NOVA LAW REVIEW

NOVA SOUTHEASTERN UNIVERSITY

ARTICLES AND SURVEYS

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VOLUME 45 **2020** **NUMBER 1**

NOVA LAW REVIEW

VOLUME 45 FALL 2020 ISSUE 1

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NOVA LAW REVIEW

VOLUME 45 FALL 2020 NUMBER 1

ARTICLES AND SURVEYS

NOTES AND COMMENTS

INTELLECTUAL DISABILITY AND THE DEATH PENALTY: FLORIDA'S WRONGS SHOULD BE MADE RIGHT

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I. INTRODUCTION: INTELLECTUAL DISABILITY AS A BAR TO THE DEATH PENALTY

The advent of the recent pronouncements of the Supreme Court of the United States in *Moore v. Texas*[1] interpreting the newest edition of the Diagnostic and Statistical Manual of Mental Disorders has changed the interplay of diagnostic and legal standards for establishing intellectual disability as a bar to the death penalty.[2] Florida law has not kept pace.[3] Psychological concepts such as *concurrent function* and the *age of onset* in the diagnosis of intellectual disability have been misconstrued by Florida courts.[4] Florida's clear and convincing evidence standard for invoking the categorical bar to death sentences compounds the risk that the intellectually disabled will be executed.[5] On May 21, 2020, *Phillips v. State*[6] rolled back retroactivity of federal precedent, further imperiling intellectually disabled defendants.[7] This article will review the etiology of intellectual disability as a bar to the death penalty and the many misapprehensions of the clear consensus of the medical community in intellectual disability diagnosis.[8] The interpretation of intellectual disability law by the Supreme Court of Florida, coupled with anachronisms in Florida intellectual disability statutes, violate the Eighth and Fourteenth Amendments of the United States Constitution because they practically guarantee that intellectually disabled men and women will be executed.[9] Unless Florida law and its interpretations change, countless unjust executions will follow.[10]

In *Atkins v. Virginia*,[11] the Supreme Court of the United States held that the Eighth Amendment to the United States Constitution bars execution

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1. 139 S. Ct. 666 (2019) (per curiam).
2. Moore v. Texas (*Moore I*), 137 S. Ct. 1039, 1049 (2017), *rev'd* 139 S. Ct. 666 (2019); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 31, 37 (5th ed. 2013) [hereinafter DSM-5]; AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 38 (11th ed. 2010) [hereinafter AAIDD-11].
3. *See* Phillips v. State, 894 So. 2d 28, 42 (Fla. 2004) (per curiam).
4. *See id.* at 37.
5. *See id.* at 46 (Pariente, C.J., concurring in part and dissenting in part).
6. 299 So. 3d 1013 (2020) (per curiam).
7. *Id.* at 1022.
8. *See* discussion *infra* Part I–VI.
9. U.S. CONST. amend. VIII; U.S. CONST. amend. XIV; *see also* FLA. STAT. § 921.137(1) (2019); *Phillips*, 299 So. 3d at 1024; discussion *infra* Part I–VI.
10. *See Phillips*, 299 So. 3d at 1024; discussion *infra* Part VII.
11. 536 U.S. 304 (2002).

of intellectually disabled people.[12] Relating the diminished culpability of the intellectually disabled to the penological philosophy of the death penalty, the *Atkins* Court found execution of intellectually disabled people served no purpose.[13] Diminished intellectual capacity, with its resultant difficulties in understanding information, inability to learn from experience, ineptitude in logical reasoning, and impossibility of controlling impulses, makes an intellectually disabled person less morally culpable and less amenable to deterrence.[14] If the death penalty does not serve penological aims, "it is nothing more than the purposeless and needless imposition of pain and suffering."[15] Exempting the intellectually disabled from capital punishment also protects the integrity of the trial process.[16] The intellectually disabled face a heightened risk of wrongful execution because they "give false confessions, are . . . poor witnesses, and are less able to give meaningful assistance to . . . counsel."[17] The central tenet of Eighth Amendment jurisprudence has been clear since 2002: "the Constitution restricts . . . the State's power to take the life of *any* intellectually disabled individual."[18]

Florida law protects intellectually disabled people from execution if they are found to have significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior, manifested in the period between conception and age eighteen.[19] "Significantly subaverage general intellectual functioning" is based on a person's intelligence quotient or "IQ" defined as "two or more standard deviations from the mean score on a standardized intelligence test."[20] Florida law defines "adaptive behavior" as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community."[21] As discussed in *Hall v. Florida*,[22] the Florida statute could be interpreted consistently with *Atkins*.[23] Yet Florida courts have historically botched the analysis by taking IQ scores as final, conclusive evidence of intellectual

12. *Id.* at 321.
13. *Id.* at 317–19.
14. *Id.* at 318.
15. *Id.* at 319 (citing Enmund v. Florida, 458 U.S. 782, 798 (1982)).
16. Hall v. Florida, 572 U.S. 701, 709 (2014).
17. *Id.*
18. Moore v. Texas (*Moore I)*, 137 S. Ct. 1039, 1048 (2017), *rev'd*, 139 S. Ct. 666 (2019) (citing *Atkins*, 536 U.S. at 321) (emphasis added); U.S. CONST. amend. VIII; *see also Hall*, 572 U.S. at 714; Roper v. Simmons, 543 U.S. 551, 563–64 (2005).
19. FLA. STAT. § 921.137(1) (2019).
20. *Id.*
21. *Id.*; *see also* FLA. R. CRIM. P. 3.203(b).
22. 572 U.S. 701 (2014).
23. *Id.* at 711; *Atkins*, 536 U.S. at 321.

disability and by barring full and fair consideration of evidence of adaptive functioning.[24] The burden of proving intellectual disability by clear and convincing evidence rests solely with the defendant.[25]

Hall corrected Florida's Eighth Amendment violations by establishing IQ as an imprecise range with a standard error of measurement ("SEM") and insisting that courts consider the professional consensus of the medical community in evaluating intellectual disability.[26] In *Brumfield v. Cain*,[27] the Court found an IQ score of 75 was not dispositive of intellectual capability.[28] As in *Hall*, and in concert with the unanimous consensus of the medical community, the flaws and imprecision in IQ test scores make them a poor vehicle for diagnosis when used on their own.[29] IQ measurement accounts for a less than perfect range of scores, especially with multiple testing that inherently results in variable test scores.[30] There are multiple reasons for IQ test score fluctuations, with most of them not having to do with effort—a common reason attributed to test score variability by experts, especially in *Atkins*.[31] Low IQ scores of all types should lead to a full, multifactored consideration of adaptive functioning in order to improve diagnostic precision and reduce the risk of executing intellectually disabled people in violation of the Eighth Amendment.[32]

On March 23, 2017, *Moore v. Texas* ("*Moore I*")[33] authoritatively revisited the standard for evaluating adaptive functioning and intellectual disability.[34] Bobby Moore, a man with mild intellectual disability, an IQ of 70.66, the ability to survive on the streets, play pool, and mow lawns for money, was given a death sentence after Texas courts applied outdated

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24. *See* Cherry v. State, 959 So. 2d 702, 713–14 (Fla. 2007) (per curiam), *abrogated by* Hall v. Florida, 572 U.S. 701 (2014).

25. FLA. STAT. § 921.137(4).

26. *Hall*, 572 U.S. at 712–13, 722 (citing the DSM-5 and the AAIDD-11); *see also* AAIDD-11, *supra* note 2, at 39.

27. 135 S. Ct. 2269 (2015).

28. *Id.* at 2278.

29. *See Hall*, 572 U.S. at 722; AAIDD-11, *supra* note 2, at 41–42.

30. AAIDD-11, *supra* note 2, at 41–42.

31. MARC J. TASSÉ & JOHN H. BLUME, INTELLECTUAL DISABILITY AND THE DEATH PENALTY: CURRENT ISSUES AND CONTROVERSIES 90–100 (2018); Stephen Greenspan & J. Gregory Olley, *Variability of IQ Test Scores*, *in* THE DEATH PENALTY AND INTELLECTUAL DISABILITY 184, 185 (Edward A. Polloway ed., 2015) (ebook) ("Because IQ test scores of *Atkins* defendants often fall close to the conventional upper limit of 70–75, some scores are likely to fall above or below that range. There are multiple reasons for IQ score fluctuation, with most of them not having to do with effort, a common factor cited by forensic expert evaluators in *Atkins* cases.") (internal parenthesis omitted).

32. *See* DSM-5, *supra* note 2, at 33–41; AAIDD-11, *supra* note 2, at 41–42; Greenspan & Olley, *supra* note 31, at 185.

33. 137 S. Ct. 1039 (2017), *rev'd*, 139 S. Ct. 666 (2019).

34. *Id.* at 1044.

standards for assessing intellectual disability in *Ex Parte Briseno*.[35] In overruling the death penalty in Moore's case, the Supreme Court of the United States forged explicit new standards for assessing adaptive functioning based on the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5").[36] First, perceived adaptive strengths should not be overemphasized in intellectual disability diagnosis.[37] Second, reliance on behavior in controlled environments, like prison, does not comply with medical consensus.[38] Third, childhood trauma and learning disabilities should be considered risk factors, rather than alternative explanations, for adaptive deficits in intellectual disability determinations.[39] Fourth, a state court may not require a defendant to show that adaptive deficits were not related to a personality disorder because clinicians recognize that the existence of a personality disorder or mental health issue is not probative of the existence of intellectual disability.[40] Finally, the Supreme Court dictated that intellectual disability determinations must be informed by the diagnostic framework of the medical community, comply with established medical practice, and rely on current versions of the leading diagnostic manuals, the DSM-5 and the eleventh edition of the Manuel published by the American Association on Intellectual and Developmental Disabilities ("AAIDD-11").[41]

When considering certiorari of the Texas Court of Criminal Appeals for the second time, the Supreme Court of the United States criticized and overruled the Texas court's reasoning stating, "we have found in its opinion too many instances . . . it repeats the analysis we have previously found wanting."[42] The Texas court erred in analyzing the criteria for adaptive functioning by overemphasizing adaptive strengths, relying on behavior in controlled environments like prison, misattributing behavior to learning disabilities or personality disorders rather than intellectual disability, and failing to consider the diagnostic consensus of the medical community.[43] In

35. 135 S.W.3d 1, 22 (Tex. Crim. App. 2004), *abrogated by* Moore v. Texas, 137 S. Ct. 1039 (2017), *and* Ex parte Moore, 548 S.W.3d 552 (Tex. Crim. App. 2018); *see also Moore I*, 137 S. Ct. at 1044, 1050.

36. *Moore I*, 137 S. Ct. at 1050–51; *see also* DSM-5, *supra* note 2, at 33–41; ROBERT L. SCHALOCK ET AL., USER'S GUIDE TO ACCOMPANY THE 11TH EDITION OF INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1–7 (11th ed. 2012).

37. *Moore I*, 137 S. Ct. at 1050.

38. *Id.*

39. *Id.* at 1051.

40. *Id.*

41. *Id.* at 1053; *see also* DSM-5, *supra* note 2, at 37; AAIDD-11, *supra* note 2, at 38.

42. Moore v. Texas (*Moore II*), 139 S. Ct 666, 670 (2019) (per curiam).

43. *Id.*

Moore II, the Court cautioned that "lay stereotypes" of the intellectually disabled should be avoided entirely.[44]

Florida defines "intellectual disability" by rule and statute as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior" manifested before the age of eighteen.[45] The statute and the rule do not reflect the diagnostic consensus of the medical community as required by the Eighth Amendment.[46] The Supreme Court of Florida has, in effect, doubled down on the misapprehensions and shortcomings of Florida's statutory scheme, guaranteeing that men and women who are more likely than not intellectually disabled under medical criteria, will be executed in violation of the Eighth Amendment.[47]

II. THE LAW SHOULD EVOLVE IN CONCERT WITH CHANGES IN INTELLECTUAL DISABILITY DIAGNOSIS IN THE MEDICAL COMMUNITY

Intellectual disability is, at its core, a medical condition rather than a legal one.[48] The diagnosis of intellectual disability is a lengthy trajectory that has continually changed and progressed based on medical and scientific advancements.[49] The interrelated fields of brain science record exponential advances in research and development—discoveries in neuroscience beget a new understanding of neuropharmacology, which can be confirmed and better understood through new technology in radiology, which inspire and inform new research and discovery in psychology.[50] This cycle has continually improved the understanding and diagnosis of intellectual disability over the past century, but the law has lagged behind.[51] The classification of intellectual disability had its conceptual roots in the 1500s with writings of Fitzherbert and

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44. *See id.* at 669. Bobby Moore was finally resentenced to life in prison on November 6, 2019 and was granted parole and released from a Texas prison on June 8, 2020. Neil Vigdor, *Texas Inmate Who Spent Nearly 40 Years on Death Row is Granted Parole*, N.Y. TIMES, June 9, 2020, http://www.nytimes.com/2020/06/09/us/texas-death-row-bobby-moore.html.

45. FLA. STAT. § 921.137(1) (2019); FLA. R. CRIM. P. 3.203(b).

46. U.S. CONST. amend. VIII; Hall v. Florida, 572 U.S. 701, 712–13, 722 (2014) (citing the DSM-5 and the AAIDD-11).

47. *See* Dufour v. State, 69 So. 3d 235, 245 (Fla. 2011) (per curiam).

48. *Hall*, 572 U.S. at 710.

49. Marc J. Tassé, *Defining Intellectual Disability: Finally We all Agree . . . Almost*, SPOTLIGHT ON DISABILITY NEWSL., http://www.apa.org/pi/disability/resources/publications/newsletter/2016/09/intellectual-disability (last visited Dec. 14, 2020).

50. *See* DSM-5, *supra* note 2, at 5.

51. *See* Alexander H. Updegrove et al., *Intellectual Disability in Capital Cases: Adjusting State Statutes After* Moore v. Texas, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 527, 527 (2018).

in the 1600s with writings of John Locke, both of whom began to differentiate intellectual disability from mental illness.[52] By the early 1880s, terms like "idiot," "feeble-minded," and "imbecile,"—which are offensive by today's standards—were employed to describe children and adults who had developmental deficits of the mind.[53] These were clearly differentiated from other mental disorders, such as insanity or epilepsy.[54] A great figure in the field of intellectual disability during the 1830s was French physician Edward Seguin.[55] Dr. Seguin was interested in behavior and outlined the early signs of developmental delay and emphasized the need for early education and diagnosis.[56] He stated, "I find a class of unfortunates more to be pitied . . . confused but lately with convicts . . . still mixed . . . with the insane and the epileptic, I mean the idiots."[57] An understanding of "feeble-minded" was largely based on observation until the late 1800s, when the etiological understanding shifted based on advances in genetic and hereditary science.[58]

The most influential factor in differentiating intellectual disability from other mental disorders was the development of individualized intelligence testing at the turn of the twentieth century.[59] In 1904, Alfred Binet and Henry Simon petitioned the French government to fund the development of a tool that could distinguish those capable of learning at normal rates from those in need of a slower-paced, specially-designed educational program.[60] Binet and Simon developed an age scale that consisted of questions utilized to assess mental development.[61] Binet was already an accomplished lawyer, psychologist, playwright, hypnotist, and after creating his test, he became one of the world's first to measure intelligence.[62] Binet's original scale has gone through numerous revisions, and the most recent Fifth Edition was published in 2003.[63]

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52. Gary N. Siperstein & Melissa A. Collins, *Intellectual Disability*, *in* THE DEATH PENALTY AND INTELLECTUAL DISABILITY 41, 42 (Edward A. Polloway ed., 2015) (ebook).

53. *Id.*

54. *See* Marie Skodak Crissey, *Mental Retardation: Past, Present, and Future*, 30 AM. PSYCH. 800, 801 (1975).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 802.

59. *See* Crissey, *supra* note 54, at 803.

60. *See id.*; THOMSON GALE, PSYCHOLOGISTS AND THEIR THEORIES FOR STUDENTS 98 (Kristine Krapp, ed. 2005).

61. Crissey, *supra* note 54, at 803.

62. *See id.*; THOMSON GALE, *supra* note 60, at 94–95.

63. Gale H. Roid, *(SB-5) Stanford-Binet Intelligence Scales, Fifth Edition*, WPS, http://www.wpspublish.com/sb-5-stanford-binet-intelligence-scales-fifth-edition (last visited Dec. 14, 2020); *see also* THOMSON GALE, *supra* note 60, at 114.

In 1939, David Wechsler first published the Wechsler-Bellevue Intelligence Scale, which consisted of eleven different subtests derived from the 1937 version of the Stanford-Binet.[64] It was further revised for the Weschler Adult Intelligence Scale ("WAIS") in 1955, the WAIS-R in 1981, the WAIS-III in 1997, and the WAIS-IV in 2008.[65] Both the WAIS and Stanford-Binet scales are individually administered, comprehensive, nationally-normed intelligence batteries used to determine intellectual function to this day.[66]

By the 1930s, the term "mental retardation" had replaced previous labels.[67] Practitioners began to understand that intellectual disability had genetic roots, and might also be related to poor nutrition, neurological deficits, trauma, and an impoverished environment.[68] The advent of the intelligence quotient, through the utilization of IQ testing, allowed for the transition from subjective labeling to objective classifications of intellectual disability based on IQ score.[69] Thus, people with IQ scores in the range of 50–75 were considered "morons," people with IQ scores in the range of 25–50 were considered "imbeciles," and those with IQ scores less than 25 were "idiots."[70] Although the labels evolved since the 1880s, the categorization of the severity of intellectual disability has historically been based on IQ alone.[71]

By the middle of the twentieth century, psychologists began to link IQ with other diagnostic features of intellectual disability.[72] The 1961 manual of the American Association of Mental Retardation[73] explained that mental retardation was present in individuals with an IQ of 84 or lower, with deficits

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64. Thomas Valentine et al., *Wechsler Adult Intelligence Scale*, *in* THE WILEY-BLACKWELL ENCYCLOPEDIA OF PERSONALITY AND INDIVIDUAL DIFFERENCES, VOLUME II, MEASUREMENT AND ASSESSMENT (Bernardo J. Carducci et al. eds., forthcoming Nov. 2020) (manuscript at 3–4); Corwin Boake, *From the Binet–Simon to the Wechsler–Bellevue: Tracing the History of Intelligence Testing*, 24 J. CLINICAL & EXPERIMENTAL NEUROPSYCHOLOGY 383, 387 (2002).

65. Valentine et al., *supra* note 64, at 4.

66. *See id.* at 3.

67. Crissey, *supra* note 54, at 805.

68. *Id.*

69. Siperstein & Collins, *supra* note 52, at 43.

70. *Id.*

71. AAIDD-11, *supra* note 2, at 8–9; *see also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 42 (4th ed. 2000) [hereinafter DSM-IV-TR]; ROGER K. BLASHFIELD ET AL., THE CYCLE OF CLASSIFICATION: DSM-I THROUGH DSM-5 27, 38 (2014).

72. Marc J. Tassé et al., *The Construct of Adaptive Behavior: Its Conceptualization, Measurement, and Use in the Field of Intellectual Disability*, 117 AM. J. ON INTELL. & DEVELOPMENTAL DISABILITIES 291, 293 (2012).

73. *Id.* at 292; *see also* DSM-IV-TR, *supra* note 71, at 48. The "AAMR" was the precursor to the American Association of Intellectual and Developmental Disabilities ("AAIDD"). DSM-IV-TR, *supra* note 71, at 48.

in adaptive behavior, and originating during the developmental period.[74] The developmental period at that time was defined as all ages up to approximately sixteen.[75] At the time of publication of the 1961 American Association on Mental Retardation ("AAMR") manual, the concepts of maturation, learning, and social adjustment were folded into the single, largely undefined construct of adaptive behavior.[76] Since 1961 the AAMR has been through numerous revisions and was the precursor to the current version of the AAIDD-11 soon to be revised in 2021.[77]

The original Diagnostic and Statistical Manual of Mental Disorders was published in 1952, and contained 128 categories of mental diseases.[78] Since then, it has been through numerous revisions, most recently DSM-5 (2013).[79] The release of the DSM-5 took into account scientific progress in such areas as cognitive neuroscience, brain imaging, epidemiology, and genetics.[80] This conceptualization and inclusion of adaptive behavior in the definition of intellectual disability led to the development of adaptive behavior assessment instruments, such as the Adaptive Behavior Diagnostic Scale ("ABDS") released in 2016; the Adaptive Behavior Assessment System ("ABAS-3") revised and republished in 2015; the Revised Scales of Independent Behavior ("SIB-R") published in 1996; and the Vineland Adaptive Behavior Scales ("Vineland II") revised in 2005.[81]

Today, the DSM-5 and the AAIDD-11 are the two nationally recognized sources providing definition and diagnostic criteria for intellectual disability.[82] The DSM-5 defines intellectual disability, or "intellectual developmental disorder" as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains."[83] According to the DSM-5, intellectual disability diagnosis requires a finding of: 1) deficits in intellectual

74. *See* Stephen Greenspan, *Evolving Concepts of Adaptive Behavior*, *in* THE DEATH PENALTY AND INTELLECTUAL DISABILITY 219, 221 (Edward A. Polloway ed., 2015); TASSÉ & BLUME, *supra* note 31, at 136; Siperstein & Collins, *supra* note 52, at 43.

75. *See* TASSÉ & BLUME, *supra* note 31, at 136.

76. Greenspan, *supra* note 74, at 220–21.

77. Stephen Greenspan, *The Arbitrariness of Age Ceilings in Developmental Services*, 5 GLOB. J. INTELL. & DEV. DISABILITIES, 70, 70–71 (2018).

78. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS v (1952); *see also* BLASHFIELD ET AL., *supra* note 71, at 25, 28.

79. BLASHFIELD ET AL., *supra* note 71, at 32–33, 37.

80. DSM-5, *supra* note 2, at 5.

81. TASSÉ & BLUME, *supra* note 31, at 115; Tassé et al., *supra* note 72, at 293–95.

82. *See* DSM-5, *supra* note 2, at 40–41.

83. *Id.* at 33.

function (IQ); 2) deficits in adaptive function; and 3) "onset of intellectual and adaptive deficits during the developmental period."[84]

The DSM-5 describes intellectual functions as areas such as reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding.[85] Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence.[86] The DSM-5 also emphasizes a required level of appropriate professional training and clinical judgment in the interpretation of intellectual test results.[87]

The AAIDD-11 states that intellectual disability is "characterized by significant limitation both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills."[88] This disability originates before the age of eighteen.[89] According to the AAIDD-11, the following five assumptions are essential to the application of this definition:

> 1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.
>
> 2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.
>
> 3. Within an individual, limitations often coexist with strengths.
>
> 4. An important purpose of describing limitations is to develop a profile of needed supports.
>
> 5. With appropriate supports over a sustained period, the life functioning of the person with intellectual disability generally will improve.[90]

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84. *Id.*
85. *Id.*
86. *Id.* at 37.
87. DSM-5, *supra* note 2, at 37.
88. AAIDD-11, *supra* note 2, at 5.
89. *Id.* at 6, 9, 28.
90. *Id.* at 5, 31, 45.

The evolution of modern definitions of intellectual disability reflects the struggles of weighing a rigid IQ score with aspects of adaptive behavior.[91] IQ test scores are only approximations of conceptual functioning and can be insufficient in assessing real-life functioning.[92] A paradigm shift in diagnosing intellectual disability occurred with the advent of the DSM-5, which relies on an individual's adaptive functioning in determining the severity level of intellectual disability—an approach consistent with the AAIDD-11 diagnostic criteria.[93] Deficits in adaptive functioning "refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background."[94] Now, adaptive functioning and all the ways in which a person interacts in a community setting informs intellectual disability diagnosis in equal measure to a range of IQ scores.[95]

Intellectual disability is a heterogeneous disorder that occurs during an individual's developmental stages.[96] Thus the third prong of the definition of intellectual disability focuses on the developmental criterion.[97] To confirm that an individual is appropriately labeled as having an intellectual disability, there must be verification of origin during the developmental period.[98] "Although the . . . [AAIDD-11 and the DSM-5] are in general agreement on most matters, there is a divergence with regard to the developmental onset criterion . . . ."[99] The DSM-5, published in 2013, views intellectual disability as a condition that must occur during the "developmental period," which may be older than age eighteen.[100] The AAIDD-11, published in 2010, clings to the age of onset at age eighteen, but the future edition of the manual will reconsider this arbitrary number.[101]

The Florida Legislature initially adopted legislation to bar the execution of the intellectually disabled in 2001.[102] After *Atkins* established a nationwide standard for the protection of the intellectually disabled, the Supreme Court of Florida considered changes to the Florida Rules of Criminal

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91. *Id.* at 38.
92. *See id.* at 38, 39.
93. Tassé, *supra* note 49, at 2.
94. DSM-5, *supra* note 2, at 37; *see also* Tassé et al., *supra* note 72, at 291.
95. *See* Tassé et al., *supra* note 72, at 295.
96. DSM-5, *supra* note 2, at 33, 38.
97. *Id.* at 33.
98. *See id.*; AAIDD-11, *supra* note 2, at 38.
99. Greenspan, *supra* note 77, at 70.
100. *Id.*
101. *Id.* at 70–71; AAIDD-11, *supra* note 2, at 28.
102. *See* FLA. STAT. § 921.137(1) (2019); Act effective June 12, 2001, ch. 2001-202, § 1, 2001 Laws of Fla. 1831, 1832 (codified at FLA. STAT. § 921.137).

Procedure and adopted Rule 3.203 in 2004.[103] When the American Psychiatric Association and the American Association on Intellectual and Developmental Disabilities adopted the term "intellectual disability" as opposed to "mental retardation," the legislature amended the statute to follow suit.[104] But the legislature has failed to amend Florida law to reflect the present clinical consensus in the diagnosis of intellectual disability in the DSM-5 and AAIDD-11.[105] The Supreme Court of Florida has compounded this problem by following outdated precedent based on prior versions of diagnostic criteria.[106] Intellectual disability is a permanent, incurable condition that is diagnosed during the developmental period.[107] While retrospective diagnosis is almost always necessary in capital cases, the Supreme Court of Florida veers far from accepted medical diagnostic criteria by adding the element of current adult deficits that must be proven, by clear and convincing evidence, to bar the death penalty for the intellectually disabled.[108]

III. THE SUPREME COURT OF FLORIDA'S DEFINITION OF CONCURRENT ADAPTIVE FUNCTION IS AT ODDS WITH MEDICAL CONSENSUS

The Supreme Court of Florida has defined the term "concurrent" adaptive deficits of intellectual disability to mean "exist at the same time" or "current" at the time of diagnosis.[109] But, in the capital punishment context, intellectual disability is universally diagnosed retrospectively, sometimes years, even decades after a defendant is sentenced to death.[110] Thus, the

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103. Amendments to Fla. Rules of Crim. Proc. & Fla. Rules of App. Proc., 875 So. 2d 563, 564 (Fla. 2004); Crim. Court Steering Comm., *Comments of the Criminal Court Steering Committee* 9–10 (2003), http://www.floridasupremecourt.org/content/download/326698/file/03-685_CCSCCommentMentalRetardation2.pdf; *see also* FLA. STAT. § 921.137 (2019); FLA. R. CRIM. P. 3.203; Atkins v. Virginia, 536 U.S. 304, 319 (2002).

104. FLA. R. CRIM. P. 3.203(b).

105. *See id.*

106. *See, e.g.*, Jones v. State, 966 So. 2d 319, 325 (Fla. 2007) (per curiam).

107. TASSÉ & BLUME, *supra* note 31, at 5–6.

108. Williams v. State, 226 So. 3d 758, 768 (Fla. 2017) (per curiam).

109. *See* Wright v. State (*Wright II*), 256 So. 3d 766, 773 (Fla. 2018) (per curiam), *cert. denied*, 139 S. Ct. 2671 (2019); *Jones*, 966 So. 2d at 326; Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008) (per curiam); Rodriguez v. State, 219 So. 3d 751, 755 (Fla. 2017) (per curiam); *Williams*, 226 So. 3d at 771; Dufour v. State, 69 So. 3d 235, 248 (Fla. 2011) (per curiam). "[T]his Court has interpreted [section 924.137 Florida Statutes and Florida Rule of Criminal Procedure 3.203] to mean that subaverage intellectual functioning must exist at the same time as the adaptive deficits, and *that there must be current adaptive deficits*." *Dufour*, 69 So. 3d at 248 (emphasis added).

110. Denis W. Keyes & David Freedman, *Retrospective Diagnosis and Malingering*, *in* THE DEATH PENALTY & INTELLECTUAL DISABILITY 322, 335 (Edward A. Polloway ed., 2015) (ebook).

requirement imposed by the Supreme Court of Florida that there be *current adaptive deficits* is antithetical to contemporary diagnostic criteria, which require intellectual and adaptive functioning deficits to exist during the developmental period.[111]

A. Jones v. State *Set the Stage in 2007, Years Before the Current Versions of the DSM-5 and AAIDD-11 Were Published*

The Supreme Court of Florida first considered the definition of concurrent function in 2007 in *Jones v. State*.[112] At the hearing on the post-conviction motion on intellectual disability, both state and defense experts generally agreed on the definitions of significantly subaverage intellectual functioning and age of onset that applied to Jones' diagnosis.[113] The disagreement over the analysis of adaptive functioning stemmed from the defense expert, Dr. Eisenstein's testimony that a determination of deficits in adaptive functioning primarily involves an analysis of childhood behavior, rather than adult behavior.[114] Dr. Eisenstein explained that, "adaptive functioning has to address the issue of the individual before age [eighteen]" and that, "at age [forty-four, Jones'] adaptive behavior, albeit important . . . is not the criteria for defining and assessing mental retardation."[115]

Rather than look to the diagnostic criteria for intellectual disability established by scientists, the Supreme Court of Florida looked to the present tense used in the "plain language" of both Florida Statute section 921.137(2) ("no person may be sentenced to death 'if it is determined . . . that the defendant *has* mental retardation'") and Florida Rule of Criminal Procedure 3.203(e) (providing for an evidentiary hearing to consider whether the defendant *is* mentally retarded) to support a conclusion that a person must prove *current* deficits in adaptive functioning to be found intellectually disabled.[116] To further support its decision, the Court cited the definition in

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111. Wright v. State (*Wright II*), 256 So. 3d 766, 773 (Fla. 2018) (per curiam), *cert. denied*, 139 S. Ct. 2671 (2019); *see also* AAIDD-11, *supra* note 2, at 6, 43 (defining the age of onset as prior to 18); DSM-5, *supra* note 2, at 33 (defining the age of onset as "developmental period"); FLA. STAT. § 921.137(1) (2019) (defining the age of onset as prior to 18); FLA. R. CRIM. P. 3.203(b) (2019).

112. 966 So. 2d 319, 326 (Fla. 2007) (per curiam).

113. *See id.* at 325.

114. *Id.* It would be six years before the DSM-5 removed the concept of "concurrent function" from the diagnostic definition of intellectual disability. *See* DSM-5, *supra* note 2, at 33; *but see* DSM-IV-TR, *supra* note 71, at 49. It may be that Dr. Eisenstein was well ahead of his time. *Jones*, 966 So. 2d at 325, n.3. He was also, as it turns out, entirely correct. *See id.*

115. *Id.*

116. *Id*. at 326; FLA. STAT. § 921.137(1); FLA. R. CRIM. P. 3.203(e).

the DSM-IV in which the criteria for diagnosis included "[c]oncurrent deficits or impairments in present adaptive functioning."[117] The Court interpreted this language in the DSM-IV, stating "the word 'present' means 'now.'"[118] Next, the Court used sarcasm to drive its flawed reasoning home—with a citation to *Alice in Wonderland*.[119] "Dr. Eisenstein's testimony that in this phrase the word 'present' actually refers to past, or childhood, adaptive functioning would impose an Alice-in-Wonderland definition of the word 'present.'"[120] Unfortunately, interpretive errors like this are certain to occur when lawyers and judges substitute their own judgment for the clearly established diagnostic criteria of the scientific community.[121]

In keeping with the clinical purpose of the DSM-IV, the term "present" clearly referred to adaptive deficits prior to age eighteen, as the developmental period was defined in the old manual.[122] However, since the Supreme Court of Florida misinterpreted the DSM-IV in *Jones* in 2007, the precedent has continued to survive despite the change in diagnostic criteria in the DSM-5 in 2013.[123] The *Jones* error has played out over and over in Florida jurisprudence—depriving death-sentenced citizens of their Eighth Amendment rights for an additional seven years and counting.[124] Florida courts are bound to follow precedent.[125] The *Jones* case is still cited as persuasive authority for the proposition that current adaptive function is relevant to a diagnosis of intellectual disability without any consideration of the current age of the defendant, despite the consistent trajectory of scientific discovery embodied in the AAIDD-11 and the DSM-5 that have omitted the term "concurrent" from the diagnostic criteria for intellectual disability.[126]

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117. *Jones*, 966 So. 2d at 326; DSM-IV-TR, *supra* note 71, at 49.

118. *Jones*, 966 So. 2d at 327.

119. *Id.*; *see also* LEWIS CARROLL, THROUGH THE LOOKING GLASS 123 (Phila. Henry Altemus Co. 1872) (1897) (stating "When *I* use a word, . . . it means just what I choose it to mean — neither more nor less.").

120. *Jones*, 966 So. 2d at 327; *see also* CARROLL, *supra* note 119, at 123.

121. *See Jones*, 966 So. 2d at 327.

122. *See* DSM-IV-TR, *supra* note 71, at 49.

123. *See Jones*, 966 So. 2d at 327; Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008) (per curiam); Dufour v. State, 69 So. 3d 235, 248 (Fla. 2011) (per curiam); DSM-5, *supra* note 2, at 33.

124. *Jones*, 966 So. 2d at 325–27; *Phillips*, 984 So. 2d at 511 (holding retrospective diagnosis "insufficient" because both Florida statutes and rules of criminal procedure require concurrent adaptive deficits); *Dufour*, 69 So. 3d at 248. "[T]his Court has interpreted [section 924.137 Florida Statutes and Florida Rule of Criminal Procedure 3.203] to mean that subaverage intellectual functioning must exist at the same time as the adaptive deficits, and that there must be current adaptive deficits." *Id.*

125. *See Phillips*, 984 So. 2d at 511; *Dufour*, 69 So. 3d at 248.

126. *Compare Jones*, 966 So. 2d at 327, *and Phillips*, 984 So. 2d at 511, *and Dufour*, 69 So. 3d at 248, *with* AAIDD-11, *supra* note 2, at 45, *and* DSM-5, *supra* note 2, at 33, *and* DSM-IV-TR, *supra* note 71, at 49.

The DSM-5 now calls for "[d]eficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility."[127] The DSM-5 specifically states that adaptive functioning in controlled settings—such as prisons—is difficult to assess, and therefore "corroborative information reflecting functioning outside those settings should be obtained."[128] The AAIDD-11 considers adaptive behaviors, as expressed in conceptual, social, and practical adaptive skills "within the context of community . . . environments typical of the [individual's] age peers and [culture]."[129] Both authoritative sources concur that adaptive behavior assessment involves evaluating the individual's behavior in *community settings* that were acquired and demonstrated on a consistent basis in the individual's day-to-day life, outside of an institutional setting.[130] Therefore, adaptive behavior assessment in death penalty cases is focused on the developmental period through time of the crime and is inherently retrospective.[131] Yet, the Supreme Court of Florida continues to apply the *Jones* precedent requiring a showing of current adaptive deficits—even though it is based on outdated diagnostic criteria and explicitly violates diagnostic prohibitions against assessment of prison behavior.[132]

B. *The* Jones *Error Was Needlessly Repeated in* Wright, Williams, *and* Rodriguez *in 2017*

In *Wright v. State*[133] the Supreme Court of Florida considered the application of Florida's intellectual disability statute to the case of a death-row prisoner who was born with fetal alcohol syndrome and microcephaly, conditions that limited the growth of his brain to two-thirds the size of normal.[134]

> Parental addiction, mental illness, and incarceration prevented any stable home life. Wright learned to speak and walk much later than average

127. DSM-5, *supra* note 2, at 33.

128. *Id.* at 38.

129. AAIDD-11, *supra* note 2, at 45; SCHALOCK ET AL., *supra* note 36, at 21.

130. *See* DSM-5, *supra* note 2, at 45; AAIDD-11, *supra* note 2, at 43–45; SCHALOCK ET AL., *supra* note 36, at 20–21.

131. Greenspan & Olley, *supra* note 31, at 189 (noting serious validity considerations in using standardized adaptive behavior testing for current adaptive behavior in prison settings); TASSÉ & BLUME, *supra* note 31, at 137.

132. Jones v. State, 966 So. 2d 319, 327 (Fla. 2007) (per curiam); Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008) (per curiam); Dufour v. State, 69 So. 3d 235, 248 (Fla. 2011) (per curiam).

133. 213 So. 3d 881 (Fla. 2017) (per curiam), *vacated and remanded*, 138 S. Ct. 360 (2017), *cert. denied*, 139 S. Ct. 2671 (2019) (mem.).

134. *Id.* at 893.

> children, wet his bed until he was sixteen years old, and suffered a "remarkable" number of serial head injuries resulting in loss of consciousness. Wright's mother received social security benefits for Wright's slow learning disability and speech delays.[135]

Wright was convicted of murder and sentenced to death because *Cherry v. State*[136] set a hardline cut-off of 70 IQ score for the diagnosis of intellectual disability in Florida.[137]

During post-conviction proceedings, Wright's case was remanded for a full hearing on intellectual disability under *Hall v. Florida*.[138] Wright's death sentence was affirmed by the Supreme Court of Florida ("*Wright I*").[139] In holding that Wright was not intellectually disabled, the Supreme Court of Florida relied almost exclusively on adult behavior in prison, including: rewriting blog entries in his own words, writing letters from prison, taking advice from other prisoners to order Kosher meals, communicating with prison staff, knowing time allocated for prison activities, using a canteen account in prison, knowing he needed his attorneys, and indications he was receptive to his attorneys' advice.[140] The Supreme Court of the United States granted, vacated, and remanded Wright's case to the Supreme Court of Florida in consideration of *Moore I*.[141]

The Supreme Court of Florida again affirmed that Wright was not intellectually disabled and reinstated his death sentence.[142] In *Wright II*, the Supreme Court of Florida's adaptive functioning analysis relied almost exclusively on the circuit court's finding that Wright's hearing testimony and plea colloquy established his adaptive strengths.[143] The Court considered "concurrent" adult behavior, with legal assistance and undoubtedly lots of practice, that would never be used by a knowledgeable expert to diagnose intellectual disability under the DSM-5.[144] Similarly, the Courts balancing of adaptive strengths against adaptive deficits would never be considered

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135. Petition for Writ of Certiorari at 6–7, Wright v. State, 213 So. 3d 881 (Fla. 2017) (No. 17-5575) (citations omitted).

