in part).

in procreation.[294] That understanding is reflected in the outcome, which awarded higher compensation to the anticipated mother.[295]

By shifting the gaze from the gestational elements of becoming a parent toward its relational elements, Hayut's rhetoric embraces an inclusive vision of becoming a parent of the kind I encourage throughout this Article.[296] It conveys a clear message that pregnancy is a joint experience that involves the mutual responsibility of both (or sometimes multiple) anticipated parents and values emotional investment by both men and women in becoming parents.[297] Scholars have long discussed how the legal discourse of parenthood is constructed by such a narrow definition of masculinity.[298] Recently, more feminist scholarship has emerged that considers how the post-birth, traditional gender division of labor is shaped by the period before the birth,[299] illustrating the potential of valuing the emotional involvement of both parents already before birth, as represented by Justice Hayut's opinion in the *Levi* decision.[300] This is not to say that judicial rhetoric alone can undo traditional norms or reshape family arrangements.[301] Nevertheless, incremental changes consistent with that rhetoric would be important steps toward a legal framework that acknowledges and supports the full range of experiences involved in the journey toward parenthood.

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294. *Id.*

295. Justice Hayut awarded NIS 500,000 to the anticipated mother and NIS 350,000 to the anticipated father. That difference is grounded on the presumption that the emotional harm of the anticipated mother is shaped *also* by the physical elements of carrying the fetus. *Id.* at 264.

296. *See supra* Section III.B.

297. *See Levi*, 218(2) PD at 262-63 (Hayut J., concurring in part and dissenting in part).

298. *See, e.g.*, Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047, 1048-50 (2012); Dara E. Purvis, *The Sexual Orientation of Fatherhood*, 2013 MICH. ST. L. REV. 983, 984-85 (2013). Karin Carmit Yefet, *Feminism and Hyper-Masculinity in Israel: A Case Study in Deconstructing Legal Fatherhood*, 27 YALE J.L. & FEMINISM 47, 49-50 (2015).

299. *See, e.g.*, Fontana & Schoenbaum, *supra* note 219, at 311-13, 315.

300. *Levi*, 218(2) PD at 263 (Hayut J., concurring in part and dissenting in part).

301. *See also* Daphna Hacker, *Single and Married Women in the Law of Israel—A Feminist Perspective*, 9 FEMINIST LEGAL STUDS. 29, 52 (2001).

CONCLUSION

The time has come to think more seriously about the *becoming* of legal parental status. The concept of temporal discrepancy reveals how traditional understandings of becoming a parent, embedded in different bodies of the law, marginalizes certain modalities of life and renders them vulnerable.[302] This concept clears space for considering an alternative framework for breaking with this understanding and mitigating its crippling outcomes.

I offer to implement this framework both at the time of the child's birth by conferring the parental status as close as possible to the birth,[303] and in the period preceding the child's birth by proposing a legal understanding that syncs with the experience of becoming a parent.[304] This understanding acknowledges the relational elements of becoming a parent, such as the social burdens involved in the process, emotional involvement, and other precious human investments that often remain invisible.[305] This understanding could be implemented by providing legal protections to the anticipated parents *ex-ante*, when they are *anticipating* parenthood—as exemplified in the discussion of work-family conflicts[306] —and/or *ex-post*, when the process of becoming parents is disrupted by a tortious act—as in conflicts arising from instances of reproductive malpractice.[307]

My hope is that this analysis can be used as a starting point for further scholarly and legislative conversations about how the law could embrace the process of becoming a parent. Instead of asking only *when* does a parent become a parent, we should also ask: *how* does a parent become a parent? Framing the question broadly to incorporate the process illuminates the need to consider its richness and to examine more seriously its implications.

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302. *See supra* Section II.B.
303. *See supra* Part II.
304. *See supra* Part III.
305. *See supra* Section III.B.
306. *See supra* Section III.B.1
307. *See supra* Section III.B.2

While articulating a detailed blueprint for this understanding as it applies in various legal contexts is beyond the scope of this Article, my analysis offers several considerations for future conversations. These include: who falls within the class of anticipated parents? What timeframe applies to the process of becoming? Which moments in time are most relevant in each legal context? This conversation should be framed through the lens of a gender-neutral understanding of parenthood that resists a reductionist, biology- and gestation-centric view of procreation, while remaining attentive to the bodily autonomy of gestational parents.[308]

Finally, though the Article's focus is parental identification, queer theories of time could fuel us to consider other internal processes that may be marginalized or simply slip under the radar of institutional rhythms.[309] We should take these theories one step further and ask whether the law can—or should—embrace these *becomings*? Thinking about these questions uncovers a space in which queer and legal studies have yet to intersect but should.[310]

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308. I acknowledge that a framework recognizing the richness of becoming a parent has the potential to interfere with a gestational parent's self-determination or to minimize the role of pregnancy. Indeed, this is a concern that policymakers must consider seriously. And, certainly, it is vital to approach this task with caution, as feminists have been long warning us about the undesired outcomes for mothers of de-gendering family laws. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 70-100 (1995). But as the suggestions I offer herein reflect, such concerns need not stand in the way of a more inclusive approach to legal parenthood.

309. Consider the experience of the transgender person whose assigned sex is incompatible with his or her subjective experience of gender. That incompatibility produces a similar separation and contradiction between the internal/self and the external/societal spheres. That separation may commence at birth, when there is discrepancy between the assigned sex on the legal documents, e.g., the birth certificate, and the expressed or felt gender of the individual, and continue until the formalization process required to bridge that gap is completed. The moment of temporal harmony will occur only after the transgender individual complies with the requirements needed to execute the formalization process. *Cf*. Ido Katri, *Scamming Reforms- Sex Reclassification from the Body to the Self, in* OXFORD ENCYCLOPEDIA OF LGBT POLITICS AND POLICY (Don Merkel ed., 2019).

310. Scholars have urged us to extend the scope of queer legal theory to objects of research beyond sex into other areas such as theories of time. *See, e.g.*, Brenda Cossman, *Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)*, 6 CRITICAL ANALYSIS L. 23, 37-38 (2019). Informed by their call to action, I hope this Article could lay the foundation for this much-needed intersection in the context of parenthood.

THE FUTURE OF THE *ALLEN* CHARGE IN THE NEW MILLENNIUM

Caleb Epperson*

I. INTRODUCTION

In matters of truth and justice, there is no difference between large and small problems, for issues concerning the treatment of people are all the same.[1]

Following the death of George Floyd on May 25, 2020, social and political movements grew rapidly nationwide to combat the prevalence of police brutality against African-American communities.[2] The impact of the ongoing Black Lives Matter movement has been observed in both cities across the United States and in related movements internationally.[3] This movement highlights the necessity for police reform and catalyzes the public's growing call for greater criminal justice reform. To achieve the goals of a fundamental reform of

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1. KENJI SUGIMOTO, ALBERT EINSTEIN: A PHOTOGRAPHIC BIOGRAPHY, 166 (Astrid Amelungse et al. eds., Schocken Books, Inc. 1989) (1987).

2. *See* Tim Arango et al., *How George Floyd Died, and What Happened Next*, N.Y. TIMES (Nov. 1, 2021), [https://perma.cc/4HZY-GJS8]; *see also* Elaine Godfrey, *The Enormous Scale of This Movement*, ATL. (June 7, 2020, 7:58 AM), [https://perma.cc/4ULB-AUBD].

3. Sophia Ankel, *30 Days that Shook America: Since the Death of George Floyd, the Black Lives Matter Movement Has Already Changed the Country*, BUS. INSIDER (June 24, 2020), [https://perma.cc/G77X-2WBE]; *see also* Daniel Odin Shaw & Saman Ayesha Kidwai, *The Global Impact of the Black Lives Matter (BLM) Movement*, GEOPOLITICS (Aug. 21, 2020), [https://perma.cc/4ZVN-BJUQ] (explaining the rise and ongoing prevalence of Black Lives Matter in England, France, and Belgium).

predatory judicial practices, every aspect of the judicial process—from arrest, trial, sentencing, and appeal—requires review.

Jury instructions are easily overlooked by the general public during judicial reform campaigns. However, these very instructions threaten the reliable administration of justice if intentionally or ignorantly misused. After attorneys rest their cases and deliver their closing arguments, jury instructions are the final true opportunity for either party to impact the jury's perception of the case.[4] The instructions that a jury hears outlines how it is to apply the given facts to the applicable legal standard.[5]

One such jury instruction that has led to over a century of controversy is the *Allen* Charge. The Supreme Court created the *Allen* Charge in its 1896 ruling Allen v. United States.[6] After over a century of use, the *Allen* Charge has created controversy through its ability to empower presiding judges to force a hung jury back into deliberations after a discordant return.[7] At the heart of the *Allen* Charge debate lies a single core issue—a presiding judge's ability to coerce jurors into agreeing to a ruling that they do not believe is proper.[8] Further, the issuance of an *Allen* Charge risks depriving a criminal defendant of the tactical use of a hung jury.[9] A hung jury consists of two parties of jurors—the majority and the minority.[10] If a jury is unable to provide a unanimous decision, the presiding judge declares a mistrial, and there are three potential outcomes: (1) a new jury is selected and a new trial proceeds; (2) the prosecution and defense reach an agreement

4. *How Courts Work: Instructions to the Jury*, AM. BAR ASS'N (Sept. 9, 2019), [https://perma.cc/RRF4-X8U2] [hereinafter *ABA: Instructions to the Jury*].

5. *Id.*

6. *See generally* Allen v. United States, 164 U.S. 492 (1896).

7. Samantha P. Bateman, Comment, *Blast It All:* Allen *Charges and the Dangers of Playing with Dynamite*, 32 U. HAW. L. REV. 323, 324 (2010).

8. *See id.*; Comment, *Deadlocked Juries and Dynamite: A Critical Look at the "*Allen *Charge"*, 31 U. CHI. L. REV. 386, 386-87 (1963) [hereinafter *Deadlocked Juries and Dynamite*].

9. *How Courts Work: Mistrials*, AM. BAR ASS'N (Sept. 9, 2019), [https://perma.cc/5JHC-7NFJ].

10. *See* David M. Stanton, United States v. Arpan*: How Does the Dynamite Charge Affect Jury Determinations?*, 35 S.D. L. REV. 461, 472 (1990).

outside of court; or (3) the prosecution simply decides to drop the charges.[11]

Given that the 125th anniversary of the *Allen* ruling passed in December 2021, it is far past time to conclusively address the consequences of the *Allen* Charge.[12] Almost every federal and state judicial system has created a unique approach to the *Allen* Charge, with the widest variety of approaches being at the state level.[13] This discrepancy of practices creates an inconsistent application of legal protections. Depending on where a defendant faces criminal charges, the protection he or she receives is likely different from those that a similarly situated defendant receives in an adjacent state.[14] The American Bar Association ("ABA") hoped to remedy these concerns upon release of its model jury instructions in 1968.[15] The ABA believed that this new model instruction addressed the coercive aspects of the *Allen* Charge.[16] However, while some states adopted the ABA model instructions, not enough did so to trigger an overwhelming change in *Allen* Charge practices.

To combat the prevalence of coercive *Allen* Charge practices, this Comment introduces what the author has deemed the "Post-Millennium *Allen* Charge."[17] This newly created *Allen*-type instruction seeks to revitalize this withered practice to accord with the modern legal landscape. Creating this new charge requires a single admission; an *Allen*-type charge in any form carries the risk of undue coercion. The Post-Millennium *Allen* Charge seeks to limit the potential for undue coercion by gathering beneficial elements from *Allen* Charge practices in the

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11. *How Courts Work: Jury Deliberations*, AM. BAR Ass'n (Sept. 9, 2019), [https://perma.cc/873Q-QHJF].

12. Current as of April 2022. The Supreme Court declared its ruling on December 7, 1896. Allen v. United States, 164 U.S. 492 (1896).

13. This Comment will focus specifically on the discrepancy of *Allen* Charge practices among state judicial systems. A number of states recognize the use of *Allen* Charges for both civil and criminal cases; however, this Comment will focus solely on case law and statutory language that affects criminal cases.

14. *See infra* Appendices I-V.

15. AM. BAR ASS'N: ADVISORY COMM. ON THE CRIM. TRIAL, STANDARDS RELATING TO TRIAL BY JURY § 5.4 (1968).

16. *Id.*

17. "Post-Millennium *Allen* Charge" is a term of art created by the author for purposes of identifying a new model instruction.

fifty states. For this new model instruction to gain traction, it must contain features that appeal to the vast majority of state judiciaries and provide coherent instructions that leave little discrepancy in its implementation. With this necessity for reform in mind, this Comment seeks to accomplish two fundamental goals. First, it categorizes and examines the *Allen* Charge practices of all fifty states.[18] Second, these state practices are dissected and used to construct the newly proposed Post-Millennium *Allen* Charge.[19]

Part II begins the substantive discussions of this Comment by outlining the development of the *Allen* Charge. First, it examines the history of *Allen* and its key predecessor case, Commonwealth v. Tuey. Next, it highlights the most heavily recognized—and scrutinized—features of the *Allen* Charge. Part III dissects the controlling *Allen* Charge practices in all fifty states. The first subsection focuses on Massachusetts and Connecticut, states that have never formally adopted the *Allen* Charge but have implemented *Allen*-type practices. Next, the Comment examines the ABA's model *Allen* Charge instruction and the implementation of the instruction into state practice. Third, the discussion turns to those states that have banned the *Allen* Charge completely or in part. The final examination is of states that have placed no limitations—or only partial limitations—on the use of *Allen* Charges. Part IV concludes the Comment with the proposed Post-Millennium *Allen* Charge.

II. DEVELOPMENT OF THE *ALLEN* CHARGE

The purpose of this background section is to offer two supporting layers of information for the analysis that follows. First, the creation of the *Allen* charge is examined through an analysis of the procedural and factual history of both *Tuey*[20] and *Allen*.[21] Second, the *Allen* Charge's coercive areas, as identified

18. Current through 2021. This Comment recognizes the debates regarding the *Allen* Charge in the jurisdictions of Washington D.C. and other U.S. territories but has chosen to not include them in the present discussion.

19. *See infra* Part IV.

20. Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1, 3 (1851).

21. Allen v. United States, 164 U.S. 492, 501-02 (1896).

by both scholars and practitioners, are examined to outline the systemic problems within *Allen*-type charges. This background knowledge serves as the skeleton frame of the analysis to follow.

A. History of the *Allen* Charge

The Supreme Judicial Court of Massachusetts unknowingly laid the groundwork for the *Allen* Charge in 1851.[22] In *Tuey*, the Supreme Judicial Court of Massachusetts found that the wording and application of a set of proto-*Allen* instructions did not have an undue coercive effect on the jurors.[23] Specifically, the court ruled that the presiding judge properly instructed the jurors in the minority to reassess their perspectives after the jury returned deadlocked.[24] The court supported that minority jurors who find that their perspectives of the case are in opposition to the majority should use that as a hint to review the evidence.[25] In his appeal, Tuey argued that the given instructions represented an action "equivalent to a direction."[26] Despite his best efforts, the court upheld Tuey's guilty verdict and laid the groundwork for the introduction of the *Allen* Charge four decades later.[27]

By 1896, Alexander Allen had successfully appealed two convictions for the murder of Phillip Henson.[28] With the murder taking place in Cherokee Territory, Allen's trials took place before the infamous "Hanging Judge" Isaac C. Parker of the Western District of Arkansas.[29] Allen's appeals of his first two

22. *Tuey*, 62 Mass. (8 Cush.) at 1.

23. *Id.* at 3-4. "Proto" prefix is used here to represent the origin of the set of instructions that would later become known as "*Allen* Charges." *Proto-*, DICTIONARY.COM, [https://perma.cc/Y2DV-TGBW] (last visited Feb. 26, 2021).

24. *Tuey*, 62 Mass. (8 Cush.) at 3-4.

25. *Id.*

26. *Id.* at 3.

27. *Id.* at 3-4.

28. Allen v. United States, 150 U.S. 551, 561-62 (1893) (describing reversal and remand of Allen's first conviction); *see also* Allen v. United States, 157 U.S. 675, 681 (1895) (describing reversal and remand of Allen's second conviction).

29. David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 AM. J. CRIM. L. 293, 313-15 (2000). Judge Isaac C. Parker received the moniker the "Hanging Judge" based on his affinity for the use of capital punishment. *Judge Isaac C. Parker*, NAT'L PARK SERV., [https://perma.cc/8LT6-TZ5K] (last visited Nov. 12, 2021).

convictions brought into dispute the facts regarding who initiated the confrontation, if Allen had a duty to retreat, and whether Allen admitted guilt when he fled the scene.[30] However, Allen's appeal of his third murder conviction is the scene where the cornerstone of over a century of controversy has laid.[31] In this appeal, Allen brought into dispute whether Judge Parker's jury instruction was unduly coercive over the minority.[32] Unfortunately for Allen, the United States Supreme Court found little merit in his claim.[33]

In his opinion, Justice Henry B. Brown spent little time evaluating the merits of the instruction given by Judge Parker.[34] The language of the instruction approved by the Supreme Court in *Allen* came almost verbatim from *Tuey*.[35] The relevant portions of the instruction included:

> But, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves, whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated; and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.[36]

Summarizing the instruction, Justice Brown acknowledged that the charge placed pressure on the minority out of an interest

30. *Allen*, 150 U.S. at 560-61; *Allen*, 157 U.S. at 678-80; Allen v. United States, 164 U.S. 492, 498-99 (1896).

31. *Allen*, 164 U.S. at 501.

32. *Id.*

33. *Id.* at 501-02.

34. *Id.* at 501.

35. *Id.*

36. Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1, 2-3 (1851).

to reach a unanimous verdict.[37] However, in this acknowledgment, Justice Brown found that there was no reversible fault with the instruction.[38] The deliberation process is described by Justice Brown as an opportunity to achieve "unanimity by a comparison of views . . . [among] equally honest, equally intelligent" jurors.[39] The opinion in *Allen* seems to praise the instruction for applying pressure on those in the minority to not "close [their] ears" from the arguments of their fellow jurors.[40] Effectively, Justice Brown argued that the deliberation room's purpose was to host an exchange of ideas and emotions in an effort to obtain solidarity among the jurors.[41] Despite outlining the importance of these principles, the Justice failed to mark the extent to which a judge may reasonably instruct jurors. Although Justice Brown's opinion only considered the validity of Judge Parker's instruction for two paragraphs, *Allen* has become the principal case for this classification of jury instructions.[42]

B. Coercive Effects of the *Allen* Charge

Throughout the 1900s, a number of state judiciaries have turned their backs on the *Allen* Charge, with many notably adopting the ABA's model instruction.[43] The cited reasons why these courts have chosen to abandon the precedent set in *Allen* stems from a wariness of the *Allen* Charge's inherent coerciveness.[44] When speaking of the "coercive effects" of the *Allen* Charge, the focus is specifically on the ability of a presiding judge to pressure a juror in the minority to "substitute the majority's opinion for his own."[45] The charge's reputation for

37. *Allen*, 164 U.S. at 501-02.
38. *Id.* at 502.
39. *Id.* at 501.
40. *Id*. at 501-02.
41. *Id*. at 501.
42. *Allen*, 164 U.S. at 501-02; *see also Deadlocked Juries and Dynamite*, *supra* note 8, at 386.
43. J. Grant Corboy, *Trial Procedure – Bombshell Instruction for Deadlocked Juries: A.B.A Standard Replaces Allen Charge in District of Columbia*, 13 WM. & MARY L. REV. 672, 676-80 (1972); Karen P. O'Sullivan, *Deadlocked Juries and the Allen Charge*, 37 ME. L. REV. 167, 168 (1985); *see also infra* Appendix II.
44. *Deadlocked Juries and Dynamite*, *supra* note 8, at 386.
45. *Id.* at 386-87.

overcoming the most resilient of jurors has earned it the common epithet as the "dynamite charge."[46] To overcome this negative characterization, *Allen* Charge supporters heavily rely on the argument that the instructions are necessary for the sake of judicial economy.[47] In essence, presiding judges must consider the cost of conducting a new trial when determining whether giving an *Allen* Charge is proper.[48] In an effort to overcome the argument of the charge's supporters, *Allen* Charge dissenters have focused on various elements within the *Allen* Charge that they view as the primary roots of the coercive threat. The two broad categories that this Comment is focused on are: (1) the undue pressure placed on the minority; and (2) the coercive actions of presiding judges during presentation of the charge.

1. Pressure on the Minority

The modern jury deliberation room is likely not as captivating as it is made out to be in the hit 1957 film *Twelve Angry Men*. Throughout the film, through the use of logic and passionate speeches, the stoic hero aids his fellow jurors in recognizing that they, the majority, were wrong in their assumption of the defendant's guilt.[49] While these scenes may inspire legal experts and laypeople alike, they do not represent the reality of the dynamic between jurors.

One of the most significant threats against jury independence is an *Allen* Charge that places direct pressure on the minority.[50] Upon receiving an *Allen* instruction, jurors in the minority are

46. Paul Marcus, *The Allen Instruction in Criminal Cases: Is the Dynamite Charge About to be Permanently Defused?*, 43 MO. L. REV. 613, 615 (1978); Bateman, *supra* note 7, at 325.

47. *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 VA. L. REV. 123, 125 (1967).

48. *Judicial Economy*, BLACK'S LAW DICTIONARY (11th ed. 2019).

49. 12 ANGRY MEN (Orion-Nova Productions 1957).

50. Green v. State, 569 S.E.2d 318, 323 (S.C. 2002) (explaining South Carolina's ban on any *Allen*-type instructions that mention either the minority or majority); *see also Deadlocked Juries—The "Allen Charge" is Defused*—United States v. Thomas, 6 U. RICH. L. REV. 370, 375 (1972) (describing the threat an *Allen* Charge poses to an independent jury ruling) [hereinafter *Deadlocked Juries: Thomas*].

more likely to change their stance than those in the majority.[51] Further, the use of an *Allen* Charge has shown to "short-circuit the usual leniency bias" of a jury.[52] In essence, upon issuance of an *Allen* Charge, jurors become more likely to shift their perception of the case to favor a guilty verdict.[53] The use of the *Allen* Charge serves only to boost the majority's morale and allows for this party to apply undue pressure on the minority.[54]

The importance of protecting the minority from undue coercion is seen once again in the discussion of hung juries. The right to a mistrial without a unanimous verdict is crucial in the pursuit of justice.[55] While both the prosecutorial and defense teams may indicate that a decisive ruling is preferable, to imply that a hung jury has no place in the legal system is dangerous. As previously discussed, those leaning towards an acquittal break under the pressure of a majority that believes the defendant is guilty.[56] By not allowing for deadlocked juries to occur, a judge is—in essence—depriving a defendant of a tactical tool to secure lesser charges, have the charges against them dropped, or an opportunity to obtain a more sympathetic jury pool.[57]

2. Presentation of the Allen *Charge*

Criticisms of the *Allen* Charge focus heavily on specific aspects of the presentation of the charge that lend power to the presiding judge to sway the deliberation process. A number of these criticisms serve as the basis of judgments made by state courts and legislatures nationwide. The most frequent of these

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51. Vicki L. Smith & Saul M. Kassin, *Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries*, 17 L. & HUM. BEHAV. 625, 632 (1993).

52. *Id.* at 640.

53. *Id.*

54. Corboy, *supra* note 43, at 679 (explaining that the use of the *Allen* Charge has the greatest effects on jurors in the minority); *see also* Smith & Kassin, *supra* note 51, at 639.

55. *See* Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J. L. REFORM 569, 581-83 (2007).

