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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

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

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 Repts. Submitted By States Parties Under Article 9 of the Convention: Concluding Observations of the Comm. on the Elimination of Racial Discrimination: India, 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

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 Sanskrit 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

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

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 workers⁷¹ 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 enactment 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

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 implicat[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

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 multifaceted 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

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]nfllicted 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

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 or 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

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.

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, *Dalit 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

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, *supra* 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

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 treatment¹⁸⁴ 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. Warrior, *Dare To Step Out of the Fog: 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 *McDonnell 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

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

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.