136. 959 So. 2d 702 (Fla. 2007) (per curiam), *abrogated by* Hall v. Florida, 572 U.S. 701 (2014).

137. *See Wright I*, 213 So. 3d at 893, 895; *Cherry*, 959 So. 2d at 713.

138. Petition for Writ of Certiorari, *supra* note 135, at 4; *see also* Hall v. Florida, 572 U.S. 701, 724 (2014).

139. *Wright I*, 213 So. 3d at 912.

140. *Id.* at 899.

141. Wright v. Florida, 138 S. Ct. 360, 360 (2017) (mem.).

142. Wright v. State (*Wright II*), 256 So. 3d 766, 779 (Fla. 2018) (per curiam), *cert. denied*, 139 S. Ct. 2671 (2019).

143. *See id.* at 778.

144. *Id.* at 773; *see also* DSM-5, *supra* note 2, at 38.

clinically sound.[145] The Supreme Court of the United States denied certiorari in *Wright II*, notwithstanding these grave errors in the analysis and the legal framework for assessing adaptive deficits and concurrent function.[146]

A focus on adult adaptive behavior in prison violates both professional medical consensus and the *Moore* standards.[147] Clinicians warn against assessing adaptive strengths in controlled settings such as prisons and detention centers, and corroborative information reflecting functioning outside the controlled setting should be obtained to appropriately diagnose intellectual disability.[148] By contrast, most death-sentenced inmates like Wright have their self-determination and personal independence dramatically curtailed on death row.[149] The Supreme Court of Florida violated the holdings of *Moore I* & *II*, as well as scientific consensus by diagnosing Wright as fully intellectually capable based on skills performed in a controlled environment.[150]

The Supreme Court of Florida continues to require a showing of *current* adaptive functioning, even in retrospective diagnoses.[151] For example, in *Rodriguez v. State*,[152] the Court primarily denied an intellectual disability claim of a man with an IQ of 64 on the grounds that he was given an invalid Mexican IQ test.[153] In assessing adaptive functioning, the Court stated: "In *Jones*, we rejected the argument that, 'in determining whether a person experiences deficits in adaptive functioning, only the person's childhood behavior is considered.'"[154] The *Rodriguez* court was clear—Florida evaluates both "*long-term* and *current* adaptive behavior" to assess intellectual disability and *current* adaptive behavior is a central requirement of a finding of intellectual disability.[155] For Rodriguez, evidence of his *current* adaptive

145. *See Wright II*, 256 So. 3d at 774–76.

146. Wright v. Florida, 139 S. Ct. 2671, 2671 (2019) (mem.); *see also Wright II*, 256 So. 3d at 773; DSM-5, *supra* note 2, at 38.

147. Moore v. Texas (*Moore I*), 137 S. Ct. 1039, 1050 (2017), *rev'd*, 139 S. Ct. 666 (2019); ROBERT L. SCHALOCK & RUTH LUCKASSON, CLINICAL JUDGMENT 20 (2d ed. 2014) (ebook); *see also* DSM-5, *supra* note 2, at 38.

148. *Moore I*, 137 S. Ct. at 1050; DSM-5, *supra* note 2, at 38; *see also* AAIDD-11, *supra* note 2, at 99.

149. Petition for Writ of Certiorari, *supra* note 135, at 25.

150. *See* Moore v. Texas (*Moore II*), 139 S. Ct. 666, 669 (2019) (per curiam); *Moore I*, 137 S. Ct. at 1050; SCHALOCK ET AL., *supra* note 36, at 20; DSM-5, *supra* note 2, at 38.

151. Rodriguez v. State, 219 So. 3d 751, 757, 759 (Fla. 2017) (per curiam).

152. 219 So. 3d 751 (Fla. 2017) (per curiam).

153. *Id.* at 754, 758.

154. *Id.* at 757 (quoting Jones v. State, 966 So. 2d 319, 325–27 (Fla. 2007)) (emphasis added).

155. *Id.* (emphasis added); *see also* Williams v. State, 226 So. 3d 758, 771 (Fla. 2017) (per curiam) (stating that the adaptive behavior information provided was found "insufficient to satisfy the second prong of the intellectual disability test because it does not address Williams's *current* adaptive behavior") (emphasis added).

functioning produced at a hearing in 2015 was very far removed from his developmental period, given that he was born in 1956.[156] While some members of the medical community might argue about an appropriate cut-off for adaptive behavior analysis, it is certainly the case that deficits in a sixty-year-old man are so far removed from the age of onset that they become unreliable evidence of intellectual disability.[157]

In *Williams v. State*,[158] the Supreme Court of Florida reviewed a post-conviction claim of intellectual disability.[159] During the post-conviction hearing, the expert psychologist for the defense discounted the results of adaptive behavior scales used to assess Mr. Williams' prison behavior—calling them "irrelevant" to an intellectual disability diagnosis.[160] The expert testimony was consistent with clear medical consensus, as expressed in the DSM-5 and AAIDD-11, which disfavor all adaptive assessments outside of community settings and in controlled environments like prisons.[161] The Court could have utilized *Williams* to bring Florida's law back into conformity with updated diagnostic criteria by correcting the *Jones* standard and holding that current function is no longer relevant to a retrospective intellectual disability assessment of a death row defendant.[162] Instead, the opinion of Williams' expert was used as support for the holding that the post-conviction court correctly found a lack of adaptive deficits.[163]

Florida's requirement of adaptive deficits present at the time of diagnosis, even when a diagnosis is decades after the age of onset, is an anachronism.[164] Florida Statute section 921.137, adopted in 2001, initially used the term "mental retardation" and tracked the language of a prior edition of the Diagnostic and Statistical Manual.[165] The DSM-IV's definition of intellectual disability admittedly required "concurrent deficits or impairments in present adaptive functioning."[166] However, DSM-5, published in 2013, altered the way that intellectual disability is diagnosed by removing the term "concurrent" from the definition of adaptive functioning and gave rise to the dramatic shift in national jurisprudence on intellectual disability in *Hall*,

156. *See Rodriguez*, 219 So. 3d at 755.
157. *See* DSM-5, *supra* note 2, at 33.
158. 226 So. 3d 758 (Fla. 2017).
159. *Id.* at 768.
160. *Id.* at 770.
161. *Id.*; DSM-5, *supra* note 2, at 38; AAIDD-11 *supra* note 2, at 99.
162. *See Williams*, 226 So. 3d at 773; Jones v. State, 966 So. 2d 319, 326–27 (Fla. 2007) (per curiam).
163. *Williams*, 226 So. 3d at 773.
164. *See* Hall v. Florida, 572 U.S. 701, 723 (2014).
165. Act effective June 12, 2001, ch. 2001-202, § 921.137, 2001 Laws of Fla. 1831, 1832 (codified at FLA. STAT. § 921.137).
166. DSM-IV-TR, *supra* note 71, at 49; *but see* DSM-5, *supra* note 2, at 49.

Moore I, and *Moore II*.[167] This is especially true in cases like *Rodriguez*, when the "current" adult behavior required to prove intellectual disability under Florida law is forty years removed from the developmental period.[168]

While it may have been plausible to contort the definition of "concurrent" to include both "at the same time" and "currently," given the DSM-IV's suggestion that subaverage intellectual functioning occurs concurrently with *present* adaptive deficits, this interpretation defies the present medical consensus.[169] Even in the DSM-IV, the term concurrent was meant to dovetail with the age of onset criteria.[170] The diagnostic definition in the DSM-5 does not contain either the term "concurrent" or "present" adaptive deficits.[171] Instead, the DSM-5 now calls for "deficits in adaptive functioning that results in failure to meet developmental and sociocultural standards for personal independence and social responsibility"[172] in conjunction with the additional requirement of onset during the developmental period.[173]

Using current function for retrospective diagnosis is problematic in other respects.[174] The DSM-5 specifically states that adaptive functioning in controlled settings—such as prisons—are difficult to assess, and therefore "corroborative information reflecting functioning outside those settings should be obtained."[175] The AAIDD-11 explains that measuring adaptive behavior "usually involves obtaining information . . . from a person or persons who know the individual well" and who "have known him/her for some time and have had the opportunity to observe the person function across community settings and times."[176] Observations made based even on a decade of life in a 9 x 10 x 6 cell under twenty-three-hour lockdown[177] have little to do with

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167. *See* DSM-5, *supra* note 2 at 49; *Hall*, 572 U.S. at 711; Moore v. Texas (*Moore I*), 137 S. Ct. 1039, 1059–60 (2017), *rev'd*, 139 S. Ct. 666 (2019); Moore v. Texas (*Moore II*), 139 S. Ct. 666, 672 (2019) (per curiam) (Roberts, concurring).

168. *See* DSM-5, *supra* note 2, at 33; Rodriguez v. State, 219 So. 3d 751, 755 (Fla. 2017) (per curiam).

169. DSM-IV-TR, *supra* note 71, at 39.

170. *See* DSM-5, *supra* note 2, at 33.

171. *See id.* at 33.

172. *Id.*

173. *Id.*

174. *See id.* at 61.

175. *Id.* at 38.

176. AAIDD-11, *supra* note 2, at 47.

177. *Id.*; *see also* Greenspan & Olley, *supra* note 31, at 189 (noting serious validity considerations in using standardized adaptive behavior testing for current adaptive behavior in prison settings).

> [C]orrections officers may have limited knowledge of a claimant's abilities due to rotating shift assignments, limited opportunities to witness an array of applied skills due to the highly restricted setting, and biased perspectives. Most important, their observations regarding inmates' adaptive behavior within a highly structured

observations across numerous "community settings" as required by both the DSM-5 and the AAIDD-11.[178] A requirement of "current" adaptive behavior for inmates who have spent decades after the developmental period in the highly structured prison environment, which has been compared to "the ultimate group home," is barely relevant to an intellectual disability diagnosis.[179]

By contrast, both the DSM-5 and the AAIDD-11 list examples of sources of collateral and retrospective information, such as: family members, teachers, employers, friends, and records from various sources that are all relevant to retrospective diagnosis.[180] It is diagnostically sound to interview and administer adaptive behavior questionnaires to people familiar with the defendant during the developmental period.[181] The community environment is the most salient source of information concerning adaptive functioning.[182] While it can be difficult to locate appropriate informants of an inmate's community functioning after they have been incarcerated, this is the only medically sound diagnostic practice suitable for death penalty cases.[183]

C. *Florida is an Outlier Among Death Penalty Jurisdictions for Using Its Own Method of Intellectual Disability Diagnosis*

Given that both the American Association on Intellectual and Developmental Disabilities and the American Psychiatric Association dropped

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> maximum security prison do not correlate with the demands and skills that are found in the typical community environment.

Caroline Everington et al., *Challenges in the Assessment of Adaptive Behavior of People Who are Incarcerated*, *in* THE DEATH PENALTY AND INTELLECTUAL DISABILITY 252, 261–62 (Edward A. Polloway ed., 2015) (ebook).

178. TASSÉ & BLUME, *supra* note 31, at 137. ("The assessment of the individual's 'present functioning' in terms of adaptive behavior . . . is challenging if the . . . individual is incarcerated and has been for a length of time. These two . . . conditions . . . of present functioning and community environment are at odds with one another in death penalty cases where the individual's 'present' adaptive behavior can only be assessed against life in a prison or on death row. Prison life and expectations cannot be substituted for societies expectations"). *Id.*

179. J. Gregory Olley & Ann W. Cox, *Assessment of Adaptive Behavior in Adult Forensic Cases: The Use of Adaptive Behavior Assessment System-II*, *in* ADAPTIVE BEHAVIOR ASSESSMENT SYSTEM-II: CLINICAL USE AND INTERPRETATION 381, 392–93 (Thomas Oakland & Patti L. Harrison eds., 2008).

180. *Id.* at 392.

181. *See id.* at 388, 391; AAIDD-11, *supra* note 2, at 47–54. Assessments of adaptive behavior must focus on typical performance and avoid self-ratings. AAIDD-11, *supra* note 2, at 47–54; *see also* Olley & Cox, *supra* note 179, at 392.

182. Olley & Cox, *supra* note 179, at 390, 392.

183. *See id.* at 392; Moore v. Texas (*Moore I*), 137 S. Ct. 1039, 1051–52 (2017), *rev'd*, 139 S. Ct. 666 (2019).

the term "concurrent" from the diagnostic criteria for intellectual disability, it is hard to justify Florida's continued use of this outdated term that triggers a legal standard that defies medical consensus.[184] Florida is not alone—ten states use the term "concurrent" in their intellectual disability statutes.[185] All but two of these states properly interpret adaptive deficits to mean concurrent with the age of onset requirement of age eighteen, or the developmental period.[186]

Florida is at odds with the twenty-six of twenty-eight death penalty jurisdictions nation-wide that define intellectual disability *without* this outdated definition of concurrent function.[187] Of the nine jurisdictions that use the term "concurrent" in the definition of intellectual disability, Alabama is the only other state that includes a requirement that intellectual disability required a showing of current intellectual and adaptive deficits.[188] In *Carroll v. State*,[189] the Supreme Court of Alabama considered the intellectual disability claims of a death sentenced defendant with an IQ of 71 who was in special education classes, failed the first grade and eighth grade twice, had learning problems, suffered from prenatal alcohol exposure, and experienced sexual and physical abuse as a child, including serial head injuries.[190] The court initially explained that under Alabama law, mental retardation requires a finding that an "offender must *currently exhibit* subaverage intellectual functioning, *currently exhibit* deficits in adaptive behavior, and these problems

184. *See* Moore v. Texas (*Moore II*), 139 S. Ct. 666, 672 (2019) (per curiam); AAIDD-11, *supra* note 2, at 45; DSM-5, *supra* note 2, at 33.

185. ALA. CODE § 15-24-2(3) (2020); ARIZ. REV. STAT. ANN. § 13-753(K)(3) (2020); CAL. PENAL CODE § 1376(a) (West 2020); KY. REV. STAT. ANN. § 532.130(2) (West 2012) (held unconstitutional on other grounds by Woodall v. Commonwealth, 563 S.W.3d 1, 7 (Ky. Ct. App. 2018)); NEV. REV. STAT. § 174.098(7) (2019); N.C. GEN STAT. § 15A-2005(a)(1)(a) (2020); OKLA. STAT. ANN. tit. 21 § 701.10b(A)(1) (West 2020); S.C. CODE ANN. § 16-3-20(C)(b)(10) (2019); WASH. REV. CODE § 10.95.030(2)(a) (2019) (held unconstitutional on other grounds by State v. Bassett, 428 P.3d. 343, 355 (Wash. 2018)); WYO. STAT. ANN. § 8-1-102(a)(xiii) (2020); *see also* State v. Agee, 364 P.3d 971, 989 (Or. 2015) (en banc); Updegrove et al., *supra* note 51, at 539–40 (stating that of twenty-nine states that address intellectual disability as a bar to the death penalty, only four rely on the most recent editions of the DSM and the AAIDD manuals).

186. *See* Carroll v. State, 215 So. 3d 1135, 1148, 1153 (Ala. Crim. App. 2015); Jones v. State, 966 So. 2d 319, 326 (Fla. 2007) (per curiam).

187. *See* ALA. CODE § 15-24-2(3); FLA. STAT. § 921.137(1) (2019).

188. ALA. CODE § 15–24–2(3); ARIZ. REV. STAT. ANN. § 13-753(K)(5); CAL. PENAL CODE § 1376(a); NEV. REV. STAT. § 174.098(7); N.C. GEN. STAT. § 15A-2005(a)(1)(a); OKLA. STAT. ANN. tit. 21 § 701.10b(A)(1); S.C. CODE ANN. § 16-3-20(C)(b)(10); WASH. REV. CODE § 10.95.030(2)(a); WYO. STAT. ANN. § 8-1-102(a)(xiii).

189. 215 So. 3d 1135 (Ala. Crim. App. 2015).

190. *Id.* at 1147–49.

must have manifested themselves before the age of [eighteen]."[191] Alabama's highest court relied on outdated precedent from 2007 and 2009—published years prior to the DSM-5 in supporting this flawed decision.[192]

Carroll's intellectual disability claim was denied, in part, due to the fact that he failed to prove that he currently exhibited deficits in adaptive behavior, as he was able to work in the prison kitchen and finally pass his GED when he was well into middle age.[193] Exactly as in *Wright*, the petition for certiorari filed after the Supreme Court of Alabama decided *Carroll* was granted, and Alabama's decision was vacated and reversed by the Supreme Court of the United States on May 1, 2017.[194] Although the court did not issue a lengthy opinion, *Carroll* was returned to Alabama on the basis of the newly announced nationwide standards in *Moore*.[195]

Florida legislators may have intended the use of the term "concurrent" to mean that the limitations in skill areas must occur simultaneously with deficits in IQ during the developmental period.[196] If that is the case, the Supreme Court of Florida has failed to properly interpret the law.[197] As a result, its decisions do not comply with the medical consensus required by *Hall*, *Moore I*, and *Moore II*.[198] In the meantime, analyzing concurrent function, as "current function" without regard to the age of onset of intellectual disability allows a denial of medically sound and legitimate intellectual disability claims and creates an unreasonable risk that intellectually disabled defendants will be executed.[199]

IV. THE EIGHTEEN YEAR AGE OF ONSET REQUIREMENT IS THE SUBJECT OF GROWING CONTROVERSY IN THE MEDICAL COMMUNITY

Florida's statutory requirement that intellectual disability must begin prior to age eighteen is at odds with current medical consensus.[200] Fifteen years ago, in *Roper v. Simmons*,[201] the Supreme Court of the United States

191. *Id.* at 1148 (citing Smith v. State, 213 So. 3d 239, 248 (Ala. 2007)) (emphasis added).
192. *See id.* at 1148; Byrd v. State, 78 So. 3d 445, 450 (Ala. Crim. App. 2009).
193. *Carroll*, 215 So. 3d at 1152; *see also* Wright v. Florida, 138 S. Ct. 360 (2017) (mem.).
194. Carroll v. Alabama, 137 S. Ct. 2093, 2093 (2017) (mem).
195. *Id.*; *see also* Moore v. Texas (*Moore I*), 137 S. Ct. 1039 (2017), *rev'd*, 139 S. Ct. 666 (2019).
196. *See* FLA. STAT. § 921.137(1) (2019).
197. *See* Salazar v. State, 188 So. 3d 799, 812–13 (Fla. 2016) (per curiam).
198. *Id.* at 818; *see also* Hall v. Florida, 572 U.S. 701, 722 (2014); *Moore I*, 137 S. Ct. at 1048; Moore v. Texas (*Moore II*), 139 S. Ct. 666, 668 (2019) (per curiam).
199. *See* Jones v. State, 966 So. 2d 319, 325n.3 (Fla. 2007) (per curiam).
200. *See* FLA. STAT. § 921.137(1) (2019); DSM-5, *supra* note 2, at 33.
201. 543 U.S. 551 (2005).

established that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[202] Scientific advancements in brain development led the way to new legal standards being applied to juvenile offenders.[203] The Court has admonished that it is impermissible for courts to disregard the teachings of the scientific community, especially when they support a finding of lesser culpability in cases where the most severe sanctions are at play.[204] Intellectual disability, which is fundamentally considered to be a neurodevelopmental disorder, is among a group of conditions with onset in the developmental period well past age eighteen.[205]

The DSM-IV established that the age of onset for intellectual disability must occur before age eighteen.[206] To be clear, the "diagnosis" of intellectual disability does not need to occur prior to the established age of onset.[207] Rather, diagnostic criteria require only that deficits in intellectual and adaptive functioning were present during the established period.[208] In conjunction with studied professional consensus in 2013, the DSM-5 removed the language regarding "age eighteen" and replaced it with onset during the "developmental period."[209] A new edition of the AAIDD criteria, due to be published shortly, will embody a similar update.[210] Like laws in the majority of death penalty jurisdictions, Florida statutes have not internalized the scientific consensus that brain development and intellectual disability diagnosis extends well past the age of eighteen.[211] Although some outliers,

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202. *Id.* at 572–73.

203. *See id.*; Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding juvenile mandatory life sentences violates the Eighth Amendment); Graham v. Florida, 560 U.S. 48, 74 (2010) (holding juvenile life sentences for crimes other than homicide violates Eighth Amendment).

204. Hall v. Florida, 572 U.S. 701, 721 (2014).

205. DSM-5, *supra* note 2, at 31; *see also Hall*, 572 U.S. at 711.

206. DSM-IV-TR, *supra* note 71, at 39.

207. TASSÉ & BLUME, *supra* note 31, at 136.

208. *Id.*

209. *Id.*; DSM-5, *supra* note 2, at 33.

210. Greenspan, *supra* note 77, at 71. "Although AAIDD, being an organization dominated by service-providing bureaucrats, is less likely than the more medically-oriented DSM to do away with a specific age cut-off specification, there is a strong likelihood, approaching near certainty, that the age [eighteen] ceiling will be dramatically loosened in its next classification manual . . . almost certainly by raising the ceiling from age [eighteen] to age [twenty-two]." *Id.*; *see also* AAIDD-11, *supra* note 2, at 9 tbl.1.2.

211. *Compare* FLA. STAT. § 921.137(1) (2019), *with* ALA. CODE § 15-24-2(3) (2020) (stating that impairments must be manifested during the developmental period), *and* ARK. CODE ANN. § 5-4-618(a)(1)(A) (West 2020) (stating that impairment must be manifested during the developmental period, but no later than age eighteen), *and* GA. CODE ANN. § 17-7-131(a)(2) (2020) (developmental period), *and* NEV. REV. STAT. § 174.098(7) (2019) (developmental period), *and* S.C. CODE ANN. § 16-3-20(C)(b)(10) (2020) (developmental

namely Indiana and Utah, have defined the age of onset to extend to age twenty-two.[212]

Significant scientific progress has been made in the last four decades in understanding and defining the brain's development from childhood through adulthood.[213] It is well established that the brain undergoes a developmental process that is not complete until approximately twenty-five years of age.[214] Consequently, the utilization of the strict cut-off of age eighteen in diagnosing neurodevelopmental disorders, such as intellectual disability, has been re-defined in medicine as reflected by the DSM-5.[215]

The scientific community now considers a more accurate "developmental period" that takes into account a body of research from the various fields related to neuroscience, psychiatry, and psychology, that has enhanced our basic understanding regarding brain maturation.[216] The "developmental period" can be operationalized as the period of neurodevelopment that occurs, leading to a mature brain at the end of adolescence and into adulthood—around age twenty-five.[217] The term "adolescence" is used to describe the transition stage between childhood and adulthood and denotes both teenage years and puberty.[218] The central nervous system changes that happen between the ages of eighteen and twenty-five are a continuation of the process that starts in puberty, and healthy eighteen-year-old adolescents are about halfway through this process.[219] At age eighteen, the prefrontal cortex of the brain is not fully developed, and longitudinal neuroimaging studies have confirmed that important "rewiring" processes occur during this time.[220] The prefrontal cortex is the part of the brain related to the development of personality, judgment, problem-solving, and rational

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period), *and* TENN. CODE ANN. § 39-13-203(a)(3) (2020) (impairment manifested during the developmental period or by eighteen years of age), *and* WASH. REV. CODE § 10.95.030(2)(a) (2019) (developmental period), *and* WYO. STAT. ANN. § 8-1-102(a)(xiii) (2020) (developmental period).

212. IND. CODE § 35-36-9-2 (2020) (impairment manifested prior to age twenty-two); UTAH CODE ANN. § 77-15a-102 (West 2020) (impairment manifested prior to age twenty-two).

213. TASSÉ & BLUME, *supra* note 31, at 136.

214. Mariam Arain et al., *Maturation of the Adolescent Brain*, NEUROPSYCHIATRIC DISEASE AND TREATMENT, Apr. 2013, at 449, 451; *see also* Miller v. Alabama, 567 U.S. 460, 472 n.5 (2012); Graham v. Florida, 560 U.S. 48, 68 (2010); Brief for the Am. Psych. Ass'n et al. as Amici Curiae in Support of Petitioners at 5, Miller v. Alabama, 567 U.S. 460 (2012) (No. 10-9646).

215. *See* DSM-5, *supra* note 2, at 7.

216. *See id.* at 5.

217. Arain et al., *supra* note 212, at 451.

218. *Id.*

219. *Id.* at 450.

220. *Id.* at 451–52.

decision making.[221] In a healthy brain, it is the area that governs impulsivity, aggression, and helps one plan and organize behavior to reach a goal.[222] All of this recent growth in neuroscientific understanding has led to "consensus within the [intellectual disability] field that just as a prong one [i.e., IQ] cut-off of 70 was too restrictive, the same can be said for maintenance of the outmoded third prong notion that intellectual disability must always be manifested before age [eighteen]."[223]

Florida currently requires the intellectually disabled prove that their symptoms developed prior to age eighteen.[224] This requirement is used to distinguish those whose cognitive disabilities occurred later in life after disease, aging, or brain injury.[225] But Florida's statute unequivocally establishes the age of onset to be age eighteen—it conflicts with medical consensus in the understanding and diagnosis of intellectual disability, tied to the developmental period that extends well beyond age eighteen.[226]

V. THE CLEAR AND CONVINCING EVIDENTIARY STANDARD CREATES AN UNACCEPTABLE RISK THAT INDIVIDUALS WITH INTELLECTUAL DISABILITY WILL BE EXECUTED

Florida law compounds the chance that intellectual disability will be underdiagnosed because it requires proof of each element of intellectual disability by clear and convincing evidence.[227] This is an insurmountable gauntlet for capital defendants with intellectual disabilities and it violates procedural due process protections and cruel and unusual punishment standards of the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.[228] By utilizing the clear and convincing standard of

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221. *Id.* at 453.

222. Arain et al., *supra* note 214, at 453.

223. Greenspan, *supra* note 99, at 71.

224. *See* FLA. STAT. § 921.137(1) (2019); FLA. R. CRIM. P. 3.203(b); James W. Ellis et al., *Evaluating Intellectual Disability: Clinical Assessments in* Atkins *Cases*, 46 HOFSTRA L. REV. 1305, 1336–37 (2018).

> The vast majority of people with the level of intellectual impairment to satisfy the first prong of the definition — and the deficits in adaptive behavior to satisfy the second prong — first experienced their disability in childhood, and for some, the cause can be traced back to their birth or their genetic make-up.

Ellis et al., *supra* note 224, at 1336–37.

225. Ellis et al., *supra* note 224, at 1337.

226. FLA. STAT. § 921.137(1); DSM-5 *supra* note 2, at 33; *see also* Arain et al., *supra* note 214, at 451–52.

227. FLA. STAT. § 921.137(4) (2019); *see also* Cooper v. Oklahoma, 517 U.S. 348, 365 (1996).

228. U.S. CONST. amend. V, VIII, XIV; *see also* Atkins v. Virginia, 536 U.S. 304, 321 (2002); Ellis et al., *supra* note 224, at 1388 n.322.

evidence, rather than the preponderance standard for intellectual disability determinations, Florida law guarantees that people who are more likely to be intellectually disabled than not intellectually disabled will be executed.[229] Florida's statute fails to protect intellectually disabled people from illegal execution and is at odds with almost every other jurisdiction in the nation.[230] Only three other states, Arizona, North Carolina, and Oklahoma, currently use the clear and convincing standard for intellectual disability determinations.[231] Regardless, Florida's use of the clear and convincing standard has dramatically more sinister effects—since 2012, Florida alone has executed more people than all of these three jurisdictions combined.[232] It is also unconstitutional under *Cooper v. Oklahoma*[233] and *Atkins*.[234]

In *Cooper*, the Supreme Court of the United States unanimously overturned an Oklahoma statute, requiring a defendant to prove incompetence to stand trial by clear and convincing evidence, because it violated the Due Process Clause.[235] The Court explained that "both traditional and modern practice" and the importance of competency to stand trial required rejection of the State's heightened burden of clear and convincing evidence.[236] The Court emphasized that "there [was] no indication that the rule Oklahoma [sought] to defend [had] any roots in prior practice" and that "the vast majority of jurisdictions remain persuaded that the heightened standard of proof imposed on the accused in Oklahoma is not necessary to vindicate the State's interest

229. FLA. STAT. § 921.137(4); FLA. R. CRIM. P. 3.203; *see also Cooper*, 517 U.S. at 350; Salazar v. State, 188 So. 3d 799, 811–12 (Fla. 2016) (per curiam).

230. *See Cooper*, 517 U.S. at 350; *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., http://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1605882308.pdf (last visited Dec. 14, 2020). *Cooper* established a national constitutional preponderance of the evidence standard for competency determinations. *Cooper*, 517 U.S. at 350. Mild intellectual disability should be treated similarly. *See* State v. McManus, 868 N.E.2d 778, 784–85 (Ind. 2007). *See* Rauf v. State, 145 A.3d 430, 434 (Del. 2016) (per curiam) (invalidating Delaware's death penalty scheme, including the clear and convincing standard in DEL. CODE ANN. tit. 11, § 4209(d)(3)(b)); *McManus*, 868 N.E.2d at 784 (holding the clear and convincing standard for establishing intellectual disability as a bar to a death sentence unconstitutional under *Atkins*); Smith v. Ryan, 813 F.3d 1175, 1178 (9th Cir. 2016) (criticizing Arizona's clear and convincing standard for intellectual disability). Georgia, the nationwide outlier, continues to impose the unconscionable burden of proving intellectual disability beyond a reasonable doubt. Raulerson v. Warden, 928 F.3d 987, 993 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 2568 (2020).

231. ARIZ. REV. STAT. ANN. § 13-753(G) (2020); N.C. GEN. STAT. § 15A-2005(c) (2020); OKLA. STAT. ANN. tit. 21 § 701.10b(E) (West 2020).

232. *Facts About the Death Penalty*, *supra* note 230.

233. 517 U.S. 348 (1996).

234. *Id.* at 369; *see also Atkins*, 536 U.S. at 321.

235. *Cooper*, 517 U.S. at 350, 369.

236. *Id.* at 356.

in prompt and orderly disposition of criminal cases."[237] "Because Oklahoma's procedural rule allow[ed] the State to put to trial a defendant who is more likely than not incompetent, the rule [was] incompatible with the dictates of due process."[238] Several state supreme courts have applied the reasoning in *Cooper* to hold that due process prevents a state from requiring a defendant to prove intellectual disability by clear and convincing evidence.[239] Florida should follow suit.[240]

Intellectual disability is a complex condition with a wide variety of human presentations.[241] A comprehensive intellectual disability evaluation includes assessing limitations in adaptive and intellectual functioning as well as the identification of genetic and nongenetic medical conditions, such as cerebral palsy, fetal alcohol syndrome, or seizure disorders, as well as co-occurring mental, emotional, and behavioral disorders.[242] Even the most comprehensive assessments may not meet the clear and convincing standard of evidence which is both "precise" and "explicit."[243] In the simplest terms, complex psychological concepts do not lend themselves to a heightened legal evidentiary standard.[244]

The deficits in intellectual function referred to in the statute as "significantly subaverage IQ" is an assessment of a person's ability to reason, make plans, solve problems, think abstractly, understand complex ideas, make

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237. *Id.* at 356, 360.

238. *Id.* at 369.

239. *See Cooper*, 517 U.S. at 369; Pruitt v. State, 834 N.E.2d 90, 103 (Ind. 2005).

> We do not deny that the state has an important interest in seeking justice, but we think the implication of *Atkins* and *Cooper* is that the defendant's right not to be executed if mentally retarded outweighs the state's interest as a matter of federal constitutional law. We therefore hold that the state may not require proof of mental retardation by clear and convincing evidence.

Pruitt, 834 N.S.2d at 103. "Just as the Supreme Court held in *Cooper* regarding incompetency, we conclude that it would violate due process to execute a defendant who is more likely than not mentally retarded." Howell v. State, 151 S.W.3d 450, 464–65 (Tenn. 2004).

240. *See* discussion *infra* Section VII; Crim. Court Steering Comm., *supra* note 103, at 7–10. In 2003, when the Florida Supreme Court was considering amendments to the Florida Rules of Criminal Procedure regarding intellectual disability as a bar to the death penalty, the Criminal Court Steering Committee, a bi-partisan group of members of the state judiciary, recommended that a preponderance standard be adopted because the "clear and convincing standard is likely excessive and unconstitutional." Crim. Court Steering Comm., *supra* note 103, at 7.

241. DSM-5, *supra* note 2, at 31.

242. AAIDD-11, *supra* note 2, at 28; DSM-5, *supra* note 2, at 39.

243. *See* Emily M. Williams, *U.S. Supreme Court Reaffirms Unconstitutionality of Executing the Intellectually Disabled*, A.B.A. (June 1, 2014), http://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2014/summer/us-supreme-court-reaffirms-unconstitutionality-of-executing-th/; Fla. Std. Jury Instr. (Civ.) 405.4.

244. *See* Williams, *supra* note 243.

judgments, and learn from experience.[245] An individually administered, standardized IQ test is an important part of this assessment.[246] *Hall* and *Moore* have conclusively established that IQ is not a single fixed number and should not be viewed as "final and conclusive" evidence of intellectual capacity.[247] Rather, IQ is an *imprecise range* with a standard error of measurement and insist that courts consider the professional consensus of the medical community in evaluating intellectual disability.[248]

Adaptive functioning deficits are found by a holistic assessment of how a person meets community standards for social responsibility and judgment.[249] Conceptual skills include language, reading, writing, time, money, numbers, problem-solving, and judgment in novel situations.[250] Social skills involve interpersonal skills, gullibility, social judgment, empathy, and friendship.[251] Finally, practical skills include activities of daily living and occupational skills, among others.[252] Deficits in one of three domains of conceptual, social, and practical behavior are sufficient for a finding of intellectual disability.[253]

The purpose of the adaptive functioning element of the definition of intellectual disability is to verify that "the impairment indicated in psychometric tests actually has a real-world impact on the individual's life and . . . is a disabling condition rather than . . . a testing anomaly."[254] The DSM-5 uses deficits in adaptive functioning to establish the severity of intellectual disability because deficits in adaptive functioning determine the level of support required.[255] The assessment of adaptive functioning relies on medical records, school records, information about an individual's functioning over time, standardized test measures of adaptive functioning,[256] neuropsychological testing, and professional judgment.[257]

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245. DSM-5, *supra* note 2, at 33; AAIDD-11, *supra* note 2, at 31.

246. DSM-5, *supra* note 2, at 37; AAIDD-11, *supra* note 2, at 31; *see* Kevin McGrew, *Intellectual Functioning*, *in* THE DEATH PENALTY AND INTELLECTUAL DISABILITY 85, 87 (Edward A. Polloway ed., 2015).

247. *See* Hall v. Florida, 572 U.S. 701, 712 (2014); Moore v. Texas (*Moore I*), 137 S. Ct. 1039, 1050 (2017), *rev'd*, 139 S. Ct. 666 (2019).

248. *See Hall*, 572 U.S. at 713.

249. AAIDD-11, *supra* note 2, at 44; DSM-5, *supra* note 2, at 37.

250. DSM-5, *supra* note 2, at 37.

251. *Id.*

252. *Id.*

253. *Id.* at 38; AAIDD-11, *supra* note 2, at 43. Deficits *in one of three domains* is sufficient. AAIDD-11, *supra* note 2, at 46.

254. Ellis et al., *supra* note 224, at 1374.

255. DSM-5, *supra* note 2, at 33.

256. Greenspan & Olley, *supra* note 31, at 187–98.

257. AAIDD-11, *supra* note 2, at 47; DSM-5, *supra* note 2, at 37.

The simplicity of Florida's intellectual disability standard, as announced by the legislature and interpreted by the courts, belies the difficulty of a full and multifactored intellectual disability diagnosis—in which intellectual functioning, adaptive functioning, and age of onset are just the beginning.[258] The clinical judgment of a psychological professional is key.[259] Clinical judgment is "rooted in a high-level of clinical expertise and experience and judgment that emerges directly from extensive training, experience with the person, and extensive data."[260] Clinical judgment enhances "the quality, validity, and precision of the clinician's decision or recommendation in situations related to diagnosis, classification, and planning supports."[261] Clinical judgment is also guided by the highest professional standards and ethics.[262] Clinical judgment plays a larger role in retrospective intellectual disability assessments because it is necessary in identifying and interpreting data that contribute to making valid diagnostic impressions.[263] It is clinical judgment, developed over years of education, training, and experience, above all else, that fulfills the heightened need for reliability in capital sentencing.[264]

Eighty to ninety percent of all intellectual disability cases are mild cases, which includes an IQ in the range of 55 to over 70.[265] Mild intellectual disability is more difficult to diagnose because people with mild intellectual disabilities have some capabilities and their disabilities are more subtle.[266] Rather than displaying general dysfunction, people at the upper end of the spectrum struggle with abstract thinking, planning, problem-solving, social

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258. *See* DSM-5, *supra* note 2, at 38.

259. AAIDD-11, *supra* note 2, at 29, 85–103; DSM-5, *supra* note 2, at 37 (stating that "[t]he diagnosis of intellectual disability is based on *both* clinical assessment *and* standardized testing of intellectual and adaptive functions") (emphases added); *see* SCHALOCK & LUCKASSON, *supra* note 147, at 15.

260. AAIDD-11, *supra* note 2, at 29; *see also* DSM-5, *supra* note 2, at 5.

261. SCHALOCK & LUCKASSON, *supra* note 147, at 19.

262. *Id.*; *see Ethical Principles of Psychologists and Code of Conduct*, AM. PSYCH. ASS'N, http://www.apa.org/ethics/code/ethics-code-2017.pdf (last visited Dec. 14, 2020); Am. Psych. Ass'n, *Specialty Guidelines for Forensic Psychology*, 68 AM. PSYCH. 7, 7 (2013); AM. PSYCH. ASS'N, THE PRINCIPLES OF MEDICAL ETHICS: WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY 3 (2013); AM. EDU. RSCH., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 2 (2014).