56. Corboy, *supra* note 43, at 679; *see also* Smith & Kassin, *supra* note 51, at 639-40.

57. *When a Tie is Really a Win: Hung Juries and Mistrials*, SCROFANO L. (Mar. 31, 2017), [https://perma.cc/K4GK-6MWQ] (describing the possible outcomes following a hung jury).

criticisms are: (1) the use of "final test" language;[58] (2) the presiding judge's knowledge of the numerical split of the jury;[59] (3) the specific language used during the delivery of the instruction;[60] (4) when the presiding judge chooses to deliver the charge;[61] and (5) if the presiding judge repeats the charge after it is first issued.[62]

The "final test" criticism references multiple issues regarding the duties of the jury.[63] A presiding judge who uses "final test" language often misrepresents the duties of the jury in order to illicit a unanimous decision.[64] The presiding judge informs jurors that they must reach a final verdict and that their duties as jurors only end upon reaching said verdict.[65] This is at the very least a misrepresentation of the law and at most an intentional attempt to coerce the jury into reaching a verdict endorsed by the judge. A presiding judge takes further coercive actions if he or she inquires about the numerical split of the jury and uses the given information to determine if an *Allen* Charge is necessary.[66] However, the likelihood of coercion is lower if the jury approaches the presiding judge regarding the split vote

58. State v. Norquay, 2011 MT 34, 359 Mont. 257, 264-69, 248 P.3d 817, 822-25 (defining and barring use of "final test" language).

59. Desmond v. State, 654 A.2d 821, 826-28 (Del. 1994) (ruling that a presiding judge should not inquire into the numerical split of a hung jury prior to delivering an *Allen* Charge).

60. Kelly v. State, 310 A.2d 538, 542 (Md. 1973) (stating that an instruction that strays from ABA model language and given after a jury has started deliberation will face higher scrutiny upon appeal); *see also* Maxwell v. State, 828 So. 2d 347, 365 (Ala. Crim. App. 2000) (ruling that the coerciveness of a given charge can be determined based on the specific language used during delivery).

61. State v. Whitaker, 872 P.2d 278, 285-86 (Kan. 1994) (finding that it is less prejudicial to deliver an *Allen* Charge prior to deliberations).

62. Elmer v. State, 463 P.2d 14, 21-22 (Wyo. 1969) (instructing that an *Allen* Charge should not be given after jury deliberations begin and that a repeated charge should be read alongside all other relevant jury instructions); *see also* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE § 15-5.4 (3d ed. 1996) [hereinafter ABA MODEL INSTRUCTION]; *cf.* Almeida v. State, 157 So. 3d 412, 415-16 (Fla. Dist. Ct. App. 2015) (ruling that presiding judges in Florida state courts may not repeat an *Allen* Charge more than once).

63. *Norquay*, 2011 MT 34 at ¶¶ 38-42.

64. *See id.*

65. *Id.*

66. Desmond v. State, 654 A.2d 821, 827 (Del. 1994); *see also* People v. Saltray, 969 P.2d 729, 733 (Colo. App. 1998) (ruling that presiding judges in Colorado may not directly inquire about the numerical split of a hung jury).

without prompt.[67] Many jurisdictions have also limited the language that a presiding judge uses when issuing an *Allen* Charge.[68] Any charge that uses different language than an approved example—or simply uses language that is widely accepted as unduly coercive—faces higher scrutiny and is at a higher risk of being overturned.[69]

The final criticisms levied seek to restrict when a presiding judge can issue an *Allen* Charge. Many jurisdictions state a preference for the presentation of an *Allen* Charge in the pre-deliberation period.[70] These jurisdictions require (or strongly recommend) presiding judges to issue the charge alongside all other jury instructions.[71] In doing so, it is thought that the coercive language of the *Allen* Charge is lessened due to it not being singled out.[72] This further lessens the impact of the charge on individual jurors since clear groupings of the majority and minority are not yet set. However, if a jurisdiction chooses to allow for the reissuance of the charge, it often limits the number of times a presiding judge may do so.[73] A totality of the circumstances test is often implemented to determine whether the choice to repeat the given charge is unduly coercive in a given case.[74]

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67. *Desmond*, 654 A.2d at 827.

68. Kelly v. State, 310 A.2d 538, 542 (Md. 1973) (stating that an instruction that strays from ABA model language and given after a jury has initiated deliberations will face higher scrutiny upon appeal).

69. *Id.*

70. *See, e.g.*, State v. Whitaker, 872 P.2d 278, 286 (Kan. 1994).

71. *Id.*; *see also* Elmer v. State, 463 P.2d 14, 22 (Wyo. 1969).

72. *See Whitaker*, 872 P.2d at 286; *Elmer*, 463 P.2d at 22.

73. ABA MODEL INSTRUCTION, *supra* note 62, § 15-5.4; *see also* Almeida v. State, 157 So. 3d 412, 415-16 (Fla. Dist. Ct. App. 2015) (ruling that presiding judges in Florida state courts may not repeat an *Allen* Charge more than once).

74. *See* State v. Souza, 425 A.2d 893, 900 (R.I. 1981) (ruling that a presiding judge must consider case-specific circumstances when considering whether to issue an *Allen*-type instruction); *see also* Maxwell v. State, 828 So. 2d 347, 365 (Ala. Crim. App. 2000) (quoting Miller v. State, 645 So. 2d 363, 366 (Ala. Crim. App. 1994)) (stating that the "whole context" of a given case must be used to determine the coerciveness of a given charge).

III. *ALLEN* CHARGE PRACTICES IN THE FIFTY STATES

Justice consists not in being neutral between right and wrong, but in finding out the right and upholding it, wherever found, against the wrong.[75]

Whether or not one agrees or disagrees with the Supreme Court's ruling in *Allen*, ignoring that the ruling has resulted in a mosaic of case law and statutes across the state judicial systems promotes the unequal treatment of criminal defendants nationwide. This outcome undermines the necessity for uniformity for legal concepts and practices of this caliber. Unfortunately, the simple solution of an outright ban of *Allen*-type charges does not provide the necessary solution to the coercive question. The *Allen* Charge has proven to be a hydra; a killing blow may seemingly be struck, but new *Allen*-type charges rise in its place. Instead—if the *Allen* Charge is to be effectively implemented—the proposed *Post-Millennium Allen Charge* must limit the specific weaknesses of the base charge. The following analysis does not seek to outline the *Allen* Charge practices of every state to the fullest extent but rather classifies states based on (1) their historical treatment of the *Allen* Charge and (2) specific features in a state's practice that address the concerns discussed in Section II.B. of this Comment. The broad sub-categories explored are: (A) the outliers; (B) states that have adopted the ABA model instruction; (C) states that have implemented *Allen* Charge bans; and (D) those states that still allow the use of the *Allen* Charge.

A. The Outliers

An appropriate place to begin our examination of the *Allen* Charge is by examining those states that have never taken part in the *Allen* Charge debate. These outliers, Massachusetts and Connecticut, have implemented *Allen*-type charges, but have

75. QUOTATIONS OF THEODORE ROOSEVELT 30 (2004).

done so outside the parameters of the *Allen* decision.[76] In doing so, they have avoided the last century of national debate and instead nurtured the growth of their own *Allen*-type charges within the boundaries of their states. Understanding the outcomes of these debates will set the stage for what to expect as the practices of various *Allen* Charge jurisdictions are later discussed. The following discussion centers on the (1) *Tuey* Charge of Massachusetts and (2) the *Chip Smith* Charge of Connecticut.

1. Massachusetts

The first state in the spotlight is Massachusetts. Instead of adopting the *Allen* Charge, the state adopted the guidelines of *Allen*'s predecessor, *Tuey*.[77] The *Tuey* Charge, now known as the *Tuey-Rodriquez* Charge, is still an accepted practice in Massachusetts but has seen limited use.[78] However, in recent decades the Judiciary of Massachusetts has imposed a series of limitations on the charge that seeks to limit the probability of undue coercive acts. Notably, a *Tuey* Charge in Massachusetts may no longer use language that places undue pressure on the minority of the jury.[79] The Supreme Judicial Court of Massachusetts recognized this weakness in *Commonwealth v. Rodriquez* and chose to end the practice affirmatively.[80] In its decision, the court corrected the model jury instruction by removing any mention of the minority versus majority distinction and changed the wording to emphasize that all parties within the jury are to reconsider whether their views are reconcilable with those on the opposing side.[81]

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76. Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1, 2-3 (1851) (establishing the practice of the "*Tuey* Charge" as the appropriate jury instruction to give to deadlocked juries in Massachusetts); *see also* State v. Smith, 49 Conn. 376, 386 (1881) (creating the *Chip Smith* charge).

77. *Tuey*, 62 Mass. (8 Cush.) at 2-3. *See generally* EDWARD M. SWARTZ, TRIAL HANDBOOK FOR MASSACHUSETTS LAWYERS § 35:9 (3d ed. 2020).

78. *Tuey*, 62 Mass. (8 Cush.) at 2-3; *see also* Commonwealth v. Rodriquez, 300 N.E.2d 192, 200-03 (Mass. 1973) (controlling case that served as catalyst of revision of *Tuey* Charge practices).

79. *See Rodriquez*, 300 N.E.2d at 201, 203.

80. *Id.* at 201-03.

81. *Id.* at 203.

The court in *Rodriquez* also chose to limit the ability of judges to give a *Tuey* Charge that states, "the case must at some time be decided."[82] This stricken-out language unduly stated that the jury had to reach a unanimous verdict.[83] Simply put, whether it be a conviction or acquittal, it is improper to state that a decision is required. In its dismissal of this language, the court decries any slight material change to an instruction that has a coercive effect.[84] Any instructions that reference the monetary or time cost of the ongoing proceedings—or future proceedings—are also unduly coercive.[85]

The Supreme Judicial Court has addressed limitations on how the charge is presented as well. In *Commonwealth v. Rollins*, the court banned the use of the charge in an indiscriminate or premature manner.[86] However, a presiding judge has the discretion to give a *Tuey* Charge based on the length of deliberations and the overall complexity of the given case.[87] What is not in the presiding judge's discretion, however, is the language of the charge.[88] When a judge announces a *Tuey* Charge, the charge is read in its entirety, and the judge cannot stray from the approved language.[89] A presiding judge who strays from the approved language jeopardizes the efforts of the higher courts to limit the coercive effects of the charge, and thus, the presiding judge's actions are found to be unduly coercive.[90]

The *Tuey* Charge has been thoroughly vetted by the Massachusetts courts. In doing so, the *Tuey* Charge has become a model of what a limited *Allen*-type charge should strive to achieve. The specific areas that the courts have addressed are the same areas that *the Post-Millennium Allen Charge* must limit if it hopes to overcome the inherently coercive nature of the *Allen* Charge.

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82. *Id.* at 201 (quoting *Tuey*, 62 Mass. (8 Cush.) at 1) (internal quotation marks omitted).

83. *Id.* at 200-01.

84. *Rodriquez*, 300 N.E.2d at 202.

85. Commonwealth v. Brown, 323 N.E.2d 902, 906, 907 (Mass. 1975).

86. 241 N.E.2d 809, 814 (Mass. 1968).

87. Commonwealth v. Haley, 604 N.E.2d 682, 688 (Mass. 1992).

88. Commonwealth v. O'Brien, 839 N.E.2d 845, 848 (Mass. App. Ct. 2005).

89. *Id.*

90. *Id.*

2. Connecticut

The second outlier to discuss is Connecticut. Like the *Tuey* Charge of Massachusetts, the *Chip Smith* Charge of Connecticut predates the *Allen* Charge.[91] The *Chip Smith* Charge derives its name from the 1881 case *State v. Smith*.[92] In what proves to be a long list of arguments upon appeal, the creation of the *Chip Smith* Charge comes in a single paragraph.[93] In its conclusion of issue eleven brought forth by Smith, the Supreme Court of Errors of Connecticut alluded to the *Tuey* decision in concluding that it is proper for a presiding judge to give an instruction that urges jurors in the minority to reconsider their position.[94] In a divergence from the Supreme Judicial Court of Massachusetts, the Supreme Court of Connecticut has instead chosen to uphold a number of the coercive aspects of the *Chip Smith* Charge.[95]

Unlike its relative in Massachusetts, the *Chip Smith* Charge's adopted language allows presiding judges to place pressure on "dissenting jurors" to consider if their votes are reasonable.[96] The Supreme Court of Connecticut argues that the use of "balancing language" counteracts the coercive effects of singling out dissenting jurors.[97] This "balancing language" instructs jurors to "express [their] own conclusion[s]" and that it is improper for them to "merely . . . acquiesc[e] in the conclusion[s] of [their] fellow jurors."[98] The court confidently states that, even if the language directed at the minority is improper, the balancing language nullifies this effect.[99] This line of argument is prevalent in many jurisdictions that have done little to limit the *Allen* Charge's coercive nature.[100]

In *State v. Feliciano*, the court allows the reading of the *Chip Smith* Charge multiple times.[101] The state courts of Connecticut

91. *See* State v. Smith, 49 Conn. 376, 381, 386 (1881).
92. *Id.* at 381.
93. *Id.* at 386.
94. *Id.*
95. State v. O'Neil, 207 A.2d 730, 746 (Conn. 2002).
96. *Id.* at 745-46.
97. *Id.* at 746.
98. *Id.*
99. *Id.*
100. *See, e.g.*, State v. McArthur, 899 A.2d 691, 706-07 (Conn. App. Ct. 2006).
101. 778 A.2d 812, 821 (Conn. 2001).

argue that if a presiding judge appropriately issues a charge the first time, there is no fault with the same instruction being repeated multiple times.[102] Comments by presiding judges that place pressure on jurors to reach a conclusive decision have also been approved.[103] While Connecticut courts discourage the mention of the costs associated with a mistrial, they have affirmed the use of such instructions upon appeal.[104] To support these rulings, they state that the potential coercive effects of the additional language are nullified if the presiding judge accurately states the commonly accepted language of the *Chip Smith* Charge.[105]

The *Chip Smith* Charge practice in Connecticut is exactly what the Post-Millennium *Allen* Charge seeks to overcome. Essentially, presiding judges are given free rein to use the charge at their discretion. This practice inappropriately increases the threat of an unduly coercive act of a presiding judge. For the Post-Millennium Allen Charge to be successful, it must not mirror the mistakes of the *Chip Smith* Charge.

B. American Bar Association Recommended Instruction

Decades after the first approval of the *Allen* Charge, the ABA created a model *Allen*-type instruction that addressed the rampant coercive issues relating to the charge.[106] The creation of the ABA model instruction served as a hopeful counter against the wild landscape of *Allen* Charge practices in state courts. This model *Allen* Charge was carried into the twenty-first century within Section 15-5.4 of the *Trial by Jury Standards*.[107] Section 15-5.4's model instruction states that:

> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

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102. *Id.*

103. *McArthur*, 899 A.2d at 705-07.

104. *Id.* at 706, 708.

105. *Id.* at 707.

106. AM. BAR ASS'N: ADVISORY COMM. ON THE CRIM. TRIAL, STANDARDS RELATING TO TRIAL BY JURY § 5.4 (1968).

107. ABA MODEL INSTRUCTION, *supra* note 62, § 15-5.4.

> (1) that in order to return a verdict, each juror must agree thereto;
>
> (2) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (3) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;
>
> (4) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and
>
> (5) that no juror should surrender his or her honest belief as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in section (a). The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.[108]

As seen in the model language above, the ABA's greatest concern regarding *Allen* Charges seems to be the abuse of the minority.[109] Specifically, sections 5.4(a)(3)-(5) outline the duty of the jurors to balance the need for independent conclusions with the necessary considerations of the views of their fellow jurors.[110] This approach to handling the minority issue reflects the efforts of Massachusetts to limit the coercive effort of the *Tuey* Charge.[111] If one desires to take pressure off those in the minority, the simple solution seems to be to limit the mention of any party within given instructions. The model ABA instruction also addresses the issues of giving an *Allen* Charge multiple times

108. *Id.*
109. *Id.*
110. *Id.* § 15-5.4(a)(3)-(5).
111. Commonwealth v. Rodriquez, 300 N.E.2d 192, 201 (Mass. 1973).

to the same jury.[112] Section 5.4(b) allows for a presiding judge to repeat the charge multiple times if he or she deems it necessary.[113] However, Section 5.4(b) limits the use of repeat charges that threaten a jury into reaching a unanimous verdict or force deliberations to extend for an unreasonable amount of time.[114]

The ABA model *Allen* Charge provides a necessary and strong foundation for the *Post-Millennium Allen Charge*. However, as is the case with many recommended practices, the ABA model instruction's effectiveness is limited by the number of states that adopt it. Studying the states that have adopted the ABA model instruction provides information on the strengths and weaknesses of this category of charges. In the following discussion, the focus will shift to states that have (1) adopted the ABA model instruction; (2) co-opted language from the ABA model; or (3) performed a "soft adoption" of the ABA model instruction.

1. Adopted ABA Model Instruction

Very few states have adopted the ABA model instruction in its entirety. The only states to have fully adopted the use of the ABA instruction thus far are (1) Illinois; (2) Maine; (3) Minnesota; (4) Vermont; (5) Tennessee; (6) New Jersey; and (7) Michigan.[115] While the ABA model instruction requires fine-tuning, the Supreme Court of Illinois describes the model instruction as being the current best option to "resolve the many questions created by the uncertainty . . . [of] instructing a jury that is in disagreement."[116] In its adoption of the ABA model instruction, the Supreme Judicial Court of Maine decried the use of any *Allen* Charge or any modified charge that achieved the same purpose.[117] This adoption of the ABA instruction is less of an acknowledgment of the strength of the ABA recommendations and is more likely a preventive action to avoid future abuse of

112. ABA MODEL INSTRUCTION, *supra* note 62, § 15-5.4(b).
113. *Id.*
114. *Id.*
115. *See infra* Appendix II.A.
116. People v. Prim, 298 N.E.2d 601, 609 (Ill. 1972).
117. State v. White, 285 A.2d 832, 838 (Me. 1972).

Allen Charges.[118] The Supreme Judicial Court of Maine seems more inclined to an outright ban of the use of *Allen*-type charges and adopted the ABA standards as a stepping stone towards this goal.[119] This distinction of a preference for the outright elimination of *Allen*-type charges brings a thought-provoking debacle to the surface. Despite their seemingly best efforts, states that have banned the use of *Allen* Charges have simply replaced the charge with a pseudo-*Allen* Charge that carries with it the same potential for coercion.[120] As discovered by the Supreme Judicial Court of Maine, the best option to overcoming the challenges posed by *Allen* is to choose the least threatening option.

The Supreme Court of Minnesota gave a resounding rebuttal of the use of the *Allen* Charge in *State v. Martin*.[121] In its ruling, the court outlined the specific coercive features of the *Allen* Charge that are overcome by the ABA model instruction.[122] Like the courts in Massachusetts, the feature of the *Allen* Charge that the Supreme Court of Minnesota found to be the most egregious was the undue pressure that it placed on the minority.[123] The egregiousness of this aspect of the instruction intensified upon consideration that the base *Allen* Charge seemingly takes the side of the majority.[124] Further, the court found error in the practice of instructing juries that "a case must at some time be decided."[125] To end its blitz of the *Allen* Charge, the Supreme Court of Minnesota rebuked the common argument of judicial economy.[126] The court found that "[h]ung juries are not a serious problem in . . . criminal cases" and that allowing coercive instructions to overcome such a trivial problem is "too dear a price to pay for relieving court congestion."[127] In this final refutation, the Supreme Court of Minnesota cemented the death of the *Allen*

118. *Id.*
119. *See id.*
120. *See infra* Appendix III.B.
121. *See* 211 N.W.2d 765, 765, 769-71 (Minn. 1973).
122. *See generally id.*
123. *Id.* at 771.
124. *See id.*
125. *Id.* at 769.
126. *Martin*, 211 N.W.2d at 770-71.
127. *Id.* at 771.

Charge in the state and provided a key counterargument to *Allen* Charge dissenters.

In *State v. Perry*, the Supreme Court of Vermont made the final determination to remove the base *Allen* Charge from regular use and instead chose to use the ABA model instruction as its new standard moving forward.[128] In its argument, the court cited the commonly referenced issue regarding the unequal pressure placed on those jurors in the minority.[129] The court's condemnation of the charge mirrored the arguments of the presiding courts in Maine and Minnesota. However, the Supreme Court of Vermont provided insight into another potential issue: that the burden of proof can shift during jury deliberations after the issuance of an *Allen* Charge.[130] Criminal trials mandate that the prosecution has the burden of proof during proceedings.[131] The *Perry* court implied that the jurors take on the responsibility of the prosecution upon the commission of a non-facially neutral *Allen* Charge.[132] Tennessee followed suit in 1975 in *Kersey v. State*.[133] In its opinion, the Supreme Court of Tennessee recognized that the *Allen* Charge unduly pressured the minority to abandon its view and give in to those of the majority.[134]

In its decision in *State v. Czachor*, the New Jersey Supreme Court banned the use of the conventional *Allen* Charge and endorsed the use of the ABA model instruction.[135] Similarly, Michigan banned the use of conventional *Allen* Charges in 1974.[136] Both states' supreme courts referenced rulings in other states and in federal appellate courts that banned the use, or repeated use, of the *Allen* Charge as they made their rulings.[137] While their reasonings for abandoning the base *Allen* Charge reflect the arguments offered in other jurisdictions, the examples

128. *See* 306 A.2d 110, 112 (Vt. 1973).
129. *Id.*
130. *Id.*
131. *See id.*
132. *See id.*
133. 525 S.W.2d 139, 144 (Tenn. 1975).
134. *Id.*
135. 413 A.2d 593, 600 (N.J. 1980).
136. People v. Sullivan, 220 N.W.2d 441, 450 (Mich. 1974).
137. *See Czachor*, 413 A.2d at 599-600; *see also Sullivan*, 220 N.W.2d at 447, 449.

they provide are used for a greater purpose.[138] These debates offer insight into the implementation of the Post-Millennium *Allen* Charge on the national scale. Simply put, a revisionary wave is required. As an increasing number of jurisdictions adopt the use of the new model instruction, jurisdictions that have not done so face mounting pressure to consider adoption as well. Winning victories state by state in the drive to implement the Post-Millennium *Allen* Charge builds the force required to break through the most draconian of *Allen* Charge jurisdictions.

2. Co-opted ABA Language

The second classification to discuss is those states that have never adopted the use of the ABA model instruction but have instead co-opted its language. These states have approved new instructions that rely on guidelines included in the ABA model instruction. Co-opted instructions based on the ABA model instruction are used in (1) Colorado and (2) North Carolina.[139]

The Chief Justice of the Colorado Supreme Court released a directive on September 22, 1971, that outlines the use of a new series of model charges.[140] This directive forbids the use of the *Allen* Charge and instead inserts new guidelines that mirror the ABA model instruction.[141] However, the Colorado courts have refined these guidelines in a series of cases since the 1970s.[142] Specifically, presiding judges should not abuse their discretion by giving an *Allen*-type instruction if there are clear signs that the jurors are past the point of being able to agree.[143] When deciding whether it is appropriate to give an additional jury instruction, presiding judges should consider the length of the deliberations prior to the return of a split verdict.[144] Further, a presiding judge should make an inquiry to determine whether the jurors believe that there still exists a "likelihood of [achieving] a unanimous

138. *See Czachor*, 413 A.2d at 599-600; *see also Sullivan*, 220 N.W.2d at 447-50.

139. *See infra* Appendix II.B.

140. People v. Schwartz, 678 P.2d 1000, 1012 (Colo. 1984).

141. *Id.*; *cf.* ABA MODEL INSTRUCTION, *supra* note 62.

142. *See* People v. Gonzales, 565 P.2d 945, 947 (Colo. App. 1977); *see also* People v. Saltray, 969 P.2d 729, 732-33 (Colo. App. 1998).

143. *Schwartz*, 678 P.2d at 1012.

144. *Id.* at 1011; *see also Gonzales*, 565 P.2d at 947.

verdict."[145] However, this inquiry is limited to the jurors' opinions of potential agreement and cannot seek the numerical split of the minority and majority.[146] North Carolina has also codified a modified *Allen* Charge that relies heavily on the language of the ABA model instruction.[147] The Criminal Code Commission of North Carolina describes the language of its new charge as the "'weak' charge set out in [ABA] Standards."[148] An interesting feature included in North Carolina is that presiding judges are instructed to state to the jury that they do not favor a specific ruling in a given case.[149] Having language that reaffirms the presiding judge's effective neutrality in the given case makes it clear to judges and jurors alike that a given instruction is not an endorsement of any one verdict.

The additional features present in the model instructions of Colorado and North Carolina expose weaknesses present in the ABA model instruction. While the ABA model instruction provides clear guidelines of what a presiding judge may express to the jury in an instruction, it leaves questions of how to do so effectively from a procedural standpoint. Further, the type of language included in North Carolina reaffirms the judiciary's drive for complete neutrality. For the Post-Millennium *Allen* Charge to be effective, it must include clear guidelines that address these common conflicts.

3. Soft Adoption of ABA Standards

The final sub-category of the states that have recognized the ABA model instruction is those that performed a "soft adoption" of the standards.[150] Soft adoptions of the ABA standards offer scant recommendations for the body of the Post-Millennium *Allen* Charge but instead provide examples of how to achieve implementation on a national scale. The "revisionary wave" addressed in earlier discussion is not a process that happens

145. *Saltray*, 969 P.2d at 733.

146. *Id.*

147. N.C. GEN. STAT. ANN. § 15A-1235 (2021).

148. § 15A-1235 cmt. (Criminal Code Commission 1977).

149. State v. Alston, 243 S.E.2d 354, 364 (N.C. 1978).

150. "Soft adoption" is a term of art created by the author for the purposes of this Comment.

quickly. To ensure the full implementation of the Post-Millennium *Allen* Charge, soft adoptions offer a compelling strategy. States are more likely to accept the new model instruction if they can see the success it brings in neighboring jurisdictions.[151] While the need for change is urgent, it is more important to ensure the effective implementation of the new instruction rather than provide a hurried relief effort. The states that have conducted soft adoptions are (1) Oregon; (2) Alaska; (3) New Hampshire; (4) North Dakota; (5) Maryland; (6) Nebraska; and (7) Rhode Island.[152] These states support using the ABA model instruction, but do not enforce its use and allow for other *Allen*-type charges to be used on a case-by-case basis.

Oregon offers a simple example of the "soft adoption" approach. In its opinion in *State v. Marsh*, the Supreme Court of Oregon "disapproved the future use" of any supplemental *Allen*-type charge, but recommended the use of the ABA model instruction when necessary, moving forward.[153] This is a theme that occurs time and time again. The ABA model instruction receives approval not only for its substance but also because it is the least harmful alternative. As expressed by the court in *Marsh*, the ABA instruction is recommended but is "not to be regarded as 'graven in stone.'"[154]

The ruling of the Alaskan Supreme Court in *Fields v. State* recommends that judges refer to the ABA model instruction for future use.[155] It does not mandate the use of the ABA model instruction but instead offers guidance by stating that those judges who follow the model instruction are effectively minimizing the coercive nature of the *Allen* Charge.[156] The Supreme Courts of New Hampshire and North Dakota have followed suit.[157] In its ruling in *State v. Blake*, the New Hampshire Supreme Court

151. *See* Gérard Roland, *Understanding Institutional Change: Fast-Moving and Slow-Moving Institutions*, 38 STUD. IN COMPAR. INT'L DEV. 109, 126 (Winter 2004) (discussing the importance of gradualism within the context of institutional reform).

152. *See infra* Appendix II.C.

153. 490 P.2d 491, 503 (Or. 1971).

154. *Id.* (quoting United States v. Thomas, 449 F.2d 1177, 1188 (D.C. Cir. 1971)).

155. 487 P.2d 831, 840-43 (Alaska 1971).

156. *Id.* at 842.

157. *See* State v. Blake, 305 A.2d 300, 306 (N.H. 1973); *see also* State v. Champagne, 198 N.W.2d 218, 238-39 (N.D. 1972).

recommended that presiding judges make use of "more circumscribed instructions recommended in the *ABA Standards*."[158] However, the opinion does not provide additional commentary, as seen in the Alaskan ruling.[159] In its recommendation of the ABA model instruction, the Supreme Court of North Dakota focuses specifically on the model instruction's emphasis on limiting minority coercion and limiting the time frame for issuing the instruction.[160]

In its ruling in *Kelly v. State*, the Maryland Court of Appeals stated that the use of the ABA model instruction will always be proper, but other instructions may also be used.[161] Further, presiding judges may personalize a given charge if they issue one prior to the deliberation period.[162] A similar practice has been adopted in Nebraska. The Nebraskan Supreme Court in *State v. Garza* acknowledged that presiding judges may use the ABA model instruction, but the use of the instruction is heavily scrutinized with a preference towards no charge whatsoever.[163] Rhode Island has also taken a unique approach to the soft adoption theory. After recommending the use of the ABA model instruction, the Supreme Court of Rhode Island admitted that it would not heavily enforce the use of the instruction.[164] Instead, it recognized that "[i]n Rhode Island [it is not] require[d] that a trial justice read a patterned instruction."[165] In the place of a strict enforcement protocol, the court established a totality of the circumstances test.[166] For any future *Allen*-type charge, Rhode Island courts would determine the validity of a given charge based

158. 305 A.2d at 306.

159. *Compare id.*, *with* Fields v. State, 487 P.2d 831, 840-43 (Alaska 1971).

160. *Champagne*, 198 N.W.2d at 238-39.

161. 310 A.2d 538, 541 (Md. 1973).

162. *Id.* at 542.

163. 176 N.W.2d 664, 666 (Neb. 1970); *see also* Potard v. State, 299 N.W. 362, 364-65 (Neb. 1941) (ruling that the only purpose of using an *Allen*-type instruction was to "encourage or coerce the jury").

164. State v. Patriarca, 308 A.2d 300, 322-23 (R.I. 1973) (recommending the use of ABA model instructions in future trials); *see also* State v. Souza, 425 A.2d 893, 899-901 (R.I. 1981).

165. *Souza*, 425 A.2d at 900.

166. *Id.*

on the circumstances of the case and the specific language of the given instruction.[167]

C. Strong Disapproval of *Allen* Charges

One of the largest categorizations of states is those that have, in theory, implemented a near-complete ban of *Allen* Charges. The states that have done so are (1) Arizona; (2) California; (3) Hawaii; (4) Idaho; (5) Indiana; (6) Kentucky; (7) Louisiana; (8) New Mexico; (9) Ohio; (10) South Dakota; (11) Tennessee; and (12) Washington.[168] Despite what first assumptions imply, the majority of these states have only banned the use of the charge as outlined in *Allen*. The following discussion will focus on how states have implemented either (1) a total ban of the *Allen* Charge; or (2) modified instructions.

1. Total Ban

An intriguing sub-category to analyze first are those states that have implemented a total ban of any type of *Allen* Charge. The states included in this sub-category are (1) Louisiana; (2) South Dakota; (3) Arizona; (4) Hawaii; and (5) Idaho.[169] Of these states, Louisiana offers the clearest ruling regarding the *Allen* Charge. Louisiana bans the use of both the base *Allen* Charge and any *Allen*-type variations.[170] This ban applies to any acts by presiding judges that have a coercive effect, and any violation of this ban is met with heavy scrutiny.[171] This total ban is also in place in South Dakota.[172]

Arizona initially implemented a ban on the *Allen* Charge in *State v. Thomas*.[173] In its decision, the court struck down the "Voeckell [Charge]."[174] The Supreme Court of Arizona found

167. *Id.*
168. *See infra* Appendix III.
169. *See infra* Appendix III.A.
170. State v. Nicholson, 315 So. 2d 639, 641 (La. 1975).
171. *Id.* at 641-43.
172. State v. Fool Bull, 2009 SD 36, 766 N.W.2d 159, 170 (indicating ban of *Allen* Charge in criminal cases).
173. 342 P.2d 197, 200 (Ariz. 1959).
174. *Id.*

that this charge mirrored the language of the base *Allen* Charge and unduly: (1) placed pressure on jurors in the minority; and (2) implicitly implied that a hung jury is a waste of state resources.[175] The Arizona court later reaffirmed this ban of *Allen*-type charges in *State v. Smith*.[176] The court found that any form of an *Allen* Charge contained "potentially objectionable material" and that any future use of the charge would be grounds for appeal in future matters.[177] Agreeing with the Arizona Supreme Court, the Supreme Court of Hawaii barred future use of *Allen*-type instructions.[178] In its decision to ban the use of the charge, the court found that the use of *Allen* Charges is detrimental to the pursuit of equal justice since the "evils [of the *Allen* Charge] far outweigh the benefits . . . ."[179]

Idaho provides a clear example of how a total ban on *Allen* Charges has been implemented. Following its ruling in *State v. Flint*, the Idaho Supreme Court barred any future form of the "dynamite instruction."[180] It took this ruling one step further when it provided a new practice for presiding judges to follow.[181] Instead of forcing jurors back into deliberation through the use of an *Allen* Charge, presiding judges are to take polls of split juries.[182] If the polling indicates that jurors still believed that they are capable of reaching an agreement, then they will enter back into deliberation.[183] The choice to provide this alternative practice is interesting in light of how other states have chosen to direct presiding judges during the deliberation period. Diverging from the customary course of action, the Idaho Supreme Court instructs presiding judges on what they may do instead of limiting what they may not do. A beneficial limiting factor to acknowledge is that presiding judges may not reference the

175. *Id.*
176. 493 P.2d 904, 907 (Ariz. 1972).
177. *Id.*
178. State v. Fajardo, 699 P.2d 20, 25 (Haw. 1985).
179. *Id.* (quoting State v. Thomas, 342 P.2d 197, 200 (Ariz. 1959)).
180. 761 P.2d 1158, 1162-65 (Idaho 1988).
181. *Id.* at 1165.
182. *Id.*
183. *Id.*

necessity of the "efficient administration of criminal justice."[184] This practice coincides with the Minnesota judiciary's decision to adopt the ABA model instruction.[185] The decisions of these courts directly attack what is likely the strongest argument in favor of the *Allen* Charge—judicial economy.

2. Modified Instructions

The following states have banned the use of the base *Allen* Charge but still allow the use of modified instructions: (1) California; (2) New Mexico; (3) Indiana; (4) Mississippi; (5) Ohio; (6) Montana; (7) Wisconsin; (8) Kentucky; and (9) Washington.[186] States that have chosen to introduce modified instructions have either created new *Allen*-type charges themselves or have modified the original charge.

California originally banned the use of any *Allen* Charge in 1977.[187] In the Supreme Court of California's decision, it cited the coercive practice of placing undue pressure on the minority.[188] However, this ruling was overturned in 2012.[189] Following the decision in *People v. Valdez*, courts in California now give *Allen*-type instructions if the instructions equally encourage the majority and minority to reconsider their views.[190] The Court of Appeals of Indiana and the Supreme Court of Ohio have reached similar conclusions.[191] *Allen* Charges face careful scrutiny in Indiana.[192] The language of a given *Allen* Charge must strive to remain neutral, and a second reading of the charge must be accompanied by all other instructions that are given before

184. State v. Martinez, 832 P.2d 331, 335 (Idaho Ct. App. 1992); D. CRAIG LEWIS, IDAHO TRIAL HANDBOOK § 30:23 (2d ed. 2020).

185. *Martinez*, 832 P.2d at 335; *cf.* State v. Martin, 211 N.W.2d 765, 771-73 (Minn. 1973).

186. *See infra* Appendix III.B.

187. People v. Gainer, 566 P.2d 997, 1003-06 (Cal. 1977).

188. *Id.* at 1005.

189. People v. Valdez, 281 P.3d 924, 984-85 (Cal. 2012).

190. *Id.*

191. *See* Fultz v. State, 473 N.E.2d 624, 629-30 (Ind. Ct. App. 1985) (citing Lewis v. State, 424 N.E.2d 107, 109 (Ind. 1981)); State v. Howard, 537 N.E.2d 188, 194-95 (Ohio 1989) (describing the Ohio courts use of a neutrally structured *Allen* Charge).

192. Clark v. State, 597 N.E.2d 4, 7 (Ind. Ct. App. 1992).

deliberations begin.[193] This theme of neutrality continues in Mississippi's model charge. There, the shortened charge that survived the state court's ban on *Allen* Charges instructs all jurors to equally weigh the evidence before them and the arguments of their peers.[194]

The Supreme Courts of Montana and Wisconsin refined their model *Allen* Charge instructions for similar reasons. Both state courts took issue specifically with the lack of neutrality regarding how presiding judges address the jurors.[195] However, a unique feature that the Montana Supreme Court chose to focus on is what is referred to as "final test" language.[196] This "final test" language mandates that jurors "make a determination of guilt or innocence . . . ."[197] The court found that this language misrepresents the law and places undue pressure on the jurors.[198] Kentucky's model *Allen* Charge follows a similar practice. Presiding judges cannot give an instruction that explains the "desirability of reaching a verdict."[199] Further, presiding judges cannot poll the jury prior to the return of a verdict.[200] Matching the requirements outlined by Kentucky, presiding judges in Washington cannot "instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate."[201]

Finally, New Mexico offers a unique alternative. After banning the use of the "shotgun [charge]," it instituted a three factor test that determines whether a given instruction is coercive.[202] In the first step, the court determines whether the presiding judge read "any additional instruction" to the jury.[203] Next, the court determines whether the given instruction both

193. *Fultz*, 473 N.E.2d at 629-30.

194. MISS. R. CRIM. P. 23.4; *see also* Sharplin v. State, 330 So. 2d 591, 596 (Miss. 1976) (barring use of the base *Allen* Charge).

195. *See* State v. Norquay, 2011 MT 34, ¶¶ 29-33, 38-40, 42-43, 359 Mont. 257, 264-69, 248 P.3d 817, 822-25; *see also* Quarles v. State, 233 N.W.2d 401, 402 (Wis. 1975).

196. *Norquay*, 2011 MT 34 at ¶¶ 29-33, 38-43.

197. *Id.* at ¶¶ 38-43.

198. *Id.* at ¶¶ 32, 38, 42-43.

199. KY. R. CRIM. P. 9.57(1).

200. KY. R. CRIM. P. 9.57(2).

201. WASH. SUP. COURT CRIM. R. 6.15(f)(2).

202. State v. Salas, 2017-NMCA-057, ¶¶ 24-25, 400 P.3d 251, 261.

203. *Id.*

"failed to caution a jury not to surrender [its] honest convictions" and whether the presiding judge "established time limits on further deliberations . . . ."[204] This is an interesting approach to the alternative instruction theory. Instead of creating a strict instruction, the courts have instead created a test to determine the validity of any future instructions. While this practice is not used in the Post-Millennium *Allen* Charge, it reflects the ever-present threat of presiding judges going outside of accepted model language. For the new model instruction to succeed, it must address this threat directly.

The practices previously discussed address many of the concerns outlined at the outset of this Comment. Once again, the concern regarding undue pressure on the minority is at the forefront. No matter how strictly a jurisdiction limits the use of *Allen*-type charges, it will always agree that the minority party issue must be addressed. This is a clear indicator that the substantive language of the Post-Millennium *Allen* Charge must also address this concern. Further steps taken by the states previously discussed are also vital as the proposed instruction is shaped. While many of these aspects may not find a home in the body of the presented charge, they may still be implemented as sub-elements that direct presiding judges as they issue the instruction.

D. Allows Use of the *Allen* Charge

For every state that has implemented some form of ban on the *Allen* Charge, another has upheld its use. However, these two opposing groups often share similar sentiments and worries regarding the *Allen* Charge's potential coerciveness. As these groups tackle the coercion issue, a variety of tactics have arisen. To begin, the states that allow the use of the *Allen* Charge are (1) Alabama; (2) Arkansas; (3) Delaware; (4) Florida; (5) Georgia; (6) Kansas; (7) Missouri; (8) Nevada; (9) New York; (10) Oklahoma; (11) South Carolina; (12) Texas; (13) Utah; (14) Virginia; (15) West Virginia; and (16) Wyoming.[205] The ensuing

204. *Id.*
205. *See infra* Appendix IV.

discussion will focus on (1) states that have preserved the original charge; and (2) states that allow the use of the *Allen* Charge but have introduced some form of limiting factor.

1. Preserve Original Charge

The simplest sub-category to discuss is the states that have not implemented any significant changes to their *Allen* Charge practices. These states are (1) Arkansas; (2) Georgia; and (3) Oklahoma.[206] The Arkansas Supreme Court definitively upheld the use of *Allen* Charges in its 1982 ruling *Walker v. State*.[207] Its dismissal of the appellant's arguments against the use of the *Allen* Charge indicates a clear dismissal of the critical coercive arguments recognized by other states.[208] Most notably, the court allows a judge to describe the potential expenses related to the current proceedings and any future trials on the same matter.[209] Further, presiding judges who use differing language from the recommended instruction face less scrutiny when compared to judges in other jurisdictions.[210] These judges are given free rein to indicate that no future jurors are better suited to reach a decision than the current jurors.[211] The Arkansas Supreme Court acknowledged that these practices allow a presiding judge to misrepresent the regular proceedings of the judicial process.[212] The court finalized its rebuttal of the appellant's argument, stating that "the statement itself does not encourage the jury to find the accused guilty; therefore, [the] appellant cannot show any resulting prejudice . . . ."[213]

The Georgia Supreme Court followed suit in its approval of the *Allen* Charge. Falling in line with prior precedent, the court decided that—despite the controversy—the *Allen* Charge's base language was not "extreme or improper" and thus preserved the

206. *See infra* Appendix IV.

207. 276 Ark. 434, 435-37, 637 S.W.2d 528, 529 (1982).

208. *Id.*

209. *Id.*

210. *Id.*; *cf.* Kelly v. State, 310 A.2d 538, 542 (Md. 1973) (stating that any instruction that strays from ABA model language will face higher scrutiny upon appeal).

211. *Walker*, 276 Ark. at 435-37, 637 S.W.2d at 529.

212. *Id.*

213. *Id.*

charge for future use.[214] The Oklahoma judiciary has approved the use of *Allen* Charges in a similar fashion.[215] In *Miles v. State*, the Court of Criminal Appeals found that an *Allen* Charge is proper if the jurors have been told "that they are not being forced to agree . . . ."[216] This language seems to indicate a preference for subduing language relating to the minority or majority of the jury, but in practice, this limitation has not been implemented.[217] The recommended supplemental *Allen* Charge instruction still includes language that asks the minority to consider the arguments and views of the majority.[218] The use of the original *Allen* Charge is still alive and well in Oklahoman and Georgian courts.

These three jurisdictions provide a unique perspective in the *Allen* Charge debate. Despite recognizing the potential coercive harm of *Allen* Charges, Arkansas, Georgia, and Oklahoma have decided that the potential benefits outweigh any danger to future defendants.[219] When addressing the advocacy of these jurisdictions regarding the *Allen* Charge, the arguments seem to rely solely on the ideal of judicial economy.[220] Even if harm occurs, if the courts are able to keep efficiently processing cases, then that justifies the harm suffered. These actions accrue a greater cost beyond harm suffered by individual defendants; it erodes the reliability and faith in the judicial process. As recognized by the Arkansas Supreme Court, the actual process of administering an *Allen* Charge requires a presiding judge to misrepresent the judicial process.[221] The costs associated with this line of thinking are far too great.

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214. Anderson v. State, 276 S.E.2d 603, 606-07 (Ga. 1981).

215. Miles v. State, 1979 OK CR 116, 602 P.2d 227, 228-29.

216. *Id.*

217. STEPHEN JONES ET AL., VERNON'S OKLAHOMA FORMS § 23.58 (2d ed. 2020).

218. *Id.* As of the August 2020 update.

219. Walker v. State, 276 Ark. 434, 435-37, 637 S.W.2d 528, 529 (1982); *Anderson*, 276 S.E.2d at 606-07; *Miles*, 602 P.2d at 228-29.

220. *See Walker*, 276 Ark. at 435-37, 637 S.W.2d at 529; *Anderson*, 276 S.E.2d at 606-07; *Miles*, 602 P.2d at 228-29.

221. *Walker*, 276 Ark. at 435-37, 637 S.W.2d at 529.

2. Implemented Limiting Factors

The second sub-category of approved *Allen* Charges attempts to address the coercive nature of the charge. States have taken various measures to limit the coercive effects of the *Allen* Charge, including (a) limiting references to the minority; (b) implementing a totality of the circumstances test; and (c) limiting how an *Allen* Charge is presented.[222] Many state jurisdictions have implemented many of these measures.

a. Restrictions on Minority Pressure

As seen in the previous discussion of states that have adopted the ABA model instruction and states that have implemented a ban on *Allen* Charges, the most commonly referenced concern is that the *Allen* Charge places undue pressure on the minority. With this in mind, it is little surprise that even those states who wish to retain the use of the *Allen* charge have shared this sentiment. The states that have not banned the *Allen* Charge but have taken steps to remedy the minority issue are: (1) Pennsylvania; (2) South Carolina; (3) Virginia; (4) Iowa; (5) New York; (6) Nevada; and (7) Florida.[223] The Superior Court of Pennsylvania provides a base understanding of the concerns in this category. Approaching the issue from the perspective of criminal defendants, the court found that calling for the minority to reconsider its view tips the scale of justice by "impl[ying] that only those who entertain a reasonable doubt as to guilt should reconsider."[224]

The practices approved by the South Carolina judiciary provide an interesting example of how a model instruction addresses the minority issue. In South Carolina, not only is it improper to emphasize the minority in a supplemental instruction, but the guidelines provided by the South Carolina Supreme Court mandate that a presiding judge address a jury with complete neutrality.[225] Language approved by the Virginian Supreme Court bolsters this push for neutrality. In *Poindexter v.*

222. *See infra* Appendix IV.
223. *See infra* Appendix IV.
224. Commonwealth v. Spencer, 263 A.2d 923, 926 (Pa. 1970).
225. Green v. State, 569 S.E.2d 318, 323-24 (S.C. 2002).

Commonwealth, the court approved an *Allen* Charge that asked jurors to consider the views of their peers but instructed that they do not surrender any "conscientious opinion."[226] The model *Allen* Charge in Iowa provides an extension of the language discussed above. Neutrality remains the focus of the charge, but each juror approaches the arguments of their fellow jurors with "a disposition to be convinced . . . ."[227] This principle achieves one of the goals of the Post-Millennium *Allen* Charge. The immediate goal of the new model instruction is to ensure the protection of criminal defendants. By approaching the creation of the new model instruction language with the goal of complete neutrality, the minority coercion issue is directly attacked, thus eliminating the most recognized threat of the base *Allen* Charge.

The state of New York also focused on the minority issue in its modified *Allen* Charge.[228] Specifically, the modifications have been made to avoid attempts by a presiding judge to "shame the jury into reaching [a] verdict . . . ."[229] By banning the mention of the minority in an *Allen* Charge, the New York judiciary is recognizing that the minority faces attacks on multiple fronts. Not only are jurors in the minority facing pressure from their fellow jurors, but with the issuance of an improper *Allen* Charge, they are being told by the presiding judge that they are a burden on the judicial process.[230] The Nevada Supreme Court's ruling in *Azbill v. State* supports the assertions made in New York.[231] Recognizing that the use of an *Allen* Charge gives a presiding judge the ability to interfere with the deliberation process, the Nevada Supreme Court recommends that judges rarely use the *Allen* Charge.[232] However, the rare usage of the instruction must not place any undue pressure on the minority, and the instruction is faulty if it does not "remind . . . jurors . . . to surrender conscientiously . . . ."[233] Once again, like the practices seen in

226. 191 S.E.2d 200, 203 (Va. 1972).
227. State v. Campbell, 294 N.W.2d 803, 808 (Iowa 1980).
228. People v. Aponte, 759 N.Y.S.2d 486, 487-90 (N.Y. App. Div. 2003).
229. *Id.*
230. *Id.*
231. 495 P.2d 1064, 1069 (Nev. 1972).
232. *Id.*
233. Ransey v. State, 594 P.2d 1157, 1158 (Nev. 1979) (citing Redeford v. State, 572 P.2d 219, 220 (Nev. 1977)).

South Carolina, the proper route to ensure jury independence is to take each juror at face value and to express that each individual is responsible for considering the views expressed by their peers.