263. DSM-5, *supra* note 2, at 37 (explaining that "[c]linical training and judgment are required to interpret test results and assess intellectual performance"); TASSÉ & BLUME, *supra* note 31, at 137 (explaining that psychological professionals must exercise clinical judgment in determining age of onset retrospectively).

264. *See* TASSÉ & BLUME, *supra* note 31, at 136–37; AAIDD-11, *supra* note 2, at 85–103.

265. Siperstein & Collins, *supra* note 52, at 41, 43.

266. *Id.* at 41.

perception, and judgment.[267] Friends and family will not usually be able to identify someone with mild intellectual disability; they may merely describe the person as slow or misunderstanding directions and social pragmatics.[268] Clinical judgment plays a disproportionately important role in the diagnosis of mild intellectual disability because most mildly intellectually disabled individuals lack problems in obvious practical adaptive functioning areas such as dressing, toileting, or using the telephone.[269]

Intellectual disability in a mild form can seem practically "invisible" to a layperson because the mildly disabled "possess a number of abilities that distinguish them from others with greater levels of impairment, yet they are still vulnerable to a host of challenges as compared to the typically developing population."[270] The general population holds stereotypical beliefs about intellectual disability, founded on Hollywood theatrics, rather than known facts about the condition.[271] The AAIDD has identified pervasive stereotypes that "interfere with justice" in intellectual disability diagnosis, which are: the intellectually disabled talk differently, cannot do complex tasks, cannot get driver's licenses, cannot support their families, cannot romantically love or be loved, cannot acquire any vocational or social skills, and do not have any strengths in their functioning.[272] *Mild intellectual disability*, a medical standard subject to numerical ranges, standards of error, and analysis of deficits over broad categories of adaptive functioning, *is rarely, if ever, clear and convincing*.[273] The clear and convincing standard reinforces the ideas of the past in which the intellectually disabled are drooling and bound to a wheelchair.[274] But all mildly intellectually disabled people are exempt from the death penalty under *Atkins*, *Hall*, and *Moore*, despite Florida's commitment to send them to their execution if they are merely more likely than not found not to be intellectually disabled under the clear and convincing standard.[275]

The clear and convincing standard of evidence makes no allowance for the complexity of intellectual disability diagnosis.[276] Along with the consideration of multiple criteria, tests with imprecise ranges, and the wide

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267. *See id.* at 41, 47–48.
268. *Id.* at 47–48.
269. *Id.* at 47; *see also* SCHALOCK ET AL., *supra* note 36 at 13–17.
270. Siperstein & Collins, *supra* note 52, at 50.
271. TASSÉ & BLUME, *supra* note 31, at 6.
272. SCHALOCK ET AL., *supra* note 36, at 26.
273. *See* DSM-5, *supra* note 2, at 37–38; AAIDD-11, *supra* note 2, at 153.
274. *See* Updegrove et al., *supra* note 51, at 553, 556; Moore v. Texas, (*Moore I*) 137 S. Ct. 1039, 1050 (2017), *rev'd*, 139 S. Ct. 666 (2019).
275. *Moore I*, 137 S. Ct. at 1051; *see* Hall v. Florida, 572 U.S. 701, 709, 725 (2014); Atkins v. Virginia, 536 U.S. 304, 318, 321 (2002).
276. *See* Addington v. Texas, 441 U.S. 418, 433 (1979).

variety of clinical presentations, clinicians may have a high degree of confidence in a diagnosis.[277] Yet, proving the existence of intellectual disability by clear and convincing evidence may be impossible.[278] The Supreme Court of the United States acknowledged this four decades ago while considering the standard applicable to civil commitment proceedings—"the subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations."[279] The subtle diagnosis of mild intellectual disability can never meet the terms of Florida's statute.[280] Florida will continue to execute its citizens in violation of the Eighth Amendment unless the preponderance standard is adopted as in *Cooper* and the vast majority of jurisdictions.[281]

VI. DOUBLING DOWN ON OUTDATED DIAGNOSTIC STANDARDS: *PHILLIPS V. STATE*

The Florida Supreme Court recently doubled down on anachronistic diagnostic standards for intellectual disability in *Phillips v. State*.[282] Phillips was initially convicted of first-degree murder in 1983, and his case worked through the cumbersome appeals process for almost two decades before the Court permitted a full airing of Phillips' intellectual disability claim under *Atkins* in 2005.[283] Phillips' early *Atkins* claim was unsuccessful, in part due to a failure to prove deficits in intellectual functioning under Florida's statutory scheme.[284] In 2018, Phillips' renewed claim for intellectual disability under *Atkins*, *Hall*, and *Moore* was denied by the circuit court.[285] On appeal, the Supreme Court of Florida upheld the circuit court's denial of the renewed intellectual disability claim by overruling the retroactive application of *Hall* in its 2016 precedent in *Walls v. State*.[286] The *Phillips* decision, if upheld after the inevitable *petition for writ of certiorari*, will have the effect of rolling back the diagnostic standards for intellectual disability by decades.[287]

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277. *See id.* at 430.
278. *See id.* at 430–32.
279. *Id.* at 430.
280. *See id.*; FLA. STAT. § 921.137(1), (4) (2019).
281. Williams, *supra* note 243.
282. 299 So. 3d 1013 (Fla. 2020) (per curiam).
283. Phillips v. State, 894 So. 2d 28, 32 (Fla. 2004) (per curiam); Phillips v. State, 984 So. 2d 503, 506 (Fla. 2008) (per curiam).
284. *Phillips*, 984 So. 2d at 509.
285. *Id.*
286. 213 So. 3d 340, 340 (Fla. 2016) (per curiam), *overruled by* Phillips v. State, 299 So. 3d 1013 (Fla. 2020) (per curiam).
287. *See Phillips*, 299 So. 3d at 1015.

Florida's intellectual disability statute, barring execution of the intellectually disabled in the wake of *Atkins* in 2002, could have been interpreted consistently with Eighth Amendment protections.[288] But the Florida Supreme Court erroneously interpreted Florida's statute to arrive at an unconstitutional result in *Cherry v. State*.[289] During Cherry's evidentiary hearing on intellectual disability, one expert testified about the wide range of IQ scores that could be the basis for an intellectual disability diagnosis.[290] He stated that the DSM-IV, "guides us to look at IQ scores as being a range rather than an absolute. And the [DSM-IV] manual talks about a score from 65, a band, so to speak, from 65–75—and of course, lower than 65—comprising mental retardation."[291] Despite the information about the medical consensus in diagnostic criteria on the face of the record in the *Cherry* case, the Court interpreted Florida's statute to establish a strict IQ threshold of 70 for intellectual disability.[292] The Court denied Cherry's claim that he was exempt from a death sentence because he had an IQ of 72 rather than 70.[293]

As in *Hall*, and in concert with the unanimous consensus of the medical community, the flaws and imprecision in IQ test scores make them a poor vehicle for diagnosis, when used alone.[294] IQ measurement accounts for a less than perfect range, especially with multiple and repeated testing that results in variable test scores.[295] There are many reasons for IQ test score fluctuations, with most of them not having to do with effort—a common reason attributed to test score variability by experts, especially in *Hall*.[296] IQ scores within a low range should lead to a full, multifactored consideration of adaptive functioning in order to improve diagnostic precision and reduce the risk of executing intellectually disabled people in violation of the Eighth Amendment.[297]

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288. *See* FLA. STAT. § 921.137(1) (2019).

> As used in this section, the term "intellectually disabled" [] means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age [eighteen]. The term "significantly subaverage general intellectual functioning," . . . means performance that is two or more standard deviations from the mean score on a standardized intelligence test.

Id.

289. 959 So. 2d 702, 714 (Fla. 2007) (per curiam), *abrogated by* Hall v. Florida, 572 U.S. 701 (2014).

290. *Id.* at 711–12.

291. *Id.*

292. *Id.* at 713.

293. *Id.* at 714.

294. *See* Hall v. Florida, 572 U.S. 701, 722 (2014).

295. *Id.* at 712–13.

296. *Id.* at 713; TASSÉ & BLUME, *supra* note 31, at 90–98.

297. *See* U.S. CONST. amend. VIII; Brumfield v. Cain, 135 S. Ct. 2269, 2278 (2015); AAIDD-11, *supra* note 2, at 43–45.

In *Hall*, the Supreme Court of the United States invalidated the Supreme Court of Florida's erroneous statutory interpretation that led to the IQ threshold of 70 in *Cherry*.[298] Using the definitions established by the *medical community* and *established medical practice*, the Supreme Court of the United States underscored the importance of the standard error of measurement in IQ testing.[299] Scientific advancements, coupled with the statewide trend rejecting a strict 70 cut-off, "provide strong evidence . . . that our society does not regard this strict cut-off as proper or humane."[300] The Court concluded, "the Florida statute, as interpreted by its courts, is unconstitutional" because "[i]ntellectual disability is a condition, not a number."[301]

Only four years ago in *Walls*, the Supreme Court of Florida recognized the sweeping importance of medical consensus in intellectual disability determinations and established that *Hall* was retroactive under *Stovall v. Deno*.[302] The court held that overruling the unconstitutional reading of Florida statute in *Cherry* was a constitutional development of "fundamental significance."[303] The *Walls* court reasoned that the Supreme Court of the United States' rejection of a strict IQ cut-off of 70 increased the number of people exempt from the death penalty and encouraged a more holistic review of intellectual disability as a bar to the death penalty.[304] Accordingly, the Supreme Court of Florida concluded that, "*Hall* warrants retroactive application as a development of fundamental significance that places beyond the State of Florida the power to impose a certain sentence—the sentence of death for individuals within a broader range of IQ scores than before."[305]

While courts and intellectuals may differ on the application of the federal retroactivity doctrine in *Walls* and *Phillips*, denying Florida's death-sentenced population the benefit of scientific advancements in the diagnosis of intellectual disability promulgated by the Supreme Court of the United States in *Hall* violates the promise of *Atkins* and the Eighth Amendment.[306] Rolling back the standards to the point where a defendant like Cherry—who

298. *Hall*, 572 U.S. at 711–14, 721; *see also* Cherry v. State, 959 So. 2d 702, 713 (Fla. 2007) (per curiam), *abrogated by* Hall v. Florida, 572 U.S. 701, 701 (2014).

299. *See Hall*, 572 U.S. at 710–14.

300. *Id.* at 718.

301. *See id.* at 721, 723; DSM-5, *supra* note 2, at 37.

302. 388 U.S. 293 (1967); *see also* Walls v. State, 213 So. 3d 340, 346 (Fla. 2016) (per curiam) *overruled by* Phillips v. State, 299 So. 3d 1013 (Fla. 2020) (per curiam).

303. *See Walls*, 213 So. 3d at 346.

304. *Id.*

305. *Id*.

306. *Id.*; *contra* Phillips v. State, 299 So. 3d 1013, 1014 (Fla. 2020) (per curiam); *see also* U.S. CONST. amend. VIII; Hall v. Florida, 572 U.S. 701, 710–14 (2014); Atkins v. Virginia, 536 U.S. 304, 321 (2002).

might be denied a claim that he is exempt from the death penalty because he had a single IQ score of 72—is inconsistent with current diagnostic criteria and the Constitution.[307] For more than two decades, the Supreme Court of the United States has pronounced, "the Constitution 'restricts . . . the State's power to take the life of' *any* intellectually disabled individual."[308] As science broadens the definition of intellectual disability, the law must follow suit.[309] The abrupt change mandated by the ill-considered *Phillips* decision, which essentially nullifies the application of scientific consensus in intellectual disability diagnosis by reestablishing a strict IQ limit of 70, is but the most recent example of Florida law lagging far behind science.[310] As a result, Florida will continue to execute the intellectually disabled in violation of *Atkins*, *Hall*, *Moore I*, *Moore II*, and the Eighth Amendment of the United States Constitution.[311]

VII. CONCLUSION

Atkins, *Hall*, and *Moore* set forth minimum standards for intellectual disability as a bar to the death penalty under the Eighth Amendment to the United States Constitution.[312] While state legislatures and state courts have some freedom to define intellectual disability in different ways, they may not "diminish the force of the medical community's consensus."[313] Florida law, as enacted by the legislature and enforced by the courts, lags far behind current scientific understandings of intellectual disability.[314] Medical consensus now views the age of onset as greater than eighteen.[315] IQ must be viewed as a range, not a single number.[316] By continuing to apply an obsolete definition of adaptive functioning and requiring proof by clear and convincing evidence, Florida's standards for intellectual disability, as a bar to the imposition of the death penalty, remain much more wrong than right.[317]

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307. *See Walls*, 213 So. 3d at 346; *Hall*, 572 U.S. at 710–14.

308. Moore v. Texas (*Moore I*), 137 S. Ct. 1039, 1048 (2017), *rev'd*, 139 S. Ct. 666 (2019) (quoting *Atkins*, 536 U.S. at 321) (emphasis added); *see also Hall*, 572 U.S. at 708; Roper v. Simmons, 543 U.S. 551, 571 (2005) (citing *Atkins*, 536 U.S. at 319).

309. *See Hall*, 572 U.S. at 710; *Roper*, 543 U.S. at 618 (Scalia, J., dissenting).

310. *Phillips*, 299 So. 3d at 1024.

311. *Id.*; *see also* U.S. CONST. amend. VIII; *Moore I*, 137 S. Ct. at 1053; *Hall*, 572 U.S. at 714; *Atkins*, 536 U.S. at 321.

312. U.S. CONST. amend. VIII; *Moore I*, 137 S. Ct. at 1048; *Moore II*, 139 S. Ct. at 672; *Hall*, 572 U.S. at 707–08; *Atkins*, 536 U.S. at 321.

313. *Moore I*, 137 S. Ct. at 1044.

314. *See* Greenspan & Olley, *supra* note 31, at 194.

315. Greenspan, *supra* note 77, at 70–71.

316. *See Hall*, 572 U.S. at 712–14.

317. *Id.* at 723; *see also Facts About the Death Penalty*, *supra* note 230.

ALL EMPLOYMENT DISCRIMINATION CLAIMS ARE NOT CREATED EQUAL: FLORIDA'S WORKSHARING AGREEMENT DOES NOT ALLOW FOR EQUAL JUSTICE UNDER THE FLORIDA CIVIL RIGHTS ACT

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I. INTRODUCTION

Courts impose roadblocks for employment discrimination plaintiffs that simply do not exist for other classes of civil plaintiffs.[1] Prospective plaintiffs are forced to navigate intricate and burdensome administrative remedies prior to initiating litigation, which in Florida, have the unique ability to effectively bar a plaintiff's right to civil adjudication.[2] Each year, an alarming number of discrimination claims brought under the Florida Civil Rights Act of 1992 ("FCRA")[3] never see the inside of a civil courtroom.[4] While some discrimination claims are denied access to Florida's courts for lack of merit, a great deal more are falling through the cracks of Florida's current workshare agreement between the two agencies that investigate violations of the statute.[5]

While this Comment seeks to analyze a procedural problem within the administrative remedies exclusive to the FCRA, a thorough analysis mandates both reference to, and comparison of, the administrative remedies

1. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 555 (2001).

2. Kenneth M. Curtin, *Administrative Pitfalls of Litigating Under the Florida Civil Rights Act*, 13 ST. THOMAS L. REV. 523, 537 (2001).

3. FLA. STAT. §§ 760.01–.11, 509.092 (2019).

4. *See, e.g.*, FLA. COMM'N ON HUM. RELS., ANN. REP. 2017–2018: A FISCAL YEAR IN REVIEW 9 (2018) [hereinafter 2018 FC ANN. REP.].

5. *See* discussion *infra* Part III; U.S. EQUAL EMP. OPPORTUNITY COMM'N, FY 2017 EEOC/FEPA WORKSHARING AGREEMENT, WORKSHARING AGREEMENT BETWEEN FLORIDA COMMISSION ON HUMAN RELATIONS AND THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 2 (2017) [hereinafter WORKSHARE AGREEMENT].

under Title VII of the Civil Rights Act of 1964 ("Title VII").[6] In fact, it is the very way in which the agencies that enforce both laws interact in Florida that this Comment suggests has created unequal access to justice under the FCRA.[7] Part II of this Comment will analyze anti-discrimination litigation in Florida and explore the pros and cons of litigating under the FCRA.[8] This section will include both an overview of the administrative remedies mandated under the statute and a numerical representation of how many claims are subsequently denied access to Florida's civil courtrooms each year.[9] Part III will outline the procedural problem created by Florida's workshare agreement, starting with its creation through contract to its solidification through Florida case law.[10] Part IV will address issues of constitutionality, equal protection, and due process.[11] Part V will briefly touch on the long-standing problem's current relevance, and Part VI will advance multiple solutions while discussing the impact that pending legislation may have on issues alleged herein.[12]

II. ANTI-DISCRIMINATION LITIGATION IN THE STATE OF FLORIDA

"[T]he United States is a land of dual sovereigns," affording protection to employees under both federal and state law.[13] Federal law prohibits employment discrimination under Title VII in addition to a plethora of other "class-specific" laws including, but not limited to, the Age Discrimination in Employment Act ("AEDA"),[14] the Americans with Disabilities Act of 1990 ("ADA"),[15] and the Equal Pay Act of 1963 ("EPA").[16] In Florida, state law prohibits employment discrimination under the FCRA.[17] While the FCRA was closely patterned after Title VII and shares significant overlap with its federal counterpart, Title VII and the FCRA comprise distinct causes of action with considerable differences in

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6. *See* discussion *infra* Section II.B; 42 U.S.C. § 2000e; Curtin, *supra* note 2, at 523.
7. *See* discussion *infra* Part III; WORKSHARE AGREEMENT, *supra* note 5, at 1.
8. *See* discussion *infra* Part II.
9. *See* discussion *infra* Parts II.A., II.B.
10. *See* discussion *infra* Part III.
11. *See* discussion *infra* Part IV.
12. *See* discussion *infra* Parts V, VI.
13. *See* Curtin, *supra* note 2, at 524.
14. *The Florida Civil Rights Act*, FINDLAW, http://corporate.findlaw.com/litigation-disputes/the-florida-civil-rights-act.html (last updated May 26, 2016); 29 U.S.C. §§ 621–626.
15. 42 U.S.C. §§ 12101–12103.
16. 29 U.S.C. § 206(d).
17. FLA. STAT. §§ 760.01–.11, 509.092 (2019).

scope and administrative schemes.[18] The most notable departure between the FCRA and Title VII is the impact that administrative remedies have on an aggrieved party's ability to seek redress in a civil courtroom.[19]

While many Florida employees may have viable claims under both Title VII and the FCRA, the FCRA is attractive to prospective plaintiffs for a multitude of reasons.[20] Notwithstanding a defendant's opportunity for removal based on diversity, the FCRA allows a plaintiff to seek redress for employment discrimination in state court.[21] State courts draw their jurors from the county in which the court sits as opposed to a district-wide pool, allowing victims of discrimination the greatest opportunity to have their claims adjudicated by a jury of like persons.[22] It has been well documented that employment discrimination plaintiffs experience significantly low success rates in federal courts, particularly when their claims are adjudicated by a judge.[23] Thus, the advantage of litigating employment discrimination in state courts cannot be understated.[24]

A. *A Brief History of the Florida Civil Rights Act*

Put simply, the FCRA is Florida's state law prohibiting discrimination in employment on the basis of "race, color, religion, sex . . . national origin, age, handicap, or marital status."[25] The FCRA was enacted in 1992, the year after Congress amended Title VII.[26] Among the most notable amendments to Title VII were provisions that allowed for the recovery of punitive and compensatory damages and the right to a jury trial for plaintiffs seeking such relief.[27] States, including Florida, moved to expand the traditional coverage of their anti-discrimination statutes to match or exceed the new protections of Title VII.[28] Florida's new law closely mirrored Title VII—enacting comparable remedies, guaranteeing plaintiffs a right to a jury trial, and imposing the same pre-suit duty to "exhaust

18. Curtin, *supra* note 2, at 524.

19. *See* Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 895 (Fla. 2002).

20. Curtin, *supra* note 2, at 525; 28 U.S.C. §1332.

21. 28 U.S.C. § 1332; FLA. STAT. § 760.11 (2019).

22. *See* FLA. STAT. § 40.01 (2019); Selmi, *supra* note 1, at 560.

23. *See* Selmi, *supra* note 1, at 560; Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 HARV. L. & POL'Y REV. 103, 103 (2009).

24. *See* Clermont & Schwab, *supra* note 23, at 119.

25. *See* FLA. STAT. § 760.01(2) (2019).

26. RICK JOHNSON & ELIZABETH OAKES, NAT'L EMP'T LAWS. ASS'N, FLA. CHAPTER, THE FLORIDA COMMISSION ON HUMAN RELATIONS: A ROGUE AGENCY 7–8 (2012).

27. *Id.*

28. *Id.* at 8.

administrative remedies."[29] However, the Florida Legislature added a unique feature in which a claim under the FCRA could be barred by an administrative finding of no cause, discussed in detail below.[30]

B. *A Crash Course in Administrative Remedies*

As a general principle, the law requires that "[w]here adequate administrative remedies are available, it is improper to seek relief in court before those remedies are exhausted."[31] At their inception, both Title VII and the FCRA either created or designated an administrative agency tasked with supporting the enforcement of their provisions.[32] Title VII created the Equal Employment Opportunity Commission ("EEOC"), and the FCRA greatly expanded the authority of the pre-existing Florida Commission on Human Relations ("Florida Commission").[33] Both agencies provide prospective plaintiffs the opportunity to engage in pre-litigation mediation and conciliation efforts, and both the EEOC and the Florida Commission hold varying degrees of authority to litigate claims on a plaintiff's behalf.[34] Because both Title VII and the FCRA proscribe such remedies, both laws mandate a plaintiff to exhaust said remedies as a condition precedent to commencing litigation.[35] Plaintiffs that file suit before exhausting administrative remedies are subject to the complete dismissal of their claims.[36]

The "exhaustion of administrative remedies" generally begins with the filing of a charge of discrimination.[37] Notwithstanding the workshare that is the subject of this Comment, plaintiffs seeking redress under federal law are required to file a charge of discrimination with the EEOC, whereas plaintiffs seeking redress under the FCRA are required to file a charge of discrimination with the Florida Commission.[38] While both the EEOC and

29. *See id.*; *The Florida Civil Rights Act*, *supra* note 14.

30. JOHNSON & OAKES, *supra* note 26, at 8–9.

31. Palm Lake Partners II, LLC v. C & C Powerline, Inc., 38 So. 3d 844, 853 (Fla. 1st Dist. Ct. App. 2010) (quoting Communities Fin. Corp. v. Fla. Dep't of Env't Regul., 416 So. 2d 813, 816 (Fla. 1st Dist. Ct. App. 1982)).

32. 42 U.S.C. § 2000e–4(a); *see also* FLA. STAT. §§ 760.03–.05 (2019).

33. 42 U.S.C. § 2000e–4(a); *see also* FLA. STAT. §§ 760.03–.06.

34. *See* 42 U.S.C. § 2000e–4(g)(6); FLA. STAT. § 760.11.

35. *See* 42 U.S.C. § 2000e–5(f); FLA. STAT. § 760.07.

36. *See* Sheridan v. State Dep't of Health, 182 So. 3d 787, 792 (Fla. 1st Dist. Ct. App. 2016); Fort Bend Cnty. v. Davis, 139 S. Ct. 1843, 1851 (2019).

37. *See* JOHNSON & OAKES, *supra* note 26, at 10–11; *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/filing-lawsuit (last visited Dec. 14, 2020).

38. *Compare* 42 U.S.C. § 2000e–4(g) *with* FLA. STAT. § 760.11.

the FCRA work to prevent discrimination before it occurs, the main function of both agencies is to accept complaints from persons who feel they have been discriminated against, investigate the charges, and issue a finding.[39]

An agency determination made by the EEOC and the Florida Commission do not take identical forms.[40] Moreover, an agency determination has a dissimilar impact on a claimant's ability to pursue civil litigation under each respective law.[41] A finding made by the EEOC, regardless of cause, does not preclude a timely federal lawsuit under Title VII.[42] Conversely, the FCRA "clearly delineates when, and under what circumstances, a civil action may be filed for unlawful discrimination," which occurs in only two distinct circumstances.[43]

1. The Rigid Administrative Structure of the Florida Civil Rights Act

The FCRA provides that any person alleging a violation of the statute "may file a complaint with the [Florida] Commission within 365 days of the alleged violation," and grants authority to the Florida Commission and Florida's Attorney General to file suit on behalf of an aggrieved party.[44] Notwithstanding the statutory use of the word "may," all persons seeking relief must file a charge of discrimination with the Florida Commission or an agency authorized to accept service on its behalf.[45] The Florida Commission is then responsible for investigating the charge and issuing a determination within 180 days.[46]

A finding issued by the Florida Commission takes one of three forms.[47] If the Florida Commission determines that there is "reasonable cause" to believe discrimination took place, the party is free to bring a civil action in a court of competent jurisdiction after a finding of cause is issued.[48] While the Florida Commission makes every effort to issue a determination within the statutory timeframe of 180 days, if a determination is not issued,

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39. *See Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/overview (last visited Dec. 14, 2020); FLA. STAT. § 760.05; JOHNSON & OAKES, *supra* note 26, at 5.

40. *See* discussion *infra* Part III.C; Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 895–96 (Fla. 2002).

41. *See Woodham*, 829 So. 2d at 894–95.

42. *Id.* at 895.

43. Sheridan v. State Dep't of Health, 182 So. 3d 787, 792 (Fla. 1st Dist. Ct. App. 2016).

44. FLA. STAT. § 760.11(1).

45. *Id.*; *see also Sheridan*, 182 So. 3d at 789.

46. FLA. STAT. § 760.11(3).

47. *Id.* § 760.11(1).

48. *Id.* § 760.11(4).

the party is likewise free to proceed to court as if a cause determination had been issued.[49] However, if the Florida Commission determines that there is "not reasonable cause" ("no cause") to believe that discrimination took place, it *must* dismiss the complaint and the charging party cannot file a civil lawsuit alleging discrimination under the FCRA.[50]

If a finding of no cause is issued, an aggrieved party's only remedy is to request an administrative hearing before the Division of Administrative Hearings ("DOAH").[51] If the claimant either fails to petition for an administrative hearing within thirty-five days of the no cause determination or the hearing results in an affirmation of no cause, the claimant's civil claims are barred.[52] In summation, a claim under the FCRA can proceed to a civil jury trial if, and only if, either a finding of cause has been found, or 180 days have elapsed without a finding issued by the Florida Commission.[53] Claimants who receive a finding of no cause by the Florida Commission, while free to appeal the determination, are ultimately prevented from having the matter adjudicated by a jury of their peers.[54] Despite its express terms that the FCRA must be liberally construed to further its purposes and to "preserve and promote access to the remedy intended by the legislature,"[55] a significant number of claims are prevented from accessing Florida's court system by the investigatory conclusions of the Florida Commission.[56]

2. Painting a Numerical Picture

Using the last year of available data, the Florida Commission issued 745 no cause findings in comparison to thirty-three reasonable cause findings for the fiscal year of 2017–2018.[57] Previous years reported very similar trends of no cause findings.[58] Analyzing the seven years of statistical data

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49. *Id.* § 760.11(8); *see also* Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 899 (Fla. 2002).

50. FLA. STAT. § 760.11(7); *see also Sheridan*, 182 So. 3d at 790.

51. FLA. STAT. § 760.11(7); *see also* JOHNSON & OAKES, *supra* note 26 at 35.

52. FLA. STAT. § 760.11(7).

53. *See Sheridan*, 182 So. 3d at 790.

54. *Id.* at 792.

55. Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000).; *see also* FLA. STAT. § 760.01(3) (2019).

56. *See, e.g.*, 2018 FC ANN. REP., *supra* note 4, at 10.

57. *Id.*

58. *Compare id.*, *with* FLA. COMM'N ON HUM. RELS., ANN. REP. 2016–2017: A FISCAL YEAR IN REVIEW 11 (2017) [hereinafter 2017 FC ANN. REP.]; FLA. COMM'N ON HUM. RELS., ANN. REP. 2015–2016: A FISCAL YEAR IN REVIEW 11 (2016) [hereinafter 2016 FC ANN. REP.]; FLA. COMM'N ON HUM. RELS., ANN. REP. 2014–2015 11 (2015) [hereinafter 2015 FC ANN. REP.]; FLA. COMM'N ON HUM. RELS., ANN. REP. 2013–2014: A FISCAL YEAR IN REVIEW 6 (2014) [hereinafter 2014 FC ANN. REP.]; FLA. COMM'N ON HUM. RELS., ANN. REP.

available from the years spanning 2011–2018, the lowest number of no cause findings reported was 645[59] and the highest was 998.[60] While no cause findings have remained relatively constant, findings of cause made by the Florida Commission have plummeted exponentially.[61] From five years leading up to 2015, an average of 146 claims issued a finding of reasonable cause were reported.[62] In the years 2016, 2017, and 2018, findings of reasonable cause dropped to seventy-three, thirty-nine, and thirty-three, respectively.[63]

It is important to note that a large volume of charges received by the Florida Commission are not resolved within the statutory time frame, allowing plaintiffs to proceed to litigation virtually by chance.[64] An alarming fifty percent of claims filed with the Florida Commission between 2017–2018 were not closed within the statutory time frame.[65] In effect, plaintiffs that desire the opportunity to litigate may even hope that the Florida Commission drags its feet instead of barring their claims outright through a finding of no cause.[66] The claims subject to the Florida Commission's jurisdiction under the current workshare are, thus, subject to a metaphorical lottery.[67] While most claims are issued a finding of no cause and prevented from litigating, a large majority also skate through essentially, by happenstance.[68]

Despite the large number of discrimination charges that are blocked from pursuit in civil courts, employment discrimination cases account for an alarmingly miniscule amount of total civil claims filed annually in Florida state courts.[69] Revisiting the last year of data issued by the Florida

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2012–2013: A FISCAL YEAR IN REVIEW 6 (2013) [hereinafter 2013 FC ANN. REP.]; FLA. COMM'N ON HUM. RELS., ANN. REP. 2011–2012: A FISCAL YEAR IN REVIEW 6 (2012) [hereinafter 2012 FC ANN. REP.]; *and* FLA. COMM'N ON HUM. RELS., ANN. REP. 2010–2011: A FISCAL YEAR IN REVIEW 8 (2011) [hereinafter 2011 FC ANN. REP.].

59. 2015 FC ANN. REP., *supra* note 58, at 11.

60. 2017 FC ANN. REP., *supra* note 58, at 11.

61. *See, e.g.*, 2018 FC ANN. REP., *supra* note 4, at 10.

62. *Compare* 2011 FC ANN. REP., *supra* note 58, at 8, *with* 2012 FC ANN. REP., *supra* note 58 at 6, 2013 FC ANN. REP., *supra* note 58, at 6, 2014 FC ANN. REP., *supra* note 58, at 6, *and* 2015 FC ANN. REP., *supra* note 58, at 11.

63. 2016 FC ANN. REP., *supra* note 58, at 11; 2017 FC ANN. REP., *supra* note 58, at 11; 2018 FC ANN. REP., *supra* note 4, at 10.

64. *See* FLA. STAT. § 760.11(8) (2019).

65. *See* 2018 FC ANN. REP., *supra* note 4, at 9.

66. *Compare* 2018 FC ANN. REP., *supra* note 4, at 10, *with* FLA. STAT. § 760.11.

67. *See* FLA. STAT. § 760.11(8).

68. 2018 FC ANN. REP., *supra* note 4, at 10.

69. *See* FLA. OFF. OF STATE CT. ADMIN., FY 2017–2018 STATISTICAL REFERENCE GUIDE 4-4 (2018) [hereinafter 2018 CIRCUIT CIVIL FILINGS].

Commission for 2017–2018, that same year the Florida Office of the State Court Administrator reported a total of 1,717 "Employment Discrimination or Other" circuit civil cases filed in the state.[70]

Moreover, while 1,717 employment discrimination claims were filed in Florida state courts between 2017–2018, that number represents less than *one percent* of the total 164,253 civil court filings that year.[71] In fact, employment discrimination cases have never exceeded more than one percent of annual circuit civil filings in Florida for any year spanning the last decade.[72] While administrative remedies pose an important function as discussed below, employment discrimination claims are hardly flooding the court dockets and overwhelming our justice system.[73]

3. Policy Rationales for Mandating Administrative Remedies

Mandating a duty to exhaust administrative remedies as a prerequisite to litigation helps to support the integrity of the administrative process as a whole by "allow[ing] the executive branch to carry out its responsibilities as a co-equal branch of government."[74] Advocates argue that administrative remedies in employment discrimination cases help conserve valuable judicial resources by preventing meritless claims and providing parties with the opportunity to vindicate credible claims without judicial intervention.[75] One of the main arguments advanced in support of administrative remedies is that immediate judicial access has the potential to weaken the effectiveness of an agency by allowing people to ignore, or otherwise circumvent, their procedures.[76]

4. Criticisms of Imposing Administrative Remedies

Administrative agencies, including both the EEOC and the Florida Commission, have been widely criticized for being overworked and ineffective due to increasing workloads absent corresponding increases in

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70. *Id.*

71. *Id.* at 4-15.

72. *See, e.g.*, FLA. OFF. OF STATE CT. ADMIN., FY 2018–2019 STATISTICAL REFERENCE GUIDE 4-4 (2019) [hereinafter 2019 CIRCUIT CIVIL FILINGS].

73. *See id.* at 4-5.

74. Santana v. Henry, 12 So. 3d 843, 846 (Fla. 1st Dist. Ct. App. 2009) (quoting Key Haven Associated Enters. Inc. v. Bd. of Trs. of Internal Imp. Trust Fund, 427 So. 2d 153, 157 (Fla. 1982); Seann M. Frazier et. al., *Choice of Forum in Florida's Administrative and Circuit Courts: A Review of the Doctrine of Exhaustion of Administrative Remedies*, FLA. BAR J. July–Aug. 1997, at 62, 63.

75. *Santana*, 12 So. 3d at 846.

76. *Id.*

staff and budget.[77] The Florida Commission has been specifically characterized by employment attorneys representing plaintiffs as a politically charged organization that cares more about combating frivolous suits than establishing equal opportunity.[78] Nevertheless, the law appears clear that administrative remedies are here to stay as courts consistently uphold and enforce administrative mandates despite the frequency in which they are challenged.[79]

III. OUTLINING THE PROCEDURAL PROBLEM: FLORIDA'S WORKSHARE AGREEMENT

In Florida, not all charges of discrimination are subject to the stringent determination standards of the Florida Commission and subsequently, are denied access to our courts.[80] Florida, like many other states, currently employs a workshare agreement with the EEOC to process and investigate charges of discrimination.[81] The failure to adopt uniform agency determinations, or otherwise define the legal effect of an EEOC determination on FCRA claims, brought significant confusion to state courts during the infancy years of Florida's workshare.[82] As courts interpreted the legal effect of a dual-filed charge under Florida's current workshare, a procedural system that favors one jurisdiction over the other has irrefutably emerged.[83]

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77. JOHNSON & OAKES, *supra* note 26, at 7; Maryam Jameel & Joe Yerardi, *Despite Legal Protections, Most Workers Who Face Discrimination Are on Their Own*, CTR. FOR PUB. INTEGRITY (Feb. 28, 2019), http://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/workplace-discrimination-cases/.

78. *See* JOHNSON & OAKES, *supra* note 26, at 3–4.

79. *See* Fort Bend Cnty. v. Davis, 139 S. Ct. 1843, 1848 (2019); Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 898 (Fla. 2002); Sheridan v. State Dep't of Health, 182 So. 3d 787, 792 (Fla. 1st Dist. Ct. App. 2016); McElrath v. Burley, 707 So. 2d 836, 838 (Fla. 1st Dist. Ct. App. 1998).

80. *See* WORKSHARE AGREEMENT, *supra* note 5, at 2; U.S. EQUAL EMP. OPPORTUNITY COMM'N, FY 2019 EXTENSION OF WORKSHARING AGREEMENT (2019) [hereinafter WORKSHARE EXTENSION]. The original workshare contract and the recent extension is available for viewing by clicking the link located on the Florida Commissions Website. *Employment: EEOC Worksharing Agreement*, FLA. COMM'N HUM. RELS., http://fchr.myflorida.com/employment (last visited Dec. 14, 2020).

81. *Employment: EEOC Worksharing Agreement*, *supra* note 80.

82. *See* Curtin, *supra* note 2, at 531–32.

83. *See* discussion *infra* Section III.C; WORKSHARE AGREEMENT, *supra* note 5, at 2; WORKSHARE EXTENSION, *supra* note 80.

A. *The Basic FEPA Workshare*

The Florida Commission is just one of ninety-two state and local Fair Employment Practice Agencies ("FEPA") that the EEOC currently contracts with through annual work sharing agreements.[84] In recognition of the procedural overlap bound to arise under both federal and state protections, Congress authorized the EEOC to cooperate with state agencies by entering into work sharing agreements that provide for division of labor in processing charges of discrimination where there is concurrent state and federal jurisdiction.[85] These workshares simultaneously help agencies avoid duplicative investigations of the same allegations while helping plaintiffs preserve their rights under both state and federal law.[86]

B. *Florida's Workshare Agreement*

Under Florida's current workshare agreement, the EEOC and the Florida Commission each designate the other as an agent for the purposes of receiving and processing charges, thus allowing a party to elect to "dual-file" a charge of discrimination with both agencies.[87] Dually filed charges can be submitted to either the EEOC or the Florida Commission but are recognized as filed with both agencies.[88] While charges can be transferred between agencies in accordance with the workshare agreement or by mutual agreement, the agency that receives the charge first will generally retain it for investigation.[89] Thus, each charge of discrimination is subject to the investigatory finding of the agency that receives and retains the charge.[90]

The original statutory scheme of Title VII anticipated that all charges would first be investigated by a deferral agency, such as the Florida Commission, and subsequently reviewed by the EEOC.[91] However, overwhelming workloads have caused the EEOC to instead "utilize a work-

84. *See United States Equal Employment Opportunity Commission (EEOC) Strategic Plan for Fiscal Years 2018-2022*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/us-equal-employment-opportunity-commission-eeoc-strategic-plan-fiscal-years-2018-2022 (last visited Dec. 14, 2020).