Florida offers a unique instruction that serves as a final example of the current measures taken to limit undue pressure on the minority. Like the previously discussed states, the Florida model instruction limits any language that refers to the minority or majority and further limits the ability of a presiding judge to re-issue a given charge.[234] What it does offer is a roundtable type of discussion.[235] After the issuance of the charge, the jurors return to the deliberation room and sequentially argue their views of the case.[236] During this time, the jurors are expected to acknowledge the weaknesses in their arguments.[237] After this "roundtable" has concluded, if it seems that the jurors are still unwilling to concede, they return to the judge with a final hung verdict.[238] This approach is an oddity in comparison to the practices of other states but is not without its own merits. While this roundtable style of discussion has not found a new home in the Post-Millennium *Allen* Charge, the Florida judiciary should be commended for its efforts to address the challenges of *Allen*-type charges.

b. Totality-of-the-Circumstances Test

Three states have concluded that the best manner to address the *Allen* Charge is to review the merits of the given charge on a case-by-case basis.[239] In what is commonly referred to as a "totality-of-the-circumstances test," the states that follow this practice judge the use of an *Allen* Charge within the parameters of the case that is currently before the court.[240] Instead of issuing a blanket ban on the practice, these states have found it easier to

234. FLA. STD. CRIM. JURY INSTR. § 4.1 (1981); *see also* Almeida v. State, 157 So. 3d 412, 415 (Fla. Dist. Ct. App. 2015) (ruling that presiding judges in Florida state courts may not repeat an *Allen* Charge more than once).

235. FLA. STD. CRIM. JURY INSTR. § 4.1.

236. *Id.*

237. *Id.*

238. *Id.*

239. *See infra* Appendix IV.

240. "Totality-of-the-Circumstances Test" is a term of art used to collectively reference certain state practices. *Totality-of-the-Circumstances Test*, BLACK'S LAW DICTIONARY (11th ed. 2019).

address issues when they appear. The states that fall within this sub-category are: (1) Alabama; (2) West Virginia; and (3) Utah.[241]

The Court of Criminal Appeals of Alabama has simply stated that the *Allen* Charge is permissible "if the language of the charge is not coercive or threatening."[242] To determine whether the language is improperly coercive, the court judges the given charge based on the "whole context" of the given case.[243] The specific factors that the court considered in *Maxwell v. State* are quite limited.[244] It considered whether the presiding judge gave an indication of how he believed the jury should decide the case and if the specific language used was "coercive or threatening."[245] The West Virginian judiciary follows a similar practice, stating that undue coercion is difficult to "determine[] by any general or definite rule."[246] Instead, the courts have implemented a practice of determining undue coercion on a case-by-case basis.[247] In a similar vein, the Court of Appeals of Utah has indicated that a valid *Allen* Charge is still unduly coercive if the presiding judge acts coercively.[248] This practice of determining coerciveness implements an environment of indecisiveness that will not aid the new model instruction. Instead of relying on various judges' interpretations of what constitutes coercive behavior, the model instruction must provide clear guidelines that keep judges within the allowed parameters. By setting a strict barrier for use, defendants on appeal can effectively argue any undue coercive acts of a presiding judge based on how far the judge strayed from the guidelines of the Post-Millennium *Allen* Charge.

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241. *See infra* Appendix IV.

242. Maxwell v. State, 828 So. 2d 347, 365 (Ala. Crim. App. 2000) (quoting Gwarjanski v. State, 700 So. 2d 357, 360 (Ala. Crim. App. 1996)).

243. *Id.* (quoting Miller v. State, 645 So. 2d 363, 366 (Ala. Crim. App. 1994)).

244. *See id.*

245. *Id.*

246. STEPHEN P. MEYER, TRIAL HANDBOOK FOR WEST VIRGINIA LAWYERS § 37:19 (2021).

247. *Id.*; State v. Spence, 313 S.E.2d 461, 463 (W. Va. 1984).

248. *See* State v. Harry, 2008 UT App 224, ¶¶ 27, 33-34, 189 P.3d 98, 106-08.

c. Presentation of the Allen *Charge*

The final sub-category of approved *Allen* Charge jurisdictions are those states that limit how a presiding judge may present an instruction.[249] These guidelines limit the when and how a presiding judge is to issue a charge, and further serve as indicators to prove that the judge has acted in a coercive manner. The states that have taken limiting measures are: (1) Delaware; (2) Kansas; (3) Wyoming; (4) Texas; and (5) Missouri.[250]

In its steps to limit the coercive effects of the *Allen* Charge, the Delaware judiciary recognizes that when a presiding judge chooses to present an instruction is a determining factor when deciding whether the judge acted coercively.[251] Further, the length of jury deliberations prior to and after the issuance of an *Allen* Charge can reflect the coercive nature of an instruction.[252] The Delaware Supreme Court elaborates further by stating that the likelihood of coercion increases if the presiding judge knows the numerical division of the jury.[253] While it is a reversible error for the judge to inquire about how the jury is split—if the jury informs the judge without prompt—then giving an *Allen* Charge is not automatically improper.[254] This acknowledgment of the potential issues arising out of the presiding judge's knowledge of the numerical split of the jury is a valuable feature. Implementing such a feature into the Post-Millennium *Allen* Charge places a strict barrier between the presiding judge and the jurors during deliberation, thus ensuring that any intentional—or unintentional—coercive acts do not occur.

The standards in Kansas and Wyoming further elaborate on how the timing of an instruction aids in determining whether a presiding judge acted coercively. In Kansas, presiding judges deliver *Allen* Charges before the jurors begin deliberating.[255] Further, it is improper for the presiding judge to emphasize the

249. *See infra* Appendix IV.
250. *See infra* Appendix IV.
251. Desmond v. State, 654 A.2d 821, 826-27 (Del. 1994).
252. *Id.*
253. *Id.* at 827.
254. *Id.* at 827-28.
255. State v. Whitaker, 872 P.2d 278, 286 (Kan. 1994); State v. Roadenbaugh, 673 P.2d 1166, 1174 (Kan. 1983).

instruction as being of higher importance than any other concurrent instructions.[256] To accomplish this, the *Allen* Charge is read alongside other jury instructions.[257] The Wyoming Supreme Court followed suit in its decision in *Elmer v. State*.[258] After providing a harsh rebuke of the use of the charge, the court recommended that the issuance of the charge occur during the delivery of the other jury instructions.[259] Straying from this recommendation increases the likelihood that the presiding judge has acted unduly coercively.[260] Here, this practice limits the potential for undue coerciveness in the Post-Millennium *Allen* Charge. First, it limits the potential coercion of jurors in the minority since the instructions are read prior to these parties being formed. Further, by reading these instructions alongside the other jury instructions present in a given case, some weight is taken off the charge by making it seem no more important than any other instruction. These are vital features in the newly proposed model instruction.

The issue of timing also serves a beneficial purpose. A balancing test allows for a court to understand whether it is appropriate to give an *Allen* Charge or if the charge has coerced a decision out of the jury.[261] In Texas, presiding judges have the discretion of determining whether the jury has deliberated for an appropriate amount of time.[262] The severity of the charges and the overall complexity of the facts are used to determine whether it is proper to issue a charge.[263] For example, in *Andrade v. State*, the court found that the presiding judge properly extended jury deliberations given the complexity of the capital murder charges.[264] After receiving the instruction, the jury deliberated for eight additional hours before reaching a unanimous verdict.[265] Here, since the facts of the case were complex and the alleged

256. *Whitaker*, 872 P.2d at 286.
257. *Id.*
258. 463 P.2d 14, 22 (Wyo. 1969).
259. *Id.* at 21-22.
260. *See id.* at 23 (McIntyre, J., concurring).
261. *See* Montoya v. State, 810 S.W.2d 160, 166 (Tex. Crim. App. 1989).
262. *Id.*
263. *See id.*
264. 700 S.W.2d 585, 589 (Tex. Crim. App. 1985).
265. *Id.* at 588-89.

crime was severe, the presented *Allen* Charge was not coercive.[266] If the jurors had returned a verdict within a shorter time frame, it is more likely that the given instruction coerced them to reach the verdict.[267] The use of the "hammer [charge]" in Missouri carries similarities to the Texas balancing test process.[268] Presiding judges in Missouri are given broad discretion in determining if their actions and the delivery of an *Allen*-type charge is coercive.[269] The balancing test weighs heavily in favor of presiding judges.[270]

The balancing test described by the Texas and Missouri courts aids the development of the Post-Millennium *Allen* Charge. This test can be used to aid a presiding judge as he or she determines whether to issue a subsequent reading of the new instruction. Likewise, if the presiding judge's decision to present the instruction is appealed, the commentary aids the appellate judge in determining if the presiding judge's actions are unduly coercive. Giving a presiding judge this discretion is certainly a risk but it is a necessary feature to build a well-rounded instruction.

IV. THE POST-MILLENNIUM *ALLEN* CHARGE

If we want our criminal justice system, and American society at large, to operate on a higher ethical code, then we have to model that code ourselves.[271]

The Post-Millennium *Allen* Charge does not seek to empower a presiding judge but rather places barriers on judicial discretion to protect the interest of defendants. This new model instruction must address the concerns of the various state judiciaries while simultaneously filling in the gaps of their current practices. In its model language, the Post-Millennium *Allen* Charge seeks to specifically address the issue of undue minority

266. *Id.*

267. *Id.*; Montoya v. State, 810 S.W.2d 160, 166 (Tex. Crim. App. 1989).

268. City of St. Charles v. Hal-Tuc, Inc., 841 S.W.2d 781, 782 (Mo. Ct. App. 1992).

269. *Id.*; *see also* State v. Dewitt, 924 S.W.2d 568, 570 (Mo. Ct. App. 1996).

270. *Hal-Tuc, Inc.*, 841 S.W.2d at 781-82; *see also Dewitt*, 924 S.W.2d at 570.

271. Barack Obama, *How to Make this Moment the Turning Point for Real Change*, MEDIUM (June 1, 2020), [https://perma.cc/9Q2D-CQCD].

coercion and the multiple issues related to the presentation of an *Allen*-type charge. To accomplish this goal, the following discussion contains both (A) the elements of the Post-Millennium *Allen* Charge; and (B) notes of use to aid the implementation of the model instruction.

A. Elements[272]

In issuing the given Post-Millennium *Allen* Charge, the presiding judge must adhere to the guidance of the following elements:

> (A) Prior to the jury's retirement for deliberation, the court may present this instruction, informing jurors that:
>
> (1) a unanimous verdict requires that all jurors have independently reached the same conclusion;
>
> (2) during deliberations, individual jurors should be impartial to the facts of the case and should give weight to the views and arguments of their fellow jurors;
>
> (3) while it is the duty of every juror to reach an independent conclusion of innocence or guilt, jurors should partake in a thorough debate to ensure all aspects of the given case have been explored; and
>
> (4) no juror is to surrender an honest belief of guilt or innocence based on threats or pressure of other jurors or court officials, or out of interest of returning a unanimous verdict.[273]
>
> (B) The presiding judge may repeat the present charge a single time after the jury informs the judge that they are unable to reach a verdict.[274]

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272. The following instructions were written by the author of this Comment for the express purpose of proposing a new model *Allen*-type instruction.

273. The language of the presented charge is a modified version of the language in the ABA model instruction. *See* ABA MODEL INSTRUCTION, *supra* note 62, at § 15-5.4(a)(1)-(5).

274. While multiple jurisdictions allow the re-issuance of a given charge multiple times, the Post-Millennium *Allen* Charge follows the example and reasoning referenced by the Florida state courts. *See* Almeida v. State, 157 So. 3d 412, 415-16 (Fla. Dist. Ct. App. 2015) (ruling that presiding judges in Florida state courts may not repeat an *Allen* Charge more than once).

> (1) The presiding judge must repeat all necessary instructions to fully explain the controlling statutory language and duties of the jury; and[275]
>
> (2) the presiding judge is to consider the length of deliberations and the complexity of the given case in deciding whether to repeat the given instruction.[276]
>
> (3) The presiding judge may not inquire into the numerical split of the jury when determining whether to re-issue the language in Section (A)(1)-(4);[277]
>
> (4) however, it is not improper for the presiding judge to repeat the present charge if the judge gained knowledge of the numerical split from an independent act of the jury.[278]
>
> (C) It is improper for presiding judges to use any language that strays from the requirements outlined in Section (A)(1)-(4) of this charge.[279]
>
> (D) Presiding judges are prohibited from referencing any cost associated with the current matter before the court, or

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275. This element adopts the reasoning presented by the Kansas state courts that presenting a charge alongside other relevant instructions aids in combating the undue coercive effects of the instruction. *See* State v. Whitaker, 872 P.2d 278, 286 (Kan. 1994) (finding that it is preferable to repeat an *Allen* Charge alongside all other instructions present in the given case).

276. This element is reminiscent of the manner in which *Allen* Charges are determined to be improperly coercive in Texas. *See* Montoya v. State, 810 S.W.2d 160, 166 (Tex. Crim. App. 1989) (ruling that the context of the given case must be considered when determining whether it was proper to issue an *Allen* Charge); *see also* Andrade v. State, 700 S.W.2d 585, 589 (Tex. Crim. App. 1985) (declaring that the complexity of the given case and the severity of the charges against the defendant are relevant factors when determining whether issuing an *Allen* Charge was proper).

277. As seen in multiple jurisdictions, the inquiry into the numerical split of a hung jury poses multiple threats of coercion. *See* Desmond v. State, 654 A.2d 821, 827 (Del. 1994) (ruling that the likelihood of coercion increases if a presiding judge seeks out the numerical split of a jury before issuing an *Allen* Charge); *see also* People v. Saltray, 969 P.2d 729, 732-33 (Colo. App. 1998) (ruling that presiding judges in Colorado may not directly inquire about the numerical split of a hung jury).

278. This element seeks to avoid unnecessarily limiting presiding judges from presenting the model instruction when they do not improperly learn of the numerical split of the jury. *Desmond*, 654 A.2d at 826-28 (ruling that a presiding judge is not limited from issuing an *Allen* Charge if the jury informs him of its numerical split without prompt).

279. This element implements the standard set by the Maryland state courts in their adoption of the original ABA model instruction. Kelly v. State, 310 A.2d 538, 542 (Md. 1973) (stating that any instruction that strays from ABA model language will face "careful" scrutiny upon appeal).

any other associated costs that may result from an inconclusive verdict.[280]

(1) It is further unacceptable to state that it is improper for an inconclusive verdict to be given.[281]

B. Notes of Use[282]

Dissecting the elements of this new model instruction provides guidance on how this charge combats the coercive nature of the base *Allen* Charge. Elements (A)(1)-(4) contain the base language of the actual charge. This language is what the presiding judge reads to the jurors prior to their retirement for deliberations. The language contained within is a version of the ABA model instruction that is refined by the lessons learned from the studied state practices.[283] Element (A)(1) provides a clear definition of the duty of individual jurors. While jurors should seek a unanimous verdict, their independence is of greater value to the judicial process. Elements (A)(2)-(4) define what an independent verdict means in the context of the current proceedings and provides practical guidance on how the jurors should conduct themselves in the deliberation room. A vital feature of these sub-elements is the reference to individual jurors. Banning the mention of either the majority or minority overcomes the largest hurdle of this debate—the undue coercion of the minority.[284]

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280. As discussed by multiple jurisdictions, the discussion of any costs associated with a proceeding only serve to unduly pressure a jury into reaching a verdict. *See* State v. Martin, 211 N.W.2d 765, 771 (Minn. 1973) (ruling that the coercive nature of informing jurors of the costs of the ongoing proceedings does little to aid the interest of judicial economy).

281. This specific element seeks to combat the improper use of "final test" language. *See* State v. Norquay, 2011 MT 34, ¶¶ 31, 37, 38-41, 43, 359 Mont. 257, 264-69, 248 P.3d 817, 822-25 (defining and barring use of "final test" language).

282. The following information provides guidelines on the use of the proposed Post-Millennium *Allen* Charge.

283. ABA MODEL INSTRUCTION, *supra* note 62, at § 15-5.4(a)(1)-(5).

284. Green v. State, 569 S.E.2d 318, 323 (S.C. 2002) (explaining South Carolina's ban on any *Allen*-type instructions that mention either the minority or majority); *see* Smith & Kassin, *supra* note 51, at 639-41 (finding that the minority faces greater pressure after the issuance of an *Allen* Charge compared to the majority); *see also Deadlocked Juries: Thomas*, *supra* note 50, at 375 (describing the threat an *Allen* Charge poses to an independent jury ruling).

Elements (B)-(D) define and limit the duties of the presiding judge in his or her issuance of the charge. First, Element (B) limits the number of times and the manner in which a presiding judge can repeat the instruction to the jury. A presiding judge risks coercing the jury into reaching an improper ruling if he or she repeatedly insists that the jurors reenter deliberations.[285] To avoid this, the model instruction limits the ability of the presiding judge to re-issue the charge to a single time. Further, Element (B)(1) limits the potential for coercion by mandating that all provided instructions be repeated alongside the model instruction. This practice avoids singling out the model instruction in the eyes of the jury.[286] Element (B)(2) empowers the presiding judge to determine whether issuing the charge a second time is necessary by conducting a totality of the circumstances test. In conducting this test, the presiding judge is to weigh the apparent complexity of the given case with the conduct of the jury. For example, the issuance of a second charge is likely proper if the jury deliberated for a relatively short amount of time in a case with complex facts or statutory requirements.[287] This specific sub-element is the area where coercive acts by the presiding judge offer the greatest threat, thus the limitation of repeating the model instruction a single time. Elements (B)(3)-(4) prevent presiding judges from inquiring about the numerical split of a hung jury when deciding whether to re-issue a second iteration of the language in Elements (A)(1)-(4). However, to avoid unduly punishing a presiding judge who took no improper actions, Element (B)(4) does not prevent the judge from issuing a second charge if he or she gained

285. This practice has repeatedly been found to be unnecessary when weighed against the possible coercive effects of a given charge. *See* Almeida v. State, 157 So. 3d 412, 415-16 (Fla. Dist. Ct. App. 2015) (ruling that presiding judges in Florida state courts may not repeat an *Allen* Charge more than once).

286. *See* State v. Whitaker, 872 P.2d 278, 286 (Kan. 1994) (finding that it is preferable to repeat an *Allen* Charge alongside all other instructions present in the given case).

287. As discussed prior, this process is a modified version of the process established in Texas state courts when determining if a given charge was coercive. *See* Montoya v. State, 810 S.W.2d 160, 166 (Tex. Crim. App. 1989) (ruling that the context of the given case must be considered when determining whether it was proper to issue an *Allen* Charge); *see also* Andrade v. State, 700 S.W.2d 585, 589 (Tex. Crim. App. 1985) (declaring that the complexity of the given case and the severity of the charges against the defendant are relevant factors when determining whether issuing an *Allen* Charge was proper).

knowledge of the numerical split from an independent act of the jury.[288]

Elements (C)-(D) conclude the model instruction by further limiting the presiding judge's ability to coerce the jury into reaching a desired conclusion. Specifically, these elements limit a judge from straying from the stated language in Elements (A)(1)-(4) and from referencing any associated costs with the judicial process.[289] First, Element (C) prevents a presiding judge from unknowingly creating a secondary instruction that improperly coerces a jury. Implementation of this element provides jurisdictions greater control over the language used in the listed instruction and provides a test for an appellate court to judge the actions of the lower court.[290] Element (D) recognizes that the costs associated with trying a case can be unduly coercive over a juror. Presiding judges cannot use the costs of the ongoing proceedings and any future proceedings as a way to guilt the jury into reaching a unanimous ruling. The costs of a trial are not the concerns of the jury and should not distract it in its determination of guilt.

V. CONCLUSION

After 125 years, it is time to put the *Allen* Charge debate to rest. In a social climate focused on reform and guarantees of equal justice, the legal community must examine the weaknesses and areas of potential harm in the judicial process assiduously. The *Allen* Charge is a relic of a bygone legal era that placed judicial efficiency as the highest ideal. In considering the *Allen* Charge's role, it is clear it can serve a beneficial purpose if the inherent coercive nature of the charge can be effectively overcome. The Post-Millennium *Allen* Charge is a collective piece that ties together the best practices of the fifty states and the

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288. *See* Desmond v. State, 654 A.2d 821, 826-28 (Del. 1994) (ruling that a presiding judge is not limited from issuing an *Allen* Charge if the jury informs him or her of its numerical split without prompt).

289. *See* State v. Martin, 211 N.W.2d 765, 771 (Minn. 1973) (ruling that the coercive nature of informing jurors of the costs of the ongoing proceedings does little to aid the interest of judicial economy).

290. *See* Kelly v. State, 310 A.2d 538, 542 (Md. 1973) (stating that any instruction that strays from ABA model language will face higher scrutiny upon appeal).

ABA model instruction. Adopting such a charge takes a step forward towards providing safeguards as criminal defendants traverse the ever-changing legal realm.

APPENDIX I: THE OUTLIERS[291]

State	Cited Materials
A. *Tuey-Rodriquez* Charge	
Massachusetts	Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1 (1851); Commonwealth v. Rodriquez, 300 N.E.2d 192 (Mass. 1973); Commonwealth v. Brown, 323 N.E.2d 902 (Mass. 1975); Commonwealth v. Rollins, 241 N.E.2d 809 (Mass. 1968); Commonwealth v. Haley, 604 N.E.2d 682 (Mass. 1992); Commonwealth v. O'Brien, 839 N.E.2d 845 (Mass. App. Ct. 2005).
B. *Chip Smith* Charge	
Connecticut	State v. Smith, 49 Conn. 376 (Conn. 1881); State v. O'Neil, 207 A.2d 730 (Conn. 2002); State v. Feliciano, 778 A.2d 812 (Conn. 2001); State v. Martinez, 378 A.2d 517 (Conn. 1977); State v. McArthur, 899 A.2d 691 (Conn. App. Ct. 2006).

291. The following materials listed in Appendices I-IV are not the sole controlling authorities in the listed jurisdictions—they are simply the materials that were referenced or cited in the discussion above. While some sources listed in the appendices are not cited in the body of this Comment, they are listed due to the aid they provided in preparing this Comment.

APPENDIX II: ABA MODEL INSTRUCTIONS

State	Cited Materials
A. Adopted ABA Model Instruction	
Illinois	People v. Prim, 298 N.E.2d 601 (Ill. 1972); People v. Branch, 462 N.E.2d 868 (Ill. App. Ct. 1984); People v. Brown, 362 N.E.2d 820 (Ill. App. Ct. 1977).
Maine	State v. White, 285 A.2d 832 (Me. 1972); State v. Cote, 507 A.2d 584 (Me. 1986); State v. Kaler, 1997 ME 62, 691 A.2d 1226.
Michigan	People v. Sullivan, 220 N.W.2d 441 (Mich. 1974); People v. Lawson, 223 N.W.2d 716 (Mich. Ct. App. 1974); People v. Thompson, 265 N.W.2d 632 (Mich. Ct. App. 1978).
Minnesota	State v. Martin, 211 N.W.2d 765 (Minn. 1973); State v. Cox, 820 N.W.2d 540 (Minn. 2012); State v. Danforth, 573 N.W.2d 369 (Minn. Ct. App. 1997).
New Jersey	State v. Czachor, 413 A.2d 593 (N.J. 1980); State v. Boiardo, 268 A.2d 55 (N.J. Super. Ct. App. Div. 1970); State v. Ross, 93 A.3d 739 (N.J. 2014).
Tennessee	Kersey v. State, 525 S.W.2d 139 (Tenn. 1975).

Vermont	State v. Perry, 306 A.2d 110 (Vt. 1973); State v. Rolls, 2020 VT 18, 229 A.3d 695.
B. Co-opted ABA Language	
Colorado	People v. Schwartz, 678 P.2d 1000 (Colo. 1984); People v. Gonzales, 565 P.2d 945 (Colo. App. 1977); People v. Saltray, 969 P.2d 729 (Colo. App. 1998).
North Carolina	N.C. GEN. STAT. § 15A-1235 (1977); State v. Alston, 243 S.E.2d 354 (N.C. 1978); State v. Blackwell, 747 S.E.2d 137 (N.C. Ct. App. 2013).
C. Soft Adoption of ABA Standards	
Alaska	Fields v. State, 487 P.2d 831 (Alaska 1971); Stapleton v. State, 696 P.2d 180 (Alaska Ct. App. 1985).
Maryland	Kelly v. State, 310 A.2d 538 (Md. 1973); Goodmuth v. State, 490 A.2d 682 (Md. 1985); Hall v. State, 75 A.3d 1055 (Md. Ct. Spec. App. 2013).
Nebraska	State v. Garza, 176 N.W.2d 664 (Neb. 1970); Potard v. State, 299 N.W. 362, 365 (Neb. 1941).
New Hampshire	State v. Blake, 305 A.2d 300 (N.H. 1973)
North Dakota	State v. Champagne, 198 N.W.2d 218 (N.D. 1972).
Oregon	State v. Marsh, 490 P.2d 491 (Or. 1971); State v. Garrett,

	426 P.3d 164 (Or. Ct. App. 2018); State v. Hutchison, 920 P.2d 1105 (Or. Ct. App. 1996).
Rhode Island	State v. Patriarca, 308 A.2d 300 (R.I. 1973); State v. Souza, 425 A.2d 893 (R.I. 1981); State v. Luanglath, 863 A.2d 631 (R.I. 2005).

APPENDIX III: STRONG DISAPPROVAL

State	Cited Materials
A. Total Ban	
Arizona	State v. Thomas, 342 P.2d 197 (Ariz. 1959); State v. Smith, 493 P.2d 904 (Ariz. 1972); State v. Kuhs, 224 P.3d 192 (Ariz. 2010).
Hawaii	State v. Fajardo, 699 P.2d 20 (Haw. 1985).
Idaho	State v. Flint, 761 P.2d 1158 (Idaho 1988); State v. Martinez, 832 P.2d 331 (Idaho Ct. App. 1992).
Louisiana	State v. Nicholson, 315 So. 2d 639 (La. 1975); State v. Bradley, 995 So. 2d 1230 (La. Ct. App. 2008); State v. Caston, 561 So. 2d 941 (La. Ct. App. 1990).
South Dakota	State v. Fool Bull, 2009 SD 36, 766 N.W.2d 159; State v. Ferguson, 175 N.W.2d 57 (S.D. 1970); State v. Hall, 272 N.W.2d 308 (S.D. 1978).

B. Modified Instructions	
California	People v. Gainer, 566 P.2d 997 (Cal. 1977); People v. Valdez, 281 P.3d 924 (Cal. 2012); People v. Butler, 209 P.3d 596 (Cal. 2009).
Indiana	Fultz v. State, 473 N.E.2d 624 (Ind. Ct. App. 1985); Lewis v. State, 424 N.E.2d 107 (Ind. 1981); Clark v. State, 597 N.E.2d 4 (Ind. Ct. App. 1992).
Kentucky	KY. R. CRIM. P. 9.57; Commonwealth v. Mitchell, 943 S.W.2d 625 (Ky. 1997); Gray v. Commonwealth, 480 S.W.3d 253 (Ky. 2016).
Montana	State v. Norquay, 2011 MT 34, 359 Mont. 257, 248 P.3d 817; State v. Randall, 353 P.2d 1054 (Mont. 1960); State v. Santiago, 2018 MT 13, 390 Mont. 154, 415 P.3d 972.
Mississippi	Sharplin v. State, 330 So. 2d 591 (Miss. 1976); Bell v. State, 2015-KA-00643-SCT (Miss. 2016); Gearlson v. State, 482 So. 2d 1141 (Miss. 1986).
New Mexico	State v. Salas, 2017-NMCA-057, 400 P.3d 251; State v. Laney, 81 P.3d 591 (N.M. Ct. App. 2003); State v. Romero, 526 P.2d 816 (N.M. Ct. App. 1974) (Sutin, J., dissenting).
Ohio	State v. Howard, 537 N.E.2d 188 (Ohio 1989); State v. Maupin, 330 N.E.2d 708 (Ohio 1975); State v. May, 2015-Ohio-4275, 49 N.E.3d 736.

Washington	WASH. SUP. COURT CRIM. R. 6.15(2); State v. Parker, 485 P.2d 60 (Wash. 1971).
Wisconsin	Quarles v. State, 233 N.W.2d 401 (Wis. 1975); Kelley v. State, 187 N.W.2d 810 (Wis. 1971).

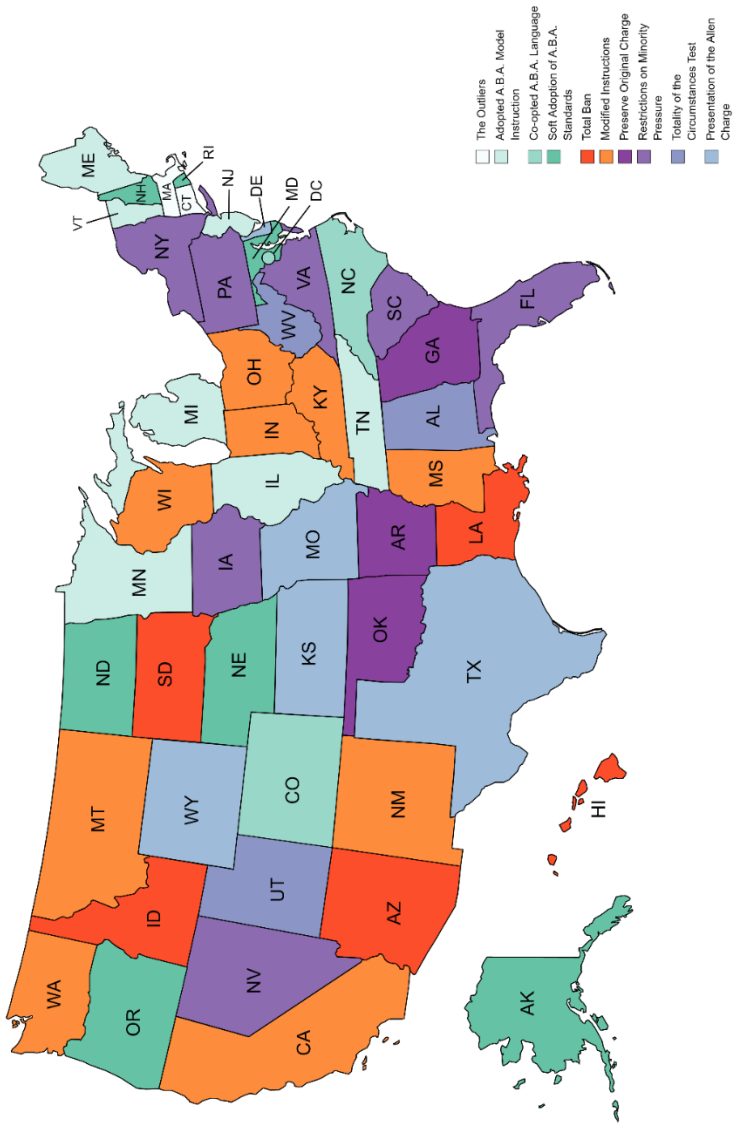
APPENDIX IV: ALLOWS USE OF THE *ALLEN* CHARGE

State	Cited Materials
A. Preserve Original Charge	
Arkansas	Walker v. State, 276 Ark. 434, 637 S.W.2d 528 (1982); Griffin v. State, 2 Ark. App. 145, 617 S.W.2d 21 (1981); Moore v. State, 2015 Ark. App. 480, 469 S.W.3d 801.
Georgia	Anderson v. State, 376 S.E.2d 603 (Ga. 1981); Anglin v. State, 806 S.E.2d 573 (Ga. 2017); Barnes v. State, 266 S.E.2d 212 (Ga. 1980).
Oklahoma	Miles v. State, 602 P.2d 227 (Okla. 1979).
B. Restrictions on Minority Pressure	
Florida	FLORIDA STANDARD JURY INSTRUCTION § 4.1 (1981); Almeida v. State, 157 So. 3d 412 (Fla. Dist. Ct. App. 2015); Peak v. State, 363 So. 2d 1166 (Fla. Dist. Ct. App. 1978); Lebron v. State, 799 So. 2d 997 (Fla. 2001).

Iowa	State v. Campbell, 294 N.W.2d 803 (Iowa 1980); State v. Cornell, 266 N.W.2d 15 (Iowa 1978); State v. Hackett, 200 N.W.2d 493 (Iowa 1972).
Nevada	Azbill v. State, 495 P.2d 1064 (Nev. 1972); Ransey v. State, 594 P.2d 1157 (Nev. 1979); Basurto v. State, 472 P.2d 339 (Nev. 1970).
Pennsylvania	Commonwealth v. Spencer, 263 A.2d 923 (Pa. 1970); Commonwealth v. Gartner, 381 A.2d 114 (Pa. 1977); Commonwealth v. Lambert, 299 A.2d 240 (Pa. 1973).
New York	People v. Aponte, 759 N.Y.S.2d 486 (N.Y. App. Div. 2003); People v. Abston, 645 N.Y.S.2d 690 (N.Y. App. Div. 1996).
South Carolina	Green v. State, 569 S.E.2d 318 (S.C. 2002); State v. Lynn, 284 S.E.2d 786 (S.C. 1981); State v. Singleton, 460 S.E.2d 573 (S.C. 1995).
Virginia	Poindexter v. Commonwealth, 191 S.E.2d 200 (Va. 1972); Prieto v. Commonwealth, 682 S.E.2d 910 (Va. 2009).
C. Totality-of-the-Circumstances Test	
Alabama	Maxwell v. State, 828 So. 2d 347 (Ala. Crim. App. 2000); Daily v. State, 828 So. 2d 344 (Ala. Crim. App. 2002).
Utah	State v. Harry, 2008 UT App 224, 189 P.3d 98; State v. Lactod, 761 P.2d 23 (Utah Ct.

	App. 1988); State v. Cruz, 206 UT App 234, 387 P.3d 618.
West Virginia	State v. Spence, 376 S.E.2d 618 (W. Va. 1988); State v. Waldron, 624 S.E.2d 887 (W. Va. 2005).
D. Presentation of the *Allen* Charge	
Delaware	Desmond v. State, 654 A.2d 821 (Del. 1994); Brown v. State, 369 A.2d 682 (Del. 1976); Collins v. State, 56 A.3d 1012 (Del. 2012).
Kansas	State v. Whitaker, 872 P.2d 278 (Kan. 1994); State v. Roadenbaugh, 673 P.2d 1166 (Kan. 1983); State v. Gomez, 143 P.3d 92 (Kan. Ct. App. 2006).
Missouri	City of St. Charles v. Hal-Tuc, Inc., 841 S.W.2d 781 (Mo. Ct. App. 1992); State v. Dewitt, 924 S.W.2d 568 (Mo. Ct. App. 1996); State v. Carl, 389 S.W.3d 276 (Mo. Ct. App. 2013).
Texas	Montoya v. State, 810 S.W.2d 160 (Tex. Crim. App. 1989); Andrade v. State, 700 S.W.2d 585 (Tex. Crim. App. 1985); Barnett v. State, 189 S.W.3d 272 (Tex. Crim. App. 2006).
Wyoming	Elmer v. State, 463 P.2d 14 (Wyo. 1969); Carter v. State, 2016 WY 36, 369 P.3d 220 (Wyo. 2016); Hoskins v. State, 552 P.2d 342 (Wyo. 1976).

APPENDIX V[292]



292. If included, the decisions of the Washington D.C. circuit create a model instruction that is classified under the "Co-opted ABA Language" sub-grouping. United States v. Thomas, 449 F.2d 1177, 1187-88 (D.C. Cir. 1971); *see also* United States v. Strothers, 77 F.3d 1389, 1391 (D.C. Cir. 1996).

IMPORTING INDIAN INTOLERANCE: HOW TITLE VII CAN PREVENT CASTE DISCRIMINATION IN THE AMERICAN WORKPLACE

Brett Whitley*

If Hindus migrate to other regions on [E]arth, [Indian] Caste would become a world problem.
— Dr. B.R. Ambedkar (1916)[1]

INTRODUCTION

Imagine it is the year 2020. You are one of the more than 160 million people across India that are labeled as Dalits, formerly known as the "Untouchables." Most Hindus view Dalits as belonging to the lowest rung in the ancient system of social stratification that impacts individuals across the globe called the caste system.[2] Your people have endured human rights abuses for centuries, but luckily, neither you nor a loved one have ever been the victim of one of the thousands of horrendous crimes such as assault, rape, or murder committed against your people each year.[3] Even so, you have never felt safe, especially when

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1. M. ZWICK-MAITREYI ET AL., CASTE IN THE UNITED STATES: A SURVEY OF CASTE AMONG SOUTH ASIAN AMERICANS 4 (Equality Labs 2018), [https://perma.cc/JW3G-V9JG].

2. *What is India's Caste System?*, BBC NEWS (June 19, 2019), [https://perma.cc/9B7F-BKAN].

3. Hillary Mayell, *India's "Untouchables" Face Violence, Discrimination*, NAT'L GEOGRAPHIC (June 2, 2003), [https://perma.cc/9D9Y-FBU7] ("Statistics compiled by India's National Crime Records Bureau indicate that in the year 2000, the last year for which figures were available, 25,455 crimes were committed against Dalits. Every hour two Dalits

newspaper headlines read: "Dalit [] beaten to death for plucking flowers;" "Dalit tortured by cops for three days;" or "Dalit woman gang-raped, paraded naked."[4] Despite your fears, you have persevered throughout school due to India's affirmative action plan, or "compensatory discrimination" program.[5] You wish not only to escape the country that is hostile to your caste, but to also obtain a job outside of the realm of undesirable occupations to which Dalits are ordinarily limited.[6] To your delight, you obtain a respectable job working for a tech giant in the United States. However, you quickly learn that the caste discrimination you faced at home transcends borders.

At your new job, you begin to associate with your upper caste coworkers who also immigrated from India. After a short conversation about where you went to school in India and your last name, your Dalit status is apparent, and your coworkers and supervisors input limitations for you based on your caste. From that point onward, you "receive[] less pay, fewer opportunities, and other inferior terms and conditions of employment . . . ."[7]

This is no imaginary tale. It is the story of an anonymous Dalit employee who sought to bring a Title VII claim based on caste discrimination against his employer, CISCO.[8] Importantly, he is not alone. It may be difficult to ever know how many Dalits are currently in the United States because they fear that their caste

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are assaulted; every day three Dalit women are raped, two Dalits are murdered, and two Dalit homes are torched.").

4. *Id.*

5. M. Varn Chandola, *Affirmative Action in India and the United States: The Untouchable and Black Experience*, 3 IND. INT'L & COMPAR. L. REV. 101, 109 (1992). Such affirmative action programs reserve admission in institutions of higher education for Dalits and other disadvantaged classes of people.

6. Shambhavi Raj Singh, *#DalitLivesMatter: Why Are Atrocities Against Dalits On The Rise?*, FEMINISM IN INDIA (June 11, 2020), [https://perma.cc/Q6FB-HD67] ("Even today, more than 90% of the employees in the sanitation and cleaning sector are Dalits."); *see also* Jeremy Sarkin & Mark Koenig, *Ending Caste Discrimination in India: Human Rights and the Responsibility to Protect (R2P) Individuals and Groups from Discrimination at the Domestic and International Levels*, 41 GEO. WASH. INT'L L. REV. 541, 550 (2010) ("Most Dalit people are still landless agricultural laborers today, just as they have been for centuries.").

7. Complaint at 3, Cal. Dep't Fair Emp. & Hous. v. CISCO Sys., Inc., No. 5:20-cv-04374-NC (N.D. Cal. 2020) (dismissed), [https://perma.cc/5PC4-TEQW].

8. *Id.* at 1-2.

can be revealed, or in other words, "outed."[9] However, there are concrete numbers that in 2003 only 1.5% of Indian immigrants in the United States were Dalit or lower caste, leaving them vastly outnumbered in comparison to the total 2.5 million people of Indian descent who lived in the United States at the time.[10] It may also be useful to compare the 2003 figures in the United States to statistics in South Asia regarding Dalit demographics to get an idea about disproportionate Dalit representation. A 2016 survey found that in some South Asian countries "Dalits represent an average of 15-18% of the population and Brahmins, the highest ranking caste, [represent] approximately 3-4%."[11]

Heinous crimes like sexual assault or murder are the most extreme products of caste discrimination and should warrant the most attention, but the effects of caste discrimination are not limited to these crimes. There are many other, less apparent ways in which a biased upper caste supervisor may remind Dalit and lower caste employees that they are inferior, therefore upholding the caste hierarchy that exists so prevalently in their home country of India. Whether the biased supervisor torments a Dalit or lower caste employee with caste-related jokes or takes his or her discriminatory goals a step further by making it his or her mission to limit the success of Dalits or lower caste employees, the supervisor's actions are the product of the caste system.

As Indian immigration to the United States continues to grow exponentially,[12] the tech industry has become "increasingly dependent on Indian workers."[13] Further, as more lower caste and Dalit individuals benefit from India's affirmative action programs and welfare schemes, Dalits and lower caste individuals now have the increased opportunity to become skilled employees and immigrate to the United States. As the United States becomes increasingly more dependent on South Asian, and especially

9. ZWICK-MAITREYI ET AL., *supra* note 1, at 16-17 (50% of all Dalit respondents who live in the United States stated that they live in fear of their Caste being "outed").

10. Tinku Ray, *No Escape from Caste on These Shores, 'Untouchables' from India Say*, PULITZER CTR. (Feb. 26, 2019), [https://perma.cc/2WN7-S72J].

11. ZWICK-MAITREYI ET AL., *supra* note 1, at 17.

12. NEIL G. RUIZ, INDIAN MIGRATION TO THE U.S. 6 (Pew Research Center 2018), [https://perma.cc/KY9Z-3525].

13. AB Wire, *India's Engineers and its Caste System Thrive in Silicon Valley: Report*, AM. BAZAAR (Oct. 28, 2020, 7:08 PM), [https://perma.cc/EY8F-FYE5].

Indian, workers, more and more Dalit and lower caste individuals have found themselves coming to the United States for gainful employment. This growing dependency on workers who come from differing caste backgrounds paired with the caste system's entrenched place in Hindu culture suggests that caste discrimination in the United States workplace is likely to get worse, especially in Indian-dominant industries such as the tech sector.[14] Though most Americans may not know the role caste plays in Hindu culture, caste discrimination is very much an "American problem."[15] Whether it is the American employer seeking to eliminate discrimination in the workplace or the Dalit employees seeking a better life, there is legislation that can protect Dalit and lower caste employees—Title VII of the Civil Rights Act of 1964.

This Comment begins in Part I with an overview of the caste system and its origins. In Part II, this Comment demonstrates how caste discrimination in employment contexts constrains social mobility. Parts III and IV include the crux of my proposal—the theory of Intersectionality shows that caste discrimination is prohibited under Title VII by recognizing that caste discrimination is simultaneous discrimination based upon one's existence in multiple protected classes. After establishing caste's coverage under Title VII, this Comment narrows its focus to how a victim of caste discrimination may bring a claim under Title VII in Part V. Lastly, in Part VI, this Comment provides proposals specific to legislative bodies, employers, and most importantly, the Equal Employment Opportunity Commission ("EEOC"). Such proposals contend that legislative bodies, employers, and the EEOC should create caste-centric policies and interpretations that specifically prohibit caste discrimination instead of attempting to shape caste so that it fits into just one of Title VII's protected classes. Overall, these proposals would

14. *See* Nitasha Tiku, *India's Engineers Have Thrived in Silicon Valley. So Has its Caste System.*, WASH. POST (Oct. 27, 2020), [https://perma.cc/8HMR-U798] ("[A] nonprofit advocacy group for Dalit rights, received complaints about caste from nearly 260 U.S. tech workers in three weeks . . . .").

15. Telephone Interview with Dr. Suraj Yengde, Assoc., Dep't of Afr. & Afr. Am. Stud., Harvard Univ. (Oct. 19, 2020).

show courts that there is support for prohibiting caste discrimination in the American workplace.

It is also important to note that this Comment is not the only work that addresses the possibility of caste discrimination being covered by Title VII. Guha Krishnamurthi and Charanya Krishnaswami authored a preliminary draft titled *Caste and Title VII* to discuss the possible prohibition of caste discrimination in the American workplace. This work thoughtfully applies the authors' expertise on the caste system to what we know about Title VII's protected classes in order to determine whether caste discrimination is discrimination based on one or more of the protected classes.[16] Similar to this Comment, *Caste and Title VII* contends that caste discrimination is a legally cognizable claim under Title VII because "in light of the Supreme Court's teaching in *Bostock v. Clayton County*, caste discrimination is cognizable as race discrimination, religious discrimination, and national origin discrimination."[17] This Comment also discusses how and why caste discrimination is discrimination based upon the protected classes. Additionally, this Comment seeks to add to the current scholarship by discussing the use of the theory of Intersectionality when arguing Title VII's coverage of caste.

This Comment adds to the current scholarship by describing how caste discrimination can be at least based in part upon one's membership in all of Title VII's protected classes. However, this Comment does not list options, or in this case, protected classes, that a court may choose to recognize caste discrimination as falling under. Instead, this Comment contends that, under the theory of Intersectionality, not only can courts recognize caste discrimination as being discrimination based *either* on one's race, religion, color, sex, or national origin, courts should recognize caste discrimination as simultaneous discrimination based potentially on one's existence in *all* of the protected classes.[18] Importantly, *Caste and Title VII* does not deny the possibility that

16. *See generally* Guha Krishnamurthi & Charanya Krishnaswami, *Title VII and Caste Discrimination*, 134 HARV. L. REV. F. 456 (2021).

17. *Id.* at 481.

18. The word "potentially" is only included due to the fact that there is only a potential chance that the protected class of sex is going to be implicated since there is only a potential chance that one is a woman—the most likely gender to be harmed by caste discrimination.

the theory of Intersectionality should be used in arguing that caste discrimination is covered by Title VII. Ultimately, while this Comment and *Caste and Title VII* are similar in many aspects, such as the overarching argument that caste discrimination is prohibited by Title VII, the two works reach this conclusion in different ways.

I. CASTE: AN OVERVIEW

In this Part, the Comment first gives a general overview of the caste system. Next, this Part provides a brief background of the development of today's caste system. Finally, this Part connects the caste system to one's ability to be upwardly mobile in society via employment.

A. What is caste?

Caste is a system of religious purity.[19] One inherits this religious purity at birth from which there is no mobility. The caste system strictly prohibits "varnasankara," or the mixture of varnas, restricting "inter-dining and inter-marriage."[20] The varnas are an "ancient fourfold arrangement of socioeconomic categories."[21] The varnas, listed in order of religious purity are the Brahmins ("priests, scriptural knowledge-keepers, and legislators"), the Kshatriyas ("kings and warriors"), the Vaishyas (merchants), and the Shudras (peasants).[22]

The caste system effectively separates people spiritually, politically, economically, and even physically, denying Dalits access to land ownership, schooling, places of worship, hospitals,

19. M.V. Nadkarni, *Is Caste System Intrinsic to Hinduism? Demolishing a Myth*, 38 ECON. & POL. WKLY. 4783, 4783 (Nov. 8, 2003).

20. *Id.*

21. T.N. Madan, *Varnas*, BRITANNICA, [https://perma.cc/A9SZ-S82X] (last visited Feb. 17, 2021).

22. ZWICK-MAITREYI, ET AL., *supra* note 1, at 10.

water sources,[23] markets, and other public places.[24] One's level of purity decides his/her varna. Hindu origin myths state that the four varnas "were created from different parts of God Brahma's body and were to be ranked hierarchically according to ritual status, purity, and occupation."[25] Hinduism considers the Dalits, meaning "broken but resilient," and the Adivasis, or the indigenous peoples of South Asia, outside the four-caste group structure making up the varnas described above, which means that both groups are considered to be of the utmost impurity.[26]

B. When did caste-based hierarchy begin?

Caste-based hierarchy is thousands of years old, making it one of the oldest systems of social discrimination in the world.[27] Despite the caste system's historical roots, there is much debate within Hindu society as to whether the caste system is integral to Hinduism.[28] The differences in belief are a result of differing interpretations of ancient Hindu scripture.

Those who believe caste is integral to Hinduism believe that the caste system is religiously codified in ancient Hindu

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23. *See, e.g.*, Susie Sell, *Access to Clean Water: How Dalit Communities in India are Fighting for Change*, GUARDIAN (Sept. 25, 2013), [https://perma.cc/657W-LBTP] ("Dalits usually have little other option in urban areas than to cram into the already crowded slums, where their access to clean, safe water and sanitation is often severely limited. Many still get their water from dirty shallow wells, or illegally from leaks in the city's piped water supply.").