85. Barbara J. Fick, *Of Time Limits, Worksharing and Deferral*, 8 1987 PREVIEW U.S. SUP. CT. CAS. 226, 226 (1988).

86. *Id.* at 228.

87. *See* WORKSHARE AGREEMENT, *supra* note 5, at 2.

88. *Id.*

89. *Id.*

90. *Id.*

91. Fick, *supra* note 85, at 226.

splitting procedure."[92] The current workshare agreement "divides the principle jurisdiction of the agencies geographically, with the [Florida Commission] processing most dual-filed claims in North Florida and the EEOC processing most claims from South Florida."[93] Although the right is not frequently exerted, "each agency maintains jurisdiction to perform a substantial weight review of the determination[]" issued by the other.[94] While "[t]he division of work is not solely [calculated] based on geography," the large majority of claims are divided by this standard.[95]

Importantly, the EEOC and the Florida Commission do not share uniform investigatory processes, nor do they issue the same categories of conclusions.[96] The impact of these conclusions has a disparate impact on a claimant's ability to pursue their claims in a civil courtroom.[97] The lack of uniformity in agency findings under the current workshare agreement, in conjunction with the legal effect of an EEOC determination as refined by

92. *The Florida Civil Rights Act*, *supra* note 14; *see also* Donna Ballman, *Is the Florida Commission on Human Relations A Malignant Force Against Employees?*, LEXISNEXIS: LEGAL NEWSROOM (Dec. 13, 2012), http://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/posts/is-the-florida-commission-on-human-relations-a-malignant-force-against-employees. It is important to note that the Workshare agreement itself is silent on geographical jurisdiction. WORKSHARE AGREEMENT, *supra* note 5, at 1–6. However, upon visiting a plethora of Employment firms' websites, every law firm in North Florida mentions a charge of discrimination with the Florida Commission whereas every law firm in South Florida references the EEOC. *E.g.*, *Employment Law Attorneys*, DOLMAN L. GRP., http://www.dolmanlaw.com/legal-services/employment-law-attorneys/ (last visited Dec. 14, 2020); *Employment Discrimination | Processing a Discrimination Claim with the FCHR*, PRINTY & PRINTY, P.A. (June 29, 2016), http://printylawfirm.com/employment-discrimination-discr-process/. This could be, in large part, because the Florida Commission's headquarters are located in Tallahassee whereas the EEOC's Florida office is located in Miami. *Compare* 2018 FC ANN. REP., *supra* note 4, at 25, *with Miami District Office*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/field-office/miami/location (last visited Dec. 14, 2020). Notwithstanding current administrative orders allowing electronic submission of charges in light of COVID-19, charges of discrimination have to be filed in person. *See Miami District Office*, *supra*. This requirement lends support to the position that the workshare defines geographical jurisdiction in an unpublished document. *The Florida Civil Rights Act*, *supra* note 14. Regardless of whether this geographical boundary exists in a document not available to the public or merely exists in common practice, the issues raised herein remain the same. *Id.*; WORKSHARE AGREEMENT, *supra* note 5, at 2.

93. *The Florida Civil Rights Act*, *supra* note 14.

94. *Id.*

95. *Id.*

96. *See* discussion *infra* Section III.C; *compare* FLA. STAT. § 760.11 (2019), *with* Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 893 (Fla. 2002).

97. *See* Curtin, *supra* note 2, at 533.

case law, has inadvertently created unequal access to justice under the FCRA.[98]

C. *The Legal Effect of an EEOC Determination*

Although the workshare itself is silent on the reciprocity of agency determinations, the Florida Commission expressly states on its website that "the determination issued by the EEOC serves as the determination of both agencies."[99] However, the EEOC and the Florida Commission do not share uniform determination decisions, which creates conflict under the rigid pre-suit mandates of the FCRA.[100] A finding issued by the Florida Commission issues one of two concrete findings: cause or no cause.[101] On the other hand, a standard EEOC determination form lists ten applicable findings that can be checked by the investigator.[102] These include a multitude of procedural bases for dismissal including, "failed to provide information . . . or otherwise failed to cooperate," listed as box five, and while "reasonable efforts were made to locate you, we were not able to do so," listed as box six.[103] Importantly, the large majority of claims receive the following determination that the Florida Commission does not offer:

> The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the Respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.[104]

There was early confusion as to whether an "unable to conclude" finding operated as a finding of no cause under the workshare and precluded suit under the FCRA, producing an early string of inconsistent case law.[105]

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98. *See id.* at 523–24.

99. *You Ask We Answer: Case Status with the EEOC*, FLA. COMM'N ON HUM. RELS., http://fchr.myflorida.com/faq-frequently-asked-questions (last visited Dec. 14, 2020).

100. *Compare* FLA. STAT. § 760.11, *with Woodham*, 829 So. 2d at 893.

101. *See* FLA. STAT. §§ 760.11(3)–(8).

102. *Woodham*, 829 So. 2d at 893.

103. Segura v. Hunter Douglas Fabrication Co., 184 F. Supp. 2d 1227, 1231 (M.D. Fla. 2002).

104. *Woodham*, 829 So. 2d at 893; *see also* FLA. STAT. § 760.11.

105. *Compare Woodham*, 829 So. 2d at 893, *with* Cisko v. Phoenix Med. Prods., Inc., 797 So. 2d 11, 12 (Fla. 1st Dist. Ct. App. 2001) (addressing lower courts' refusal to equate unable to conclude with no reasonable cause), *and* White v. City of Pompano Beach, 813 So. 2d 1003, 1006 (Fla. 4th Dist. Ct. App. 2002) (refusing to equate unable to conclude with no reasonable cause).

The Supreme Court of Florida resolved the issue in the case of *Woodham v. Blue Cross & Blue Shield of Fla. Inc.*,[106] refusing to equate "unable to conclude" with a determination that "there is not reasonable cause."[107] The court reasoned that to hold otherwise would be contrary to the plain language of the statute and incompatible with the court's requirement to "liberally constr[ue] the FCRA in favor of a remedy for those who are victims of discrimination . . . ."[108] In reaching their holding, the Supreme Court of Florida expressly concluded that the language used by the EEOC does not state the claim was dismissed for *lack of merit*, but rather that it lacked sufficient information from which to make a determination.[109]

It has been close to two decades since the ruling of *Woodham*, and as of yet, the Florida Commission has yet to adopt an analogous finding of "unable to conclude."[110] While the Supreme Court of Florida granted review of *Woodham* because they found the question raised therein to be of "great public importance," the court's answer begs the exploration of more questions.[111]

1. Access to Information v. Lack of Merit

It strains logic to believe that the Florida Commission has the staff and resources to thoroughly investigate every charge of discrimination it receives and render a determination exclusively on merit, while the EEOC brazenly admits that it cannot.[112] In general, attorneys representing victims of employment discrimination often initiate cases based on substantially less information than an attorney might possess for other types of claims.[113] "Employers often do not provide reasons for their employment decisions . . . ."[114] Frequently, the information necessary to corroborate a plaintiff's allegations lies within the exclusive knowledge and control of their employers.[115] In many cases, attorneys are forced to initiate suit with little more than the word of the plaintiff.[116]

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106. 829 So. 2d 891 (Fla. 2002).
107. *Id.* at 897.
108. *Id.*
109. *Id.* at 896–97.
110. *See* FLA. STAT. § 760.11 (2019); *Woodham*, 829 So. 2d at 893.
111. *See Woodham*, 829 So. 2d at 892.
112. *See id.* at 896.
113. *See* Selmi, *supra* note 1, at 556, 558, 570.
114. *Id.* at 570.
115. *See* Lonny Scheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 217 (2007).
116. *See* Selmi, *supra* note 1, at 570.

Naturally, employees likewise have limited information at their disposal when they file a charge of discrimination with the Florida Commission.[117] While the Florida Commission utilizes a variety of fact-finding models to collect information, this process undeniably falls short of formal discovery proceedings.[118] First and foremost, investigations are conducted by investigators, not licensed attorneys.[119] Despite the Florida Commission's express statement that "[i]t is the [i]nvestigator's job to determine if the evidence is relevant to [the] charge," these investigators arguably lack the legal expertise necessary to render such determinations.[120]

Generally, the Florida Commission gathers information by sending respondents and witnesses a generic "request for information."[121] These requests contain form questions and are not tailored to the facts of a particular case.[122] Surely, on some occasions, employers and witnesses fail to respond to a request for information altogether.[123] While the Florida Commission has the authority to compel the cooperation and testimony of witnesses through subpoenas, the agency does not publish any statistical data on the frequency in which that right is exercised.[124] While the Florida Commission states that such a failure would allow for an inference "that such information is adverse to the respondent's interest" in rendering a determination of cause,[125] the statistical data does not support that this happens frequently.[126] Moreover, if a witness *does* appear before the Florida Commission, the interview is conducted absent plaintiff's counsel, and thus outside of the adversarial system of justice on which our legal system was founded.[127]

2. Legislative Intent in Light of "Unable to Conclude"

In the absence of an analogous, unable to conclude determination, how then is the Florida Commission inclined to rule if they lack the

117. *See id.*
118. *See* FLA. COMM'N ON HUM. RELS., INVESTIGATOR TRAINING MANUAL 16 (2005).
119. *See id.*
120. *Id.*
121. *Id.* at 20–24.
122. *See id.* at 24.
123. *See* FLA. COMM'N ON HUM. RELS., *supra* note 118, at 25.
124. *Id.*
125. *Id.*
126. *See, e.g.*, 2018 FC ANN. REP., *supra* note 4, at 10.
127. *See* FLA. COMM'N ON HUM. RELS., *supra* note 118, at 25.

information necessary to render a determination on the merits of a charge?[128] Courts tasked with interpreting the intent of the Florida Legislature have held:

> [p]roblematically, by employing a technical use of the English language, the second category [of "no cause"] is broader than intended and includes all possible outcomes other than a reasonable cause finding. The Florida Legislature used "reasonable cause" to describe the first category and "not reasonable cause" to describe the second category. 'Not reasonable cause' is the negative of 'reasonable cause.' That is, 'not reasonable cause' is every response other than a finding of reasonable cause.[129]

Using the framework of this analysis, the category of "not reasonable cause" would encompass all scenarios in which "reasonable cause" was not expressly found.[130] Findings of no cause axiomatically include no cause found due to lack of information for any number, or combination, of informational asymmetries.[131] This Comment suggests that the no cause issued by the Florida Commission is a misnomer and should be categorized as "unable to conclude" when the situation demands.[132]

The procedural problem alleged in this Comment was created by contract and has been solidified through decades of Florida case law.[133] Under the current workshare, charges filed in the EEOC's jurisdiction will most likely result in a determination of "unable to conclude," whereas charges filed in the Florida Commission's jurisdiction will likely result in a determination of no cause.[134] By extension, charges filed in the EEOC's jurisdiction have greater access to the statutory right to a jury trial under the FCRA, whereas the majority of charges filed in the Florida Commission's jurisdiction will be barred.[135] In synthesizing case law with the current state of the workshare agreement, it seems clear that the greatest opportunity for

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128. *See* Segura v. Hunter Douglas Fabrication Co., 184 F. Supp. 2d 1227, 1231–32 (M.D. Fla. 2002).

129. *Id.* at 1231.

130. *See id.*

131. *See id.*

132. *Compare id.* (analyzing the intent of the Florida legislature to conclude that a finding of no cause is issued where *anything other than cause* is found), *with* Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 896 (Fla. 2002) (refusing to equate unable to conclude with lack of merit).

133. *See Segura*, 184 F. Supp. 2d at 1232; *Woodham*, 829 So. 2d at 892, 897; WORKSHARE AGREEMENT, *supra* note 5, at 1.

134. *Compare* Ballman, *supra* note 92, *with* 2018 FC ANN. REP., *supra* note 4, at 10.

135. *See* Ballman, *supra* note 92; 2018 FC ANN. REP., *supra* note 4, at 11.

civil redress strongly favors those plaintiffs within the EEOC's jurisdiction.[136] A plaintiff's access to the remedies prescribed by the statute is therefore being delineated by arbitrary geographical boundaries rather than afforded exclusively on merit.[137]

IV. QUESTIONS OF EQUAL ACCESS AND DUE PROCESS

A. *A Direct Assault on the Constitutionality of the Florida Commission*

The administrative remedies imposed by the FCRA have been directly challenged as an unconstitutional access to courts and a deprivation of due process of law.[138] In *McElrath v. Burley,*[139] a plaintiff, who received a no cause determination from the Florida Commission, sued the executive director in his official capacity seeking to have the procedures governing a party's ability to sue declared unconstitutional.[140]

Burley argued that the administrative procedures governing a party's ability to seek civil redress were "unconstitutional as a denial of access to [the] courts and violative of due process and equal protection."[141] Plaintiff's constitutional challenge did not stem from any issues arising under the workshare agreement between the EEOC and the Florida Commission.[142] Rather, Burley argued that the statute unconstitutionally allowed "claimants whose claims are not processed within 180 days, regardless of merit, have the right to proceed directly to circuit court without having to go through the administrative process to which the statute relegated [her] . . . ."[143] Burley argued two plaintiffs with identical charges are being treated differently under the statute virtually by happenstance.[144] The trial court agreed, holding that the diversion from court violated the access-to-courts, due-process, and equal-protection provisions of the Florida Constitution and declared the no cause provision of the FCRA unconstitutional.[145] The

136. *Compare* WORKSHARE AGREEMENT, *supra* note 5 at 1, *with Segura*, 184 F. Supp. 2d at 1231–32 (analyzing the intent of the Florida legislature to conclude that a finding of no cause is issued where "anything other than cause" is found), *and Woodham*, 829 So. 2d at 897 (refusing to equate unable to conclude with lack of merit and allowing claimants issued a finding of "unable to conclude" to proceed with litigation under the FCRA).

137. *See* Curtin, *supra* note 2, at 524–25.

138. McElrath v. Burley, 707 So. 2d 836, 839 (Fla. 1st Dist. Ct. App. 1998).

139. 707 So. 2d 836 (Fla. 1st Dist. Ct. App. 1998).

140. *Id.* at 838.

141. *Id.*

142. *See id.*

143. *Id.*

144. *McElrath*, 707 So. 2d at 838.

145. *Id.*

victory for discrimination plaintiffs was short-lived and was quickly reversed by the First District Court of Appeals.[146]

1. Issues of Equal Protection

While many of the conclusions reached by the First District Court of Appeals can be rationally applied to unequal access under the workshare agreement, the problem alleged herein can be equally distinguished.[147] The equal protection argument advanced in *McElrath* was that two individuals could have similarly situated claims but receive different access to courts based on the Florida Commission's ability to render a timely determination.[148] The court's main focus in this case was, arguably, to ensure that the inability of the Florida Commission to issue any ruling within the statutory time frame did not foreclose relief to plaintiffs through no fault of their own.[149]

In rejecting the plaintiff's equal protection arguments, the court held that "it is not necessary under the equal protection clause to treat all persons in an identical manner."[150] An equal protection analysis employs a "minimum scrutiny test," which requires only that "a statute bear some reasonable relationship to a legitimate state purpose."[151] In employing said test, the court held that, while a statute "may result incidentally in some inequality, or that it is not drawn with mathematical precision[s] will not result in its invalidity."[152] The court upheld the constitutionality of the no cause provision on the premise that the statute itself does not contain any classification which discriminates between charging parties by mandating all persons seeking relief to go through the same screening process.[153] The court reasoned that it was not until a determination was made that there was any notable divergence in the treatment of charging parties.[154]

While this may hold true as applied to two parties filing with the Florida Commission, there is an arguable divergence in the treatment of charging parties under Florida's current intra-agency workshare, which irrefutably results in much more than some *incidental* inequality.[155] While

146. *Id.* at 841.
147. *See id*. at 839, 841.
148. *Id.* at 839.
149. *McElrath*, 707 So. 2d at 840.
150. *Id.* at 839.
151. *Id.* at 839–40.
152. *Id.* at 840.
153. *Id.* at 840, 841.
154. *McElrath*, 707 So. 2d at 840.
155. *Compare* Segura v. Hunter Douglas Fabrication Co., 184 F. Supp. 2d 1227, 1231–32 (M.D. Fla. 2002) (analyzing the intent of the Florida legislature to conclude

equal protection may not mandate treating all persons in an identical manner, the lack of harmony between state and federal agencies is overwhelmingly subjecting plaintiffs to different administrative standards based solely on where they reside.[156]

2. Issues of Due Process

Under Florida's common law, an employee was considered to hold at-will employment, which could be terminated by his employer at any time without incurring liability.[157] The FCRA modified the common law and "created a cause of action for unlawful termination."[158] For this reason, the First District Court of Appeals rejected the plaintiff's due process challenge in *McElrath*, holding that "[t]he constitutional right of access to courts guaranteed by Article I, Section 21, of the Florida Constitution, protects only rights which existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."[159] Discrimination, retaliation, and unlawful termination were created by the Florida Legislature, and those particular causes of action are not afforded a constitutional right of access to courts.[160] Moreover, the court reasoned that "due process is satisfied when a party has his 'day in court' by virtue of an administrative hearing and the right to appeal to a judicial tribunal."[161]

3. The Insufficiency of an Administrative Hearing as a Remedy

This Comment suggests that the administrative hearing process described below falls short of a plaintiff's "day in court" as held by the First District Court of Appeal.[162] While civil due process is a flexible confine wherein states are free to impose conditions on the right to institute litigation, due process nonetheless demands a meaningful opportunity to be heard in a meaningful way.[163] Should a court impose administrative remedies, they

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that a finding of no cause is issued where anything other than cause is found), *with* Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 896 (Fla. 2002) (refusing to equate "unable to conclude" with "lack of merit"); *see also* 2018 FC ANN. REP., *supra* note 4, at 10.

156. *See Woodham*, 829 So. 2d at 895; *Segura*, 184 F. Supp. 2d at 1231–32; 2018 FC ANN. REP., *supra* note 4, at 12.

157. Curtin, *supra* note 2, at 523.

158. *Id.*

159. *McElrath*, 707 So. 2d at 839.

160. *See id.*

161. *Id.* at 841 (citing Scholastic Sys., Inc. v. LeLoup, 307 So. 2d 166, 169 (Fla. 1974); *see also* Dep't of Agric. & Consumer Servs. v. Bonanno, 568 So. 2d 24, 30 (Fla. 1990) (per curiam).

162. *See* Curtin, *supra* note 2, at 525; *McElrath*, 707 So. 2d at 841.

163. *See McElrath*, 707 So. 2d at 841.

must be both "available and adequate," and cannot be so "devastating that the proposed administrative remedies would offer too little or would be too late."[164]

A temperate glance at the reality of an administrative hearing raises credible concerns about the adequacy of the remedy as compared to a day in court.[165] As previously detailed, the overwhelming majority of parties that file a charge of discrimination with the Florida Commission are issued a finding of no cause and locked into the sole remedy of an administrative hearing.[166] If a hearing is successfully petitioned for within thirty-five days, the claimant will appear before an administrative law judge for a proceeding analogous to a bench trial.[167] Even in the best-case scenario, the employee is only entitled to lost wages and costs if able to prevail; the compensatory or punitive damages available under the statute are not available in this setting.[168]

If the administrative law judge rules in the party's favor, a panel of commissioners thereafter approve, reject, or modify any relief granted.[169] On the rare occasion a party is afforded relief, the employer is likely to appeal as entitled by the statute.[170] If the employee is able to prevail once again, they must renounce and forfeit all recovery won before being entitled to proceed to court with a jury, risking the chance of losing relief previously afforded.[171] As of 2012, it was reported that "[i]n the [twenty] years this system has been in place, not one employee has successfully navigated [this system]."[172]

V. THE CURRENT RELEVANCE OF AN OLD PROCEDURAL PROBLEM

Plaintiffs that fall within the purview of the Florida Commission's jurisdiction are being disproportionately denied access to Florida's courts.[173]

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164. Frazier et al., *supra* note 74, at 63; Communities Fin. Corp. v. Fla. Dep't of Env't Regul., 416 So. 2d 813, 816 (Fla. 1st Dist. Ct. App. 1982).

165. *See* JOHNSON & OAKES, *supra* note 26, at 51.

166. *Id*; *see also* FLA. STAT. § 760.11(7) (2019).

167. *See* FLA. STAT. § 760.11(7); JOHNSON & OAKES, *supra* note 26, at 51.

168. *See* JOHNSON & OAKES, *supra* note 26, at 51.

169. *Id.* at 51–52.

170. *Id.* at 52.

171. *Id.*

172. *Id.*

173. *Compare* Segura v. Hunter Douglas Fabrication Co., 184 F. Supp. 2d 1227, 1231–32 (M.D. Fla. 2002) (analyzing the intent of the Florida legislature to conclude that a finding of no cause is issued where anything other than cause is found), *with* Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 893 (Fla. 2002) (refusing to interpret an "unable to conclude" finding issued by the EEOC to mean that the claim lacked merit); *see also* 2018 FC ANN. REP., *supra* note 4, at 10.

A finding of no cause deprives a plaintiff access to civil adjudication, the opportunity for meaningful discovery, early mediation, and—ultimately—settlement negotiations.[174] While the procedural deficiency created by Florida's workshare is by no means a novel problem, recent events revitalize the necessity of its resolution as new charges of discrimination are predicted.[175]

A. *Florida's Workshare and Black Lives Matter*

Amidst what has been hailed America's long overdue awakening to systemic racism, Americans are finally engaging in meaningful, albeit overdue, conversations about race inequality in our country.[176] The Black Lives Matter movement has empowered employees across all employment sectors to share their lived experiences with workplace discrimination.[177] The wave of firsthand accounts and the rise of public consciousness surrounding discrimination has been said to draw parallels of the #MeToo movement of 2017.[178] Following the rise of the #MeToo movement, there was a natural increase in sex discrimination and harassment litigation throughout the country.[179] As employees continue to take to social media to recount their experiences of employment discrimination, law firms and corporations alike expect a similar surge in race discrimination lawsuits in the near future.[180]

If this problem remains unresolved by the Florida Legislature, victims of race discrimination are at risk of falling through the cracks of the current workshare agreement and being denied a voice in our civil courtrooms.[181] In fact, should the procedural problem outlined herein persist unabated, charges of discrimination based on race will arguably be the class

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174. *See* FLA. STAT. § 760.11(7) (2019).

175. *Id.*; *see also Woodham*, 892 So. 2d at 893; WORKSHARE AGREEMENT, *supra* note 5, at 2. This Comment suggests that the procedural problem was created at the inception of Florida's workshare agreement and solidified through the Supreme Court of Florida's ruling in *Woodham v. Blue Cross & Blue Shield of Florida*. *Woodham*, 892 So. 2d at 893; WORKSHARE AGREEMENT, *supra* note 5, at 2.

176. *See* Justin Worland, *The Overdue Awakening: Ending centuries of racism requires systemic change*, TIME, June 22, 2020, at 26, 28.

177. *See* Ellen Milligan et al., *Black Lives Matter to Spark Rise in Race Discrimination Claims*, BLOOMBERG, (July 17, 2020, 1:00 AM) http://www.bloomberg.com/news/articles/2020-07-17/black-lives-matter-to-spark-rise-in-race-discrimination-claims.

178. *Id.*

179. *Id.*

180. *Id.*

181. *See e.g.*, 2018 FC ANN. REP., *supra* note 4, at 10.

most adversely affected.[182] In any given year, the most frequent charge of discrimination filed is on the basis of race; putting black employees living in North Florida at the greatest risk, regardless of whether the expected increase of employment litigation proves accurate.[183]

B. *Florida's Workshare and the Expansion of Title VII*

The recent expansion of Title VII likewise necessitates the resolution of the procedural problem raised in this Comment.[184] The Supreme Court of the United States has recently decreed that Title VII's employment prohibitions based on sex extend to employees discriminated against on the basis of sexual orientation and gender identity in the consolidated cases of *Equal Employment Opportunity Commission ("EEOC") v. R.G. & G.R. Harris Funeral Homes, Inc.*,[185] *Zarda v. Altitude Express, Inc.*,[186] and *Bostock v. Clayton County Board of Commissioners*.[187]

Like Title VII, the FCRA currently prohibits employment discrimination on the basis of sex but has long left the term undefined in the statute.[188] The term "sex" has been liberally construed and largely left to

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182. *Id.*; *see also* 2017 FC ANN. REP., *supra* note 58, at 11; 2016 FC ANN. REP., *supra* note 58, at 11; 2015 FC ANN. REP., *supra* note 58, at 11. In recent years there has been a massive influx of disability discrimination charges filed with the Florida Commission. *See* 2018 FC ANN. REP., *supra* note 4, at 10; 2017 FC ANN. REP., *supra* note 58, at 11; 2016 FC ANN. REP., *supra* note 58, at 11; 2015 FC ANN. REP., *supra* note 58, at 11. It may appear at first glance that charges of discrimination filed on the basis of disability contend with, if not surpass, charges filed on the basis of race, in the last year of available data. *See* 2018 FC ANN. REP., *supra* note 4, at 10. However, when race and color are appropriately aggregated, charges of discrimination based on race continue to be the most frequently filed charge. *Id.* Charges based on race have led by a landslide virtually every year proceeding 2015. *See id.*; 2017 FC ANN. REP., *supra* note 58, at 11; 2016 FC ANN. REP., *supra* note 58, at 11; 2015 FC ANN. REP., *supra* note 58, at 11. This conclusion is also supported by charge statistics reported by the EEOC when appropriately aggregated. *See* WORKSHARE AGREEMENT, *supra* note 5, at 2; Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data (Jan. 24, 2020) http://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data [hereinafter EEOC Press Release].

183. *See* 2018 FC ANN. REP., *supra* note 4, at 10; Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

184. *See Bostock*, 140 S. Ct. at 1737.

185. 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom.*, Bostock v. Clayton Cnty., Georgia 140 S. Ct. 1731 (2020).

186. 883 F.3d 100 (2d. Cir. 2018), *aff'd sub nom.*, Bostock v. Clayton Cnty., Georgia 140 S. Ct. 1731 (2020).

187. 723 F. App'x 964 (11th Cir. 2018), *rev'd*, 140 S. Ct. 1731 (2020); *Bostock*, 140 S. Ct. at 1737.

188. Kelly M. Peña, *LGBT Discrimination in the Workplace: What Will the Future Hold?*, FLA. BAR J., Jan. 2018, at 35, 37.

judicial interpretation in Florida Courts.[189] At present, it remains unclear if and when the Florida Legislature will amend the FCRA to reflect the inclusion of sexual orientation and gender identity under the umbrella of "sex."[190] Prior to the United States Supreme Court's momentous ruling, legislators have tried and failed to amend the FCRA and extend its protections to discrimination based on sexual orientation and gender identity.[191] During Florida's 2017 legislative session, Senate Bill 666 and House Bill 623 were both introduced for consideration, but were indefinitely postponed and later withdrawn from consideration.[192]

However, the legislature need not act for new cases based on sex to seek refuge under the FCRA.[193] Not only is federal case law applicable to FCRA claims, but "[a]ny changes to federal case law on Title VII interpretation necessitates a change in the interpretation of the FCRA."[194] Thus, cannons of statutory interpretation and basic legal principles of stare decisis and federal preemption support the conclusion that such claims are on the horizon.[195]

VI. PROPOSED SOLUTIONS

It is worth noting that an aggrieved party *might* still have viable discrimination claims under Title VII or other class-specific federal laws should the Florida Commission bar such claims under the FCRA.[196] If the Florida Legislature continues to ignore the problems the workshare creates, North Floridians are likely to abandon litigating under the rigid confines of the FCRA altogether in favor of the more laissez-faire scheme of Title VII.[197] Thus, legislative inaction could effectively deprive Florida of its state interest in protecting its discrimination victims while potentially stressing federal dockets.[198] Instead, this Comment advocates for three possible solutions that could easily be undertaken by the Florida Legislature to eliminate the problem raised by this Comment.[199]

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189. *Id.*
190. *See id.* at 37–38.
191. *Id.* at 36.
192. *Id.* at 37.
193. Palm Beach Cnty. Sch. Bd. v. Wright, 217 So. 3d 163, 165 (Fla. 4th Dist. Ct. App. 2017) (en banc).
194. *Id.*
195. *See id.*
196. *See* JOHNSON & OAKES, *supra* note 26, at 52.
197. *See id.*
198. *See id.*
199. *See id.* at 50; FLA. STAT. §§ 760.40–.60 (2019); Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 897 (Fla. 2002).

A. *Align the Determinations Issued by the Florida Commission with the Determinations Issued by the EEOC*

The most prudent solution that can be undertaken is to harmonize the Florida Commission with the EEOC by adopting an analogous finding of "unable to conclude."[200] This solution would honor the intent of the Florida Legislature when the FCRA was enacted by leaving the statute largely unchanged.[201] This solution would allow the Florida Commission to maintain its right to deny access to the FCRA when a claim is blatantly unmeritorious.[202] However, potentially credible claims that cannot be proven or disproven within the statutory time frame would be guaranteed the right to pursue civil redress when the situation demands.[203]

B. *Align the Florida Commission with Other State Fair Employment Practice Agencies*

Removing the "no cause" provision of the FCRA would naturally align the Florida Commission with both the EEOC and the majority of state FEPAs successfully operating throughout the country.[204] The EEOC used to have a no cause provision, and many state FEPAs continue to retain the determination.[205] The key difference lies within the impact that a finding of no cause has on a claimant's ability to pursue civil remedies post-investigation.[206] While various discrimination statutes may still impose the requirement to exhaust administrative remedies, the effect of a no cause finding generally involves no more than a mere refusal of further agency involvement.[207] Under such models, the integrity of the administrative process is preserved by keeping agencies involved in allegations and affording them the opportunity to take action while not infringing on a party's access to courts.[208]

200. *See Woodham*, 829 So. 2d at 897.
201. *See* FLA. STAT. § 760.11 (2019).
202. *Id.*
203. *See Woodham*, 829 So. 2d at 894.
204. *See* JOHNSON & OAKES, *supra* note 26, at 50–51.
205. *Id.* at 50.
206. *Id.* at 52.
207. *Id.*
208. *Id.*

C. *Align the Florida Civil Rights Act with Florida's Other Discrimination Statutes*

Right below the FCRA, contained within the same chapter of Florida Statutes, lies the Florida Fair Housing Act ("FFHA").[209] Both the FCRA and the FFHA: prohibit discrimination based on the same protected classes, are enforced by the same agency, and require the same duty to "exhaust administrative remedies."[210] Like Title VII, the FFHA does not contain a corresponding no cause restriction.[211] At present, a civil action may be filed after 180 days of filing a complaint with the Florida Commission, regardless of whether an express finding of cause has been found.[212] In fact, the FFHA expressly states that "[t]his subsection does not prevent any other legal or administrative action provided by law."[213] This model has not resulted in an overwhelming increase in housing discrimination claims, nor has it divested the Florida Commission of the opportunity to investigate and remedy egregious violations of the statute.[214]

1. A Comparison of Pending Legislation

Legislative changes are currently underway to completely eliminate the administrative remedies currently required under the FFHA.[215] A new bill introduced as HB 175 passed by way of unanimous vote in both chambers as SB 374.[216] SB 347, enrolled on March 12, 2020, and pending action by the Governor, will allow a civil action

> regardless of whether . . . a complaint with the Florida Commission [has been filed], the [Florida] Commission has resolved a complaint if the aggrieved person chose to file one, or any particular amount of time has passed since the . . . complaint [was filed] with the [Florida] Commission.[217]

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209. *See* FLA. STAT. §§ 760.34–.37 (2019).
210. *See id.*; FLA. STAT. § 760.11.
211. *See* FLA. STAT. § 760.34.
212. *Id.*
213. *Id.* § 760.35(d).
214. *See* 2019 CIRCUIT CIVIL FILINGS, *supra* note 72, at 1.
215. *See* Fla. H.R. Comm. on Human Rel., HB 175 (2020) Final Bill Analysis 1 (Mar. 24, 2020), http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0175z.CJS.DOCX&DocumentType=Analysis&BillNumber=0175&Session=2020.
216. *See* Fla. S. Comm. on Gov't. Oversight & Acct., SB 374 (2019) Staff Analysis 1 (Dec. 6, 2019), http://www.flsenate.gov/Session/Bill/2020/374/Analyses/2020s00374.go.PDF.
217. *Id.*

The bill limits an aggrieved person from filing a civil action in only one of two instances.[218] The first instance is if the claimant has consented to a conciliation agreement or if a hearing has already been commenced by an administrative law judge.[219]

The difference between the administrative mandates in like discrimination statutes is attributable to issues of federal funding.[220] For more than a decades time, the HUD has cautioned that the Florida court's interpretation of the FFHA is inconsistent with federal law that allows victims to file suit regardless of whether a complaint has been filed with HUD.[221] Florida's continued failure to make this change has "caused Florida law not to be certified [by HUD] as substantially equivalent to federal law," and thereby threatened hundreds of thousands of dollars currently used to conduct investigations each year.[222]

The FCRA recently underwent its own legislative changes through the enactment of Florida House Bill 255, signed into law by Florida Governor Ron DeSantis on June 30, 2020.[223] While the amendment affects seven sections of the FCRA, no pertinent change was made that would provide relief to the issues raised in this Comment.[224] Conversely, the new law requires a plaintiff be "promptly notified" of rights on the occasion that the Florida Commission fails to render a determination within its statutory period and defines a statute of limitations in such instance.[225] While the statute was previously silent on the issue, case law had previously held a claim to be viable in such instance for up to four years.[226] HB 255 amended the FCRA to mandate a civil action be filed within 365 days of the failure to

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218. *Id.*

219. *Id.*

220. *Id.*

221. *See* Fla. S. Comm. on Gov't. Oversight & Acct., SB 374 (2019) Staff Analysis, at 5; Brendan Rivers, *Fla. Bill Would Make It Easier For Victims of Housing Discrimination to File Civil Claims*, WJCT NEWS (Mar. 29, 2019), http://news.wjct.org/post/fla-bill-would-make-it-easier-victims-housing-discrimination-file-civil-cases.

222. Mathew Dietz, *Changes to Florida Statutes that Effect Civil Rights and Fair Housing in Florida*, DISABILITY INDEP. GRP. (Mar. 22, 2020), http://www.justdigit.org/changes-to-florida-statutes-that-effect-civil-rights-and-fair-housing-in-florida; *see also* Rivers, *supra* note 221.

223. *See* Fla. H.R. Comm. Sub. for HB No. 225 (2020), http://www.flsenate.gov/Session/Bill/2020/255/BillText/er/PDF.

224. *See id.*

225. *Id.*

226. *See id.*; Joshua v. City of Gainesville, 768 So. 2d 432, 434 (Fla. 2000).

render a determination before such claims are barred.[227] While this change may harmonize the statute of limitations amongst determinations made by the Florida Commission, it further distinguishes employment discrimination from Florida's other statutes.[228]

VII. CONCLUSION

For decades, litigating under the FCRA has been a legal minefield that plaintiffs are forced to navigate differently based on where they reside.[229] Florida continues to delineate access to justice under the FCRA based on arbitrary geography bounds to the detriment of its northern residents.[230] As pending legislation is on track to eliminate the administrative mandates under Florida's other discrimination statutes, the employment law sector continues to await any action that could result in some relief.[231]

227. *See* Comm. Sub. H.B. No. 255, Pub. L. No 2020–153, Fla. Laws 760 (2020).

228. *See id.*

229. *See* FLA. STAT. § 760.11 (2019); WORKSHARE AGREEMENT, *supra* note 5, at 1; Ballman, *supra* note 92.

230. *See* WORKSHARE AGREEMENT, *supra* note 5, at 1–6.

231. *See* Rivers, *supra* note 221.

WHY FLORIDA SHOULD REJECT PRENUPTIAL AGREEMENT INTERPRETATION THROUGH COMMON LAW CONTRACT AND INSTEAD EMBRACE ENFORCEMENT IN EQUITY

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I. INTRODUCTION

Prenuptial agreements present a puzzle.[1] They juxtapose the hopes of marriage and the disappointments of divorce, offering a stunning contrast between the intimacy of romance and the transactional legalese of a financial document.[2] Prenuptial agreements are as practical as they are harmful; as helpful as they are hurtful.[3] They represent the end of what is thought to be an eternal bond, and do so by outlining the beginning of the end at the beginning of the beginning.[4] It is within these paradoxes that prenuptial agreements pose a special legal problem, one that lies not with its existence, but rather with its interpretation through common law contract.[5]

This Comment will explore and seek to solve this problem of prenuptial agreement interpretation through the examination of wide-ranging legal and psychological concepts within the narrow confines of Florida law.[6] While this Comment focuses mainly on Florida law, the notions, ideas, and implications apply broadly not only to prenuptial agreements, but also to the divide between law and psychology, the associations between gender and economic inequality and bargaining power, and the contrasts and turf wars

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1. *See* discussion *infra* Section III.A; *cf.* Holloway v. United States, 526 U.S. 1, 15 (1999) (Scalia, J., dissent) ("It is so utterly clear in normal usage that 'intent' does *not* include conditional intent . . . .").

2. *See* Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RTS. L. REP. 147, 182 (1996); discussion *infra* Section III.B.

3. *See* discussion *infra* Section IV; Chelsea Biemiller, Note, *The Uncertain Enforceability of Prenuptial Agreements: Why the "Extreme" Approach in Pennsylvania Is the Right Approach for Review*, 6 DREXEL L. REV. 133, 161 (2013).

4. *Developments in the Law — The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2075 (2003) [hereinafter *Marriage and Family*].

5. *See* J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL'Y 83, 117 (2011) ("Premarital agreements should not be governed by contract rules applicable to commercial contracts.").

6. *See* discussion *infra* Part V.

between common law contract and equity.[7] First, some obligatory background.[8]

Florida is an equitable distribution state.[9] Equitable distribution means the fair distribution of assets obtained and liabilities incurred during the marriage.[10] A court in a dissolution of marriage proceeding must begin with the presumption of equal distribution, unless fairness dictates otherwise.[11] There are three components to equitable distribution relating to marital assets and liabilities: (1) identification; (2) valuation; and (3) distribution.[12] In determining distribution, the court must consider any relevant circumstance "necessary to do equity and justice between the parties."[13]

After equitable distribution has been decided, the court may consider whether an award of alimony is appropriate.[14] What alimony is, other than financial support from one former spouse to the other, depends on the type of alimony and the purpose it serves.[15] Florida allows for five types of alimony: (1) temporary, which is awarded during dissolution proceedings; (2) bridge-the-gap, which aids the party in the transition to being single; (3) rehabilitative, which assists the party's efforts to rehabilitate their earning capacity; (4) durational, which provides the party with financial assistance for an extended period of need; and (5) permanent, which provides the party with financial assistance to cover needs and necessities for life.[16] Alimony is determined by one party's need and the other party's ability to pay.[17] In an award for alimony, the court may consider any relevant circumstance "necessary to do equity and justice between the parties."[18]

Prenuptial agreements are written contracts entered into prior to a marriage that fix, limit, or altogether waive the property rights between

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7. *See* discussion *infra* Section III.B.; discussion *infra* Section IV.C.; discussion *infra* Section II.C.

8. *See* discussion *infra* Section II.C.

9. FLA. STAT. § 61.075 (2019).

10. *See id.* § 61.075(1).

11. *Id.*

12. *Id.* § 61.075(3)(b).

13. *Id.* § 61.075(1)(j).

14. FLA. STAT. § 61.075(9). Temporary alimony, which is alimony given to a spouse in need during litigation, is awarded prior to equitable distribution. *Id.* § 61.071.

15. *See* Canakaris v. Canakaris, 382 So. 2d 1197, 1200 (Fla. 1980).

16. *See* FLA. STAT. §§ 61.071, 61.08(5)–(8).

17. *Id*. § 61.08(2).

18. *Id.* § 61.08(2)(j). Need, for example, may be established through a showing of "earning ability, age, health, education, the duration of the marriage, the standard of living," and more. *Canakaris*, 382 So. 2d at 1201–02.

spouses upon dissolution of marriage.[19] In other words, prenuptial agreements preemptively define prospective spouses' rights at divorce.[20] These defined rights within prenuptial agreements thus allow "prospective spouses to substitute their own contractual system" in place of the equitable system covered by Florida law.[21]

If the equitable system under Florida law is presumptively fair, why do people enter into prenuptial agreements?[22] Or, stated differently, why should courts even honor prenuptial agreements?[23]

Prenuptial agreements, first and foremost, protect assets.[24] That is, they protect the economically advantaged spouse's wealth and earnings at death or divorce.[25] Prenuptial agreements act as insurance policies against the crushing psychological and physiological tolls that divorce imposes upon separating spouses and their families.[26] They reduce the uncertain outcomes surrounding "judicial division of marital assets."[27] Compared to divorce negotiations, which are often marked by anger, hostility, and resentment, prenuptial agreements allow parties to negotiate at a time when trust, support, and communication are most palpable.[28]

Prenuptial agreements also divest assets from the economically inferior spouse.[29] They have been proclaimed to be insurance policies "against scheming second wives," and perhaps relatedly, they too often

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19. *See* Posner v. Posner (*Posner I*), 233 So. 2d 381, 383 (Fla. 1970). Prenuptial agreements also fix property rights upon death. Del Vecchio v. Del Vecchio, 143 So. 2d 17, 19 (Fla. 1962). A broader definition of a prenuptial agreement is from the original Uniform Premarital Agreement Act ("UPAA"): "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." UNIF. PREMARITAL AGREEMENT ACT § 1(1), 9C U.L.A. 39 (1983). Florida adopted its own version of the UPAA in 2007. *See* FLA. STAT. § 61.079(1). The 2012 revision to the UPAA defines a prenuptial agreement as "an agreement between individuals who intend to marry which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event." UNIF. PREMARITAL AGREEMENT ACT § 2(5), U.L.A. 3–4 (2012).

20. Lashkajani v. Lashkajani, 911 So. 2d 1154, 1156 (Fla. 2005).

21. Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 234 (1994).

22. *See id.* at 295.

23. *Id.*

24. *Marriage and Family*, *supra* note 4, at 2075.

25. Brod, *supra* note 21, at 239.

26. *Marriage and Family*, *supra* note 4, at 2075; Biemiller, *supra* note 3, at 161.

27. *Marriage and Family*, *supra* note 4, at 2075; Biemiller, *supra* note 3, at 161.

28. Biemiller, *supra* note 3, at 161.

29. Brod, *supra* note 21, at 239. In a typical heterosexual relationship, the economically inferior spouse has historically been the female. *Id.*

eliminate the fair and equitable judicial distribution of assets at the expense of women.[30] Compared to divorce negotiations, when both parties have counsel, the social and economic power disparities inherent within society lead to one-sided prenuptial agreements that overwhelmingly harm women.[31] In fact, "all but the wealthiest women who have signed premarital agreements will suffer serious economic and social harm at the end of marriage."[32] Worse yet, prenuptial agreements that harm women also harm the children under their care.[33]

Scholars have argued that prenuptial agreements promote honesty and communication, leading to family harmony and a happier marriage.[34] Others, however, equate the idea of prenuptial agreements with the idea of *eating children*:

> When Jonathan Swift made his famous modest proposal . . . suggesting that children of destitute people be eaten . . . members of polite society were either appalled or intrigued . . . . Over 200 years later, men make such modest proposals to women every day, in the form of premarital agreements.[35]

Of course, a rundown of pros, cons, and (perhaps) tongue-in-cheek metaphors do not necessarily provide a complete, let alone unbiased, insight into why people *actually* undertake prenuptial agreements.[36] The reality is that prenuptial agreements are predominantly entered into for four reasons: (1) there is a significant asset or income disparity between the parties that the wealthier party wishes to protect; (2) one or both parties have children from a prior relationship, and thus wish to protect their children's interests; (3) one or both parties had prior negative experiences in dissolution proceedings and

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30. Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 916 (1997); Brod, *supra* note 21, at 239. The idea that wealthy men need protection against "gold-digging" women is a particularly rampant stereotype. Guggenheimer, *supra* note 2, at 162.

31. *See* Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 188 (2013). Mandatory independent legal representation is a solution hotly debated by scholars and commentators. *Id.* at 213–14. *Compare* Sandra Kennedy, Note, *Ignorance Is Not Bliss: Why States Should Adopt California's Independent Counsel Requirement for the Enforceability of Prenuptial Agreements*, 52 FAM. CT. REV. 709, 719 (2014) (calling for "bright-line" independent counsel rules), *with* Elizabeth R. Carter, *Rethinking Premarital Agreements: A Collaborative Approach*, 46 N.M. L. REV. 354, 373, 375 (2016) (calling independent legal representation "overly paternalistic").

32. Brod, *supra* note 21, at 251.

33. *Id.* at 241.

34. *E.g.*, Marston, *supra* note 30, at 895, 907, 916.

35. Guggenheimer, *supra* note 2, at 147.

36. *See* Kennedy, *supra* note 31, at 709.

prefer to contract to their own, certain outcomes; and (4) one or both parties have family or business assets they wish to keep nonmarital for various reasons personal to the circumstances.[37]

That said, the underlying reasons that parties enter into prenuptial agreements are, for the purposes of this Comment, largely peripheral.[38] Rather, the focus here concerns the confounding nature of the ways in which Florida courts interpret and enforce prenuptial agreements.[39] The premise is simple: Dissolution of marriage proceedings are held in courts of equity, while prenuptial agreements are interpreted through common law contract.[40] This adjudicatory divergence is irreconcilable.[41]

This Comment will examine the contradictory nature between the distinction in dissolution proceedings and prenuptial agreement enforcement through an analysis of the procedural, substantive, cognitive, public policy, and flat-out common-sense issues as tied in and compared to Florida statutory and case law.[42] It will also explore policy concepts pulled from tort, property, and criminal law, as well as examine the stark contrast between common law contract and equity.[43] Finally, this Comment will conclude with a solution as uncomplex as the premise: Prenuptial agreements should be interpreted through equity.[44]

II. EQUITY AND COMMON LAW CONTRACT

A. *Terminology*

"Equity" and "chancery" are interchangeable terms without distinction just as "prenuptial agreement," "antenuptial agreement," "premarital agreement," and "matrimonial agreement" are equally interchangeable without distinction.[45] Indeed, under Florida's Constitution, circuit courts retain exclusive jurisdiction "in all cases in equity," while

37. *Id.*

38. *See* Carter, *supra* note 31, at 355.

39. *See* discussion *infra* Part III; Lashkajani v. Lashkajani, 911 So. 2d 1154, 1156–58 (Fla. 2005).

40. *See* discussion *infra* Section II.C; FLA. STAT. § 61.011 (2019); Hahamovitch v. Hahamovitch, 174 So. 3d 983, 986 (Fla. 2015).

41. *See* discussion *infra* Part III; *Lashkajani*, 911 So. 2d at 1159.

42. *See* discussion *infra* Parts IV, V.

43. *See* discussion *infra* Section V.D; discussion *infra* Section II.C; discussion *infra* Section III.A.

44. *See* discussion *infra* Part VI.

45. Ireland v. Cheney, 196 N.E. 267, 270 (Ohio 1935); Manuel R. Valcarcel, Note, *He Who Seeks Equity Must Find the Court Which Does Equity — The Current Jurisdictional Conflict*, 19 NOVA L. REV. 415, 421–22 (1994); Carter, *supra* note 31, at 354.

Chapter 61 of the Florida Statutes refers to equitable proceedings in a dissolution of marriage as "chancery."[46] Chapter 61 refers to both "antenuptial" and "premarital" agreements, while Florida courts have deviated between "prenuptial" and "antenuptial" agreements seemingly based upon a justice's preferred nomenclature.[47] There is also no apparent historical distinction between usage of "prenuptial" and "antenuptial."[48] For consistency, the terms "equity" and "prenuptial agreement" will hereinafter be used when possible.*

B. *A Brief History of Equity*

The interchangeability of "equity" and "chancery" and the relation to the judicial system is not without historical significance.[49] The English Court of Chancery first appeared in the thirteenth century, operating as a separate and, in theory, superior forum to the established common law courts.[50] The purpose of Chancery was to serve as a haven for those unfairly prejudiced by a myriad of deficient and unyielding rules of the law.[51] The English Court of Chancery thus served to offer remedies "in accordance with the principles of equity": Where the fixed ideals of the law failed, equity granted relief on the broad moralistic principles of justice and fairness.[52]

Florida courts, which evolved from the English legal system like all other jurisdictions in the United States, administer justice "according to good conscience."[53] Originally, Florida courts of equity were separate from courts of law.[54] In 1967, Florida established the merger rule, which abolished the procedural differences between law and equity but retained the substantive

46. FLA. CONST. art. V, § 20(c)(3); FLA. STAT. § 61.011 (2019).

47. *See* FLA. STAT. § 61.052(5); FLA. STAT. § 61.079; Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962) (using both "antenuptial agreement" and "prenuptial contract"); Cuillo v. Cuillo, 621 So. 2d 460, 461, 464 (Fla. 4th Dist. Ct. App. 1993) (using "antenuptial," in the majority opinion and using "prenuptial" in the concurring opinion).

48. *Compare* Forde v. Forde, 10 So. 2d 919, 921 (Fla. 1942) (prenuptial), *and* Famiglio v. Famiglio, 279 So. 3d 736, 737 (Fla. 2d Dist. Ct. App. 2019) (prenuptial), *with* Ball v. Ball, 36 So. 2d 172, 174 (Fla. 1948) (antenuptial), *and* Ziegler v. Natera, 279 So. 3d 1240, 1241 (Fla. 3d Dist. Ct. App. 2019) (antenuptial).

49. *See* Valcarcel, *supra* note 45, at 422.

50. *See* 30A C.J.S. *Equity*, § 7 (2020).

51. Joel Levin & Banks McDowell, *The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations*, 29 MCGILL L.J. 24, 58 (1983); Degge v. First State Bank of Eustis, 199 So. 564, 565 (Fla. 1941) (en banc).

52. *See* Ireland v. Cheney, 196 N.E. 267, 270 (Ohio 1935); Hedges v. Lysek, 84 So. 2d 28, 31 (Fla. 1955).

53. *Degge*, 199 So. at 565; *see also Ireland*, 196 N.E. at 270.

54. Valcarcel, *supra* note 45, at 421–22.

differences.[55] That is, in order to advance the administration of justice, a court maintains jurisdiction (as opposed to a transfer from the equity side to the "law side of the court") over a cause of action regardless of whether the ultimate relief is legal or equitable.[56] Today, there is technically no "chancery court" judiciary in Florida; rather, the circuit courts have often been labeled "chancery courts" when exercising equity jurisdiction.[57]

C. *Equity Versus Common Law Contract in Florida*

Over sixty years ago, the Supreme Court of Florida famously confirmed that "a court of equity is a court of conscience; it 'should not be shackled by rigid rules of procedure and thereby preclude justice being administered according to good conscience.'"[58] In other words, strict adherence to bright line rules is inconsistent with the well-established tenants of equity.[59] Equity thus has "wide discretion in fashioning remedies to satisfy the exigencies of the circumstances."[60]

Contract, on the other hand, is a question of law; a question determined by formal, often rigid, rules of presumption and interpretation.[61] Unambiguous terms in a contract are conclusive and "must be applied as written."[62] A court may only resort to contract interpretation when the contract language is unclear.[63] Contract interpretation is governed by the language "within the four corners of the document."[64] Only the intent from the plain language and common usage of the words used may be

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55. Emery v. Int'l Glass & Mfg., Inc., 249 So. 2d 496, 498 (Fla. 2d Dist. Ct. App. 1971); *see also* FLA. R. CIV. P. 1.040 ("There shall be one form of action to be known as 'civil action.'").

56. *Emery*, 249 So. 2d at 498; *see also* FLA. R. CIV. P. 1.040.

57. Valcarcel, *supra* note 45, at 422.

58. Wicker v. Bd. of Pub. Instruction of Dade Cnty., 106 So. 2d 550, 558 (Fla. 1958) (quoting Degge v. First State Bank of Eustis, 199 So. 564, 565 (Fla. 1941) (en banc)); *accord* Planned Parenthood of Greater Orlando, Inc. v. MMB Props., 211 So. 3d 918, 925 (Fla. 2017).

59. *See Planned Parenthood of Greater Orlando*, 211 So. 3d at 925.

60. Schroeder v. Gebhart, 825 So. 2d 442, 446 (Fla. 5th Dist. Ct. App. 2002) (citing to Singer v. Tobin, 201 So. 2d 799, 800–01 (Fla. 3d Dist. Ct. App. 1967) (per curiam)); *see also Planned Parenthood of Greater Orlando*, 211 So. 3d at 925.

61. *See* Bethany Trace Owners' Ass'n v. Whispering Lakes I, L.L.C., 155 So. 3d 1188, 1191 (Fla. 2d Dist. Ct. App. 2014).

62. Brooks v. Green, 993 So. 2d 58, 61 (Fla. 1st Dist. Ct. App. 2008); *see also* Stokes v. Victory Land Co., 128 So. 408, 410 (Fla. 1930).

63. Boat Town U.S.A., Inc. v. Mercury Marine Div. of Brunswick Corp., 364 So. 2d 15, 17 (Fla. 4th Dist. Ct. App. 1978).

64. Gold Crown Resort Mktg. Inc. v. Phillpotts, 272 So. 3d 789, 792 (Fla. 5th Dist. Ct. App. 2019).

considered.[65] The intention inside the minds of the parties to a contract is irrelevant.[66] Outside factors may not be considered unless the face of the document is ambiguous.[67] Contract provisions may not be considered in isolation; intent is determined through examination of the entire instrument.[68]

Equity's sweep is broader and more general, awarding appropriate relief as reasonable to the circumstances given the particular facts of a case.[69] For example, equity may compel partial performance of a contract where strict performance would be unjust.[70] Equity may also reform a contract that violates the intention of the parties.[71] "In an equitable action, the court should balance the equities between the parties to do complete justice."[72] Equity will always seek to prevent an injustice caused by accident or mistake.[73]

In contract, the law requires a court give effect to all provisions of an agreement when possible.[74] A court of law may not inquire into an agreement's fairness.[75] A trial court of law may never rewrite an otherwise valid contract in order to make a bad bargain more reasonable.[76] Under Florida's common law, courts must uphold freely made agreements—no matter how unfair or unreasonable—so long as the agreements are not violative of public policy.[77] Freedom to contract is a fundamental, elemental right.[78] Parties are bound by the language of the bargain, regardless of how unfavorable that language later proves.[79]

These mantras, each repeated frequently, consistently, and at times unabashedly over the past hundred years throughout the Florida common law court system, serve to demonstrate the stark contrast between equity and

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65. Burlington & Rockenbach, P.A. v. Law Offices of E. Clay Parker, 160 So. 3d 955, 958 (Fla. 5th Dist. Ct. App. 2015).

66. *Stokes*, 128 So. at 410.

67. *Boat Town U.S.A., Inc.*, 364 So. 2d at 17.

68. Canal Lumber Co. v. Fla. Naval Stores & Mfg. Co., 92 So. 279, 281 (Fla. 1922); *Burlington & Rockenbach, P.A.*, 160 So. 3d at 958.

69. *See* Rennolds v. Rennolds, 312 So. 2d 538, 542 (Fla. 2d Dist. Ct. App. 1975).

70. Presley v. Worthington, 53 So. 2d 714, 716 (Fla. 1951) (en banc).

71. Schroeder v. Gebhart, 825 So. 2d 442, 445 (Fla. 5th Dist. Ct. App. 2002).

72. 22 FLA. JUR. 2D *Equity* § 50 (2020).

73. Hedges v. Lysek, 84 So. 2d 28, 31 (Fla. 1955).

74. Perez-Gurri Corp. v. McLeod, 238 So. 3d 347, 350 (Fla. 3d Dist. Ct. App. 2017).

75. Petracca v. Petracca, 706 So. 2d 904, 911 (Fla. 4th Dist. Ct. App. 1998).

76. *E.g.*, Brooks v. Green, 993 So. 2d 58, 61 (Fla. 1st Dist. Ct. App. 2008).

77. *Petracca*, 706 So. 2d at 911.

78. *Id.* at 910; *e.g.*, Barakat v. Broward Cnty. Hous. Auth., 771 So. 2d 1193, 1195 (Fla. 4th Dist. Ct. App. 2000).

79. Doty v. Bryson, 154 So. 3d 457, 460 (Fla. 5th Dist. Ct. App. 2015).

contract.[80] If equity is a court of conscience, contract is a court of consequence.[81]

Consider, briefly, just one example of such consequence.[82] The following facts are taken from *Lashkajani v. Lashkajani*,[83] during a certified question to the Supreme Court of Florida in 2005: Three days prior to their wedding, the wife, age twenty-five, signed a prenuptial agreement with her husband, age forty-five.[84] Ten and a half years later, the wife, who had been a homemaker and stay-at-home mother to the couple's three children, filed for dissolution.[85] The wife alleged adultery and claimed the husband was physically and emotionally abusive toward her and their children.[86] The wife sought to invalidate the prenuptial agreement on grounds of coercion and unfairness.[87] The prenuptial agreement contained a prevailing party clause that stated, in part, if either party sought enforcement or prevention of the agreement and failed, the prevailing party would be awarded attorney's fees.[88]

The Court held that prenuptial agreements are enforced "as a matter of contract."[89] The wife, a stay-at-home mother, was thus required to pay her *decamillionaire* soon-to-be ex-husband $63,022.92 in attorney's fees for her failure to invalidate the prenuptial agreement during litigation.[90] The Court continued: "[Because] prevailing party clauses have long been enforceable in ordinary contracts, we find no reason not to enforce them here."[91]

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80. *Compare* Degge v. First State Bank of Eustis, 199 So. 564, 565 (Fla. 1941) (en banc) (calling equity "a court of conscience"), *with* Cuillo v. Cuillo, 621 So. 2d 460, 464 (Fla. 4th Dist. Ct. App. 1993) (Farmer, J., concurring) (opining "[w]hy should the law be concerned about anyone . . . 'contracting away valuable rights?'").

81. *See* Levin & McDowell, *supra* note 51, at 40. There are, of course, exceptions: Fraud, coercion, duress, reliance, mistake, foreseeability, implied conditions, impossibility, and unconscionability, to name a few. *Id.* at 41.

82. *See* Lashkajani v. Lashkajani, 911 So. 2d 1154, 1155 (Fla. 2005).

83. 911 So. 2d 1154 (Fla. 2005).

84. Respondent/Former Wife's Answer Brief at 8, Lashkajani v. Lashkajani, 911 So. 2d 1154 (Fla. 2005) (No. SC03-1275).

85. *Id.* at 9.

86. *Id.*

87. *Lashkajani*, 911 So. 2d at 1155.

88. *Id.* at 1155 n.1.

89. *Id.* at 1158.

90. *Id.* at 1155–56, 1160. The husband had a net worth of "at least $12 million." *Id.* at 1155. Attorney's fees in a dissolution of marriage proceeding are based on: (1) need; and (2) ability of the other party to pay. *See* FLA. STAT. § 61.16 (2019).

91. *Lashkajani*, 911 So. 2d at 1158. "[I]t is not unjust to place this risk on the challenging party when she or he voluntarily entered this agreement knowing the clause was included." *Id.* at 1159 n.3.

III. CONTRACT INTERPRETATION

Marriage is a contract.[92] A valid marriage, like a valid contract, must be entered into voluntarily.[93] Like any agreement, a marriage must be effectuated by parties legally eligible to contract.[94] The parties to a marital contract must be mentally competent, and the marriage, like a contract, must not be contrary to public policy.[95] A marriage, also like a contract, may be void *ab initio* or voidable subject to ratification.[96] The right to marry, like freedom to contract, is a fundamental right.[97]

Prenuptial agreements are also contracts.[98] A valid prenuptial agreement must be entered into voluntarily in contemplation of marriage.[99] The contract must be signed, in writing, by both parties in order to satisfy the Statute of Frauds.[100] A prenuptial agreement must not be the product of fraud, duress, coercion, or overreaching, and may be unenforceable if unconscionable at the time of execution.[101] The provisions within a prenuptial agreement must not be in contravention of public policy.[102] For example, a prenuptial agreement may not eliminate rightful child support

92. *See* Smith v. Smith, 224 So. 3d 740, 746 (Fla. 2017); Mahan v. Mahan, 88 So. 2d 545, 548 (Fla. 1956) ("The marriage contract is one of the most sacred of compacts."); HENRY SUMNER MAINE, ANCIENT LAW 96 (Batoche Books 1999) (1861) ("[T]he movement of the progressive societies has hitherto been a movement *from Status to Contract*.").

93. Goldman v. Dithrich, 179 So. 715, 717 (Fla. 1938).

94. *Id.* In order to marry in Florida, both parties must be eighteen years of age or older. FLA. STAT. § 741.04(1) (2019). However, there is one exception: if one party is seventeen, has written parental consent, and the other party is not more than two years older. *Id.* § 741.04(1)(a)–(b).

95. *Goldman*, 179 So. at 717; *see also Mahan*, 88 So. 2d at 548. Examples of marriages that contravene public policy include incest and bigamy. Janine Campanaro, Note, *Until Death Do Us Part? Why Courts Should Expand Prenuptial Agreements to Include Ten-Year Marriages*, 48 FAM. CT. REV. 583, 585 (2010).

96. *See Smith*, 224 So. 3d at 746.

97. *Id.* at 749. *Compare* Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("The right to marry is fundamental . . . ."), *and* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is . . . fundamental to our very existence and survival."), *with* Barakat v. Broward Cnty. Hous. Auth., 771 So. 2d 1193, 1195 (Fla. 4th Dist. Ct. App. 2000) ("A fundamental tenet of contract law is that parties are free to contract."), *and* Petracca v. Petracca, 706 So. 2d 904, 910 (Fla. 4th Dist. Ct. App. 1998) ("[F]reedom to contract is fundamental . . . .").

98. *See* Lashkajani v. Lashkajani, 911 So. 2d 1154, 1156 (Fla. 2005).

99. FLA. STAT. § 61.079(2)(a) (2019).

100. *Id.* §§ 61.079(3), 61.079(2)(a); Kersey v. Kersey, 802 So. 2d 523, 525 (Fla. 1st Dist. Ct. App. 2001).

101. FLA. STAT. § 61.079(7)(a)(1)–(3).

102. *See id.* § 61.079(4)(a)(8).

payments.[103] Finally, the right to contract to a prenuptial agreement is a fundamental right.[104]

In Florida, the adjudicatory proceedings of the cancelation of the marital contract—i.e., dissolution of marriage—are held in equity.[105] The prenuptial contract, on the other hand, is adjudicated under the common law of *contract*.[106]

If this divide appears contradictory, that is because it is.[107] Consider the following: A dissolution of marriage proceeding typically includes the equitable distribution of marital assets and liabilities, an award of alimony, and determination of incidents related to children of the marriage (such as child support, timesharing, and parental responsibility).[108] Chapter 61 of the Florida Statutes is aptly titled, "Dissolution of Marriage; Support; Time-sharing"; the first provision under Chapter 61 states, "Proceedings under *this chapter* are in chancery."[109] It is thus reasonable to believe that *all* proceedings under Chapter 61 are in equity.[110] Prenuptial agreements, which most commonly include alimony and distribution of assets, are also covered under Chapter 61.[111] Yet, despite the statute expressly stating that all proceedings under Chapter 61 are in equity, prenuptial agreements instead proceed through common law contract.[112]

In fact, the court in *Lashkajani* readily acknowledged this apparent contradiction, despite ultimately interpreting the prenuptial agreement through contract: "Although contract principles play a role in dissolution proceedings," the Court conditioned, "courts must remember that proceedings under [C]hapter 61 are in equity and governed by basic rules of fairness as opposed to the strict rule of law."[113] Trial judges, the court continued, are given "wide leeway to work equity in [C]hapter 61 proceedings."[114]

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103. *Id.* § 61.079(4)(b).

104. *See* Lashkajani v. Lashkajani, 911 So. 2d 1154, 1158 (Fla. 2005); Levin & McDowell, *supra* note 51 at 81.

105. FLA. STAT. § 61.011.

106. *See, e.g.*, Hahamovitch v. Hahamovitch, 174 So. 3d 983, 986 (Fla. 2015).

107. *See id*; FLA. STAT. § 61.011.

108. *See* FLA. STAT. § 61.052.

109. *Id.* § 61.011 (emphasis added).

110. *See id.*

111. *Id.* § 61.079. Under Chapter 61, the section on "Premarital agreements" is situated between "61.075 Equitable Distribution of Marital Assets and Liabilities" and "61.08 Alimony." *Id.* §§ 61.075–61.08. *See also* Elizabeth R. Carter, *Are Premarital Agreements Really Unfair?: An Empirical Study*, 48 HOFSTRA L. REV. 387, 390 (2019).

112. FLA. STAT. §§ 61.011, 61.079.

113. Lashkajani v. Lashkajani, 911 So. 2d 1154, 1159 (Fla. 2005) (citation omitted).

114. *Id.* (citation omitted).

The *Lashkajani* ruling leaves more questions than answers.[115] If "contract principles play a role" and trial judges are given "wide leeway" in dissolution proceedings, the questions then are *which* contract principles play a role, why those count but others do not, and why, if judges are given wide leeway, do contract principles play a role *at all*?[116] Consider the following contract principles, from *Whitley v. Royal Trails Property Owners' Ass'n*,[117] a contract case concerned with the interpretation of specific homeowner's association provisions within the association's declaration, articles, and the by-laws:

> The parties' intention governs contract construction and interpretation; the best evidence of intent is the contract's plain language. The court should reach a contract interpretation consistent with reason, probability, and the practical aspect of the transaction between the parties.
>
> When two or more documents are executed by the same parties at or near the same time, in the course of the same transaction, and concern the same subject matter, they will be read and construed together. Where a writing expressly refers to and sufficiently describes another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing. Thus, the meaning is gathered from a general view of the whole writing, with all of its parts being compared, used, and construed, each with reference to the others.[118]

Apply the *Whitley* contract principles to a dissolution proceeding: When two documents—the prenuptial agreement and the marriage contract—concerning the same subject matter—marriage—are executed in the course of the same transaction, just prior to, and at the time of marriage, they should be read and construed together.[119] Where one document refers to the other—prenuptial agreements unavoidably refer to the marriage contract—the meaning should be gleaned from the overall view, and interpreted with reason, probability, and practicality.[120] This section first aims to interpret and understand prenuptial agreements through a general examination of the marital contract by looking at "intent."[121] Next, this section will show why the dual interpretation is incompatible from the

115. *See id.* at 1158–1160.
116. *See id.* at 1159.
117. 910 So. 2d 381 (Fla. 5th Dist. Ct. App. 2005).
118. *Id.* at 383 (citations omitted).
119. *See id.*
120. *Id.*; *see also* FLA. STAT. § 61.079 (2019).
121. *See* discussion *infra* Section III.A; *Whitley*, 910 So. 2d at 383.

perspective of cognitive psychology.[122] Finally, this section will conclude with the neglected, but readily available, remedy of interpretation through equity.[123]

A. *Conditional Intent*

"Intent" encapsulates an unavoidable contradiction within the notion of prenuptial agreements.[124] Because intention governs contract interpretation, it is vital that the parties' actual intent be reconciled.[125] This section aims for such reconciliation.[126]

Marriage is "enduring and intimate to the degree of being sacred. It . . . promotes a way of life . . . a harmony in living . . . [and] a bilateral loyalty."[127] Marriage "is an association for as noble a purpose as any . . ."[128] When two people agree to marry, their purpose is to unite into perpetuity; the expectation a couple has is a lifelong commitment of love, companionship, and stability.[129] The hope then, upon marriage, is never dissolution; logically, it follows that the hope upon signing a prenuptial agreement is to *never enforce* the prenuptial agreement.[130]

Is this reconcilable?[131] Former Supreme Court Justice Antonin Scalia thought the answer to be no.[132] True "intent," Justice Scalia wrote, can never indicate a conditional purpose that a party hopes will not occur:

> "Intent" is "[a] state of mind in which a person seeks to accomplish a given result through a course of action." One can hardly "seek to accomplish" a result he hopes will not ensue . . . .

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122. *See* discussion *infra* Section III.B; Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439, 443 (1993).

123. *See* discussion *infra* Section III.C; Schroeder v. Gebhart, 825 So. 2d 442, 446 (Fla. 5th Dist. Ct. App. 2002).

124. *Cf.* Holloway v. United States, 526 U.S. 1, 13 (1999) (Scalia, J., dissenting).

125. *See* Whitley v. Royal Trails Prop. Owners' Ass'n, 910 So. 2d 381, 383 (Fla. 5th Dist. Ct. App. 2005).

126. *Id.*; *see also* discussion *infra* Section III.C; PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05 cmt. a. (AM. L. INST. 2002).

127. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

128. *Id.*

129. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

130. *See* discussion *infra* Section III.B; *Griswold*, 381 U.S. at 486; Baker & Emery, *supra* note 122, at 443.

131. *See* Holloway v. United States., 526 U.S. 1, 13 (1999) (Scalia, J., dissenting).

132. *Id.* at 14.

> . . . .
>
> . . . It is an unheard-of usage [] to speak of my having an "intent" to do something, when my plans are contingent upon an event that is not virtually certain, and that I hope will not occur. When a friend is seriously ill, for example, I would not say that "I intend to go to his funeral next week." I would have to make it clear that the intent is a conditional one: "I intend to go to his funeral next week if he dies."[133]

Justice Scalia is referring to "conditional intent."[134] Imagine the absurdity of a prospective spouse proclaiming, just days before solemnization, "I intend on divorcing and enforcing my prenuptial agreement."[135] If intent is to be ascertained within the four corners of a prenuptial agreement, the conditionality of such intent must be recognized and distinguished from true intent.[136] Simply put, intent cannot be conditional, and no justification can alter this reality.[137] The law must recognize this reality.[138] But how?[139] To understand the application within the marital context using Justice Scalia's interpretation of intent—that is, true intent can never be conditional—one must look beyond the scope of the law.[140]

B. *Psychological Intent*

One way to better understand the concept of intent is to depart from the notion of legal intent and view intent from within its natural habitat: psychology and the human mind.[141] One study famously examined marriage license applicants and their perceptions of the risk of divorce, both for themselves and for the population as a whole.[142] The findings were revealing: While marriage license applicants accurately estimated half of all

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133. *Id.* at 13–14 (Scalia, J., dissenting) (citations omitted).

134. *Id.* at 13. ("Conditional intent is no more embraced by the unmodified word 'intent' than a sea lion is embraced by the unmodified word 'lion.'")

135. Campanaro, *supra* note 95, at 587. The reason for such absurdity is, if the sole or overriding intention of entering into a prenuptial agreement is to protect assets, then why marry at all? *Id.* A cohabiting relationship protects assets better than a prenuptial agreement. *Id.* at 587–88.

136. *See* Gold Crown Resort Mktg. Inc. v. Phillpotts, 272 So. 3d 789, 792 (Fla. 5th Dist. Ct. App. 2019).

137. *Holloway*, 526 U.S. at 13–14 (Scalia, J. dissenting).

138. *See id.* at 14.

139. *See id.*

140. *See id.* at 14, 15.

141. *See* Baker & Emery, *supra* note 122, at 440–44.

142. *Id.* at 439.

couples in the United States would end up divorced, the median response to the applicants' own likelihood of divorce was *zero* percent.[143] In other words, everyone knew the risk of divorce was fifty percent while simultaneously and irrationally concluding an outright immunity from their own personal risk of divorce.[144]

Now consider the *true* intent of a party presented with an unreasonable or unfair prenuptial agreement: The party knows the societal risk of divorce—fifty percent—but the party also presumes the risk does not apply to him or herself.[145] These exceptionally idealistic, naïve, and unwarranted expectations provide an example of "representativeness bias," in which people believe themselves to be unrepresentative of the population as a whole.[146] Thus, the true intent upon signing a prenuptial agreement may more realistically reflect the uncomplicated intent to simply get—and stay—married.[147]

Judges have often relied upon the notion that prenuptial agreements are voluntarily entered into because a party may either choose to sign the agreement, marry, and live with the consequences, or instead choose not to sign and, presumably, not marry.[148] Never mind that this binary perspective would render virtually every putative agreement voluntary; human psychology does not support such black and white reasoning.[149]

A study in 2017 outlined the theory of "deliberate ignorance" based on anticipated regret.[150] Where a person anticipates that a risk might lead to an unknown and possibly negative result, the person, with deliberate ignorance, will choose the known option in order to circumvent that regret.[151] Avoiding the anticipation of regret and maintaining positive emotions are the

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143. *Id.* at 443.

144. *Id.* at 446–47.

145. *See id.*

146. Baker & Emery, *supra* note 122, at 445–46.

147. *See id.* at 443, 446; Marston, *supra* note 30, at 895–96.

148. *See, e.g.*, Eager v. Eager, 696 So. 2d 1235, 1236 (Fla. 3d Dist. Ct. App. 1997). ("It is not a threat or duress for the proponent of the agreement to make it clear that there will be no marriage in the absence of the agreement. To hold otherwise would effectively provide a per se basis to invalidate most, if not all, antenuptial property agreements.")

149. *See* Gan, *supra* note 31, at 201; Levin & McDowell, *supra* note 51, at 42. This binary perspective would render agreements entered into via blackmail and extortion as equally voluntary. Levin & McDowell, *supra* note 51, at 42. There is also a third option that judges fail to consider: "negotiating a prenuptial agreement to both parties' satisfaction." Gan, *supra* note 31, at 212.

150. Gerd Gigerenzer & Rocio Garcia-Retamero, *Cassandra's Regret: The Psychology of Not Wanting to Know*, 124 PSYCHOL. REV. 179, 181 (2017).

151. *Id.* at 182.

motives for deliberate ignorance.[152] In the marital context, anticipated regret is the risk of *not* signing the prenuptial agreement (and thus potentially ending the relationship); signing the prenuptial agreement and going forward with the marriage, on the other hand, enables the party to maintain the status quo of positive emotions.[153] That is, a party may sign a prenuptial agreement—thereby foregoing the risk and anticipated regret of ending the relationship—by picking the definite option of continuing a happy relationship where the anticipated regret of breaking up will be impossible.[154]

Succinctly put, the inner conflict between anticipated regret and continued happiness leads a party in a prenuptial agreement to close their eyes to reality and sign away valuable rights with deliberate ignorance.[155] The question is, then, should this really be treated as intent?[156]

Although deliberate ignorance is a widespread state of mind, not everyone closes their eyes to risk, and many, in fact, attempt to evaluate and embrace it.[157] Unfortunately, those who do attempt to assess long-term risk—here, the long-term risk of a prenuptial agreement ever coming to fruition—often analyze risk poorly and evaluate themselves with marked overconfidence.[158]

The more confident the prediction, the larger the gap in accuracy.[159] Worse, the more distant a prediction is in time, i.e., temporal distance, the

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152. *Id.* at 181.

153. *See id.* at 183.

154. *See id.*

155. *See* Gigerenzer & Garcia-Retamero, *supra* note 150, at 180; *compare* Cuillo v. Cuillo, 621 So. 2d 460, 464 (Fla. 4th Dist. Ct. App. 1993) (Farmer, J., concurring) ("Why should the law be concerned about anyone, including a prospective spouse, 'contracting away valuable rights?'"), *with* Peacock Hotel, Inc. v. Shipman, 138 So. 44, 46 (1931) ("[W]here it is perfectly plain to the court that one party . . . has gained an unjust and undeserved advantage . . . a court of equity will not hesitate to interfere . . . .").