24. Sarkin & Koenig, *supra* note 6, at 543 (quoting Comm. on the Elimination of Racial Discrimination, Consideration of Reps. Submitted By States Parties Under Article 9 of the Convention: Concluding Observations of the Comm. on the Elimination of Racial Discrimination: Inda, 3, U.N. Doc. CERD/C/IND/CO/19 (2007)).

25. ZWICK-MAITREYI, ET AL., *supra* note 1, at 10.

26. *Id.*; *see also India: Adivasis*, MINORITY RTS. GRP. INT'L, [https://perma.cc/HAS3-LYWV] (last visited Apr. 1, 2021) ("Adivasis are not a homogenous group; there are over 200 distinct peoples speaking more than 100 languages and varying greatly in ethnicity and culture. However, there are similarities in their way of life and generally perceived oppressed position within Indian society. According to the official Census held in 2011, Adivasis constitute 8.6 percent of the nation's total population, some 104.3 million people.").

27. *What is India's Caste System?*, *supra* note 2.

28. Nadkarni, *supra* note 19, at 4784; *see* Sarkin & Koenig, *supra* note 6, at 548-49 ("Mahatma Gandhi argued, '[C]aste has nothing to do with religion. It is a custom whose origin I do not know and do not need to know for the satisfaction of my spiritual hunger.'") (quoting SOCIAL AND RELIGIOUS REFORM: THE HINDUS OF BRITISH INDIA 199-200 (Amiya P. Sen ed., 2003)).

scripture.[29] However, those who oppose this belief argue that the importance of caste is a relatively new idea developed during British colonial rule—at a time when access to information was scarce and censored through the colonizer's perspective.[30]

There are many reasons why one may continue to believe that the caste system is integral to Hinduism, despite other, explicitly contradictory interpretations of the Hindu canon.[31] For one, those who support the interpretation that favors the caste system's legitimacy have the most to lose. Understandably, those who are in power do not want to relinquish their power nor the power their children inherit. Supporters of the interpretation that favors the caste system's legitimacy may argue that the caste system provides a stable, organized system of labor that avoids the overexploitation of resources by only allowing certain castes to reap the benefits of certain resources.[32]

Before British colonialism reached India, those who would now be defined as Hindu existed without a unified collective religious identity.[33] During the age of British colonial expansion, the colonizers quickly developed an awareness that the diversity of cultures and religions would require cognizable categories that would be comparable to the normative Christian perspective.[34] This perspective supports a system of "an absolute claim for only one truth, of a powerful church dominating society, and consequently of fierce religious and social confrontation with members of other creeds."[35] Operating in accord with this normative Christian perspective, the British held a preconceived

29. ZWICK-MAITREYI, ET AL., *supra* note 1, at 10.

30. Sanjoy Chakravorty, *Viewpoint: How the British Reshaped India's Caste System*, BBC NEWS (June 19, 2019), [https://perma.cc/HJ3D-U4AW].

31. *See* Nadkarni, *supra* note 19, at 4785-88.

32. *Id.* at 4790 ("It was easier for skills and knowledge to be imparted within family from father to children as there were no trade schools . . . [a]s families became specialised in arts and crafts, they flourished . . . ."); *Id.* ("The caste system performed an important function of reducing competition for and avoiding overexploitation of natural resources. Only fisherman caste could go for fishing . . . [o]nly hunters' caste could go for hunting wildlife in the forests . . . .").

33. Ben Heath, *The Impact of European Colonialism on the Indian Caste System*, E-INT'L RELS. (Nov. 26, 2012), [https://perma.cc/9J4L-WNU2].

34. RICHARD KING, ORIENTALISM AND RELIGION: POSTCOLONIAL THEORY, INDIA AND 'THE MYTHIC EAST' 99 (1999).

35. *Id.* at 103 (quoting HINDUISM RECONSIDERED 14-15 (Günther-Dietz Sontheimer & Hermann Kulke eds., 1991)).

notion that Hinduism was the one religion that unified India despite the diversity of cultures and religions that the British knew existed in India.[36] This Christian perspective also led the British to look to Indian literary works, as well as the proclaimed experts of such works, as sources for understanding Indian culture.[37]

In such an age, only one group held such expertise—the Brahmins. Accompanying this expertise, the Brahmins already had great social, economic, and political power, placing them in a position where they could serve as the sole source of information regarding Hinduism. Specifically, the Brahmins influenced the British interpretation of these texts by emphasizing brahmanical beliefs "as central and foundational to the 'essence' of Hinduism."[38] And most importantly, the Brahmins' interpretations supported the Christian/Western tradition of "an absolute claim for only one truth, [in] a powerful church dominating society."[39] The British, by following the Brahmins' interpretations, understood that Hinduism "represent[ed] the triumph of universalized, brahmanical forms of religion over the 'tribal' and the 'local' [religions] . . . ."[40] Through the Brahmins' interpretations, the "British found a loosely defined cultural élite that proved amenable to an ideology that placed [the Brahmins] at the apex of a single world-religious tradition."[41] With this information, the British could now classify Hindus under a single, social construct, effectively making colonial control and manipulation easier.

To officially begin solidifying this emerging form of Hinduism which, at its core is nothing more than a textual theory called "Brahmanism," the British elevated Brahman-Sanskrit texts like the Manusmriti to canonical status in the 19th Century by deeming these texts the authentic sources of knowledge regarding Hindus.[42] The Manusmriti is now regarded as the most

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36. *Id.* at 107.

37. *Id.* at 101.

38. *Id.* at 103.

39. KING, *supra* note 34 (quoting HINDUISM RECONSIDERED 14-15 (Günther-Dietz Sontheimer & Hermann Kulke eds., 1991)).

40. *Id.* at 104.

41. *Id.* at 103.

42. *See* Padmanabh Samarendra, *Census in Colonial India and the Birth of Caste*, 46 ECON. & POL. WKLY. 51, 54 (2011) ("The colonial officials like William Jones and Henry

authoritative book on Hindu law and "acknowledges and justifies the caste system as the basis of order and regularity of society."[43]

The caste system was further institutionalized in India during "the mid to late 19th Century through the census."[44] The census was a direct survey of the population of India. The administrators of the census went to the people of India with questionnaires to inquire about their number, attributes, and where they fit within the fourfold varna divisions described in the Brahmin texts.[45] However, the administrators were met with great difficulty in accomplishing this task, finding instead that a strict fourfold varna division was "non-existent" throughout India.[46] Despite this lack of uniformity, similar census projects continued in an effort to organize colonial India.[47] As similar processes unfolded over time, Indians began to associate their national and cultural identity with this view of Hinduism. When India became independent in 1947, this view of Hinduism, that originated from the colonizers and Brahmins, was already solidified. Although the British and Brahmins shaped modern-day Hinduism, modern-day Hindu scholars sometimes categorize the same texts "very differently," placing emphasis on the multitude of other Sanskritic texts that serve as the basis of Indian culture.[48]

C. How does caste limit social mobility via occupations and employment?

Although caste and India are colloquially associated with each other, the concept of untouchability is not at all confined to the 160 million Dalits located in India.[49] Approximately ninety million additional Dalits suffer caste discrimination abuses in other Asian countries as well as other parts of the world, such as

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Colebrook, writing from towards the close of the 18th century, considered Sanskrit texts as the authentic sources of knowledge about the Hindus.").

43. *What is India's Caste System?*, *supra* note 2.

44. Chakravorty, *supra* note 30.

45. *Id.*

46. Samarendra, *supra* note 42, at 57.

47. *Id.*

48. *See* Chakravorty, *supra* note 30.

49. Sarkin & Koenig, *supra* note 6, at 543; *see also* Mayell, *supra* note 3 (describing India's Dalit population and the effects of untouchability).

Europe and North America.[50] While international actors have addressed the issues of caste discrimination and untouchability since the 1990s,[51] the "international community has failed to [monitor] the progress of the Indian government and others in addressing these abuses."[52] Article 17 of the Indian Constitution has abolished the practice of untouchability and "Article 15 prohibits discrimination and mentions caste discrimination as one type of discrimination that is no longer permissible."[53] However, "despite formal protections in law, discriminatory treatment remains endemic and discriminatory societal norms continue to be reinforced by government and private structures, often through violent means."[54] Smita Narula, an esteemed caste scholar and professor of law, even goes so far as to compare caste to "oxygen" in Indian society because both are "invisible and indispensable."[55]

Poverty is deceptive, leading an observer to believe that it affects all who suffer from it equally. While lack of upward mobility is not limited to Dalits and lower caste people, the truth of the matter is that "if you are a Dalit in India, you are far more likely to be poor" and "the poverty endured is abject, violent, and

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50. *See, e.g.*, Anushiya Shrestha et al., *The Hydro-Social Dynamics of Exclusion and Water Insecurity of Dalits in Peri-Urban Kathmandu Valley, Nepal: Fluid yet Unchanging*, 28 CONTEMP. S. ASIA 320, 326 (2020) ("Without land, with limited education and few capital assets, livelihood options are limited for Dalits [in Nepal]."); KALINGA TUDOR SILVA ET AL., INDIAN INST. OF DALIT STUD., CASTE DISCRIMINATION AND SOCIAL JUSTICE IN SRI LANKA: AN OVERVIEW 17-19 (Sukhadeo Thorat & Surinder S. Jodka eds., 2009) (study demonstrating that among many difficulties faced by some lower castes in Sri Lanka, lower castes in different areas face limited access to "religious and ritual spheres," difficulty in securing land from high caste landowners, poor access to water and sanitation facilities, and are degraded to "unclean work"); *see also* Sarkin & Koenig, *supra* note 6, at 543.

51. *See* Sarkin & Koenig, *supra* note 6, 563-64 ("[Since India's independence in 1947] a number of international treaties and findings by treaty bodies require that India properly address caste discrimination. The ICERD [occurring in 1965] is most applicable . . . . Other applicable treaties include the International Convention on Civil and Political Rights (ICCPR) [occurring in 1966], the International Covenant on Economic, Social and Cultural Rights (ICESCR) [occurring in 1966], the Convention on the Rights of the Child (CRC) [occurring in 1989], and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) [occurring in 1979].").

52. *Id.* at 544.

53. *Id.* at 556; *see also* Citizens for Just. & Peace, *Caste Discrimination and Related Laws in India*, CJP (Jan. 25, 2018), [https://perma.cc/C2WT-E8WH].

54. Smita Narula, *Equal by Law, Unequal by Caste: The "Untouchable" Condition Critical Race Perspective*, 26 WIS. INT'L L.J. 255, 257 (2008).

55. *Id.* at 259.

virtually inescapable."[56] Though some Dalits have the privilege of escaping such poverty, they have had no luck in escaping caste discrimination in the American workplace. Dalits' inability to escape caste discrimination in the workplace is reflected not only through the occasional snide remark, but also in limitations in upward, social mobility.[57] It is easy to see why such limitations would exist in the workplace because one's job is a prerequisite for development in India as well as most, if not all, other countries across the globe.[58] These limitations, in turn, further institutionalize the caste system "because of its capacity not only to monitor the movements of groups, but also to regulate the occupational map of the society."[59]

This lack of upward mobility can be illustrated by looking at a study evaluating the relationship between caste and occupation in Pune, India. Pune is "traditionally known for the dominance of the upper castes and their spread to various upper occupational locations."[60] The study reflects that this tradition has for the most part, continued to hold true in the twenty-first century. In 2007, 54% of upper caste earners were in the higher occupations while 32% of Dalits engage in "[v]ery poor" occupations, an 8% increase from the year 2000.[61] The study broadly classifies occupations into upper or higher, upper middle, middle, lower middle, poor or low, and very poor or very low. These occupational categories "implicitly refer to ideas of status attached to various occupations, opportunities for generating wealth and requirement of knowledge skills/technical skills or mere physical labour."[62] Thus a "very poor" occupation would likely involve "mere physical labour," while an "upper"

56. *Id.* at 268.

57. *See* ZWICK-MAITREYI ET AL., *supra* note 1, at 20.

58. Kaivan Munshi, *The Impact of Caste on Economic Mobility in India*, MINT (Aug. 16, 2017, 8:37 AM), [https://perma.cc/ZMG6-2WUZ] ("Economic mobility is a prerequisite for development.").

59. Rajeshwari Deshpande & Suhas Palshikar, *Occupational Mobility: How Much Does Caste Matter?*, 43 ECON. & POL. WKLY. 61, 66 (2008).

60. *Id.* at 64.

61. *Id.*; *see also* Narula, *supra* note 54, at 285 ("Eighty-five percent of Dalits live in rural areas while over 75 percent of Dalits perform land-connected work; 25 percent as marginal or small farmers and over 50 percent as landless laborers . . . .").

62. Deshpande & Palshikar, *supra* note 59, at 63.

occupation would likely involve knowledge skills/technical skills.[63]

While this study also shows Dalits as the most upwardly mobile over the last four generations, it is important to note where the Dalits started. To illustrate further, the upper caste has not been as upwardly mobile as the Dalits have been over the last four generations, but the upper castes already hold the highest occupations. Essentially, the upper castes have, for the most part, already reached the occupational peak, while the Dalits started from the lowest point. In other words, "[t]here is a difference in moving upwards from a middle occupational location and from a very low occupational location."[64] Most importantly, the findings of this study conclude "for purposes of upward movement, caste matters."[65] Indeed, this conclusion is the reason why it is included in this Comment. In order to realize how a biased supervisor discriminating against an employee of a lower caste violates Title VII, one must first realize how "[c]enturies of socio-physical segregation and illiteracy compromise [lower caste individuals'] position[s] in today's economy and society."[66]

With this background in mind, it is easy to imagine how entrenched Indian norms like caste discrimination can transcend borders and persist in the American workplace despite legislative efforts in India and on the international stage to combat caste discrimination. Claims of caste discrimination are most prevalent in South Asian-dominant sectors, such as the tech sector.[67] In fact, a 2018 survey of South Asians in the United States found that 67% of Dalits reported being discriminated against at their workplace due to their caste.[68] However, few South Asian employees actually raise their concerns of caste discrimination to their American employers because they believe "their concerns

63. *Id.*

64. *Id.* at 65.

65. *Id.* at 66.

66. Rajnish Kumar et al., *Social and Economic Inequalities: Contemporary Significance of Caste in India*, ECON. & POL. WKLY., 55, 56, (2009).

67. AB Wire, *supra* note 13 (investigating high rates of claims for caste discrimination in tech companies, with a nonprofit advocacy group in 2020 receiving a number of such claims from Facebook (33), Cisco (24), Google (20), Microsoft (18), IBM (17), and Amazon (14) employees).

68. ZWICK-MAITREYI ET AL., *supra* note 1, at 20.

will not be given weight" due to Americans' lack of understanding of caste dynamics or will lead to "negative consequences to their career."[69] In some cases, lower caste individuals do not even make it past the interview process when searching for jobs in America when another Indian is the interviewer.[70] Though lower caste individuals in the United States are likely to be skilled workers[71] who have achieved greater upward mobility in comparison to the majority of lower caste individuals in India, lower caste individuals, regardless of what job they have, face caste discrimination that limits their advancement. For instance, a Dalit surgeon expressed that though he was a member of the Legislative Assembly and a microsurgeon specializing in hand and spinal reconstruction, he still "remain[s] very much a dalit . . . open to routine humiliation from the upper castes."[72]

II. HOW DID TITLE VII COME TO BE?

In the 1960's, African Americans faced significant inequality in American society. In 1964, Congress finally took measures to combat such inequality through the enaction of the monumental Civil Rights Act.[73] However, Congress also realized that in order to truly achieve the goals of the Civil Rights Act—to integrate African Americans into mainstream society—Congress would have to fight discrimination not only in public accommodations, schools, and voting, but also in the realm of employment.

The notion that one's employment opens (or closes) many doors for his future is as true today as it was in 1964—when the Civil Rights Act was enacted. In 1962, the rate of unemployment was 124% higher for nonwhite Americans in comparison to the

69. *Id.*

70. Tiku, *supra* note 14 ("In more than 100 job interviews for contract work over the past 20 years, Kaila said he only got one job offer when another Indian interviewed him in person.").

71. *See* Sonia Paul, *When Caste Discrimination Comes To The United States*, NPR (Apr. 25, 2018), [https://perma.cc/3WJL-RADD] ("Today, India alone routinely attracts the majority of skilled worker visas the US allots to foreign nationals . . . .").

72. Narula, *supra* note 54, at 266.

73. Pub. L. No. 88-352, 78 Stat. 241.

white rate; and the trend worsened as unskilled and semi-skilled jobs that African Americans traditionally held were rapidly disappearing due to the growth of automation.[74] It was clear that Congress needed to address this lack of opportunity and the practices that imposed these limitations on African Americans in order to successfully integrate African Americans into mainstream society.

Congress's answer to the problems that African Americans faced in the employment realm was the equal employment provisions of the Civil Rights Act of 1964 ("Title VII").[75] Congress enacted these provisions to prohibit discrimination against employees on the basis of race, color, religion, sex, or national origin.[76] Specifically, it is unlawful for employers:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[77]

"[E]mployer" under Title VII means "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."[78] Just as Title VII was initially enacted to combat discrimination in the workplace against African Americans in 1964, Title VII can also be used to protect Dalit and lower caste employees from potential discriminators in

74. Ann K. Wooster, Annotation, *Title VII Race or National Origin Discrimination in Employment—Supreme Court Cases*, 182 A.L.R. Fed. 61 § 2(a) (2002).

75. 42 U.S.C. § 2000e-2.

76. 42 U.S.C. § 2000e-2.

77. 42 U.S.C. § 2000e-2(a).

78. 42 U.S.C. § 2000e(b).

employment agencies, labor organizations, training programs, and in many more aspects of employment.[79]

Broadly, Title VII's purpose is to create a non-discriminatory workplace. This purpose is advanced when employers take preemptive measures to avoid discrimination like adopting anti-discrimination policies, implementing effective grievance mechanisms, and following the EEOC's guidance on Title VII. Importantly, courts hold that in order to carry out the "purposes of Congress to eliminate the inconvenience, unfairness and humiliation of . . . discrimination," Title VII must be accorded a liberal construction.[80] The fact that courts must accord Title VII a liberal construction is significant to this Comment's proposal because though caste is not specifically listed as—or is not easily pigeonholed into—a protected class, these circumstances alone should not restrict courts from interpreting Title VII to cover caste.

III. HOW CAN CASTE BE CLASSIFIED UNDER TITLE VII?

Now that the background and goals of Title VII are apparent, this Comment demonstrates why courts should recognize that Title VII prohibits caste discrimination. This Comment argues that the method described below gives potential victims of caste discrimination the best opportunity to obtain relief and prevent future caste discrimination in the workplace. Specifically, this Comment proposes that the theory of Intersectionality offers the best solution to prohibiting caste discrimination under Title VII. By recognizing that caste cannot fit within only one protected class and instead, simultaneously overlaps into multiple protected classes, courts should accept that caste is covered by Title VII.

In 1989, "Kimberlé Crenshaw introduced the idea that civil rights laws are ill equipped to address the types of inequality and discrimination faced by people who suffer multiple, or

79. 42 U.S.C. § 2000e-2(b)-(d).

80. *See* Sandoval v. Am. Bldg. Maint. Indus., 578 F.3d 787, 792-93 (8th Cir. 2009) (quoting Baker v. Stuart Broad. Co., 560 F.2d 389, 391 (8th Cir. 1977)).

'intersecting,' axes of discrimination."[81] While courts have always recognized that Title VII protects individuals from discrimination based on their existence in *one* of the protected classes mentioned in Title VII, courts have begun, albeit slowly and incompletely,[82] to recognize that Title VII also "protects individuals against discrimination based on the combination or 'intersection' of two or more protected classifications."[83]

There are multiple reasons why courts have begun to accept the theory of Intersectionality as a means to bring employment discrimination claims. For one, courts look to the plain text of Title VII to find Congress's intent to accept this theory.[84] Most importantly, the courts see the "or"[85] used when listing the protected classes in Title VII as legislative intent to defend those who face discrimination due to their existence in multiple protected classes. Courts also see Congress's intent to accept Intersectionality by observing its refusal to adopt an amendment to Title VII, which would have added the word "solely" to modify the word "sex."[86] If Congress would have added the word "solely," Congress would have demonstrated its intent to limit Title VII plaintiffs to using their membership in only one

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81. Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC'Y REV. 991, 991 (2011).

82. *See* Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 729 (2015) (describing how since the late 1970s, some decisions have "contained encouraging language allowing black women to bring combined race/sex discrimination claims, but employ[] an awkward 'sex-plus' analysis" that "allow[s] African American women to 'aggregate' evidence of racial and sexual harassment, but implie[s] that race and sex discrimination were 'additive' rather than inextricably intertwined . . . in particular . . . abuses directed toward female employees of color").

83. Brown v. OMO Grp., Inc., No. 9:14-CV-02841, 2017 WL 1148743 at *5 (D.S.C. 2017); *see* Westmoreland v. Prince George's Cnty., 876 F. Supp. 2d 594, 604 (D. Md. 2012); *see also* Kimble v. Wis. Dep't. of Workforce Dev., 690 F. Supp. 2d 765, 769-771 (E.D. Wis. 2010).

84. *See, e.g.*, Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987).

85. 42 U.S.C § 2000e-2(a) ("race, color, religion, sex, or national origin[]").

86. *Hicks*, 833 F.2d at 1416 ("The use of the word 'or' evidences Congress' intent to prohibit employment discrimination based on any or all of the listed characteristics.") (quoting Jeffries v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980)); *see* Alice Abrokwa, *"When They Enter, We All Enter": Opening the Door to Intersectional Discrimination Claims Based on Race and Disability*, 24 MICH. J. L. & POL. 15, 52 (2018); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989), *superseded on other grounds*, Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, *as recognized in* Comcast Co. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020).

protected class as the basis for their suit.[87] Lastly, courts realize that refusing to accept this theory would leave those who do not fit within a single protected class—such as is the case for African American women—without a viable Title VII remedy.[88]

"Intersectionality theorists [suggest] two distinct processes through which people facing multiple disadvantages are subordinated in the courts . . . ."[89] These are "demographic intersectionality" and "claim intersectionality."[90] Demographic intersectionality focuses on how judges', juries', and lawyers' discriminatory preconceptions of someone who belongs to multiple protected classes impact court outcomes.[91] However, because demographic intersectionality focuses on the effects of discrimination in the courtroom, it is not the focus of this Comment.[92] Instead, claim intersectionality is the focus because it puts the attention on "discriminatory [processes] that operate in the labor market."[93]

Claim intersectionality occurs "when plaintiffs allege discrimination on the basis of two or more ascriptive characteristics" like national origin and sex.[94] This theory "examines how multiple identities overlap to produce distinct forms of oppression."[95] Claim intersectionality focuses on the belief that "the law does not adequately redress intersectional discrimination that occurs in the labor market."[96] Claim intersectionality is more relevant because this Comment seeks to recognize that the law indeed can adequately redress intersectional discrimination that occurs in the labor market. The

87. *See* Abrokwa, *supra* note 86, at 52; *see also Price Waterhouse*, 490 U.S. at 241.

88. *See Jefferies*, 615 F.2d at 1032.

89. Best et al., *supra* note 81, at 993.

90. *Id.*

91. *Id.* at 994.

92. *See Id.*

93. *Id.*

94. Best et al., *supra* note 81, at 994.

95. Apilado v. N. Am. Gay Amateur Athletic All., No. C10-0862, 2011 WL 13100729 at *3 (W.D. Wash. July 1, 2011); *see e.g.*, Hill v. Am. Gen. Fin., Inc., 218 F.3d 639, 641 (7th Cir. 2000) (finding claims of both racial and sexual harassment were present and supported by allegations that plaintiff's supervisor made statements such as "[o]nce you go black, you never go back" while rubbing against her buttocks).