156. *See* Gigerenzer & Garcia-Retamero, *supra* note 150, at 181. Certainly, the law has not been favorable to deliberate ignorance, i.e. willful blindness, although in law, willful blindness encompasses closing one's eyes to criminal or tortious activity, not contracting away valuable rights. *See* Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011). It may be argued the purpose of holding the willfully blind accountable is to both deter harmful criminal activity and protect citizens. *See id.* The same purpose could be served here. *See id.* While the law protecting its citizens from *their own* willful ignorance sounds like the tricky-to-navigate-road toward paternalism, equitable remedies that alleviate some of the more harmful effects of deliberate ignorance should be favored. *See* Levin & McDowell, *supra* note 51, at 26.

157. Gigerenzer & Garcia-Retamero, *supra* note 150, at 195; Robert P. Vallone, et al., *Overconfident Prediction of Future Actions and Outcomes by Self and Others*, 58 J. PERSONALITY & SOC. PSYCHOL. 582, 583 (1990).

158. Vallone, et al., *supra* note 157 at 585; *see also* Baker & Emery, *supra* note 122, at 446.

159. Vallone, et al., *supra* note 157, at 590.

more optimistic and confident the individual feels.[160] This unwarranted overconfidence leads to increased risk-taking, and ultimately, poor decision-making, with definite repercussions for the long-term success of any given marriage.[161] What then of intent?[162]

> [Cognitive biases and other psychological] difficulties are exacerbated in the context of premarital agreements because of the possibility that the agreement will be invoked many years after it was entered. About half of all divorces occur after the seventh year of marriage. A contract whose terms are intended to apply, for the first time, more than seven years after its execution is otherwise uncommon.[163]

Judicial inquiry into the parties' intent from, perhaps, a decade earlier, viewed without cognitive context and solely from within the four corners of the prenuptial document, seems inconsistent with reason, probability, and practicality.[164] Such inquiry is, in a word, inequitable.[165] There is very little practical intention, or even conditional intent, involved with signing and anticipating the eventual enforcement of a prenuptial agreement.[166] People are irrationally overconfident and ignorantly optimistic about the prospects of their marriages.[167] They avoid the anticipated regret of not signing a proposed prenuptial agreement while being predisposed to engage in long-term risk-taking.[168] This lack of true intent is exacerbated when considered in light of the surrounding circumstances: The true intent of the parties was to get, and to stay, married.[169]

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160. Shiri Nussbaum, et al., *Predicting the Near and Distant Future*, 135 J. EXPERIMENTAL PSYCH.: GEN. 152, 159 (2006). "Temporal distance is defined as how much time (e.g., past or future) separates between the perceiver's present time and the target event." Yaozhong Liu & Jinjing Xu, *The Effect of Temporal Distance and Social Distance on the Choice of Consumers' Preferences*, 6 MOD. ECON. 275, 276 (2015).

161. *See* Nussbaum, et al., *supra* note 160, at 152; Vallone, et al., *supra* note 157, at 590; PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05 (AM. L. INST. 2002).

162. *See* Whitley v. Royal Trails Prop. Owners' Ass'n, 910 So. 2d 381, 383 (Fla. 5th Dist. Ct. App. 2005).

163. PRINCIPLES OF FAMILY DISSOLUTION § 7.05.

164. *See* Gold Crown Resort Mktg. Inc. v. Phillpotts, 272 So. 3d 789, 792 (Fla. 5th Dist. Ct. App. 2019); *Whitley*, 910 So. 2d at 383.

165. *See* PRINCIPLES OF FAMILY DISSOLUTION § 7.05 cmt. a.

166. *See id.* at cmt. b.

167. *See* Baker & Emery, *supra* note 122, at 445–46; PRINCIPLES OF FAMILY DISSOLUTION § 7.05 cmt. b.

168. *See* Gigerenzer & Garcia-Retamero, *supra* note 150, at 182; Vallone, et al., *supra* note 157, at 585–86.

169. *See* Baker & Emery, *supra* note 122, at 447.

C. *Solving Intent*

While common law contract derives intent from inside the four corners of the prenuptial agreement—or, if guided by *Whitley*, through the context of the marital contract—the true intent of the parties is much more nuanced.[170] When the true intent is to remain married forever—and thus never enforce the prenuptial agreement—how can the courts of contract glean this intent from plain language?[171] The reality is that courts of contract, with their strict and typically all-or-nothing rules, simply cannot.[172]

Enter equity.[173] Equity—the court of conscience, the court of fairness, the court of justice—can determine true intent.[174] Equity is reasonable to the circumstances and can understand that prenuptial agreements must be viewed in light of the true intent of the marital contract.[175] Equity can balance all the factors to do complete justice, fully understanding that cognitive biases cloud the intentions of parties to marital and prenuptial contracts.[176] Equity, unimpeded by the harsh rules of contract, has wide discretion in sculpting remedies that "satisfy the exigencies of the circumstances," and thus has the ability to fashion solutions that differ, say, between a marriage lasting two years and a marriage lasting twenty-two or forty-two years.[177] If the intent to a prenuptial agreement is in need of determination, equity can serve as the interpreter.[178]

IV. PRENUPTIAL AGREEMENTS AND THE WOMEN THEY HARM: DEFENSES AND AVOIDANCE

Thus far, this Comment has mostly ignored the proverbial elephant on the page: Prenuptial agreements harm women.[179] Proponents of

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170. *See* Whitley v. Royal Trails Prop. Owners' Ass'n, 910 So. 2d 381, 383 (Fla. 5th Dist. Ct. App. 2005); Gold Crown Resort Mktg. Inc. v. Phillpotts, 272 So. 3d 789, 792 (Fla. 5th Dist. Ct. App. 2019).

171. *See* PRINCIPLES OF FAMILY DISSOLUTION § 7.05 cmt. b.

172. *See Phillpotts*, 272 So. 3d at 792.

173. *See* Schroeder v. Gebhart, 825 So. 2d 442, 446 (Fla. 5th Dist. Ct. App. 2002).

174. *See id.*

175. *See* Rennolds v. Rennolds, 312 So. 2d 538, 542 (Fla. 2d Dist. Ct. App. 1975).

176. 22 FLA. JUR. 2D *Equity* § 50; *Marriage and Family*, *supra* note 4, at 2085.

177. *Schroeder*, 825 So. 2d at 446; Planned Parenthood of Greater Orlando, Inc. v. MMB Props., 211 So. 3d 918, 925 (Fla. 2017); *see also* FLA. STAT. § 61.08(4) (2019) (noting differences in marriage length for purposes of determining alimony).

178. *See* Presley v. Worthington, 53 So. 2d 714, 716 (Fla. 1951) (en banc); *Schroeder*, 825 80. 2d at 445; 22 FLA. JUR. 2D *Equity* § 50; discussion *supra* Section II. C.

179. *See* Brod, *supra* note 21, at 239.

prenuptial agreements charge those who believe in such harm with spreading paternalistic notions that women are "uneducated, unsophisticated, [and] economically dependent."[180] These proponents argue that women and men are equal, and contractual freedom should reflect this equality.[181] After all, women have long been racing toward closing the gender gap; and in fact, are currently outpacing men in college enrollment, college degrees, and workforce participation.[182] The number of stay-at-home dads is growing.[183] So too are the number of wives out-earning their husbands.[184] Gender equality, it seems, is nearly here.[185]

Yet, *nearly* is not equivalent to *finally*, and prenuptial agreements do, in fact, disproportionately harm women.[186] The notion of prenuptial agreements harming women is hardly in need of evidentiary support, as the idea is so pervasive that is has become cliché.[187] It is patently obvious to all except zealots of freedom of contract, and perhaps, affluent feminists who deny the existence and consequences of gender inequality in the same way some African-American celebrities deny the existence and consequences of racism.[188] Unfortunately, prenuptial agreements harming women is plainly

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180. Carter, *supra* note 111, at 388.

181. Jenna Christine Colucci, Note, *The P Word: Ohio Should Adopt the Uniform Premarital Agreements Act to Achieve Consistency and Uniformity in the Treatment of Prenuptial Agreements*, 66 CLEV. ST. L. REV. 215, 234 (2017); *see also* Guggenheimer, *supra* note 2, at 156 ("If women are successful in voiding bad agreements, they will never learn to contract more thoughtfully and successfully.").

182. Carter, *supra* note 31, at 358; Tara Law, *Women Are Now the Majority of the U.S. Workforce — but Working Women Still Face Serious Challenges*, TIME (Jan. 16, 2020 4:55 PM), http://www.time.com/5766787/women-workforce/.

183. Jason Beaubien, *Stay-At-Home Dads Still Struggle with Diapers, Drool, Stigma and Isolation*, NPR (June 17, 2018, 5:37 PM), http://www.npr.org/sections/health-shots/2018/06/17/619557786/stay-at-home-dads-still-struggle-with-diapers-drool-stigma-and-isolation.

184. Aimee Picchi, *More Women Are Now Outearning Their Husbands – and Emotions Can Be Big*, USA TODAY: MONEY (Mar. 3, 2020, 12:44 PM), http://www.usatoday.com/story/money/2020/03/03/gender-wage-gap-more-women-out-earning-husbands/4933666002/.

185. *See* Colucci, *supra* note 181, at 234.

186. Brod, *supra* note 21, at 239.

187. *See id.*; Oldham, *supra* note 5, at 89 n.45; *Prenup*, *Google Dictionary*, http://www.google.com/search?q=google+dictionary#dobs=prenup (last visited Dec. 14, 2020). The Google dictionary example-sentence for "prenup" is: "Did you get her to sign a prenup?" *Prenup*, *supra*. A gendered example sentence phrased, "get her to sign" speaks to the obviousness of such harm. *Id.*

188. Oldham, *supra* note 5, at 89; Brod, *supra* note 21, at 239; Waton v. Waton, 887 So. 2d 419, 421 (Fla. 4th Dist. Ct. App. 2004) ("It is undisputed that the agreement is patently unreasonable. However, if an unreasonable agreement is freely entered into, it is enforceable."); Jenice Armstrong, *Black Celebs Who Deny Racism Exists Are Out of Touch*, PHILA. INQUIRER (Mar. 26, 2015, 3:01 AM),

evident throughout case law.[189] Exploring and solving the problems associated with prenuptial agreements harming women has, for decades, been the topic of innumerable scholarly articles.[190] Even comedian Chris Rock famously joked about why he "understands" men wanting to murder their wives during and after divorce:[191]

> [He] should'a had a prenup. That's right, prenuptial agreement. Everybody needs a prenup. People think you gotta be rich to get a prenup, oh no. You got twenty million, your wife want ten, big deal, you ain't starving. But if you make thirty *thousand*, and your wife want fifteen, you might have to kill her![192]

That prenuptial agreements harm women is further evident through even a cursory look at gender statistics: Women, on average, make less money than men;[193] women marry at younger ages than men[194] and therefore

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http://www.inquirer.com/philly/living/20150326_Black_celebs_who_deny_racism_exists_are_out_of_touch.html. "[R]acial inequities in America are systemic and can't just be kumbaya'd away . . . ." Armstrong, *supra*. Gender inequalities cannot be "kumbaya'd" away either. *See* Brod, *supra* note 21, at 240; *cf.* Carter, *supra* note 111, at 388.

189. Oldham, *supra* note 5, at 89 n.45.

190. *Compare* Brod, *supra* note 21, at 295 (calling for states to adopt better procedural and substantive standards of fairness), *with* Oldham, *supra* note 5, at 84 (calling for states to adopt better procedural and substantive requirements).

191. CHRIS ROCK, *O.J., I Understand*, *on* ROLL WITH THE NEW (DreamWorks Records 1997). Of course, reducing a funny stand-up bit to writing without providing context, timing, or tone often removes the comedy entirely. *See id.*; Olga Khazan, *The Dark Psychology of Being a Good Comedian*, THE ATLANTIC: HEALTH (Feb. 27, 2014), http://www.theatlantic.com/health/archive/2014/02/the-dark-psychology-of-being-a-good-comedian/284104/. The brilliance of comedians lies in their ability to turn tragedy—in this case, Rock was joking about the gruesome murder of Nicole Brown Simpson—into comedy. ROCK, *supra*; Khazan, *supra*. While the bit was objectively funny (from the standpoint of any reasonably prudent observer), the overarching idea exposes "prenups" for what they truly are: harmful to women. ROCK, *supra*. That a comedian would devote a "bit" to poking fun at the notion of men violently attacking women over the man's hard-earned money serves as evidence of the pervasiveness of the cultural acceptance of men wishing to keep their money and women taking that money away. ROCK, *supra*. The moral Rock presents, albeit tongue-in-cheek, is that "prenups" allow men to continue controlling their money while men without prenups are doomed to such an extent that *murder* is actually a viable remedy. ROCK, *supra*.

192. ROCK, *supra* note 191.

193. *See PINC-03. Educational Attainment-People 25 Years Old and Over, by Total Money Earnings, Work Experience, Age, Race, Hispanic Origin, and Sex*, U.S. CENSUS BUREAU, http://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-03.2018.html (last visited Dec. 14, 2020). Among men and women twenty-five years and older, men significantly outearn women in every statistical category. *Id.* Men without college degrees outearn similarly educated women by more than $20,000 per year. *Id.* Among those with bachelor's degrees, men earn $27,000 more per year. *Id.* Men with professional degrees

marry older men;[195] women are more likely to pause or altogether stop their careers to take care of children;[196] and women who have experienced career interruptions return to the workforce making less money at lower positions than their male counterparts.[197] Women are less likely to be hired or promoted to managerial positions and five-fold less likely to be CEOs or CFOs.[198] More than two-thirds of wives in dual-income households earn less than their husbands, and relatedly, in times of economic downturn, women's careers are more likely to take a back seat or end altogether.[199] The list goes on.[200] This economic disparity between men and women is present in virtually every single quantifiable statistic that exists.[201]

Substitute gender inequality for the more generalized correlation between age and money, and common sense dictates that older people make more money and have more assets, giving them more reasons to enter into prenuptial agreements.[202] However, common sense also dictates that because women of equal age, education, and occupational experience still, on

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earn $62,000 more per year. *Id.* Even men with bachelor's degrees outearn women with master's degrees by more than $16,000 per year. *PINC-03.*, *supra*.

194. CASEY E. COPEN, ET AL., NAT'L CTR. FOR HEALTH STATS., FIRST MARRIAGES IN THE UNITED STATES: DATA FROM THE 2006-2010 NATIONAL SURVEY OF FAMILY GROWTH 5 (2012). "The median age at first marriage was 25.8 for women and 28.3 for men." *Id.* Women are also nearly three times more likely than men to marry before reaching the age of twenty. *See id.* at 5–6.

195. Carter, *supra* note 111, at 402; Dan Kopf, *Younger Women Tend to Marry Older Men in the US. That's finally changing*, QUARTZ (Oct. 17, 2018), http://qz.com/1426405/marriages-in-the-us-are-finally-seeing-more-age-equality/.

196. Lauren Winn, *Job Hunting After 50: How Women Can Plot Their 'Comeback Careers'*, NBC NEWS (Feb. 10, 2020, 4:23 PM), http://www.nbcnews.com/better/lifestyle/job-hunting-after-50-how-women-can-plot-their-comeback-ncna1127376.

197. *See* Lauren Weber, *Women's Careers Could Take Long-Term Hit from Coronavirus Pandemic*, WALL ST. J. (July 15, 2020, 8:00 AM), http://www.wsj.com/articles/womens-careers-could-take-long-term-hit-from-coronavirus-pandemic-11594814403.

198. Jess Huang et al., *Women in the Workplace 2019*, MCKINSEY & CO. (Oct. 15, 2019), http://www.mckinsey.com/featured-insights/gender-equality/women-in-the-workplace-2019.

199. Weber, *supra* note 197.

200. *See* Megan Friedman et al., *18 Ways Women Still Aren't Equal to Men*, MARIE CLAIRE (Aug. 9, 2019), http://www.marieclaire.com/politics/news/a15652/gender-inequality-stats/.

201. *Id.*; *PINC-03.*, *supra* note 193.

202. *See PINC-03.*, *supra* note 193. Common sense says that a younger spouse enters the marriage with less education, a lower-level job, or both; lower-level jobs at younger ages translate into lower annual income due to fewer years in the workforce; lower annual income, with fewer years earning the income, translates into fewer accumulated assets; fewer accumulated assets translates into fewer assets to protect. *See id.*

average, make significantly less money than their male counterparts, older women, on average, have less incentive to enter into prenuptial agreements because, relative to men, they have less income and fewer assets to protect.[203] The gender gap is real enough when two similarly situated partners marry;[204] it is further magnified when younger women marry older men,[205] and taken to its logical and disturbing extreme when the older men are more educated.[206]

Combine the data with common sense and the picture is clear: Prenuptial agreements are overwhelmingly created by and entered into by wealthy, older men who wish to protect their assets from the younger women they marry.[207] The agreements waive, or significantly reduce, property rights that women would otherwise possess through equitable distribution.[208] The agreements waive or significantly reduce alimony rights that women would otherwise be entitled to by statute.[209] These agreements are unfair,

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203. *See id.*

204. *See id.* For example, a man between the ages of twenty-five and thirty-four with a bachelor's degree who marries a woman between the same age range and education makes, on average, nearly $15,000 more per year. *Id.*

205. *See PINC-03.*, *supra* note 193. For example, a man between the ages of thirty-five and forty-four with a bachelor's degree who marries a younger woman between the ages of twenty-five and thirty-four with the same education makes, on average, nearly $40,000 more per year. *Id.* If both have professional degrees, the man makes on average almost $120,000 *more* per year. *Id.*

206. *See id.* For example, a man between the ages of thirty-five and forty-four with a professional degree who marries a younger woman between the ages of twenty-five and thirty-four will make, on average, nearly $150,000 *more* per year. *Id.* That is, the man will make *ten times the difference* when compared to a man and woman of the same age and education level. *PINC-03.*, *supra* note 193.

207. *See* Brod, *supra* note 21, at 243; Oldham, *supra* note 5, at 89 n.45. Common sense dictates that two similarly situated spouses either have little need to enter into a prenuptial agreement because they have few or no assets to protect, or any agreement entered into would reflect their equal bargaining positions and thus be presumptively fair, negating any reasons to challenge the validity of the agreement upon dissolution. *PINC-03.*, *supra* note 193.

208. *Compare* Berg v. Young, 175 So. 3d 863, 868 (Fla. 4th Dist. Ct. App. 2015) (determining the wife waived all rights to equitable distribution), *and* Flaherty v. Flaherty, 128 So. 3d 920, 921 (Fla. 2d Dist. Ct. App. 2013) (asserting the prenuptial agreement waived "any interest in assets acquired during the marriage"), *with* Brod, supra note 21, at 234–35, 235 n.20 ("It would be contrary to the very purpose of most premarital agreements to give the economically vulnerable spouse more than he or she would be entitled to receive under state law."), *and* FLA. STAT. § 61.075 (2019) ("[T]he court must begin with the premise that the distribution [of assets] should be equal . . . .").

209. *See, e.g.*, Waton v. Waton, 887 So. 2d 419, 421 (Fla. 4th Dist. Ct. App. 2004) (concluding the "[w]ife waived all rights to alimony and equitable distribution by signing an antenuptial agreement"); FLA. STAT. § 61.08.

inequitable, and overwhelmingly the product of what feminist theory treats as duress.[210]

While feminist literature spans a wide breadth with many diverse schools of thought, Dr. Orit Gan's analysis of duress in *Contractual Duress and Relations of Power* carries particular weight given her lengthy focus on duress in relation to prenuptial agreements.[211] Gan's analysis involves a broad and complex examination of consent with regard to both the micro forces—from relational dynamics to specific circumstances surrounding individual agreements—and macro forces—including social, gender, and economic power disparities—that lead, on the whole, to women succumbing to coercive pressures in prenuptial agreements.[212] However, before delving into Gan's analysis, duress and overreaching must first be examined from within Florida's common law.[213]

A. *Duress as Defined Through Florida's Common Law*

Florida courts have defined duress as a mental state "produced by an improper external pressure or influence that practically destroys the free agency of a party and causes *him* to do an act or make a contract not of *his* own volition."[214] Duress requires two showings: (1) the prenuptial agreement was signed involuntarily; and (2) the involuntariness was caused by the other party's coercive conduct.[215] In other words, duress involves the "loss of volition in response to outside compulsion."[216]

More important in the prenuptial agreement context is understanding the factual approximation of what is, and is not, duress.[217] For example, signing a prenuptial agreement under threat of non-marriage does not constitute duress.[218] Threats encompassing life-altering repercussions, on the

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210. *See* Gan, *supra* note 31, at 209.

211. *See id.* at 208–16.

212. *See id.* at 175–87.

213. *See, e.g.*, Francavilla v. Francavilla, 969 So. 2d 522, 524–25 (Fla. 4th Dist. Ct. App. 2007); Brod, *supra* note 21, at 253–54.

214. *Francavilla*, 969 So. 2d at 524–25 (emphasis added); *see also infra* note 262 and accompanying text. When defining duress in prenuptial agreement cases, the use of male gendered pronouns in reference to the victim — while women are the parties using the duress defense — is not insignificant. *See* Gan, *supra* note 31, at 194. "Duress typically excludes women's perspectives and experiences and ignores pressures unique to women's lives." *Id.* at 192. "Duress doctrine generally acknowledges pressures and constraints that are predominantly endured by men." *Id.*

215. *Francavilla*, 969 So. 2d at 525.

216. *Id.*

217. *See id.*; Gan, *supra* note 31, at 175.

218. *E.g.*, Eager v. Eager, 696 So. 2d 1235, 1236 (Fla. 3d Dist. Ct. App. 1997). "To hold otherwise would effectively provide a per se basis to invalidate most, if not all,

other hand, do constitute duress.[219] Courts have often declared seemingly arbitrary delineations: Receiving a prenuptial agreement two weeks before the wedding is not duress, but receiving an agreement two days before the wedding constitutes duress.[220] Accordingly, signing an agreement after receiving it at 11:30 p.m. the night before the wedding is duress.[221] Yet, signing a prenuptial agreement while seven months pregnant—an hour before the wedding ceremony—is not duress.[222] From this smattering of case law, the all-or-nothing standards of duress present as defective.[223]

Other all-or-nothing criteria present as equally dubious.[224] Signing a prenuptial agreement without the advice of an attorney is not duress; neither is signing an agreement based upon the misrepresentation that it would never be enforced.[225] Bafflingly, signing a prenuptial agreement as a *twice-divorced woman with a college nursing degree* is, apparently, enough definitive evidence to negate the possibility of duress:

> We first address whether the agreement was reached under duress, coercion, or overreaching. The record before us presents the former wife as an individual with a high level of education and business acumen who, having twice married, understood the significance of the document she was about to sign and chose not to seek the advice of a lawyer.[226]

The guide of a textured, equitable standard is severely wanting.[227]

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antenuptial property agreements." *Id.* The fact that the court recognized that "most, if not all," prenuptial agreements are signed under threat of non-marriage is quite disturbing. *See id.*

219. Ziegler v. Natera, 279 So. 3d 1240, 1243 (Fla. 3d Dist. Ct. App. 2019). It cannot be overlooked that the wife's testimony in this case was unrebutted by the husband because the husband did not show for trial. *Id.* at 1242 n.6.

220. Waton v. Waton, 887 So. 2d 419, 421 (Fla. 4th Dist. Ct. App. 2004) (finding no duress); Hjortaas v. McCabe, 656 So. 2d 168, 170 (Fla. 2d Dist. Ct. App. 1995) (finding duress). The court also noted that the disparity between the husband and wife's net worth at the time of marriage demonstrated the "financial power" the husband held over the wife. *Hjortaas*, 656 So. 2d at 170.

221. Flaherty v. Flaherty, 128 So. 3d 920, 921, 924 (Fla. 2d Dist. Ct. App. 2013).

222. Francavilla v. Francavilla, 969 So. 2d 522, 525 (Fla. 4th Dist. Ct. App. 2007). The court noted that the evidence indicated "some months" of negotiations. *Id.*

223. *See infra* note 246 and accompanying text; Levin & McDowell, *supra* note 51, at 57.

224. *See* Levin & McDowell, *supra* note 51, at 72–73, 84.

225. *See* Gordon v. Gordon, 25 So. 3d 615, 617 (Fla. 4th Dist. Ct. App. 2009); Cuillo v. Cuillo, 621 So. 2d 460, 462 (Fla. 4th Dist. Ct. App. 1993).

226. *See Gordon*, 25 So. 3d at 616–17.

227. Levin & McDowell, *supra* note 51, at 83. Duress, it could be argued, is a meaningless doctrine outside of equity. *See id.* at 83 n.141.

B. *Overreaching*

Overreaching, the often mentioned but rarely defined step-cousin of duress, has no real case law test or precedent in Florida save for a single case.[228] In *Schreiber v. Schreiber*,[229] the court analyzed an overreaching defense regarding a marital settlement agreement as follows:

> The problem we find with [the overreaching] argument is the lack of competent evidence that the MSA was the product of overreaching on appellee's part. It definitely was one-sided and unfair. But, that alone, no matter how egregious, does not translate into overreaching absent a sufficient showing that the MSA resulted from an inequality of bargaining power or other circumstances such that there was no meaningful choice on the part of the disadvantaged party. Basically, overreaching involves the situation where one party, having the ability to force the other into an unfair agreement, does so.[230]

Thus, to constitute overreaching—which, by statute, is an enumerated defense to invalidate a prenuptial agreement—the party must show: (1) disproportionate bargaining power or other circumstances; and (2) no meaningful choice.[231] This definition of overreaching necessitates a re-examination of the scenarios Florida case law found were not duress.[232]

Specifically, is signing a prenuptial agreement under threat of non-marriage overreaching?[233] Should the prospective husband in *Lashkajani*—twenty years older and with a significant asset and income advantage—have been characterized as having disproportionate bargaining power when compared to his younger, asset-poor prospective wife?[234] What about meaningful choice: Does the prospective wife, when deciding whether to end the potential marriage over the decision not to sign a document—a

228. *See* Schreiber v. Schreiber, 795 So. 2d 1054, 1056 (Fla. 4th Dist. Ct. App. 2001). A prenuptial agreement is unenforceable if it is "the product of fraud, duress, coercion, or overreaching." FLA. STAT. § 61.079(7)(a)(2) (2019). In *Schreiber*, the court — without a Florida common law definition — relied on Black's Law Dictionary for the definition of "overreaching." *Schreiber*, 795 So. 2d at 1057 n.3.

229. 795 So. 2d 1054 (Fla. 4th Dist. Ct. App. 2001).

230. *Id.* at 1057.

231. *See id.* at 1056, 1057 n.3; FLA. STAT. § 61.079(7)(a)(2).

232. *Schreiber*, 795 So. 2d at 1056.

233. Francavilla v. Francavilla, 969 So. 2d 522, 524 (Fla. 4th Dist. Ct. App. 2007); *see also infra* notes 284–85 and accompanying text.

234. *See* Lashkajani v. Lashkajani, 911 So. 2d 1154, 1155 (Fla. 2005).

document that she never expects to be enforced—have a meaningful choice?[235]

What about the woman in *Francavilla v. Francavilla*,[236] who, while seven months pregnant, signed the prenuptial agreement an hour before the wedding ceremony?[237] Does late-stage pregnancy qualify as "other circumstances"?[238] Did she have a "meaningful choice"?[239]

In both *Lashkajani* and *Francavilla*, the opinions each quoted the same line from the Supreme Court of Florida decision in *Casto v. Casto*:[240] A prenuptial agreement may be set aside if "reached under fraud, deceit, duress, coercion, misrepresentation, or overreaching."[241] Inexplicably, both *Lashkajani* and *Francavilla* subsequently disregarded any definition, analysis, or even mention of the word "overreaching" again.[242] Perhaps the *Lashkajani* and *Francavilla* courts were merely following *Casto's* precedent: In *Casto*, the wife sought to set aside a postnuptial agreement "because of duress and overreaching conduct."[243] The Court touched on duress in its analysis, but never mentioned or examined overreaching despite the wife using it as a specific defense to the contract.[244] While the length to which attorneys and litigants within the marital context use overreaching as a defense is unclear, Florida judges have seemingly scoffed and refused to use overreaching as a defense to prenuptial agreements seriously.[245]

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235. Hjortass v. McCabe, 656 So. 2d 168, 170 (Fla. 2d Dist. Ct. App. 1995); *see also* discussion *supra* Section III.B.

236. 969 So. 2d 522 (Fla. 4th Dist. Ct. App. 2007).

237. *Id.* at 525.

238. *See id.*

239. *See id.*

240. 508 So. 2d 330 (Fla. 1987).

241. *Id.* at 333; *see also* Lashkajani v. Lashkajani, 911 So. 2d 1154, 1157 (Fla. 2005); *Francavilla*, 969 So. 2d at 524. Misrepresentation is no longer a valid defense per se, although the reference likely refers to the misrepresentation of assets, which would be part of an unconscionability defense. *See* FLA. STAT. § 61.079(7)(a) (2019).

242. *See Lashkajani*, 911 So. 2d at 1157; *Francavilla*, 969 So. 2d at 524.

243. *Casto*, 508 So. 2d at 332. The husband threatened to blow up the wife's house if she could not find a lawyer who would allow her to sign his proposed agreement. *Id.* at 335. Postnuptial agreement case law is controlling for prenuptial agreements. Waton v. Waton, 887 So. 2d 419, 423 n.1 (Fla. 4th Dist. Ct. App. 2004); *see also* discussion *infra* Part V.

244. *See Casto*, 508 So. 2d at 334.

245. *See Lashkajani*, 911 So. 2d at 1160; *Francavilla*, 969 So. 2d at 524.

C. *"Legal Duress" Versus Gan's Analysis of Duress*

Legal duress,[246] i.e., how the common law defines duress, focuses on the threats of the individual actor while ignoring the exploitation and subtle economic vulnerabilities women face that directly influence a woman's ability to negotiate and contract.[247] For example, one-sided, unfair, and egregious contractual terms proposed by a socially and economically advantaged party are seen merely as "offers."[248] In Gan's analysis of duress, however, Gan sees these one-sided offers through the scope of the parties' disparate negotiation starting points.[249] Taking into account social power dynamics and systemic economic pressures, Gan's analysis of duress sees these "offers" for what they truly are: points along a spectrum ranging from voluntary (consent) to duress (threats):

> [F]eminists see consent as a complicated and nuanced concept . . . . Human behavior is complex and often cannot be classified as either duress or consent; there are many intermediate situations in which hesitation or ambiguity occurs, which the current law does not recognize. Parties might experience hesitations, conflicted feelings, subtle pressures, stress, or constraints. They might feel obligated, pressured, stressed, exploited, or compelled. All of these intermediate feelings fall in between the two extremes of either consent or duress.[250]

Consider, briefly, the relevant facts of *Hahamovitch v. Hahamovitch*:[251] Mr. Hahamovitch, a successful thirty-nine-year-old commercial real estate developer, hired a twenty-one-year-old woman to work for him for $30,000 per year.[252] After a five-year relationship ensued, the couple decided to marry.[253] Mr. Hahamovitch presented his future wife with a prenuptial agreement that waived all of her rights and claims to current and future property titled solely in Mr. Hahamovitch's name, which, as Mr. Hahamovitch was a real estate developer, meant she would be

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246. *See* Gan, *supra* note 31, at 187–88. To distinguish common law duress from "Gan's analysis of duress," the remainder of this section will refer to common law duress as "legal duress." See discussion *infra* Section IV.C.

247. Gan, *supra* note 31, at 187–88.

248. *Id.* at 188.

249. *See id.* at 187–88.

250. *Id.* at 201.

251. 174 So. 3d 983 (Fla. 2015).

252. *See* Initial Brief on the Merits for Petitioner at 3, Hahamovitch v. Hahamovitch, 174 So. 3d 983, 985 (Fla. 2015) (No. SC 14-277).

253. *Id.* at 3–4.

waiving all rights to his future business.[254] Now consider the nearly twenty-year age difference, the employer/employee relationship, and the wide economic disparity between the parties.[255] Does this add up to exploitation?* Are there subtle economic vulnerabilities at play?* Does the negotiation starting point—a waiver of all property rights—qualify as an offer between parties on a level playing field?* The question is, when the woman signs, is this voluntary?* Duress?* Overreaching?* Or none of the above?*

Legal duress is binary: The contract is either voluntary or a product of threats.[256] The truth is, most, if not all prenuptial agreements, as with contracts generally, fit somewhere in the middle.[257] Gan's analysis of duress calls for contractual voluntariness to be viewed along a spectrum, ranging from consent to coercion, with overreaching, social and economic inequalities, and pressures unique to women's lives packing the gray areas in between.[258] Contract, with its rigid rules and binary thinking, is not equipped to utilize Gan's analysis of duress.[259] Equity, on the other hand, is.[260]

Equity, the court of conscience, the court of fairness, the court with "wide discretion in fashioning remedies to satisfy the exigencies of the circumstances," is fully equipped to evaluate prenuptial agreements through Gan's analysis of duress.[261] If contract views duress as binary, equity sees duress in three dimensions.[262]

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254. *Hahamovitch*, 174 So. 3d at 985.

255. *See* discussion *infra* notes 273–75 and accompanying text; Gan, *supra* note 31, at 188, 193–94.

256. Gan, *supra* note 31, at 201. Legal duress "acknowledges pressures and constraints that are predominantly endured by men, such as the threat of physical harm, threat to damage goods, threat to breach a contract, and other economic threats." *Id.* at 192.

257. *Id.* at 194; *see also* Eager v. Eager, 696 So. 2d 1235, 1236 (Fla. 3d Dist. Ct. App. 1997).

258. *See* Gan, *supra* note 31, at 201. An incomplete list of pressures unique to women's lives include social sexual pressures, prostitution, sexual harassment, forced marriage, and rape. *Id.* at 192.

259. *See* discussion *supra* Section II.C; Bethany Trace Owners' Ass'n v. Whispering Lakes I, L.L.C., 155 So. 3d 1188, 1191 (Fla. 2d Dist. Ct. App. 2014).

260. *See* discussion *supra* Section II.C; Wicker v. Bd. of Pub. Instruction of Dade Cnty., 106 So. 2d 550, 558 (Fla. 1958).

261. Schroeder v. Gebhart, 825 So. 2d 442, 446 (Fla. 5th Dist. Ct. App. 2002); *see also* Gan, *supra* note 31, at 201.

262. *See* Gan, *supra* note 31, at 201. In Florida, the common law duress definition originates from a 1928 Supreme Court of Florida ruling. *See* Herald v. Hardin, 116 So. 863, 864 (Fla. 1928). "Duress is a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition." *Id.* Needless to say, while American society's views on women have changed considerably since then, the common law definition of duress has remained the same. Francavilla v. Francavilla, 969 So. 2d 522, 524–25 (Fla. 4th Dist. Ct. App. 2007) (using seventy-nine-year-old common law definition of duress).

Reconsider the basic facts from *Lashkajani*, viewed through Gan's analysis: Three days prior to their wedding, the wife, age twenty-five, signed a prenuptial agreement with her significantly wealthier husband, age forty-five.[263] Where does a twenty-year age gap between parties with wide economic disparity fit along the spectrum of voluntary and duress?[264] If a court of equity balances each of the relevant factors, weighing the social and economic inequalities with the unique pressures women face both at the macro level (within society) and at the micro level (three days prior to the wedding), then perhaps such a court would arrive at a conclusion where the most egregious and unfair parts of the agreement are invalidated, the contract is reformed, or the agreement is held void in its entirety.[265] While the outcome cannot be determined beforehand with precision, this much is clear: As contract toils in black and white, equity thrives in color.[266]

D. *A Note on Unconscionability*

Unconscionability, like duress, is a defense to contract enforcement.[267] At common law, an unconscionable contract is viewed as one "no man [sic] in his senses and not under delusion would make on the one hand, and as no honest and fair man [sic] would accept on the other."[268] Florida courts favor a balancing approach to unconscionability.[269] This means that while both the procedural and substantive prongs of unconscionability must be present in order to invalidate a contract, "they need not be present in the same degree."[270] Under common law, an

263. Respondent/Former Wife's Answer Brief at 8, Lashkajani v. Lashkajani, 911 So. 2d 1154 (Fla. 2005) (No. SC03-1275).

264. *Id.*; *see also* Gan, *supra* note 31, at 201.

265. *Cf.* Goodall v. Whispering Woods Ctr., L.L.C., 990 So. 2d 695, 699 (Fla. 4th Dist. Ct. App. 2008). Reformation in equity is available when mutual mistake causes the contract to inaccurately "express the true intention or agreement of the parties . . . ." *Id.*

266. *Compare* Bethany Trace Owners' Ass'n v. Whispering Lakes I, L.L.C., 155 So. 3d 1188, 1191 (Fla. 2d Dist. Ct. App. 2014) (explaining common law contract interpretation is a question of pure law involving formal, rigid rules), *with* Rennolds v. Rennolds, 312 So. 2d 538, 542 (Fla. 2d Dist. Ct. App. 1975).

267. AMS Staff Leasing, Inc. v. Taylor, 158 So. 3d 682, 687 (Fla. 4th Dist. Ct. App. 2015).

268. *Id.* at 688 (quoting Hume v. United States, 132 U.S. 406, 411 (1889)).

269. Basulto v. Hialeah Auto., 141 So. 3d 1145, 1159 (Fla. 2014).

270. *Id.* Procedural unconscionability focuses on "the manner in which the contract was entered," including the relative bargaining power, lack of meaningful choice, the negotiation process, and "the complaining party's ability and opportunity to understand the disputed terms of the contract." *Id.* at 1157 n.3. Substantive unconscionability focuses on the "outrageous degree of unfairness" within the contract itself. Steinhardt v. Rudolph, 422 So. 2d 884, 889 (Fla. 3d Dist. Ct. App. 1982).

outrageously unfair substantive contract or provision, for example, requires only a "modicum" of procedural unfairness in order to be invalidated.[271]

Unconscionability is thus a flexible "safety valve" from the rigid rules of contract.[272] It is "chameleon-like," without black letter rules, and is "so vague that neither the courts, practicing attorneys, nor contract draftsmen can determine with any degree of certainty when it will apply in any given situation."[273] Perhaps for these reasons, and given the nature of the relationships of parties agreeing to prenuptial agreements, the guidelines for unconscionable prenuptial agreements are codified in the Florida Statutes.[274]

Under Chapter 61, a prenuptial agreement or provision is unenforceable if the defending party proves: (1) the agreement was unconscionable at the time of execution; and (2) the defending party shows he or she was not provided with, did not waive, and could not have reasonably known, the other party's property or financial obligations.[275] The guidelines for unconscionable prenuptial agreements were outlined in the 1962 Supreme Court of Florida case, *Del Vecchio v. Del Vecchio*.[276] There, the Court stated, "[a] valid antenuptial agreement contemplates a fair and reasonable provision therein . . . or, absent such provision, a full and frank disclosure . . . of the husband's worth, or, absent such disclosure, a general and approximate knowledge . . . of the prospective husband's property."[277] In other words, an unconscionable prenuptial agreement is an unfair agreement "executed in the absence of full and fair financial disclosure . . . ."[278]

But what constitutes "full" financial disclosure?[279] Consider the divide between the majority and dissent in *Gordon v. Gordon*.[280] There, the Fourth District evaluated the husband's failure to disclose his airline pension

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271. *Basulto*, 141 So. 3d at 1159.

272. *Steinhardt*, 422 So. 2d at 890; *see also* Burlington & Rockenbach, P.A. v. Law Offices of E. Clay Parker, 160 So. 3d 955, 958 (Fla. 5th Dist. Ct. App. 2015) (listing other contractual safety valves).

273. Gainesville Health Care Ctr., Inc. v. Weston, 857 So. 2d 278, 283 (Fla. 1st Dist. Ct. App. 2003); *see also Steinhardt*, 422 So. 2d at 890; Fotomat Corp. of Fla. v. Chanda, 464 So. 2d 626, 628 n.1 (Fla. 5th Dist. Ct. App. 1985) (citations omitted).

274. *See* FLA. STAT. § 61.079(7)(a) (2019); Casto v. Casto, 508 So. 2d 330, 334 (Fla. 1987). ("[P]arties to a marriage are not dealing at arm's length . . . .").

275. *See* FLA. STAT. § 61.079(7)(a)(3)(a.)–(c.). The defending party must show: (1) the substantive prong, as defined by the vague term "unconscionable"; and (2) the procedural prong, as defined by the process of financial disclosure. *Id.*; *Casto*, 508 So. 2d at 333–34.

276. 143 So. 2d 17 (Fla. 1962).

277. *Id.* at 20.

278. Ziegler v. Natera, 279 So. 3d 1240, 1242 (Fla. 3d Dist. Ct. App. 2019).

279. *See id.*

280. 25 So. 3d 615 (Fla. 4th Dist. Ct. App. 2009).

plan prior to the wife signing the prenuptial agreement.[281] The majority held that disclosure of "every minute detail" was not required and thus the prenuptial agreement was valid.[282] The dissent, on the other hand, characterized the husband's underreporting of potentially $229,000 as "neither a minute detail nor excusably inexact."[283] By comparison, the Second District in *Hjortaas v. McCabe*,[284] found the omittance of two million dollars in financial statements as insufficient disclosure.[285] The line, it seems, falls somewhere in between.[286] Enter equity:

> The law in Florida is clear that an unconscionable contract or an unconscionable term therein will not be enforced by a court of equity. "It seems to be established by the authorities that where it is perfectly plain to the court that one party [to a contract] has overreached the other and has gained an unjust and undeserved advantage which it would be inequitable to permit him to enforce, that a court of equity will not hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness."[287]

What is clear is that the vague standards of unconscionability and binary standards of legal duress are in need of both clarity and revision.[288] These concepts require better measures than common law contract has thus far provided, but not one in which contract, or any other area of the law, is incapable of providing.[289] The law, in fact, constantly reviews and adjusts to broad and vague concepts—from due process and copyright infringement to reckless driving and the best interests of the child—and adjusts with standards of reasonableness and fairness in mind.[290] Here, in the case of prenuptial agreements, the solution is not a rewriting of common law contract, but a slight nudge toward interpretation in line with the rest of Chapter 61 proceedings.[291]

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281. *Id.* at 616.
282. *Id.* at 617.
283. *Id.* at 618 (Ciklin, J., dissenting).
284. 656 So. 2d 168 (Fla. 2d Dist. Ct. App. 1995).
285. *Id.* at 170.
286. *See id.*; *Gordon*, 25 So. 3d at 617–18.
287. Steinhardt v. Rudolph, 422 So. 2d 884, 889 (Fla. 3d Dist. Ct. App. 1982) (quoting Peacock Hotel, Inc. v. Shipman, 138 So. 44, 46 (1931)).
288. *See* Gan, *supra* note 31, at 194, 197–98.
289. *See id.*; discussion *supra* Section II.C.
290. *See* Biemiller, *supra* note 3, at 148–49.
291. *See* FLA. STAT. § 61.30(11)(a)(11) (2019).

V. CONTRACT MODIFICATION: THE SUBSTANTIAL CHANGE STANDARD

People invariably change over time.[292] Personality, once thought to be a fixed set of traits that remain static across life, is now seen as dynamic and ever-changing.[293] A considerable source of personality change is the effect that life events have upon a particular person.[294] Specifically, the transition to marriage and the ongoing marital relationship have been identified as major contributors to personality change.[295]

Scientists measure personality through the "Big Five" personality traits: agreeableness, conscientiousness, extraversion, neuroticism, and openness to experience.[296] Although fluctuations in marital satisfaction have been linked to each of the "Big Five" traits, upward changes in neuroticism have most consistently been associated with a decline in marital satisfaction.[297] Importantly, initial levels of neuroticism are less relevant to marital satisfaction than the changes of neuroticism over time.[298] Thus,

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292. Justin A. Lavner et al., *Personality Change Among Newlyweds: Patterns, Predictors, and Associations with Marital Satisfaction over Time*, 54 DEVELOPMENTAL PSYCH. 1172, 1183 (2017).

293. *Id.* While young people experience a greater magnitude of change, personality changes are evident throughout all ages and phases of life. Jordi Quoidbach et al., *The End of History Illusion*, 339 SCIENCE 96, 98 (2013).

294. *See* Madison S. O'Meara & Susan C. South, *Big Five Personality Domains and Relationship Satisfaction: Direct Effects and Correlated Change over Time*, 87 J. PERSONALITY 1206, 1207 (2019). Personality may also impact and direct certain life events, which in turn further impacts personality. *See* Lavner et al., *supra* note 292, at 1183. Personality is thus said to "covary" — meaning fluctuate alongside — with changes in marital satisfaction. *Id.*

295. *See* Lavner et al., *supra* note 292, at 1172. Marriage, among other things, affects "lifestyle, identity, and responsibilities." *Id.* at 1173.

296. Diederik Boertien & Dimitri Mortelmans, *Does the Relationship Between Personality and Divorce Change over Time? A Cross-Country Comparison of Marriage Cohorts*, 61 ACTA SOCIOLOGICA 300, 302 (2018). The "Big Five" is a classification system that consolidates the expansive list of traits identified by researchers into five categories. *Id.* In general, agreeableness refers to traits including trust, cooperation, and sympathy; conscientiousness includes discipline, detail, and ambition; extraversion refers to sociability; neuroticism is marked by hostility, insecurity, anxiety, self-consciousness, and depression; and openness to experience includes boldness, originality, and creativity. *Id.*; *see also* Carly D. L. LeBaron, *Stability and Change in Women's Personality Across the Life Course* (July 2013) (unpublished Ph.D. dissertation, Bringham Young University) (on file with Brigham Young University).

297. *See* Boertien & Mortelmans, *supra* note 296, at 302, 312 (suggesting martial satisfaction predictors include agreeableness, openness to experience, and neuroticism); Lavner et al., *supra* note 292, at 1173 ("[N]euroticism, agreeableness, conscientiousness, and extraversion are associated with an individual's own marital satisfaction . . . .").

298. O'Meara & South, *supra* note 294, at 1217. Perhaps of relevance, research shows that entering into a new relationship is associated with a significant increase in

while negative changes to openness to experience and conscientiousness are direct indicators of an increased likelihood of divorce, changes leading to increased neuroticism mark the most "rapid pathways toward divorce."[299]

What does this all mean?[300] It means that adults—specifically married adults—change over time.[301] The problem is, people are able to recognize and reflect upon *past* personality changes but cannot and do not recognize the possibility of *future* personality changes.[302] This is called the "end of history illusion."[303] The end of history illusion is a cognitive bias that causes parties to miscalculate both the likelihood of personal changes and the consequences of such changes.[304] Specifically, people are predisposed to view the present as a milestone—that is, the defining moment of their own personal history—where who they currently are, will forever remain who they will be.[305] The end of history illusion has wide-ranging implications for marriage and divorce, causing parties to overpay for future possibilities (e.g., divorce) in order to satiate their current preferences (e.g., marriage).[306] Add prenuptial agreements to the mix, and the inability to predict how and when a party will change has tremendous consequences.[307]

Changes are not just limited to a person's personality.[308] While personality changes might factor into the demise of a marriage, other significant changes may transform a previously fair prenuptial agreement into an oppressive burden should the parties divorce.[309] The point, then, is

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extraversion and a decrease in neuroticism. Lavner et al., *supra* note 292, at 1173. This means that new relationships may be characterized by unusual changes to neuroticism; how the individual's neuroticism fluctuates over the course of the relationship, as opposed to the actual neuroticism level, may better correspond with the overall marital satisfaction. *Id.* at 1173.

299. *See* Boertien & Mortelmans, *supra* note 296, at 313; Ronald D. Rogge et al., *Predicting Marital Distress and Dissolution: Refining the Two-Factor Hypothesis*, 20 J. FAM. PSYCH. 156, 159 (2006). One study found that the transition to parenthood was marked by significant changes to a wife's neuroticism. *See* LeBaron, *supra* note 296.

300. *See* Lavner et al., *supra* note 292, at 1183.

301. *Id.*

302. *See* Quoidbach et al., *supra* note 293, at 98.

303. *See id.* at 96.

304. *Id.*

305. *Id.*

306. *Id.*

307. *See* Famiglio v. Famiglio, 279 So. 3d 736, 737 (Fla. 2d Dist. Ct. App. 2019) ("The tiniest words can have the greatest consequence. In this appeal of a judgment interpreting a prenuptial agreement, the word 'a,' the smallest of words in the English language, could mean the difference of a million and a half dollars.").

308. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05 cmt. b, illus. 1 (AM. L. INST. 2002).

309. *See id.* Consider the following adapted illustration: Prior to their marriage, Husband and Wife entered into a prenuptial agreement that designated all property

that people and their lives change in unexpected ways, or at least, unexpected to them.[310] Equity allows for these changes to be taken into consideration, while common law contract, for the most part, does not.[311] This section will explore how equity, specifically in Florida's Chapter 61 proceedings, allows for fair modifications to otherwise set-in-stone contracts, agreements, or final judgments due to the substantial, material, and unanticipated change tests.[312]

A. *Chapter 61 Modifications*

Chapter 61 proceedings in equity legitimize and thus allow unexpected life changes—changes that render prior agreements and judgments inapplicable, unjust, or unrealistic—as grounds for modification.[313] Accordingly, Chapter 61 proceedings seek equitable solutions through a weighing of all the necessary factors.[314] While the analysis and outcomes between child support, timesharing, parental responsibility, and alimony may vary, Florida's statutory policy recognizes that people change, situations differ, outcomes are unexpected, and fairness dictates that these problems are resolved properly.[315]

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titled in the other's name as nonmarital and waived any and all future alimony. *Id.* Husband and Wife were the same age, held the same job, earned the same income, held no significant assets, and neither wanted children. *Id.* However, two years into the marriage, Wife's sister died in a tragic car accident, leaving Wife as the legal guardian of her two young nieces. *Id.* With her husband's blessing, Wife switched to part-time in order to devote her time to parenting; soon after, Wife dropped out of the workforce altogether. PRINCIPLES OF FAMILY DISSOLUTION § 7.05 cmt. b, illus. 1. Meanwhile, Husband received several promotions with corresponding pay raises. *Id.* Several years later, Husband and Wife divorce. *Id.* Wife leaves the marriage with no job, no assets, no alimony, two children, no child support (her Husband did not legally adopt the children), and no retirement plan. *Id.* Meanwhile, Husband leaves the marriage with significant assets, a substantial retirement plan, and twice the income as when the marriage began. *Id.*

310. Quoidbach et al., *supra* note 293, at 96.

311. *See* 22 FLA. JUR. 2D *Equity* § 29 (2020); PRINCIPLES OF FAMILY DISSOLUTION § 7.05 cmt. b, illus. 1; FLA. STAT. § 61.14(1)(a) (2019).

312. *See* 22 FLA. JUR. 2D Equity § 29; PRINCIPLES OF FAMILY DISSOLUTION § 7.05; discussion *infra* Section V.A.

313. *See* FLA. STAT. § 61.13(3) (allowing modification to parental responsibility and timesharing); *id.* § 61.14(1)(a) (allowing modification of alimony); *id*. § 61.30(1)(b) (allowing modification of child support).

314. *See* PRINCIPLES OF FAMILY DISSOLUTION § 7.05; FLA. STAT. § 61.13(3).

315. PRINCIPLES OF FAMILY DISSOLUTION § 7.05.

1. Child Support

In Chapter 61 proceedings, child support is determined by the Florida statutory guidelines.[316] Florida uses the income shares model, where each parent pays their pro-rata share of the support amount.[317] However, as the proceedings are in equity, judges have the discretion to deviate from the guideline amount based on a balancing of any relevant factors unique to the parties and their children.[318] Once child support has been determined via final judgment or agreement by the parties, the trial court retains continuing jurisdiction, and either parent may petition to modify child support provided the statutory criteria are met.[319]

"[A] fundamental prerequisite to bringing an action to modify child support payments is a showing of substantial change of circumstances."[320] Because future events and the resulting effects cannot be known at the time of original child support determination, Florida case law allows for a three-part test for child support modification.[321] The moving party must show: "(1) a substantial change in circumstances; (2) the change was not contemplated at the time of the final judgment of dissolution; and (3) the change is sufficient, material, involuntary, and permanent in nature."[322]

In order to prove a substantial change in circumstances, the movant must show a difference of fifteen percent or fifty dollars per month, whichever is greater, between the initial monthly child support obligation and the current statutory obligation if the changed circumstances are accepted.[323] A significant increase in income due to a promotion or second

316. FLA. STAT. § 61.29.

317. *See id.* Child support is calculated from net income, which is gross income minus post-tax and involuntary contributions. FLA. STAT. § 61.30(3).

318. FLA. STAT. § 61.30(11)(a). If the deviation is greater than five percent above or below the guideline amount, the judge must provide written findings why the deviation is fair. *Id.* § 61.30(1)(a).

319. *See id.* § 61.13(1)(a)(2); Maher v. Maher, 96 So. 3d 1022, 1022 (Fla. 4th Dist. Ct. App. 2012). In the event the parties agree to a non-guideline child support amount, the judge must examine the agreement to ensure the child's right of support has not been adversely affected. FLA. STAT. § 61.13(1)(a)(1)(c).

320. Overbey v. Overbey, 698 So. 2d 811, 813 (Fla. 1997); *accord* Brown v. Brown, 180 So. 3d 1070, 1072 (Fla. 1st Dist. Ct. App. 2015) (per curiam); *see also* FLA. STAT. § 61.13(1)(a)(2).

321. Harbin v. Harbin, 762 So. 2d 561, 562 n.2 (Fla. 5th Dist. Ct. App. 2000).

322. *E.g.*, *id.* When the initial determination is based upon an agreement by the parties, as opposed to a final judgment, "there is a heavier burden on the party seeking a downward modification." Wood v. Wood, 162 So. 3d 133, 135 (Fla. 1st Dist. Ct. App. 2014) (per curiam).

323. FLA. STAT. § 61.30(1)(b); *Brown*, 180 So. 3d at 1073. For example, a pay cut from $100,000 per year down to $97,000 per year would not qualify as a substantial enough change. *See* FLA. STAT. § 61.30(1)(b).

occupation, for example, is grounds for an upward modification of child support.[324] Voluntary retirement does not qualify as grounds for a downward modification of child support, but forced retirement, because it is involuntary and unanticipated, is grounds for downward modification.[325] Likewise, a substantial decline in income due to major business losses is also grounds for downward modification.[326] A dramatic drop in 100% commission-based salary, however, is not grounds for downward modification where fluctuations were previously contemplated and expected.[327]

In total, a trial court in Chapter 61 proceedings has the power to make any adjustments and modifications necessary in order "to achieve an equitable result."[328]

2. Parenting Plan

In Chapter 61 proceedings, modifications to a parenting plan—which include timesharing and parental responsibility—also require a prerequisite substantial change test.[329] Specifically, the moving party must show: (1) a substantial, material change in circumstances; (2) the change was unanticipated by the parties; and (3) the modification serves the best interests of the child.[330] Because the presumption favors the reasonableness of the original parenting plan determination, the party moving for modification carries an extraordinary burden of proving each element of the substantial change test.[331] Thus, a showing of hostility, poor communication regarding

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324. *See* Shaw v. Nelson, 4 So. 3d 740, 742, 745 (Fla. 1st Dist. Ct. App. 2009). However, a court may disregard income from a second occupation if such employment was obtained in order to support subsequent children. FLA. STAT. § 61.30(12)(a).

325. Pimm v. Pimm, 601 So. 2d 534, 537 (Fla. 1992); *Harbin*, 762 So. 2d at 562–63.

326. Suarez v. Suarez, 284 So. 3d 1083, 1085, 1087 (Fla. 4th Dist. Ct. App. 2019). The court held the substantial loss in business income — which occurred due to changed industry regulations, severe market fluctuations, and the loss of a preeminent client — warranted an adjustment in alimony, but reversed and remanded the change in child support due to a separate error by the trial judge. *Id.* at 1087, 1090. The test for child support and alimony is otherwise the same. *See Harbin*, 762 So. 2d at 562 n.2.

327. Tisdale v. Tisdale, 264 So. 3d 1105, 1108 (Fla. 1st Dist. Ct. App. 2019).

328. *See* FLA. STAT. § 61.30(11)(a)(11).

329. Brown v. Brown, 180 So. 3d 1070, 1072 (Fla. 1st Dist. Ct. App. 2015) (per curiam).

330. FLA. STAT. § 61.13(2); *see, e.g.*, Korkmaz v. Korkmaz, 200 So. 3d 263, 265 (Fla. 1st Dist. Ct. App. 2016). Florida Statute section 61.13(3) enumerates a laundry list of considerations when determining the best interest of the child. *See* FLA. STAT. § 61.13(3)(a)–(t).

331. *See, e.g.*, Ragle v. Ragle, 82 So. 3d 109, 111 (Fla. 1st Dist. Ct. App. 2011). Courts view changes to child timesharing arrangements as disruptive. *Id.* at 113. The goal is to promote stability and finality for the children, and modification proceedings run

important decisions, and an angry and bitter relationship on the part of one parent toward the other is insufficient to establish changed circumstances as a justification for modification.[332] A showing of parental alienation, on the other hand, may justify modification.[333] Conversely, a parent's relocation, even to another state, does not constitute a substantial change.[334]

B. *Alimony Modification*

Compared to child support, timesharing, and parental responsibility, alimony modification proceedings should have a more direct parallel to how prenuptial agreements are adjudicated considering the frequency of which prenuptial agreements contain or waive alimony payments.[335] However, this is not the case.[336] While prenuptial agreements are enforced through common law contract, alimony modification is adjudicated in accordance with the principles of equity.[337] The problem though is that the analyses and policy arguments offered by the courts in favor of equitable alimony modification erode and often directly contradict arguments held out in favor of strict contractual enforcement of prenuptial agreements.[338]

In Chapter 61 proceedings, modifications to alimony also require—hardly surprising at this point—the prerequisite substantial change test.[339] The elements to the substantial change test for alimony are identical to the child support test.[340] The moving party must show: "(1) there has been a substantial change in circumstances; (2) the change was not contemplated at

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counter to this goal. *See Korkmaz*, 200 So. 3d at 265. Therefore, policy governs that trial courts be given less discretion in modification than during initial child timesharing determinations. *Ragle*, 82 So. 3d at 113. The presumption and resulting modification standard apply to settlement agreements incorporated into final judgments as well as final judgments that resulted after adversarial hearings. Wade v. Hirschman, 903 So. 2d 928, 934 (Fla. 2005).

332. *Korkmaz*, 200 So. 3d at 266; *see also* Sanchez v. Hernandez, 45 So. 3d 57, 62 (Fla. 4th Dist. Ct. App. 2010) (asserting acrimonious relationship does not qualify as a substantial change).

333. *Korkmaz*, 200 So. 3d at 265.

334. *Ragle*, 82 So. 3d at 112.

335. *See* FLA. STAT. § 61.079(4)(a)(4). ("Parties to a premarital agreement may contract with respect to: . . . [t]he establishment, modification, waiver, or elimination of child support . . . .").

336. *See* Pimm v. Pimm, 601 So. 2d 534, 537 (Fla. 1992).

337. *See id.*

338. *Compare id.* at 536–37 (arguing public policy favors downward modification of alimony under certain, reasonable circumstances), *with* Petracca v. Petracca, 706 So. 2d 904, 911 (Fla. 4th Dist. Ct. App. 1998) (concluding unreasonable and unfair domestic bargains are enforceable because public policy favors freedom of contract).

339. *See* FLA. STAT. § 61.14(1)(a).

340. Harbin v. Harbin, 762 So. 2d 561, 562 n.2 (Fla. 5th Dist. Ct. App. 2000).

the time of the final judgment of dissolution; and (3) the change is sufficient, material, permanent, and involuntary."[341] However, there are two notable differences in application of the test.[342] First, the party seeking the alimony modification bears the same burden of proof regardless of whether the alimony award was initiated through a final judgment or a marital settlement agreement.[343] Second, and most importantly, the equitable substantial change test for alimony *also applies to prenuptial agreements* despite decades of contradictory case law.[344]

1. Alimony Modification in Case Law

In *Pimm v. Pimm*,[345] the Supreme Court of Florida answered a certified question as to whether alimony payments from a final judgment of dissolution of marriage could be modified due to the husband's voluntary retirement.[346] The judgment was silent regarding alimony payments post-husband's retirement.[347] The wife argued that the retirement was contemplated at the time of the final judgment, and the silence in the agreement was evidence that, regardless of retirement, the husband would continue paying.[348] The husband argued that if his reduced income upon retirement—after retiring at a normal age—was not considered a substantial change, then he would never be able to retire.[349]

The Court in *Pimm*, fully in line with equitable principles, dictated that the lower court weigh the reasonableness of a voluntary retirement against the consequences that a reduction in alimony would have upon the receiving spouse.[350] The Court explicitly mandated a balancing test with the retiree's age, health, motivation, and occupation weighed against the receiving spouse's needs, income, and accumulated assets.[351] In other words, the Court mandated that a voluntary agreement entered into thirteen years

341. *E.g.*, *id.*; Bauchman v. Bauchman, 253 So. 3d 1143, 1147 (Fla. 4th Dist. Ct. App. 2018); Dogoda v. Dogoda, 233 So. 3d 484, 486 (Fla. 2d Dist. Ct. App. 2017).

342. *See Dogoda*, 233 So. 3d at 486; Posner v. Posner (*Posner II*), 257 So. 2d 530, 534 (Fla. 1972).

343. FLA. STAT. § 61.14(7); *Dogoda*, 233 So. 3d at 486; Garvey v. Garvey, 138 So. 3d 1115, 1120 (Fla. 4th Dist. Ct. App. 2014).

344. *See Posner II*, 257 So. 2d at 534.

345. 601 So. 2d 534 (Fla. 1992).

346. *Id.* at 535. The alimony portion of the judgement was reached via marital settlement agreement. *Id.*

347. *Id.* at 537.

348. *Id.*

349. *Pimm*, 601 So. 2d at 536.

350. *Id.* at 537.

351. *Id.*

prior be interpreted and modified through equity.[352] Yet, prenuptial agreements—which are also putatively voluntary and often entered into thirteen or more years prior—are interpreted and enforced through contract.[353]

Moreover, since *Pimm* was decided in 1992, a substantial amount of case law has recognized the equitable principles regarding alimony modification.[354] From *Bauchman v. Bauchman*[355]—"The trial court has broad discretion to modify a former spouse's alimony obligation 'as equity requires, [giving] due regard to the changed circumstances'" of the parties—to *Dogoda v. Dogoda*[356]—"when the parties enter into an agreement for payments for . . . alimony . . . the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability of the parties"—and *Suarez v. Suarez*:[357] "In considering [alimony] modification, the court can and should take into consideration all factors and contrast the total circumstances at the time of the original order with all the current circumstances."[358] There is a reason these cases continue to cite the same or similar language: The language is codified in Chapter 61 of the Florida Statutes.[359] The court in *Gelber v. Brydger*[360] summed it up best:

> Concerning modifications of support, maintenance, and alimony agreements or orders, section 61.14(1)(a), Florida Statutes (2017), is primarily concerned with equity and fairness. In the part pertinent to this case, the statute provides:

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352. *See id.* It bears noting that institutionalized sexism could play a role in cases like these. *See* Brod, *supra* note 21, at 266–67 (observing hostility toward gender equality is apparent in many judicial opinions). When women have sought to invalidate prenuptial agreements that were unfairly paying little or nothing after a period of many years, courts have had no trouble enforcing the agreements as contracts; in *Pimm*, however, when the man sought to modify the marital settlement agreement because he felt it was unfair to pay the same amount after retirement, the court deemed it necessary to interpret the agreement in equity. *See Pimm*, 601 So. 2d at 537.

353. *See* Hahamovitch v. Hahamovitch, 174 So. 3d 983, 986 (Fla. 2015).

354. *Pimm*, 601 So. 2d at 535; *see also* Bauchman v. Bauchman, 253 So. 3d 1143, 1146 (Fla. 4th Dist. Ct. App. 2018); Dogoda v. Dogoda, 233 So. 3d 484, 486 (Fla. 2d Dist. Ct. App. 2017); Suarez v. Suarez, 284 So. 3d 1083, 1087 (Fla. 4th Dist. Ct. App. 2019).

355. 253 So. 3d 1143 (Fla. 4th Dist. Ct. App. 2018).

356. 233 So. 3d 484 (Fla. 2d Dist. Ct. App. 2017).

357. 284 So. 3d 1083 (Fla. 4th Dist. Ct. App. 2019).

358. *Suarez*, 284 So. 3d at 1086–87 (quoting Wilson v. Wilson, 37 So. 3d 877, 880 (Fla. 2d Dist. Ct. App. 2010)); *Bauchman*, 253 So. 3d at 1146; *Dogoda*, 233 So. 3d at 486; FLA. STAT. § 61.14(1)(a) (2019).

359. *See* FLA. STAT. § 61.14(1)(a).

360. 248 So. 3d 1170 (Fla. 4th Dist. Ct. App. 2018).

> When the parties enter into an agreement for payments for . . . alimony . . . and the circumstances or the financial ability of either party changes . . . either party may apply to the circuit court . . . for an order decreasing or increasing the amount of . . . alimony, and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability of the parties . . . decreasing, increasing, or confirming the amount of . . . alimony provided for in the agreement or order. The statute refers to changed circumstances and financial ability and permits the court to enter orders "as equity requires."[361]

In other words, alimony modifications due to changed circumstances are adjudicated in equity.[362] The statute is clear and the case law interpretation is clear.[363] So why are prenuptial agreements adjudicated in contract?[364] An "agreement for payments" bears no logical differentiation from a "prenuptial agreement for payments."[365] The answer lies deep within Florida's case law.[366]

2. Prenuptial Agreement Modification in Case Law

In *Casto*, the Supreme Court of Florida used the terms "postnuptial agreement," "settlement agreement," "property settlement agreement," "separation agreement," and "marital agreement" interchangeably.[367] Subsequent decisions interpreted the *Casto* Court's ambivalent terminology as precedent when applied to both prenuptial and marital settlement agreements.[368] Accordingly, if marital settlement agreements for alimony are modifiable in equity, and *Casto* set a precedent that marital settlement and

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361. *Id.* at 1172.

362. *See id.*

363. *Id.* That the statute is clear may admittedly be hyperbole; the line quoted is a long and winding 199 words and is virtually indecipherable without repeated re-readings. *See* FLA. STAT. § 61.14(1)(a).

364. *See* Posner v. Posner (*Posner II*), 257 So. 2d 530, 535 (Fla. 1972).

365. *See* FLA. STAT. § 61.14(1)(a). Of course, a prenuptial agreement may waive alimony and thus not technically be an agreement for payments. *Id.* In such instances, the substantial change test could still apply, given that trial courts have broad discretion to modify an alimony obligation — in this case, an obligation of zero dollars — as equity requires. *See id.*

366. *See Chief Reporter's Foreword*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS at xvii (AM. L. INST. 2002).

367. *See* Casto v. Casto, 508 So. 2d 330, 331–34 (Fla. 1987).

368. *See* Gordon v. Gordon, 25 So. 3d 615, 616 (Fla. 4th Dist. Ct. App. 2009) (noting *Casto's* principles apply to prenuptial agreements); Schreiber v. Schreiber, 795 So. 2d 1054, 1055 (Fla. 4th Dist. Ct. App. 2001) (affirming trial court's interpretation of *Casto* as applied to alimony provisions in marital settlement agreements).

prenuptial agreements are to be viewed equally, why then, are prenuptial agreements viewed as unmodifiable contracts at dissolution of marriage?[369] Actually, the Supreme Court of Florida twice ruled that prenuptial agreements *are* modifiable.[370] In *Posner v. Posner* (*Posner I*),[371] the seminal case on prenuptial agreements, the Court held:

> In summary, we hold that the antenuptial agreement, if entered into under [procedurally fair conditions], was a valid and binding agreement between the parties at the time and under the conditions it was made, but subject to be increased or decreased under changed conditions as provided in [section] 61.14, Florida Statutes, F.S.A.[372]

After a remand to the trial court, the wife was precluded from presenting evidence relating to changed circumstances during the marriage.[373] The wife appealed to the Third Circuit, interpreting *Posner I* as allowing for the wife to "show a change of circumstances from the date of the execution of the antenuptial agreement," as opposed to the trial court's interpretation that a change in circumstances could only be shown after the entry of final judgment.[374] At issue, it seems, was a single line of language in dicta taken from *Posner I* that stated, "the question of the modification thereof upon a showing of a change in circumstances *after* the entry of the decree of divorce."[375] When the Third Circuit affirmed, the wife again appealed, asking the Supreme Court of Florida to clarify its prior language from *Posner I*.[376] In quashing the Third Circuit and trial court's

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369. Posner v. Posner (*Posner I*), 233 So. 2d 381, 385–86 (Fla. 1970).

370. *See* Posner v. Posner (*Posner II*), 257 So. 2d 530, 534 (Fla. 1972).

371. 233 So. 2d 381 (Fla. 1970).

372. *See id.* at 386. Prenuptial agreements that divided property at the death of a spouse were long recognized as "conducive to marital tranquility" and thus favored by public policy. *Id.* at 383; Del Vecchio v. Del Vecchio, 143 So. 2d 17, 20 (Fla. 1962). Prenuptial agreements that facilitated divorce, however, were illegal. *Posner I*, 233 So. 2d at 382. *Posner I* spurred the national movement as the first case to recognize prenuptial agreements as valid at divorce. *Marriage and Family*, *supra* note 4, at 2078.

373. *Posner II*, 257 So. 2d at 533.

374. Posner v. Posner, 245 So. 2d 139, 140 (Fla. 3d Dist. Ct. App. 1971), *rev'd*, 257 So. 2d 530 (Fla. 1972).

375. *Posner I*, 233 So. 2d at 385 (emphasis added). Justice Spector's concurring opinion in *Posner I* further stated, in part, "I agree with Justice Roberts[] . . . that the wife's circumstances have so changed since the amount agreed upon was incorporated in a divorce decree." *Id.* at 386 (Spector, J., specially concurring). While neither Justice Spector's concurring nor Justice Roberts' majority opinions explicitly held the change in circumstances *must* be post-judgment, one can understand why the trial and appellate courts interpreted *Posner I* as they did. *See id.*

376. *See Posner II*, 257 So. 2d at 533.

interpretations, the Court reiterated its mandate by holding that changed circumstances may be shown from the date of final judgment *as well as* the "date of the agreement":

> In addition, the mandate of this Court required consideration by the trial court of Florida Statutes [section] 61.14, F.S.A., which provides that a change in circumstances of the party since the date of the agreement can be considered by the Chancellor in modification of support and alimony provided for in an antenuptial agreement.[377]

Thus, the Supreme Court of Florida unequivocally *mandated* that trial courts follow the statute in regard to equitable modifications of prenuptial agreements.[378] Specifically, the Court noted that changed circumstances apply from the date the agreement *was signed*.[379] The Court further espoused equitable principles regarding prenuptial contract interpretation: "Freedom to contract includes freedom to make a bad bargain. But freedom to contract is not always absolute. The public interest requires that antenuptial agreements be executed under conditions of candor and fairness."[380] Whether *Posner II* called for an equitable interpretation of prenuptial agreements or a less rigid contractual interpretation remains open for discussion.[381] However, this much is clear: While prenuptial agreement case law since *Posner II* has shifted toward greater freedom of contract, Florida Statute section 61.14—which allows for equitable alimony modifications to *any* agreements—has remained the same.[382]

So, what does this contradiction in the law mean, and how should this misunderstood statute apply?[383] First, any prenuptial agreement that contains alimony provisions—either waiver or express payments—should be modifiable under the substantial change test at dissolution of marriage adjudication.[384] Second, while the statute and the *Posner I* and *Posner II*

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377. *Id.* at 534. (emphasis omitted).

378. *Id.*

379. *Id.*

380. *Id.* at 535.

381. *See* Osborne v. Osborne, 604 So. 2d 858, 860 (Fla. 2d Dist. Ct. App. 1992) (per curiam). Citing *Posner II*, the Second Circuit in *Osborne* affirmed the trial court's upward modification of alimony due to changed circumstances. *Id.* (citing *Posner II*, 257 So. 2d at 533). The changed circumstances included a fifteen-year marriage, two children, a significant increase in the husband's income, and a five-fold increase in the husband's net worth. *Id.* at 859–60; *Posner II*, 257 So. 2d at 535, 537.

382. *Compare* Posner v. Posner (*Posner I*), 233 So. 2d 381, 385–86 (Fla. 1970) (quoting FLA. STAT. § 61.14), *with* FLA. STAT. § 61.14(1)(a) (2019).

383. *See* FLA. STAT. § 61.14(1)(a).

384. *See id.*

rulings do not mention asset distribution, it should reasonably follow that asset distribution in a prenuptial agreement be similarly modifiable at dissolution of marriage adjudication.[385] These two substantial change test applications—although contrary to Florida's current common law contract interpretation of prenuptial agreements—are not novel concepts; in fact, the American Law Institute ("ALI") recommended precisely the same measures.[386]

C. *The American Law Institute's Recommendations*

In 2002, the ALI released *Principles of the Law of Family Dissolution: Analysis and Recommendations*, a comprehensive restatement and set of black-letter recommendations in the area of family law.[387] Deliberately titled "Principles," the ALI decided against a more formal "Restatement" of the law because it felt the social and legal consequences of marital dissolutions necessitated better legislative and judicial guidance.[388] Of particular significance, section 7.05 examined circumstances surrounding enforcement of prenuptial agreements where, if enforced, such agreements "would work a substantial injustice" against one of the parties to the agreement.[389] Section 7.05 contains a set of black-letter statutory guidelines and associated commentary that the ALI felt would better serve the administration of justice.[390]

Specifically, section 7.05 called for greater scrutiny of prenuptial agreements where, since the time of execution: (1) ten or more years elapsed; (2) the couple, without prior children in common, either birthed or adopted a child; or (3) a substantial, unanticipated change in circumstances has occurred.[391] In essence, each of the first two factors could fit within the

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385. *See* FLA. STAT. § 61.14; *Posner I*, 233 So. 2d at 385–86; *Posner II*, 257 So. 2d at 537. Unlike alimony, equitable distribution is not modifiable after final judgment; this has more to do with res judicata and the impracticality of modifying property awards many years down the road. *See* FLA. STAT. § 61.075(7)–(8). Imagine, for example, a house awarded to one spouse at final judgment; six years down the line, the other seeks modification to get the house back; two years later, the first seeks modification to get the other's car. *See* FLA. STAT. § 61.075. This kind of back-and-forth property-switching litigation would amount to utter absurdity. *See id.*

386. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05(2)(c) (AM. L. INST. 2002).

387. *Marriage and Family*, *supra* note 4, at 2083.

388. *Director's Foreword*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS at xv (AM. L. INST. 2002).

389. *See* PRINCIPLES OF FAMILY DISSOLUTION § 7.05.

390. *Id.*; *Chief Reporter's Foreword*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS at xvii (Am. L. Inst. 2002).

391. PRINCIPLES OF FAMILY DISSOLUTION § 7.05 cmt. b, § 7.05(2)(a)–(c).

guise of a substantial, material, and unanticipated change.[392] In the first factor, the transition to divorce from a decade or more of marriage *is* a substantial and material change, while numerous psychological studies have shown that the possibility of divorce is unanticipated.[393] In the second enumerated factor, the addition of children to a family is a de facto substantial and material change, and the myriad of possibilities a planned-for child, let alone an unplanned child, brings to a family can never be fully anticipated.[394]

The ALI further advised that if one or more of the substantial change elements are met, the party seeking to invalidate the agreement must then prove "enforcement would work a substantial injustice."[395] Courts should consider: (a) the disparity between the agreement and the likely outcome absent an agreement; (b) for short-term marriages, the disparity between the defending party's circumstances with enforcement relative to imagined circumstances had the marriage not occurred; (c) the purpose of the agreement, the current relevance, and whether the terms serve to further such purpose; and (d) the impact upon the children.[396] That is, the ALI recommends a balancing of factors in order to do complete justice to the parties of prenuptial agreements, which, of course, sounds not unlike enforcement in equity.[397]

D. *Examination of ALI's Ten-Year Recommendation Through Legal Policy Analogies*

A prenuptial agreement is essentially a long-term, personal contract where enforcement remains a mere possibility; even then, the possibility sits years or even decades into the future.[398] Such long-term agreements are otherwise uncommon.[399] This section will take a brief step back to review

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392. *See id.*

393. *See* Baker & Emery, *supra* note 122, at 443. One might be forgiven for asking if there is *ever* a case where divorce is not a substantial, material, and unanticipated change. *See id.*

394. *See* Beaubien, *supra* note 183.