96. Best et al., *supra* note 81, at, 993.

EEOC, "the agency charged with interpreting Title VII,"[97] clearly supports Intersectionality. The EEOC Compliance Manual states:

> Title VII prohibits discrimination not just because of one protected trait (e.g., race), but also because of the intersection of two or more protected bases (e.g., race and sex). For example, Title VII prohibits discrimination against African American women even if the employer does not discriminate against White women or African American men. Likewise, Title VII protects Asian American women from discrimination based on stereotypes and assumptions about them "even in the absence of discrimination against Asian American men or White women." The law also prohibits individuals from being subjected to discrimination because of the intersection of their race and a trait covered by another EEO statute—e.g., race and disability, or race and age.[98]

Although Intersectionality may be a relatively innovative and complex idea regarding Title VII claims, "it nonetheless has been admitted in many cases."[99]

Despite this support for the viability of Title VII claims that use Intersectionality, plaintiffs that use this theory still face multiple hurdles in the judicial system due to skepticism of the theory. First, some courts refuse to even recognize intersectional claims as legally cognizable.[100] In these cases, the judges considered race and sex discrimination claims separately, despite Black female plaintiffs arguing that they experienced unique discrimination due to their existence in multiple, protected classifications.[101] Second, the complexity of the theory of

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97. Bennun v. Rutgers State Univ., 941 F.2d 154, 172 (3rd. Cir. 1991), *abrogated on other grounds* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

98. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC Compliance Manual, Section 15: Race and Color Discrimination, at 8-9, [https://perma.cc/YTS4-H8MT].

99. *Apilado*, 2011 WL 13100729 at *3; *see also* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (concluding that a plaintiff may aggregate evidence of racial hostility with evidence of sexual hostility in a Title VII action); Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980) ("We agree that discrimination against black females can exist even in the absence of discrimination against black men or white women."); *see* B.K.B. v. Maui Police Dep't 276 F.3d 1091, 1101 (9th Cir. 2002).

100. *See* Best et al., *supra* note 81, at 996.

101. *See Id.*

Intersectionality also may limit the theory's utility.[102] Plaintiffs who bring claims based upon Intersectionality face "complex bias" in court and disproportionate difficulty in winning their cases.[103] Lastly, even in cases where judges allow the use of Intersectionality as a method to demonstrate discrimination, some judges limit their considerations to the intersection of two characteristics at the most "out of concern that [] too many intersections would turn Title VII into a 'many-headed Hydra' and make it impossible to make any employment decisions 'without incurring a volley of discrimination charges' . . . ."[104]

The fact of the matter is that discrimination is often multi-faceted due to the multiple characteristics that employees possess. With this being said, caste, a construct that combines numerous aspects of life, would be the perfect centerpiece of a Title VII claim based upon Intersectionality. Therefore, courts must begin to apply Intersectionality with the understanding that Title VII was constructed to cover all who face employment discrimination, including those who face simultaneous discrimination on multiple fronts.

Dr. Suraj Yengde, a leading scholar on caste discrimination who was born into a family of "Untouchables," describes caste as a storm cloud overhead.[105] When a Dalit or lower caste member sees the cloud of caste overhead, he or she does not expect just one drop of racism or one drop of colorism. Instead, as any Dalit or lower caste individual knows, there is going to be a violent downpour of all types of discrimination.[106] While one protected class under Title VII may be applicable to a certain set of facts in a discrimination case, caste cannot be jammed into one category or another. To understand caste discrimination, one must realize

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102. Mayeri, *supra* note 82, at 730.

103. *Id.*; *see also* Best et al., *supra* note 81, at 992, 997 ("[P]laintiffs who make intersectional claims, alleging that they were discriminated against based on more than one ascriptive characteristic, are only half as likely to win their cases as are other plaintiffs." Plaintiffs lost the defense motion for summary judgment 96 percent of the time in an empirical study that examined 26 employment discrimination cases in the federal district courts for the Southern and Eastern Districts of New York, a rate higher than plaintiff loss rates in other studies of summary judgment outcomes.).

104. Best et al., *supra* note 81, at 997.

105. Telephone Interview with Dr. Suraj Yengde, Assoc., Dep't of Afr. & Afr. Am. Stud., Harvard Univ. (Oct. 19, 2020).

106. *Id.*

that Dalits and lower caste individuals face discrimination that is multi-dimensional. Despite the multitude of the aforementioned hurdles that challenge plaintiffs who aim to utilize Intersectionality, Intersectionality is the best method to apply to caste discrimination because it appreciates the complexity of caste.

IV. WHICH PROTECTED CLASSES PROHIBIT CASTE DISCRIMINATION UNDER TITLE VII?

This Part describes how caste discrimination potentially intersects into all of the protected classes enumerated in Title VII.[107] It will be clear that some of the classes described have the capability of prohibiting caste discrimination all by themselves. Meaning, a court can find that caste discrimination is prohibited under Title VII because caste discrimination is discrimination based on just race or national origin. However, this Comment discusses not how each protected class can single-handedly prohibit caste discrimination, but how the courts should recognize that caste discrimination is a multi-dimensional problem that simultaneously overlaps among a number of protected classes.

A. Race

Race is a "social construction" rather than a biological category.[108] Looking to India, the Indian government, Dalits, and progressive academics seem to be in agreement that caste is not race.[109] Dalit scholars actually classify the caste system as "worse than racism" partly because it is "[i]nflicted by birth, sanctified

107. *See supra* note 18 and accompanying text.

108. SOCIOLOGY: UNDERSTANDING AND CHANGING THE SOCIAL WORLD 331-33 (2010) (stating that among the reasons to question the biological concept of race are the facts that "people from different races are more than 99.9% the same in their DNA" and that "an individual or a group of individuals is assigned to a race on arbitrary or even illogical grounds.").

109. Ambrose Pinto, *UN Conference Against Racism: Is Caste Race?*, ECON. & POL. WKLY., 2817-18 (2001) ("The position of GONGO's (a term that is used for government of India's bureaucrats and officials) [is] that caste is social and race is biological . . . ."); *Id.* ("Dalits in India, the Ambedkarites, and the progressive academics have never equated race with caste.").

by religion, [and] glorified by tradition."[110] Ultimately, while these views may be important in shaping *future* EEOC guidance regarding Title VII's coverage of caste discrimination, we must look to what the EEOC, the courts, and other legislation *currently* say about race to determine whether courts may accept caste discrimination as discrimination based upon race.

Currently, "Title VII does not contain a definition of 'race.'"[111] Further, "Title VII cases largely have been silent as to what 'race' means under the statute."[112] With Title VII's silence in mind, one might also look to 42 U.S.C. § 1981 to find definitions of racial discrimination because "[t]he basic contours of what constitutes racial discrimination under § 1981 also apply in Title VII cases, and vice versa."[113] Section 1981(a) gives "[a]ll persons," regardless of race, the same right to "make and enforce contracts," and pertinent to this piece, employment contracts.[114] Most importantly, the Court in *St. Francis College v. Al-Khazraji*, a case where an associate professor claimed racial discrimination based upon his Arabian ancestry, held that "[u]nder § 1981 the term 'race' includes groups identified by their ancestry *or* ethnic characteristics."[115] Thus, the *St. Francis College* Court showed that a plaintiff could bring a § 1981 claim, and therefore a Title VII claim, based on racial discrimination if the plaintiff was discriminated against based on his or her ethnicity *or* ancestry.

It is clear that one's caste can very well be interpreted as one's ethnicity because ethnicity refers to one's "unique set of cultural characteristics" such as one's religion, naming, and

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110. *Id.* at 2819.

111. *Questions and Answers about Race and Color Discrimination in Employment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 9, 2006), [https://perma.cc/9NNP-MST8] (last visited Feb. 22, 2021).

112. WHAT IS "RACE" DISCRIMINATION, 5 EMP. COORDINATOR EMP. PRACTICES § 3:5.

113. Krishnamurthi & Krishnaswami, *supra* note 16, at 475 n.107.

114. *See* 42 U.S.C. § 1981(a).

115. *See supra* note 112 (emphasis added); *see generally* St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (emphasis added) ("Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry of ethnic characteristics . . . . The Court of Appeals was thus quite right in holding that § 1981, 'at a minimum,' reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*.'").

public life.[116] It may even be the case that caste fits perfectly within the class of race due to the characteristics listed as making up one's ethnicity, and therefore one's race. As this Comment discussed in Part I, it is true that one's caste is a conglomeration of such cultural characteristics such as naming,[117] religion,[118] and public life.[119] However, though a plaintiff can possibly base his or her entire claim on the premise that caste discrimination is race discrimination, this Comment shows how a plaintiff can use the theory of Intersectionality to more completely demonstrate how caste encompasses discrimination based at least in part upon all of Title VII's protected classes.

Though the vast number of cases are silent as to what "race" means under Title VII, the Second and Third Circuits have issued similar holdings that align with *St. Francis College*. In *Bennun v. Rutgers State University*, the court held that Title VII protects individuals who are ethnically Hispanic—"of or derived from Spain or the Spanish."[120] Further, the *Bennun* Court ruled that discrimination based on someone's "ancestry or lack thereof constitutes racial discrimination" under Title VII.[121] Similarly, in *Barrella*, the Second Circuit also held that "race" under Title VII encompasses ethnicity just as § 1981 does.[122]

Lastly, and most importantly for courts following the Second and Third Circuits, the EEOC also supports this idea that discrimination based upon one's ancestry is racial discrimination. The EEOC explains that "[r]ace discrimination includes discrimination on the basis of ancestry or physical or cultural

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116. Hervé Varenne, *The Study of Ethnicity, Minority Groups and Identity*, BRITANNICA, [https://perma.cc/TN29-6MBD] (last visited Feb. 23, 2021).

117. Jeya Rani, *So the Term 'Dalit' Can't Be Used But 'Brahmin' and 6,000 Other Caste Names Can*, WIRE (Sept. 14, 2018), [https://perma.cc/9JJC-J454] (describing how it is common that one's caste can be identified through their surname).

118. *Why This India Priest Carried an 'Untouchable' into a Temple*, BBC NEWS (Apr. 20, 2018), [https://perma.cc/DDB4-2GZH].

119. Sell, *supra* note 23 ("Dalits usually have little other option in urban areas than to cram into the already crowded slums, where their access to clean, safe water and sanitation is often severely limited. Many still get their water from dirty shallow wells, or illegally from leaks in the city's piped water supply.").

120. *See supra* note 112; *see also* Bennun v. Rutgers State Univ., 941 F.2d 154, 180 (3d Cir. 1991).

121. *See supra* note 112.

122. Vill. of Freeport v. Barrella, 814 F.3d 594, 607 (2d Cir. 2016).

characteristics associated with a certain race, such as skin color, hair texture or styles, or certain facial features."[123] The aspects of ancestry in the EEOC's definition, as well as the rulings in the Second and Third Circuits, strengthen this Comment's contention that caste, a system centered upon ancestry and encompassing characteristics common to one's ethnicity, intersects with the protected class of race.

B. Color

Discrimination based on color is not defined in Title VII. However, the EEOC describes "Color [D]iscrimination" as involving treating someone unfavorably because of "his/her skin pigmentation (lightness or darkness of the skin), complexion, shade, or tone."[124] Therefore, in order for caste discrimination to be discrimination based on color in the eyes of the EEOC, caste discrimination must involve treating someone unfavorably due to their complexion. Importantly, in the caste discrimination context, "[c]olor discrimination can occur . . . between persons of the same race or ethnicity."[125] When inquiring whether caste discrimination is based on color and/or race, one analyzes similar facts because race is based on physical features and skin color is a physical feature.

While Indian scholars and commentators discount the idea that skin color is inherent to Hinduism,[126] there seems to be an understanding among Indians that skin color, caste, and religion are clearly "closely related" and that "whatever is black is not welcome in the Indian society."[127] One innovative and frequently cited study has even gone as far as to support this relation through science, finding that the "social structure defined by the caste

123. *See supra* note 111.

124. *Id.*

125. *Id.*

126. Neha Mishra, *Indian and Colorism: The Finer Nuances*, 14 WASH. U. GLOB. STUDS. L. REV. 725, 726 n.6 (2015) ("[U]nderstanding Varna in the context of color is misleading."); *see also* Krishnamurthi & Krishnaswami, *supra* note 16, at 477 ("[C]aste discrimination is not best understood as discrimination on the basis of 'color.'").

127. David Love, *Blackness Around the Globe: Dark-Skinned Dalits Fight an Oppressive Caste System in India—'Whatever is Black is Not Welcomed'*, ATLANTA BLACK STAR (May 2, 2016), [https://perma.cc/XSR2-KVTY].

system has a 'profound influence on skin pigmentation.'"[128] As one Indian observer notes "[a]ll the images of the popular gods and goddesses that we see around us, photographs in our home shrines or prayer halls . . . all show them to be light-skinned."[129] These light-skinned portrayals are sometimes even in direct contrast to how the gods and goddesses are illustrated in Hindu scripture.[130]

Most significantly, in terms of finding that caste discrimination can be based on one's complexion, lower caste applicants report that their skin color is an immediate way to reveal their lower caste status, which in turn, severely limits their ability to be hired.[131] Ultimately, though the link between caste and skin color may not be religiously codified, the connection has subsequently been cemented into Hindu culture—a culture that has now immigrated into the American workplace. With this evidence of caste-based colorism existing both in India and in the United States, the courts should acknowledge that caste discrimination is prohibited by Title VII because caste discrimination can, at least in part, be based upon one's complexion. Further, the fact that skin color is a feature of caste discrimination, strengthens the argument that caste is best understood as an intersectional issue because caste discrimination overlaps into the protected class of color.

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128. Luke Koshi, *Does Caste Influence Colour in India? Genetics Study Finds a Profound Link*, NEWS MINUTE (Nov. 23, 2016), [https://perma.cc/D7UY-VLFK].

129. *Dark is Divine: What Colour are Indian Gods and Goddesses?*, BBC NEWS (Jan. 21, 2018), [https://perma.cc/84YN-BHMJ].

130. *See Id.* ("[E]ven Krishna, who is described as a dark-skinned god in the scriptures, is often shown as fair. And so is the elephant-headed Ganesha, even though there are no white elephants in India.").

131. Tiku, *supra* note 14 ("In more than 100 job interviews for contract work over the past 20 years, Kaila said he only got one job offer when another Indian interviewed him in person . . . . 'They don't bring up caste, but they can easily identify us,' Kaila says, rattling off all of the ways he can be outed as potentially being Dalit, including the fact that he has darker skin.").

C. Religion

The EEOC Compliance Manual clearly recognizes that Hinduism is a religion under Title VII.[132] Further, "Title VII defines 'religion' to include 'all aspects of religious observance and practice as well as belief.'"[133] As discussed in Part I, despite many scholars arguing that the caste system is relatively new to the practice of Hinduism, there is no doubt that since the British arrived, caste has become inextricably intertwined with Hinduism.[134] Currently, it is true that caste cannot exist without Hinduism and vice versa. Importantly, there are no cases where the plaintiff has used the theory of Intersectionality to demonstrate that he/she is being discriminated against based upon his or her existence in both the protected class of religion as well as another protected class. Therefore, this Section is only an expression of the concept of Intersectionality and how a victim of caste discrimination can still use this theory in bringing a Title VII claim.

We can see this interconnectedness by looking at the history of Hinduism's growth in the Indian sub-continent. In fact, the dominant brahmanical religion that we now know as modern Hinduism, absorbed many primeval tribal groups—such as the Dalits—over centuries of development, along with their gods, goddesses, religious rituals and customs.[135] Brahmin priests absorbed tribal traditions and institutionalized them with myths and forms of cult practices to their own advantage. This process of "Hindu imperialism" went hand in hand with subjugating tribal groups politically and economically so as to justify the Dalits' exclusion.[136]

As previously discussed in Part I, the caste system is a system of religious purity that is handed down from generation to

132. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2021, SECTION 12: RELIGIOUS DISCRIMINATION (2021), [https://perma.cc/9LTW-S4QF].

133. *Id.*

134. *See supra* Section I.B.

135. A.M. Abraham Ayrookuzhiel, *The Dalits, Religions and Interfaith Dialogue*, 7 J. HINDU-CHRISTIAN STUDS. 2 (1994) ("the tribal god or Orissa became identified with Vishnu").

136. *Id.*

generation.[137] Important to this point, "discrimination on the basis of religion can be on the basis of religious heritage."[138] In *Gulitz v. DiBartolo*, the court recognized that because the plaintiff's coworkers discriminated against him based on his Jewish heritage—an assertion supported due to his father's practicing of Judaism—Title VII protected the plaintiff because he fell into the protected class of religion.[139] Essentially, the fact that plaintiff was "being discriminated against on account of the religion of his forbears" qualified him for Title VII protection.[140] Such reasoning would translate well to a potential caste discrimination case brought by a Dalit or lower caste plaintiff because "to discriminate against someone based on caste is [] to discriminate against them on the basis that they had an ancestor who occupied a certain position in Hindu society."[141] Following the *Gulitz* reasoning, this type of discrimination would certainly be religious discrimination prohibited by Title VII and fits the mold of the Intersectionality theory despite *Gulitz* itself not being a case based upon Intersectionality.

Though Hinduism has led Dalits to embrace other religions in search of human dignity, such as Islam, Sikhism, Christianity, and Buddhism,[142] one's Dalit status does not leave them. Indeed, for those that suffer the most from the caste system, the Dalits, conversion "is an action that does not bear any change in [Dalits'] material lives."[143] For example, despite Christianity professing itself as an egalitarian religion, Dalit Christians are not even allowed to sit in pews meant for higher-caste Christians.[144] Indeed, Dalit Christians are "'twice discriminated against'—in society and within the church."[145] Further, Dalit Muslims are not allowed to marry high-caste Muslims and "Buddhist monasteries

137. *See* Nadkarni, *supra* note 19, at 4783.

138. Krishnamurthi & Krishnaswami, *supra* note 16, at 477.

139. No. 08-CV-2388, 2010 WL 11712777, at *5 (S.D.N.Y. July 13, 2010).

140. *Id.*

141. Krishnamurthi & Krishnaswami, *supra* note 16, at 478.

142. *See* Ayrookuzhiel, *supra* note 135, at 3.

143. Rahul Sonpimple, *Dait Conversions: An Act of Rebellion Against Caste Supremacy*, ALJAZEERA (June 14, 2018), [https://perma.cc/4HCU-CXUG].

144. Vatsala Vedantum, *Still Untouchable: The Politics of Religious Conversion*, CHRISTIAN CENTURY (June 19, 2002), [https://perma.cc/4F4J-YHJH].

145. *Id.*

have not been able to prevent their converts from their earlier casteist practices."[146] At the end of the day, even if Dalits convert, they are still subject to discrimination based upon Hindu tradition. Therefore, such discrimination would still be religious discrimination and would therefore fall under Title VII.

D. Sex

While it is difficult, if not plainly inaccurate, to "simply reduc[e]"[147] caste discrimination to sex discrimination, it would be even more inaccurate to reject the fact that "[c]aste discrimination has a unique and specific impact on Dalit women who endure multiple forms of discrimination."[148] By recognizing that Dalit and lower caste women suffer from a unique type of caste discrimination that is based not only upon their caste status, but also upon their sex, one can easily see why the theory of Intersectionality best encompasses caste discrimination. Importantly, to understand how caste discrimination based at least in part on sex even exists in United States employment, one must look to caste discrimination based on sex in India. By looking to the effects of caste discrimination against women in India, one can better understand why an upper-caste supervisor in the United States may attempt to uphold such entrenched practices by discriminating against Dalit and lower caste women even in the United States employment context.

Dalit women in particular face a "'triple burden' of gender bias, caste discrimination and economic deprivation."[149] In India, caste discrimination against Dalit women rises to the level of outright violence. Dalit women "continue to be stalked, abused, molested, raped and murdered with impunity."[150] In India, ten

146. *Id.*

147. Krishnamurthi & Krishnaswami, *supra* note 16, at 471.

148. Narula, *supra* note 54, at 277. Although this Section will focus on caste discrimination perpetuated against lower caste women on the basis of sex due to the overwhelming evidence that shows that lower caste, and especially Dalit, women suffer from the worst treatment, it is important to realize that simultaneous caste and sex-based discrimination in United States employment could exist against both men and women as well as against those who are members of the upper castes.

149. Soutik Biswas, *Hathras Case: Dalit Women are Among the Most Oppressed in the World*, BBC NEWS (Oct. 6, 2020), [https://perma.cc/S6EB-WBYK].

150. *Id.*

Dalit women were raped every day in 2019.[151] Though records do not reflect that such sexual violence is perpetuated against Dalit women in the United States, sexual violence against Dalit women is not completely foreign to the United States.[152]

For employment, Dalit women in India "are allotted some of the most menial and arduous tasks and experience greater discrimination in payment of wages than Dalit men."[153] Therefore, one can imagine how it is even more offensive to an upper caste supervisor as well as the caste hierarchy to see that Dalit women, considered the lowest of the low in India, are achieving economic and social mobility through employment in the United States. While Dalit women in the United States have much more opportunity than Dalit women in India, who are often landless laborers or forced into prostitution,[154] Dalit women do not shed their caste once they are in the United States.

Such an inability to escape caste in the United States as a Dalit or lower caste woman can be seen by looking at the story of Maya Kamble. Kamble was one of the first women to enter the technical industry in Los Angeles, California.[155] Kamble identifies as a Buddhist Ambedkarite but nonetheless is considered as a Dalit to her upper caste supervisors due to the fact that Buddhist Ambedkarites descend from Dalit converts.[156] Kamble's supervisor, knowing that she came from Dalit origins, continuously subjected her to bias in the workplace.[157] This supervisor "continually ice[d] her out of conversations" and even told her not to touch a tool because she was "ill-fated"—a jeer used towards Dalits, and especially Dalit women, due to the belief that a Dalit's impurity generates misfortune.[158]

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151. *Id.*

152. *See e.g.*, Ray, *supra* note 10 (discussing the story of Preeti Meshram, a Dalit woman who was raped by an upper caste classmate while going to New England college for her doctorate).

153. Narula, *supra* note 54, at 277-78.

154. *Id.* at 278-83.

155. Thenmozhi Soundararajan, *Caste in the USA, Episode 4: Battling Caste Bias as a Woman in Tech, and Thriving Under Non-Indian Bosses*, FIRSTPOST (Nov. 11, 2020), [https://perma.cc/Q2LL-VU26].

156. Gail Omvedt, BUDDHISM IN INDIA: CHALLENGING BRAHMANISM AND CASTE 264 (2003).

157. Soundararajan, *supra* note 155.

158. *Id.*

Importantly, Kamble is not the only Dalit woman in the United States tech industry who faces "the casteist networks of Silicon Valley Tech."[159] In October 2020, thirty Dalit female engineers in Silicon Valley came forward with a statement speaking out on caste bias in their workplaces, which included tech giants like Apple, Microsoft, and Google.[160] These female engineers described that "working with Indian managers is a living hell," stating that "[t]heir *gender and caste* politics leave a lot to be desired."[161] Specifically, these engineers said that "[d]ominant caste men make jokes about Dalit reservation, as well as inappropriate jokes about Dalit and Muslim women."[162] These women even told of instances where this hostility in the workplace escalated to sexual harassment.[163]

Overall, from these personal accounts in the United States, it is clear that although Dalit and lower caste men are also subjected to similar treatment, Dalit and lower caste women face unique discrimination. By observing the limitations and violence Dalit women face in India and how this discrimination has translated to the American workplace, one can see that Dalit and lower caste women are at the intersection of both caste and sex-based discrimination. With this understanding, the theory of Intersectionality is the best way to address caste discrimination, especially for female employees.

E. National Origin

Similar to the analysis in Section D, it would be inaccurate to reduce caste discrimination as discrimination based solely on one's South Asian identity.[164] However, although caste discrimination may not be distilled solely to national origin discrimination, this Comment proposes that caste discrimination can, at least in part, overlap into the protected class of national

159. *A Statement on Caste Bias in Silicon Valley from 30 Dalit Women Engineers*, WASH. POST (Oct. 27, 2020), [https://perma.cc/KW5Q-Q3XK].

160. Tiku, *supr*a note 14.

161. *A Statement on Caste Bias in Silicon Valley from 30 Dalit Women Engineers*, *supra* note 159 (emphasis added).

162. *Id.*

163. *Id.*

164. *See* Krishnamurthi & Krishnaswami, *supra* note 16, at 472.

origin based on the EEOC's, and the common law's, definition of national origin discrimination. While one's membership in some of the protected classes may be easy to identify, such as one's race, color, or sex, one's national origin may be more difficult to identify. Courts across the country recognize that unlawful discrimination must be based on the employee's objective *appearance* to others, not his own subjective feelings about himself.[165] Therefore, it is irrelevant whether the alleged discriminator was actually correct in assuming an employee's place of origin.[166]

The EEOC defines "national origin discrimination broadly, as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."[167] This broad interpretation of national origin finds support in the judicial system which deems national origin as "better understood by reference to certain traits or characteristics that can be linked to one's place of origin, as opposed to a specific country or nation."[168] The first clause of the EEOC's definition of national origin focuses on discrimination based on an individual's or their ancestors' place of origin. Importantly, like the EEOC's definition of national origin, its definition of "place of origin" is also broad. One's place of origin can even include large geographic regions such as South Asia.[169] Also, as mentioned

165. Bennun v. Rutgers State Univ., 941 F.2d 154, 173 (3d Cir. 1991); *see also* Mobijohn v. Ellenville Cent. Sch. Dist., No. 92-CV-0672, 1995 WL 574461, at *1 n.2 (N.D.N.Y. Sept. 28, 1995); Almendares v. Palmer, No. 00-CV-7524, 2002 WL 31730963, at *10 (N.D. Ohio Dec. 3, 2002); Huffman v. City of Conroe, No. H-07-1964, 2009 WL 361413, at *5 (S.D. Tex. Feb. 11, 2009).

166. *See Almendares*, 2002 WL 31730963, at *10; Guidelines on Discrimination Because of National Origin, 45 Fed. Reg. 85633 (Dec. 29, 1980) ("In order to have a claim of national origin under Title VII, it is not necessary to show that the alleged discriminator knew the *particular* national origin group to which the complainant belonged.").

167. 29 C.F.R. § 1606.1 (2022).

168. McNaught v. Va. Cmty. Coll. Sys., 933 F. Supp. 2d 804, 817 (E.D. Va. 2013) (quoting Kanaji v. Child.'s Hosp. of Phila., 276 F. Supp. 2d 399, 401-02 (E.D. Pa. 2003)); *but see* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973) (explaining that national origin discrimination under Title VII is discrimination based on "where a person was born, or, more broadly, the country from which his or her ancestors came").

169. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2016-2, EEOC ENFORCEMENT GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION.

above, a discriminator does not need to pinpoint the employee's exact country of origin in order to discriminate on the basis of the plaintiff's place of origin. Therefore, even if a person suffering from national origin discrimination is from the United States instead of South Asia, the victim can still bring a Title VII claim based on national origin discrimination.

While it is nearly impossible to distinguish certain South Asian regions as being majority Dalit or majority Brahmin due to the presence of all castes throughout South Asia,[170] those discriminating on the basis of caste likely have knowledge that nearly half of India's Dalit population resides in four Indian states.[171] Therefore, though caste can more accurately be described as a "qualification" of one's South Asian identity, it is possible that a potential discriminator can learn *or presume* that someone is from one of these four Indian states and discriminate on that basis.[172]

Even with this in mind, a stronger argument exists in the second clause of the EEOC's definition as well as in definitions of national origin existing in common law.[173] These definitions focus on discrimination based on certain objectively identifiable "physical, cultural or linguistic characteristics of a national origin group," such as South Asians.[174] As discussed in Sections I.A-B, caste has existed for centuries in South Asia, structuring individual identities as well as intercommunity relationships that continue to exist today.[175] Therefore, caste discrimination is inherently dictated by South Asian culture and practice.

The cultural characteristic of one's surname is one objectively identifiable example of how caste is inextricably

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170. Priyali Sur, *Under India's Caste System, Dalits are Considered Untouchable. The Coronavirus is Intensifying that Slur*, CNN (Apr. 17, 2020, 3:04 AM), [https://perma.cc/9TUQ-6FND] (quoting activist Paul Divakar from the National Campaign on Dalit Human Rights, "India has 600,000 villages and almost every village a small pocket of outskirts is meant for Dalits").

171. B. Sivakumar, *Half of India's Dalit Population Lives in 4 States*, TNN (May 2, 2013, 6:16 AM IST), [https://perma.cc/HQ3G-VGL9].

172. *See* Krishnamurthi & Krishnaswami, *supra* note 16, at 472.

173. *See* McNaught v. Va. Cmty. Coll. Sys., 933 F. Supp. 2d 804, 817 (E.D. Va. 2013) (quoting Kanaji v. Child.'s Hosp. of Phila., 276 F. Supp. 2d 399, 401-02 (E.D. Pa. 2003)).

174. 29 C.F.R. § 1606.1 (2022).

175. Madhusudan Subedi, *Caste in South Asia: From Ritual Hierarchy to Politics of Difference*, POLITEJA, 320 (2016).

intertwined with South Asia. Carrying caste surnames is the most humiliating aspect of a Dalit's daily life.[176] Similar to how Americans may have profession-based surnames, such as Miller or Baker, Dalit surnames tell their own story. A Dalit's surname tells a story of contempt that travels back to the days of their ancestors. On the contrary, the Brahmins flaunt their caste names as surnames with much pride.[177] Despite there being over a billion people in India with different languages, cultures, and food customs, a surname that reflects one's Brahmin-status can quickly establish a common ground between upper caste individuals.[178]

The power or oppression that flows from caste surnames is not unrecognized in India. Caste surnames were even abolished altogether in the Indian state of Tamil Nadu in 1929—the only state to have ever done so.[179] The caste surname has become an "oral caste certificate" that can transcend borders and lead to caste-discrimination in the United States.[180] All an upper caste supervisor or employer in the United States has to do in order to find out an employee's caste is to say, "Hello, my name is (upper caste surname). What is yours?"

Assuming the upper caste supervisor begins to subject the plaintiff to less pay and/or caste-based insults after learning the plaintiff's surname, the plaintiff may begin to mull the possibility of bringing a Title VII claim based on national origin discrimination. To prove his claim, the employee needs to use the disparate treatment illustrated in Part V to demonstrate how his surname is an objectively identifiable cultural characteristic that falls within the protected class of national origin. To do so, the employee would need to show that his surname would immediately put an upper caste supervisor on notice of his Dalit status. Then, the employee will need to tie all of the information together for the court. At the very least, the employee needs to demonstrate by a preponderance of the evidence that "national origin was a motivating factor for any employment practice,"

176. Rani, *supra* note 117.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*

even if other legitimate factors also motivated the action.[181] Overall, the deep ties between caste and the national origin group of South Asians demonstrate how caste discrimination overlaps into the protected class of national origin, thus enforcing this Comment's proposal that the theory of Intersectionality is the best way for courts to understand and prohibit caste discrimination under Title VII.

V. HOW IS A TITLE VII DISCRIMINATION CLAIM BROUGHT?

Now that this Comment has demonstrated how caste discrimination can be covered by Title VII, this Part describes how a plaintiff would actually bring a Title VII claim based on caste discrimination. Further, and importantly, this Part identifies the standards of causation to be met regarding each approach.

There are "four separate legal theories under which a plaintiff can bring a Title VII caste discrimination [claim]."[182] The first approach is disparate treatment, which "refers to the unlawful practice of treating an employee differently based on his or her membership in a protected class."[183] Disparate treatment[184] is proven by "direct evidence, circumstantial evidence, or by proving a [discriminatory] pattern [] on the part of the employer."[185] The second approach is by disparate impact, which refers to a practice that, "while not facially discriminatory, has a disparate impact on a particular protected class."[186] While it is possible to bring a caste discrimination-based Title VII claim

181. Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (quoting 42 U.S.C. § 2000e-2(m)).

182. Donald F. Kiesling Jr., *Title VII and the Temporary Employment Relationship*, 32 VAL. U. L. REV. 1, 4 (1997).

183. *Id.*

184. This is the most common type of claim. *Id.*

185. *Id.*; Gilbert v. MetLife, Inc., No. 09-1990, 2011 WL 183441 at *7 (D. Minn. 2011) (quoting Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004)) ("'direct' refers to the causal strength of proof . . . . A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part *McDonnell Douglas* analysis to get to the jury, regardless of whether his strong evidence is circumstantial."); *see also* Goins v. W. Grp., 635 N.W.2d 717, 722 (Minn. 2001) (direct evidence "shows that the employer's discrimination was purposeful, intentional or overt").

186. Kiesling Jr., *supra* note 182, at 4.

under the disparate impact theory, this Comment does not discuss this approach at length due to an employee's likely inability to produce the requisite statistical evidence demonstrating disparities in the "percentage of [lower caste] workers in the employer's work force with the percentage of qualified members . . . in the relevant labor market."[187] Such statistics would be difficult to produce because there are a lack of concrete numbers of Dalit and lower caste individuals in the workforce—a difficulty that is at least partially explained by the fact that Dalits and lower caste individuals are usually hesitant to expose their caste status.[188]

The third approach is retaliation.[189] This approach protects employees who participate in filing a discrimination charge against an employer but then, in retaliation to this filing, suffer an adverse employment action.[190] The fourth potential approach is harassment in a hostile work environment.[191] This theory requires that the plaintiff present evidence that his/her workplace is permeated with "discriminatory intimidation . . . and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[192] Similar to the disparate impact approach, this Comment does not concede the impossibility of a biased supervisor creating a hostile work environment because of one's caste, yet this Comment also does not discuss this approach at length. This decision to not discuss harassment is based on the fact that if courts agree that caste is covered by Title VII under the disparate treatment theory, courts would likely also recognize a caste-based Title VII claim under the harassment theory, where the effects of the discrimination need to be even more evident, as legally cognizable.

187. MacRae v. McCormick, 458 F. Supp. 970, 979-80 (D.C. Cir. 1978).
188. ZWICK-MAITREYI, ET AL., *supra* note 9.
189. Kiesling Jr., *supra* note 182, at 5.
190. *Id.*
191. Harris v. Forklift Sys., Inc., 510 U.S. 17, 19-20 (1993).
192. *Id.* at 21 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 67 (1986)).

A. Disparate Treatment

If there is circumstantial or direct evidence that an individual is being discriminated against on the basis of their caste, then the employee may bring an unlawful discrimination suit based on disparate treatment.[193] "The cornerstone of a disparate-treatment case is that the employee must show that discrimination was intentional, unlike in disparate impact cases where there is only discriminatory effect."[194] "A person suffers disparate treatment in his employment 'when he or she is singled out and treated less favorably than others similarly situated'" because of a protected characteristic.[195] There are two alternative methods under which disparate treatment can be proven.

1. Pretext or Single-Motive Analysis

In cases involving a plaintiff who attempts to prove the employer's defense to discrimination is pretextual, courts "use the [] burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*"—the premier case in proving discrimination in employment.[196] A pretext analysis is an "all-or-nothing instruction."[197] It asks the factfinder to find the one discriminatory motive for the employment action. Under this analysis, the complainant must first establish, by a preponderance of the evidence, a prima facie case of discrimination.[198] This may be done by demonstrating that (1) the employee belongs to a protected class; (2) the plaintiff "applied and was qualified for a job for which the employer was seeking applicants;" (3) "despite [plaintiff's qualifications], he was rejected;" and (4) "after his rejection, the position remained open and the employer continued

193. Maya R. Warrier, *Dare To Step Out of the Fogg: Single-Motive Versus Mixed-Motive Analysis in Title VII Employment Discrimination Cases*, 47 LOUISVILLE L. REV., 409, 417 n.54 (2008).

194. *Id.* at 409.

195. Cornwell v. Electra Cent. Credit Union, 439 F.3d 1018, 1028 (9th Cir. 2006) (quoting McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1121 (9th Cir. 2004)).

196. Raskin v. Wyatt Co., 125 F.3d 55, 60 (2d Cir. 1997) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

197. William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 213 (2003).

198. *McDonnell Douglas Corp.*, 411 U.S. at 802.

to seek applicants from persons of [plaintiff's] qualifications."[199] Next, the employer "must clearly set forth, through introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the challenged employment action."[200] It is likely that most cases that originate from caste discrimination will at least survive summary judgment because "the degree of proof necessary to establish a prima facie case [of discrimination] is 'minimal and does not even need to rise to the level of a preponderance of the evidence.'"[201]

If a prima facie case is established, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[202] If the employer shows a "legitimate, nondiscriminatory reason" for its actions, the employee needs only to show, by a preponderance of the evidence, that the employer's asserted reasons for its actions are a mere "pretext" for its true discriminatory motives.[203]

However, the *McDonell Douglas* framework is not the only means of establishing a prima facie case of individual discrimination. As the facts inevitably vary in Title VII cases, the "prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations."[204] Overall, as long as the plaintiff in some way carries the "initial burden of offering evidence adequate to create an inference that an employment decision is based on a discriminatory criterion illegal under the Act," the *McDonnell Douglas* method will be set into motion allowing a victim to possibly recover.[205]

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199. *Id.*

200. Wooster, *supra* note 74.

201. Story v. Napolitano, 771 F. Supp. 2d 1234, 1248 (E.D. Wash. 2011) (quoting Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994)).

202. *McDonnell Douglas Corp*., 411 U.S. at 802.

203. *Id.* at 802-05; *see* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 143 (2000).

204. *McDonnell Douglas*, 411 U.S. at 802 n.13; *see, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976) (holding that it is unnecessary to make each individual of a class action show personal monetary loss and that petitioners have carried their burden by only demonstrating the existence of a discriminatory hiring pattern and practice by the respondents).

205. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977).

2. Mixed-Motive Analysis

What the *McDonnell Douglas* framework failed to address is the fact that employment decisions are usually made for multiple reasons. Mixed motives are "usually prevalent in employment decision-making because (1) biased decision-making based on social-category information can occur without the decision maker's awareness and (2) people are experts in masking behavior that is often questionable or negatively viewed by society."[206] *Price Waterhouse v. Hopkins* first addressed the issue of what happens when an employer has more than motive when making an employment decision.[207] However, *Price Waterhouse* only brought more confusion. Lower courts were split in deciding whether to follow Justice O'Connor's concurrence which stated that the employer's discriminatory motive must be a "substantial factor" or the plurality's opinion which stated that the employer's discriminatory motive must be a "motivating factor."[208]

In response to the confusion caused by *Price Waterhouse* and other Supreme Court decisions that limited the rights of employees who sued their employers for discrimination, Congress passed the Civil Rights Act of 1991 ("1991 Act")—an amendment to the Civil Rights Act of 1964.[209] In particular, § 107 of the 1991 Act set standards applicable to mixed motive cases—as demonstrated in *Desert Palace, Inc. v. Costa*.[210] The first provision establishes an alternative for proving that an unlawful employment practice has occurred.[211] This provision states that "an unlawful employment practice is established when the complaining party demonstrates [by a preponderance of the evidence] that race, color, religion, sex, or national origin was a motivating factor for any employment practice," even if other legitimate factors also motivated the action.[212] The second

206. Warrier, *supra* note 193, at 424.

207. *See generally* 490 U.S. 228 (1989).

208. Warrier, *supra* note 193, at 414.

209. *S. 1745 (102nd): Civil Rights Act of 1991*, GOVTRACK, [https://perma.cc/3RG6-3H5U] (last visited March 17th, 2021).

210. 539 U.S. 90, 94 (2003).

211. *Id.* at 101.

212. *Id.* at 94, 99 (quoting 42 U.S.C. § 2000e-2(m)).

provision provides a limited affirmative defense that does not absolve the employer of liability but instead only restricts the remedies available to a potential plaintiff.[213]

Most importantly, after *Desert Palace*, direct evidence is not necessary in order to submit a mixed-motive instruction to the jury in a Title VII discrimination case.[214] This is significant because plaintiffs were previously forced to use the pretext method when no direct evidence existed. Now that this barrier has been lifted, employees have much more freedom to choose the mixed-motive method, which is not burdened by the higher standard of causation within the pretext analysis.[215]

The *Desert Palace* Court at least impliedly indicated the irrelevance, or even impossibility, of continuing to apply *McDonnell Douglas* under Title VII after the Ninth Circuit stated that "'an unlawful employment practice' encompasses *any* situation in which a protected characteristic was 'a motivating factor' in an employment action, even if there were other motives."[216] Essentially, as soon as the defendant illustrates a legitimate, non-discriminatory reason, the case becomes a mixed-motive case because there now possibly exists both discriminatory and non-discriminatory motives.[217] Despite the *Desert Palace* holding, courts continue to use the *McDonnell Douglas* standard in employment discrimination cases.[218]

To put the significance of the *Desert Palace* decision in perspective for this piece, consider how an employee can now use a mixed-motive method without producing direct evidence. For example, a potential upper caste, discriminatory supervisor will likely attempt to cover up the discriminatory motive behind their employment decision regarding the Dalit employee. As is true with numerous employers, the supervisor will likely attempt to rationalize the adverse employment action by reasoning that they took action for reasons that sound justifiable but, are in reality,

213. *Id.* at 94.

214. *Id.* at 98-99.

215. Corbett, *supra* note 197, at 212.

216. Warrier, *supra* note 193, at 421 (emphasis added) (quoting Costa v. Desert Palace, Inc., 299 F.3d 838, 848 (9th Cir. 2002)).

217. Corbett, *supra* note 197, at 213.

218. Warrier, *supra* note 193, at 422.

merely a cover-up for discrimination. The discriminatory supervisor can explain that the Dalit employee did not get the promotion because of non-descript reasons like he "did not have enough experience managing others" or that the Dalit employee was terminated for having a "lack of deference to others." Circumstantial evidence can expose the employer's ill intentions by allowing the plaintiff to show that the employer uses shifting rationales or discriminatory remarks, giving a juror a "window into [the employer's] state of mind."[219] The employee can also show workforce composition, which can demonstrate that the upper ranks of a company are closed off to Dalit employees.[220] Overall, the flexibility and less stringent causation analysis of the mixed-motive method gives employees another weapon to combat employment discrimination.

For instance, upper caste supervisors may develop a practice of not promoting those who are beneficiaries of India's system of affirmative action—a system that commonly benefits Dalits. An upper caste employer can easily discover that the Dalit employee is a beneficiary by simply looking up the employee's graduating class to see whether the employee has "ST," which means, "Scheduled Tribe," next to his name.[221] "Scheduled Tribe" is a common label for lower caste members.[222] A potential employee can point to how the supervisor promotes only those who are not beneficiaries of India's affirmative action system and that when the supervisor does promote beneficiaries, he only does so when the beneficiary does not have "ST" next to his name.

VI. WHAT ARE SOME ALTERNATIVE OPTIONS IN PREVENTING CASTE DISCRIMINATION?

In America, "caste" is not a household word. Even if an American has heard of the caste system, it is rare that this person also fully appreciates caste's complexity as well as the inequality

219. David I. Brody, *"But I Can't Prove It." Yes You Can, with Circumstantial Evidence*, NAT'L L. REV. (Mar. 11, 2019), [https://perma.cc/2Y9J-Q72L].

220. *Id.*

221. *See* SAMUEL L. MYERS, JR. & VANISHREE RADHAKRISHNA, HATE CRIMES, CRIMES OF ATROCITY, AND AFFIRMATIVE ACTION IN INDIA AND THE UNITED STATES 22 (2017).

222. *Id.*

that flows from the caste system. This lack of understanding is reflected in the American legal system where "there are very little [constitutional and statutory] protections for Dalits in the United States for the discrimination that they encounter here with caste Hindus."[223]

With this in mind, many are skeptical as to whether there exists federal law "to insulate Dalits and low caste Indians from caste bias."[224] In this Part, this Comment proposes that, in order to circumvent a potentially hesitant judicial system, those who see caste discrimination as a persistent problem in employment in the United States need to avoid molding caste into something that satisfies how courts—which are largely unfamiliar with caste—classify Title VII discrimination. Instead, advocates for the end of caste discrimination need to take the issue head on. In other words, advocates—whether they are EEOC employees, members of Congress, or administrators at universities—need to push for caste-centric policy that explicitly prohibits caste discrimination.[225] For example, the EEOC can issue new guidance to the courts and employers stating that caste discrimination is intersectional discrimination prohibited by Title VII. Although the courts would have to agree with this guidance, the fact that the leading agency on Title VII, as well as other advocates for the end of caste discrimination, have spoken up about the issue should put the courts on notice.

Another example of advocates taking charge on this issue comes from Brandeis University. Brandeis's former nondiscrimination policy only prohibited "forms of discrimination that are overtly described in federal and state law."[226] However, Brandeis realized that in order to follow its principles of equitable access and inclusion, it would have to take steps that even federal and state laws have yet to approach. Similar to this Comment's intersectional proposal, Brandeis

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223. Phillip Martin, *Caste Bias Isn't Illegal in the United States. But This University is Trying to Fight It*, GBH NEWS (Feb. 27, 2019), [https://perma.cc/8B72-AB8S].

224. *Id.*

225. *See* Telephone Interview with Dr. Suraj Yengde, Assoc., Dep't of Afr. & Afr. Am. Stud., Harvard Univ. (Oct. 19, 2020).

226. BRANDEIS UNIVERSITY, *Statement on the Interpretation of Caste Within the Brandeis Nondiscrimination Policy*, BRANDEIS UNIV. (Nov. 26, 2019), [https://perma.cc/8XGE-JQRL].

"believes that caste identity is so inextricably intertwined with [race, color, ancestry, religious creed, and national or ethnic origin] that discrimination based on one's caste is effectively discrimination based on an amalgamation of legally protected characteristics."[227] For these reasons, Brandeis took charge and prohibited discrimination and harassment based on caste.[228]

Congress can even pass legislation that explicitly prohibits caste discrimination under Title VII. Although it may seem that prohibiting such intolerance should be uncontroversial, one must not forget that the upper caste still has power and influence in the United States. Many castes are organized into associations preserved for members of a particular caste.[229] The most prominent and powerful Hindu advocacy organization in the United States, the Hindu American Foundation ("HAF"), denies that caste bias occurs in Hindu advocacy organizations, suggesting "what some call casteism may be overblown."[230] Congress must be willing to listen to not only those Hindu organizations like the HAF—which holds the most influence—but also to the Dalit organizations that feel the brunt of caste discrimination.

Lastly, the employers who have allowed caste discrimination in the workplace can lead the fight by implementing workplace policies that prohibit caste discrimination. These employers would certainly include tech giants like IBM, Google, or any other company with a large South Asian workforce. Such private companies would have the advantage of not needing to jump through the numerous, difficult hoops required to pass congressional legislation. Creating these nondiscrimination policies would also be in the best interest of these companies because they would face less Title VII litigation and liability. Further, taking such steps would show not only their employees, but also the world, that the human dignity of those suffering from caste discrimination must be respected.

Overall, the aforementioned alternatives are merely ways to circumvent judicial interpretation. The EEOC and university-

227. *Id.*
228. *Id.*
229. Martin, *supra* note 223.
230. *Id.*

level alternative would only attempt to persuade the courts that caste discrimination is an issue that needs to be addressed and then prohibited, while the congressional alternative would sternly demand that the courts perform their duty and adhere to the new legislation.

CONCLUSION

Just as B.R. Ambedkar, the most influential Dalit civil rights leader, predicted in 1916, caste has become a "world problem" as Indian migration has spread across the globe.[231] In order to combat this problem, courts need to make affirmative rulings that caste discrimination is prohibited by Title VII. Specifically, courts should accept the theory of Intersectionality as a means to reach such a conclusion because caste is a unique, multi-dimensional form of discrimination simultaneously overlapping into potentially *all* of the protected classes enumerated in Title VII. Further, this fight should not, and cannot, be confined to the courtroom if caste discrimination in the United States is to be stopped. To end the harms of caste discrimination in the workplace, legislative bodies, agencies, and employers need to specifically identify caste discrimination as a prohibited practice. Although caste, like an ancient poisonous tree, will not easily be uprooted, prohibiting caste discrimination in the American workplace is a substantial step towards equality for all.

231. ZWICK-MAITREYI ET AL., *supra* note 1, at 4.