395. PRINCIPLES OF FAMILY DISSOLUTION § 7.05(3).

396. *Id.*

397. *See id.* The ALI did not explicitly recommend equitable enforcement, but rather alluded to equitable enforcement as "appropriate." *Id.* § 7.05 cmt. a. "[E]nforcement . . . dependent upon a review of the fairness . . . is familiar in American law . . . . [C]ourts have often applied a judicially created rule of equity . . . . This judicial gloss upon the statutory provisions governing premarital agreement is appropriate." *Id.*

398. *See* PRINCIPLES OF FAMILY DISSOLUTION § 7.05 cmt. b.

399. *Id.* Long-term commercial agreements, while common, are not analogous. *Id.* Long-term commercial agreements govern ongoing relationships, not terminated

public policy concepts from other areas of the law that reflect the ALI's recommendation for greater scrutiny of prenuptial agreements.[400]

1. Equity of Redemption

Perhaps the closest parallel to signing a prenuptial agreement is the mortgagor-mortgagee relationship.[401] Consider the mortgagor.[402] The mortgagor is the grantor of the mortgage, i.e., the homeowner.[403] The mortgagee is the grantee of the mortgage, i.e., the lender, typically a bank.[404] For purposes of this analogy, the homeowner is the wife, while the bank is the wealthy husband.* The mortgage contract is the prenuptial agreement, and it states: In the event of default—divorce—the homeowner wife loses all rights to the property.* This agreement, while harsh, seems fair because, upon signing the mortgage contract, the wife *knows* she will never default.[405]

Suppose the homeowner wife signed a thirty-year mortgage, and after twenty-two years of paying on time, defaults on a single payment.[406] Perhaps she lost her job or fell ill; her child's college tuition or her father's nursing care took financial precedence; maybe she signed an ARM loan and was doomed from the beginning.[407] No matter.* After twenty-two years of equity paid into the marriage, the bank wants a divorce.[408] Under the terms of the bank's *prenuptial agreement*, the bank will reclaim the wife's home, leaving her with nothing.[409] Historically, this is precisely what would happen; once the mortgage contract was breached, "the mortgagor forfeited all right and interest in the property" leaving the bank with the ability to

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relationships; they are often entered into by teams of experts who typically employ risk-shedding strategies and reject unfair terms. *Id.*

400. *See* discussion *infra* Section V.D.1–3; PRINCIPLES OF FAMILY DISSOLUTION § 7.05.

401. *See* PRINCIPLES OF FAMILY DISSOLUTION § 7.05 cmt. b.

402. *See, e.g.*, Hoffman v. Semet, 316 So. 2d 649, 651 (Fla. 4th Dist. Ct. App. 1975) (per curiam).

403. *See id.*

404. *See id.*

405. *See* Baker & Emery, *supra* note 122, at 443.

406. *Cf.* Hahamovitch v. Hahamovitch, 174 So. 3d 983, 985 (Fla. 2015).

407. *See* Commonwealth v. Fremont Inv. & Loan, 897 N.E.2d 548, 552 (Mass. 2008). An adjustable-rate mortgage, or ARM loan, is a loan with a fixed interest rate for the first few years that varies considerably over the remaining life of the mortgage. *Id.* ARM loans practically doom the mortgagor to foreclosure. *Id.* at 554.

408. *See Hahamovitch*, 174 So. 3d at 985.

409. *See id.* at 986.

"reenter and assume full ownership."[410] However, public policy shifted over time, and courts began to recognize this unfairness.[411] Enter equity.[412]

Equity responded with a fair remedy to the harsh breach of the long-term mortgage contract by recognizing the homeowner's right of redemption as an "interest in the mortgaged property."[413] This interest, or equity of redemption, has long been favored in Florida as "inherent in any mortgage."[414] The equitable right of redemption is thus the homeowner's right to "reclaim [her] estate in foreclosed property after it has been forfeited . . . at law."[415] In other words, courts have recognized that public policy favors leaving the "dutiful and faithful" mortgagor with *something* after a long-term relationship ends in default.[416]

The ALI's recommendation that greater scrutiny be given to prenuptial agreements in marriages of ten or more years essentially reflects the same principles in the equity of redemption.[417] That is, after ten years, a spouse has "paid" enough equity into the marriage to warrant some sort of return despite a contrary prenuptial agreement.[418] Ten years, however, is not a bar to prenuptial agreement enforcement, but rather a sign that—just like a mortgagor paying down a mortgage for ten or more years—strict enforcement is likely to lead to injustice.[419]

2. Laches

The equitable defense of laches is, by statute, available to either party in limiting the time for prenuptial agreement enforcement.[420] The defense of laches entails a failure to assert a right for an unreasonable length of time that would prejudice the defending party.[421] Evidence disappears,

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410. Hoffman v. Semet, 316 So. 2d 649, 652 (Fla. 4th Dist. Ct. App. 1975) (per curiam).

411. *See id.*

412. *See id.*

413. *See id.*

414. *In re* Orlando Tennis World Dev. Co., 34 B.R. 558, 560 (Bankr. M.D. Fla. 1983).

415. Saidi v. Wasko, 687 So. 2d 10, 11 (Fla. 5th Dist. Ct. App. 1996).

416. *Cf.* Posner v. Posner (*Posner II*), 257 So. 2d 530, 537 (Fla. 1972) ("[T]his case is not to be confused with . . . an effort to obtain a lifetime of independence from a [short] shipwrecked marriage.").

417. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05 cmt. b (AM. L. INST. 2002).

418. *See id.*

419. *See id.*

420. FLA. STAT. § 61.079(9) (2019).

421. Ticktin v. Kearin, 807 So. 2d 659, 663 (Fla. 3d Dist. Ct. App. 2001) (per curiam).

memories fade, people change, and parties move on.[422] Essentially, an agreement that sits idle and unenforced for a long enough period should remain unenforced.[423] While there are no Florida cases on point, hypothetically, laches could be raised to invalidate a prenuptial agreement after a long-term marriage if the wife could show enforcement would be prejudicial to her rights as a spouse otherwise entitled to alimony and equitable distribution.[424]

In *Flaherty v. Flaherty*,[425] the Second District declined to allow the defense of laches to *validate* a voidable prenuptial agreement.[426] The wife in *Flaherty* successfully argued the prenuptial agreement was a product of duress.[427] The husband conceded, contending that because duress renders a contract voidable, the wife's failure to bring forth a challenge during the marriage served to ratify and thus *validate* the agreement.[428] The court disagreed, citing several other jurisdictions that unanimously refused to consider laches as a method to validate an otherwise invalid prenuptial agreement.[429] Requiring a spouse to disrupt the marriage by revising, amending, or challenging the validity of the agreement not only contravenes public policy against litigation during an intact marriage, it equates silence with consent.[430]

Flaherty aside, it remains to be seen the extent to which a Florida court would allow laches as a defense to enforcement.[431] Should a defense of laches be allowed after a twenty-year marriage?[432] That is, should a court accept a twenty-year *delay* between signing and enforcement as a valid contractual defense?[433] It should; the defense is codified in Chapter 61.[434] The ALI, while not explicit, agrees.[435] From a policy standpoint, the ALI's recommendation of greater scrutiny, after ten years, derives from the same

422. *See id.*
423. *See id.*
424. *Cf. id.*
425. 128 So. 3d 920 (Fla. 2d Dist. Ct. App. 2013).
426. *Id.* at 924.
427. *Id.* at 922.
428. *Id.* at 923.
429. *Id.* at 923–24.
430. *See Flaherty*, 128 So. 3d at 924; *accord* Kellar v. Estate of Kellar, 291 P.3d 906, 918 (Wash. Ct. App. 2012); Gan, *supra* note 31, at 186–88.
431. *Cf. Flaherty*, 128 So. 3d at 924.
432. *See* FLA. STAT. § 61.079(9) (2019).
433. *Id.*
434. *See id.* Equitable defenses limiting the time for prenuptial agreement enforcement, including laches and estoppel, are available to either party. *Id.*
435. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05 cmt. b (AM. L. INST. 2002).

foundational principle: The greater the passage of time, the less that strict enforcement makes sense.[436]

3. Statutes of Repose

A similar concept to laches is the policy behind statutes of repose.[437] "A statute of repose precludes a right of action after a specified time [has elapsed]."[438] The precluded right of action, in this case, would be one party to a long-term marriage precluding the other party from enforcing the prenuptial agreement.[439] While traditionally limited to areas such as medical malpractice, products liability, and other areas of tort law, the underlying principles favoring statutes of repose are analogous.[440] That is, at a certain point, a party should be entitled to a fresh start, no longer beholden to past events.[441] Imagine a scenario where a spouse of *fifty-five* years seeks enforcement of a prenuptial agreement upon divorce; does strict enforcement sound like desirable public policy?[442] In other words, people should be allowed to move on from unenforced civil agreements made decades in the distant past.[443] While specific statutes of repose are a matter for the legislature, the ALI's directive toward expanded scrutiny for ten-year marriages is, as in laches, merely an illustration of the same public policy argument.[444]

E. *Toward an Equitable Solution*

Where the ALI stopped short of explicitly recommending courts enforce prenuptial agreements in equity, *The Law of Marriage and Family* nearly solved the riddle.[445] After a lengthy and thorough analysis of the gaps

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436. *Id.*

437. *See* Doe v. Shands Teaching Hosp. & Clinics, Inc., 614 So. 2d 1170, 1174 n.2 (Fla. 1993).

438. *Id.*

439. *See id.*

440. Carr v. Broward Cnty., 505 So. 2d 568, 571 (Fla. 4th Dist. Ct. App. 1987) *aff'd*, 541 So. 2d 92 (Fla. 1989); *see also* CTS Corp. v. Waldburger, 573 U.S. 1, 7(2014) ("[S]tatutes of repose . . . limit the temporal extent or duration of liability for tortious acts."); Carr v. Broward Cnty., 541 So. 2d 92, 95 (Fla. 1989) (recognizing statutes of repose "restrict or limit causes of action in order to achieve certain public interests").

441. *See* Jones v. Thomas, 491 U.S. 376, 392 (1989) (Scalia, J., dissenting) (likening statutes of repose to the Double Jeopardy Clause).

442. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05 cmt. b. (Am. L. Inst. 2002).

443. *See id.*

444. *See id.*; *Waldburger*, 573 U.S. at 8.

445. *Marriage and Family*, *supra* note 4, at 2098.

between the academic principles and the principles actually in practice within family law, *The Law of Marriage and Family* concluded:

> A system in which judges undertake substantive fairness review at the time of an agreement's enforcement and presumptively invalidate agreements failing to approximate equal division of marital property would strike an appropriate compromise between the contractual and partnership approaches by consistently treating spouses as equal parties to the marital relationship.[446]

The *Law of Marriage and Family* thus called for a balancing of outcomes between the prenuptial agreement as enforced, compared with the statutory guidelines regarding, in Florida's case, equitable distribution and alimony awards upon dissolution of marriage.[447] In other words, a fair prenuptial agreement is one that approximates the outcome of a dissolution of marriage proceeding in equity.[448] That recommendation—a disguised equity *light*—would be improved with the explicit use of the textured, equitable standard of fairness that equity has developed over the centuries, i.e., the kind of analysis recommended in this Comment.[449]

VI. CONCLUSION

Admittedly, this Comment may, at times, read like an idealistic and sentimental allegiance to the *one-and-only* court of equity.* However, like equity, this Comment is attentive to the circumstances and understands that equity is not the be-all and end-all.* Certainly, outcomes in equity are not always fair nor always reasonable.[450] Equity is not a set of contractual training wheels; it will not transform "oopsies" into lottery tickets, nor rescue a party because the terms are unfavorable, unfortunate, or imprudent.[451] Equity is not omniscient; it cannot resolve cognitive biases, nor cure gender and economic inequality.[452] Equity, sadly, is not the answer to all of the

446. *Id.*
447. *See id.*
448. *Id.*
449. *See* discussion *supra* Section III.C; Presley v. Worthington, 53 So. 2d 714, 716 (Fla. 1951) (en banc); Schroeder v. Gebhart, 825 So. 2d 442, 445 (Fla. 5th Dist. Ct. App. 2002).
450. *Schroeder*, 825 So. 2d at 443; *see also* Rennolds v. Rennolds, 312 So. 2d 538, 541–42 (Fla. 2d Dist. Ct. App. 1975).
451. *See* 22 FLA. JUR. 2D *Equity* § 29 (2020).
452. *See* Planned Parenthood of Greater Orlando, Inc. v. MMB Props., 211 So. 3d 918, 925 (Fla. 2017).

law's problems; but it does offer a robust and creative solution to prenuptial agreement interpretation.[453]

How, exactly, might an equitable interpretation of prenuptial agreements work?[454] It would operate just like *any other* proceeding in Chapter 61: through a balancing of factors necessary to do complete justice.[455] That an agreement was signed with the intent to stay married is a factor.[456] That cognitive biases affecting judgment and risk are factors.[457] That a marriage lasted or endured fifteen years, and two children are factors; that a marriage lasted six months, too, is a factor.[458] That the husband was forty-five, and the wife was nineteen are factors that weigh more heavily than a husband of thirty and a wife of thirty-one.[459] That a wife, or husband, left the workforce for eleven years to raise the couple's children is also a weighty factor; her or his age, education, and abilities must also be factors.[460] That the agreement was signed days, weeks, or months before the wedding, with or without counsel, with or without negotiations: Those, too, are factors.[461] That substantial and unforeseen changes occurred—from a debilitating disability to a substantial increase in wealth—must also be factors.[462] That distribution and alimony without a prenuptial agreement would be exponentially higher is also a factor.[463] This list of factors is not comprehensive; a court of equity, while interpreting a prenuptial agreement, should consider "[a]ny other factors necessary to do equity and justice between the parties."[464] It is equity's flexibility and welcoming of additional factors and novel circumstances that make it as powerful of a tool as it is.[465]

Florida is clear that Chapter 61 proceedings are *already* in equity: Equitable distribution is "based on all relevant factors," alimony is determined through a weighing of "all relevant factors," and timesharing and parental responsibility are decided by "evaluating all of the factors."[466] The Florida family court system currently provides answers to the gray areas of

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453. *See id.*
454. *See Marriage and Family*, *supra* note 4, at 2098.
455. *See* FLA. STAT. § 61.075(1)(j) (2019); 22 FLA. JUR. 2D *Equity* § 50 (2020).
456. *See* FLA. STAT. § 61.079(2)(a)–(3).
457. *See id.* § 61.08(2)(c).
458. *See id.* § 61.08(2)(b).
459. *See id.* § 61.08(2)(j).
460. *See id.* § 61.075(1)(j).
461. *See* FLA. STAT. § 61.075(1)(j).
462. *See id.*
463. *See id.*
464. *Id.*
465. *See* Schroeder v. Gebhart, 825 So. 2d 442, 446 (Fla. 5th Dist. Ct. App. 2002).
466. FLA. STAT. §§ 61.075(1), 61.08(2), 61.13(3).

who gets what property, how much money goes where and to whom, and what serves the best interests of the children.[467] Equity has "wide discretion in fashioning remedies to satisfy the exigencies of the circumstances."[468] Whether a court wishes to reform a provision, to strike an entire section, or to avoid or enforce an agreement in its entirety is ultimately a matter of which factors weigh heaviest under the specific facts and circumstances of the case.[469] That courts are weighing all the appropriate factors during the *same proceedings* in which prenuptial agreements are adjudicated makes this solution all the more practical and familiar.[470]

This Comment argues that prenuptial agreements should be decided like any other proceeding in Chapter 61, where fairness should always count, and reasonableness should always guide.[471] In a larger sense, the risk of equity's discretion must be considered against the narrow and rigid common law strictures complacent with one-size-fits-all.[472] While this conflict is played out in all types of legal disputes, not all disputes are of the same nature.[473] Florida family law is one arena without reason for such conflict; Chapter 61 mandates that family law proceedings accommodate equity's principles of fairness, reasonableness, good faith, equality, and ethical considerations.[474]

Recall the puzzle that prenuptial agreements present; when viewed through the lens of equity, Florida's natural home of family law, those problems dissipate, the paradox evaporates, and the possibility of reconciling prenuptial agreement expectations with fair resolutions emerges.*

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467. *See id.* § 61.001(b)–(c).

468. *Schroeder*, 825 So. 2d at 446; *see also* Planned Parenthood of Greater Orlando, Inc. v. MMB Props., 211 So. 3d 918, 925 (Fla. 2017) (quoting Shaw v. Palmer, 44 So. 953, 954 (Fla. 1907)).

469. *See* discussion *supra* Section II.C; 22 FLA. JUR. 2D *Equity* § 50 (2020); Rennolds v. Rennolds, 312 So. 2d 538, 542 (Fla. 2d Dist. Ct. App. 1975).

470. *See* discussion *supra* Section I; FLA. STAT. § 61.14(1)(a); Posner v. Posner (*Posner I*), 233 So. 2d 381, 385–86 (Fla. 1970).

471. *See* FLA. STAT. § 61.001; Lashkajani v. Lashkajani, 911 So. 2d 1154, 1159 (Fla. 2005).

472. *Cf.* Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2409 (2015) (arguing poorly decided but well-settled precedent promotes predictability and preserves judicial integrity).

473. *See* Oldham, *supra* note 5, at 117.

474. *See* FLA. STAT. §§ 61.001, 61.075(1); *Rennolds*, 312 So. 2d at 542.

BARBARIC RETRIBUTIVISM: NEW HAMPSHIRE AND WASHINGTON ARE TWO OF THE LATEST STATES TO ABOLISH THE DEATH PENALTY. HERE IS WHY FLORIDA SHOULD FOLLOW SUIT

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I. INTRODUCTION

The death penalty has been around, in some form, dating back as early as eighteenth century B.C.[1] However, it was not until roughly 250 years ago that the anti-death penalty movement—also known as the abolition movement—began with the publication of the Italian criminologist and philosopher Cesare Beccaria's book titled *Dei delitti e delle pene*.[2] Beccaria's book, which was published in 1764, has been translated into more than twenty languages, including English, as an essay *On Crimes and Punishment* in 1767.[3] It was not until the publication of Beccaria's famous work that Western European nations began doing away with capital punishment.[4] In his work, Beccaria argued that capital punishment is neither just nor necessary, unless the death of the citizen is the only real way to deter others from committing crimes.[5] However, Beccaria goes on to explain why capital punishment comes up short in its endeavor to deter others from committing crimes:

> It is not the intensity of the punishment that has the greatest effect on the human mind, but its extension, for our sensibility is more easily and firmly affected by small but repeated impressions than by a strong but fleeting action. The rule of habit is universal over every sentient being, and just as habit helps man to walk and talk and satisfy his needs, so moral ideas are impressed upon the mind only by enduring and repeated blows. It is not the terrible but fleeting spectacle of a criminal's death that is the most powerful brake on crimes, but the long and arduous example of a man deprived of his liberty, who, having become a beast of burden, repays the society he has offended through his toils. Much more compelling than the idea of death, which men always perceive at a vague distance, is that efficacious because often repeated reflection that I myself shall be reduced to such a protracted and miserable condition if I commit similar misdeeds.[6]

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1. *Early History of the Death Penalty*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty (last visited Dec. 14, 2020).

2. John D. Bessler, *The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions*, 79 MONT. L. REV. 7, 8 (2018); CESARE BECCARIA, ON CRIMES AND PUNISHMENT AND OTHER WRITINGS 55 (Aaron Thomas & Jeremy Parzen trans., Univ. Toronto Press 2008) (1764).

3. Bessler, *supra* note 2, at 8.

4. *Id.* at 9.

5. BECCARIA, *supra* note 2, at 52.

6. *Id.* at 52–53.

Proponents of the death penalty usually argue that its application is effective because it is less costly than life imprisonment, or because it is an effective means to deter crime.[7] However, as further discussed later in this Comment, both of these rationales have been discredited by experts and data.[8] Additionally, proponents of the death penalty may argue that the criminal gets what he or she deserves: the criminal killed, and so, the criminal should be killed.[9] However, this line of logic is the ultimate form of retributivism, or an eye for an eye.[10] "In civilized society, we reject the principle of literally doing to criminals what they do to their victims: The penalty for rape cannot be rape, or for arson, the burning down of the arsonist's house. We should not, therefore, punish the murderer with death."[11]

Despite the arguments made by death penalty proponents, starting in the 1950s, public sentiment began to turn away from capital punishment.[12] Many allied nations either discontinued the practice of the death penalty or limited its use.[13] Meanwhile, the number of executions in the United States dropped dramatically.[14] While there were 1289 executions nationwide in the 1940s, there were only 715 executions in the 1950s.[15] This trend continued into the 1960s and 1970s as the number of executions nationwide plummeted to 191 from 1960 to 1976.[16] In 1966, public support for the death penalty reached an all-time low, as a Gallup poll showed support for the death penalty at only 42%.[17] The decline in support of the death penalty still continues today, as evidenced by the fact that over the last fifteen years, ten states, and the District of Columbia, have moved to abolish the death penalty, and another three states have implemented gubernatorial moratoriums.[18]

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7. Tom Head, *5 Arguments in Favor of the Death Penalty*, THOUGHTCO., http://www.thoughtco.com/arguments-for-the-death-penalty-721136 (last updated Jan. 20, 2020).

8. *See* discussion *infra* Part V.

9. *See* Head, *supra* note 7.

10. *See Punishment*, JRANK.ORG, http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html (last visited Dec. 14, 2020).

11. *The Death Penalty: Questions and Answers*, ACLU, http://www.aclu.org/other/death-penalty-questions-and-answers (last visited Dec. 14, 2020).

12. *The Abolitionist Movement*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/the-abolitionist-movement (last visited Dec. 14, 2020).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *The Abolitionist Movement*, *supra* note 12.

18. *State by State*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Dec. 14, 2020).

Two of the latest states to abolish the death penalty are New Hampshire in 2019, and Washington in 2018.[19] Using these two states as examples, this comment will seek to urge the State of Florida to be the next state to formally abolish the barbaric practice of the death penalty.[20] Part II of this comment will delve into the history of the death penalty by examining the early history of the death penalty, followed by the history of the death penalty in America, and, finally, the history of the death penalty in Florida.[21] Part III of this comment will examine and distinguish the two primary theories of punishment and show how the death penalty is inconsistent with the theory of punishment employed in today's modern society.[22] Part IV of this comment will then analyze the rationales used in New Hampshire and Washington in their respective decisions to abolish the death penalty.[23] Then, applying the rationales used in New Hampshire and Washington, as well as other reasonings, Part V of this comment will suggest that the State of Florida should be the next state to formally abolish the death penalty.[24] Part VI of this comment will illustrate why life imprisonment without parole is a superior alternative to the death penalty, thereby rendering the practice of the death penalty obsolete.[25] Finally, this comment will conclude that there are absolutely no benefits to employing the death penalty, and the practice—whose consequences are irreversible—should be halted, and more specifically, the State of Florida should be the next state in the country to abolish this barbaric, retributive practice.[26]

II. HISTORY OF THE DEATH PENALTY

A. *Early History of the Death Penalty*

As mentioned earlier, the first established death penalty laws date as far back as eighteenth century B.C. in the Code of King Hammurabi of Babylon, which established the death penalty as the punishment for twenty-five different crimes, not including murder.[27] "The first death sentence historically recorded took place in [sixteenth] [c]entury B.C. Egypt, where . .

19. *Id.*
20. *See* discussion *infra* Part IV–V.
21. *See* discussion *infra* Part II.
22. *See* discussion *infra* Part III.
23. *See* discussion *infra* Part IV.
24. *See* discussion *infra* Part V.
25. *See* discussion *infra* Part VI.
26. *See* discussion *infra* Part VII.
27. Michael H. Reggio, *History of the Death Penalty*, *in* SOCIETY'S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY 1, (Laura E. Randa ed., 1997).

. a member of nobility, was accused of magic, and [instructed] to take his own life."[28] Additionally, the death penalty was implemented in the fourteenth century B.C.'s Hittite Code, as well as in the seventh century B.C.'s Draconian Code of Athens, which made death the punishment for all crimes.[29] The death penalty was also codified in the fifth century B.C.'s Roman Law of the Twelve Tablets.[30] During these infant years of the death penalty and its practice, crimes punishable by death included:

> the publication of libels and insulting songs, the cutting or grazing of crops planted by a farmer, the burning of a house or a stack of corn near a house, cheating by a patron of his client, perjury, making disturbances at night in the city, willful murder of a freeman or a parent, or theft by a slave.[31]

Further, methods of execution during these infant years were particularly cruel and inhumane, as death sentences were carried out by such means as crucifixion, drowning, beating to death, burning alive, and impalement.[32] Moving forward to tenth century A.D., hanging emerged as the usual method of execution in Britain.[33] Nevertheless, in the following century, "William the Conqueror would not allow [anyone] to be hanged or otherwise executed for any crime, except in times of war."[34] However, this trend would not last as the sixteenth century saw an estimated 72,000 people executed under the reign of Henry VIII.[35] During the reign of Henry VIII, common methods of execution included "boiling, burning at the stake, hanging, beheading, and drawing and quartering," and crimes punishable by death included "marrying a Jew, not confessing to a crime, and treason."[36] The next two centuries saw Britain increase the number of capital crimes, which culminated with 222 crimes punishable by death by the 1700s, including "stealing, cutting down a tree, and robbing a rabbit warren."[37] However, because of the severity of the death penalty and the negligible acts for which it was being imposed, juries, in an attempt to minimize government abuse, "would not convict defendants

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28. *Id.*
29. *Early History of the Death Penalty*, *supra* note 1; Reggio, *supra* note 27, at 1.
30. *Early History of the Death Penalty*, *supra* note 1; Reggio, *supra* note 27, at 1.
31. Reggio, *supra* note 27, at 1.
32. *Early History of the Death Penalty*, *supra* note 1.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Early History of the Death Penalty*, *supra* note 1.

if the offense was not serious."[38] This led to reforms in Britain's death penalty which resulted in the death penalty being eliminated from more than 100 of the 222 crimes punishable by death from 1823 to 1837.[39]

B. *The Death Penalty in America*

More than any other country, Britain tremendously influenced America's use of the death penalty.[40] When the British settlers came to America, they brought with them the practice of capital punishment.[41] The British influence of capital punishment was particularly prominent in Virginia, where the first recorded execution in the English American Colonies occurred in 1608.[42] Virginian officials executed Captain George Kendall in the Jamestown colony of Virginia for allegedly conspiring to betray the British to the Spanish.[43] Then, "[i]n 1612, Virginia's Governor, Sir Thomas Dale, [enacted] the Divine, Moral, and Martial Laws, [which prescribed the death] penalty for even minor offenses such as stealing grapes, killing chickens, killing dogs or horses without permission, or trading with Indians."[44] However, these laws would be softened seven years later due to the fear that this excessive obtrusion of the death penalty would deter individuals from settling in Virginia.[45] Virginia was also responsible for the first legal execution of a criminal, Daniel Frank, who was executed in 1622 for the crime of theft.[46]

At first, death penalty laws varied from colony to colony.[47] While some colonies were very strict in their use of the death penalty, other colonies were quite lenient.[48] For example, in the Massachusetts Bay Colony, the first execution took place in 1630, despite the Capital Laws of New England not being implemented until years later.[49] However, under the Capital Laws of New England that went into effect between 1636 and 1647, the death penalty was imposed for crimes including, but not limited to: Pre-

38. *See id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. Reggio, *supra* note 27, at 2–3; *Early History of the Death Penalty*, *supra* note 1.
43. Reggio, *supra* note 27, at 3; *Early History of the Death Penalty*, *supra* note 1.
44. *Early History of the Death Penalty*, *supra* note 1; Reggio, *supra* note 27, at 3.
45. Reggio, *supra* note 27, at 3.
46. *Id.*
47. *Early History of the Death Penalty*, *supra* note 1.
48. Reggio, *supra* note 27, at 3.
49. *Early History of the Death Penalty*, *supra* note 1.

meditated murder, sodomy, witchcraft, and adultery.[50] Yet, by 1780, the Commonwealth of Massachusetts limited its application of the death penalty to only seven capital crimes: Murder, sodomy, burglary, buggery, arson, rape, and treason.[51] Moreover, the New York Colony implemented the Duke's Laws of 1665 which authorized the death penalty for acts including "denial of the true God, pre-meditated murder, killing someone who had no weapon of defense, killing by lying in wait or by poisoning, sodomy, buggery, kidnapping, [and] perjury in a capital trial . . . ."[52] On the other hand, South Jersey and Pennsylvania were two of the more lenient colonies when it came to capital punishment.[53] In fact, the death penalty was not used for any crime in South Jersey, and only two crimes—murder and treason—were punishable by death.[54] Despite the discrepancies among the colonies regarding the death penalty, by 1776 most of the colonies had similar death penalty statutes which prescribed death—usually by hanging—for the crimes of "arson, piracy, treason, murder, sodomy, burglary, robbery, rape, horse-stealing, slave rebellion, and often counterfeiting."[55]

"The first reforms of the death penalty occurred between 1776 and 1800."[56] This era saw Thomas Jefferson make an unsuccessful effort to revise Virginia's harsh death penalty laws by proposing a law that recommended the death penalty for only murder and treason.[57] Additionally, a great impact was made on American intellectuals by European theorists including Montesquieu and Voltaire, as well as by English Quaker prison reformers John Bellers and John Howard.[58] However, the most influential voice of this era regarding abolishing the death penalty came from none other than Cesare Beccaria, whose essay *On Crimes and Punishment* had an especially strong impact on the early reform movement in America.[59] In his work, Beccaria states, "[T]he death penalty is not a *right*, but the war of a nation against a citizen, which has deemed the destruction of his being to be necessary or useful."[60] However, as stated earlier in the introduction, Beccaria goes on to illustrate why the destruction of a citizen is almost never necessary nor useful, and the death penalty fails in its ultimate quest to deter

50. Reggio, *supra* note 27, at 3.
51. *Id.*
52. Reggio, *supra* note 27, at 3–4; *Early History of the Death Penalty*, *supra* note 1.
53. Reggio, *supra* note 27, at 4.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. Reggio, *supra* note 27, at 4.
59. *Id.*; *see also* BECCARIA, *supra* note 2, at 52.
60. BECCARIA, *supra* note 2, at 52.

future crime.[61] This inaugural reform era also saw the formation of organizations in different colonies in an effort to abolish the death penalty, as well as relieving poor prison conditions.[62]

The second great reform era took place between 1833 and 1853, which saw public hangings as cruel.[63] Prior to this reform era, hangings were a public spectacle, much like a modern-day sporting event, which would often attract an attendance of tens of thousands of people to view the hangings, while local merchants would sell souvenirs and alcohol.[64] This second reform movement led to fifteen states prohibiting public executions by 1849.[65] More importantly, this second reform era reached its peak in 1846 when Michigan became the first state to formally abolish the death penalty.[66] Further, in 1852, Rhode Island followed suit and formally abolished the death penalty, while Massachusetts limited its use to only first-degree murder.[67] This reform era concluded with a fourth state, Wisconsin, abolishing the death penalty in 1853.[68]

The next great reform era began at the end of the century and occurred between 1895 and 1917.[69] This era saw Congress pass legislation reducing the number of federal death crimes.[70] Of even more significance, this era saw nine more states abolish capital punishment, while votes in other states came close to reaching abolition.[71] The death penalty abolition movement cooled down until 1955, when England and Canada both completed exhaustive studies which were largely critical of capital punishment.[72] On the heels of these studies, Hawaii and Alaska abolished the death penalty in 1957 and were followed by Delaware in 1958 and Oregon in 1964.[73] In 1965, Iowa, New York, West Virginia, and Vermont ended the death penalty, with New Mexico following suit in 1969.[74] However, despite the great traction that was made by these reform

61. *See id.* at 52–53.
62. Reggio, *supra* note 27, at 5.
63. *Id.*
64. *Id.*
65. *See id.* at 6.
66. *Id.*
67. Reggio, *supra* note 27, at 6.
68. *Id.*
69. *Id.* at 7.
70. *Id.*
71. *Id.*
72. Reggio, *supra* note 27, at 8.
73. *Id.*
74. *Id.*

movements, one of the greatest moments for the abolition movement did not occur until 1972.[75]

The difficulty in trying to end capital punishment state-by-state forced death penalty abolitionists to turn their efforts to the courts.[76] This new plan of attack proved to be fruitful, as the Supreme Court of the United States delivered a monumental decision in 1972 in *Furman v. Georgia*,[77] which "effectively ended capital punishment in the United States."[78] In *Furman*, the Court was tasked with addressing "whether the administration of the death penalty constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments."[79] "In the 5-4 decision, the majority opinion of the Court held that the current statutes under which the death penalty was administered amounted to cruel and unusual punishment on the grounds that the current practice illustrated patterns of arbitrary and discriminatory sentencing decisions."[80] However, the majority opinion in *Furman* made sure to clarify that it was the "current administration of the death penalty, and not the concept of death as the ultimate punishment, which violated the protections of the Eighth and Fourteenth Amendments."[81] This left the door open for states to modify their death penalty statutes in order to conform with the requirements set forth by the Supreme Court of the United States.[82] And that is exactly what happened, as several states developed new death penalty statutes after the *Furman* decision in an effort to keep the death penalty alive.[83] In 1976, just four years after the *Furman* decision, the Court approved the death penalty statutes presented in the cases of *Gregg v. Georgia*,[84] *Jurek v. Texas*,[85] and *Proffitt v. Florida*,[86] and effectively revived the death penalty.[87] Some of the modifications made to death penalty statutes resulting from these cases included creating a

75. *See id.*
76. *Id.*
77. 408 U.S. 238 (1972).
78. *Id.* at 239–40; Reggio, *supra* note 27, at 8.
79. *Furman*, 408 U.S. at 239; Stacy L. Mallicoat, *Politics and Capital Punishment: The Role of Judicial, Legislative, and Executive Decisions in the Practice of Death*, *in* INVITATION TO AN EXECUTION: A HISTORY OF THE DEATH PENALTY IN THE UNITED STATES 9–10 (Gordon Morris Bakken ed., 2010).
80. Mallicoat, *supra* note 79, at 10.
81. *Furman*, 408 U.S. at 239–40; Mallicoat, *supra* note 79, at 10.
82. Mallicoat, *supra* note 79, at 10; *see Furman*, 408 U.S. at 239–40.
83. Mallicoat, *supra* note 79, at 10.
84. 428 U.S. 153 (1976).
85. 428 U.S. 262 (1976).
86. 428 U.S. 242 (1976).
87. Mallicoat, *supra* note 79, at 10.

> bifurcated process for capital crimes . . . [which] separated the guilt and sentencing decisions into two separate trials . . . . [as well as a system of automatic appeal,] which mandated that the highest court of each state review all convictions and death sentences to protect against constitutional errors.[88]

Despite years of back and forth between proponents of the death penalty and abolitionists, "[t]he controversy over the death penalty [still] continues today."[89]

C. *The Death Penalty in Florida*

The first known execution in Florida took place in 1827 when Benjamin Donica was hanged for murder.[90] Nearly 100 years later, in 1923, a bill was passed in Florida that placed all executions under state jurisdiction, rather than local jurisdiction, and replaced the incumbent execution method of hanging with the electric chair.[91] After years of uninterrupted executions in the state of Florida, the 1972 decision in *Furman* forced the state to discontinue its practice of executing inmates.[92] However, as mentioned earlier, this abolition was short-lived, as Florida subsequently passed a new capital punishment statute, which was upheld by the Supreme Court of the United States in 1976 in *Proffitt*.[93] Following its reinstatement of the death penalty, Florida became the first state to conduct "a non-voluntary execution post-*Gregg*" and *Proffitt,* when it executed John Spenkelink in 1979.[94] The use of the electric chair led to the state of Florida botching the executions of both Jesse Tafaro in 1990, and Pedro Medina in 1997.[95] Both of these executions "ended with flames erupting from the[] heads" of Tafaro and Medina "due to the improper use of sponges designed to conduct electricity to their brains."[96] The state blamed these botched executions on human-related error, and the state legislature subsequently transitioned to lethal injection as its default method of execution in 2000.[97] Years later, in 2016, "Florida statutorily abolish[ed] judicial override," a practice by which trial

88. *Id.*
89. Reggio, *supra* note 27, at 9.
90. *Florida*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida (last visited Dec. 14, 2020).
91. *Id.*
92. *Id.*
93. *See* Proffitt v. Florida, 428 U.S. 242, 259–60 (1976); *Florida*, *supra* note 90.
94. *Florida*, *supra* note 90.
95. *See id.*; Mallicoat, *supra* note 79, at 12–13.
96. Mallicoat, *supra* note 79, at 12–13.
97. *See id.* at 13; *Florida*, *supra* note 90.

judges were granted the authority to impose death sentences on defendants despite a jury's recommendation for life imprisonment.[98] One year later, in 2017, "Florida statutorily abolish[ed] non-unanimous jury recommendations for death and require[d]" a unanimous recommendation of death from the sentencing jury before a trial judge could impose a death sentence.[99]

Today, Florida is recognized as one of the nation's leaders in imposing the death penalty.[100] Since 1979, when executions were reinstated post-*Gregg* and *Proffitt*, Florida has executed ninety-nine Floridians, while exonerating a nation-high twenty-nine individuals due to evidence of wrongful convictions.[101] These statistics indicate roughly a 30% rate of error, much higher than the national rate of error of about 11%.[102] Additionally, in 2019, Florida ranked number one in the nation in the number of new death sentences, number two in the nation in the size of death row, and number five in the nation in the number of executions.[103] Finally, Florida taxpayers pay more than fifty-one million dollars annually to try to enforce the death penalty, over and above the cost [of] seeking life imprisonment without the possibility for parole for these same defendants—roughly one million dollars a week.[104]

III. THEORIES OF PUNISHMENT: RETRIBUTIVISM VS. UTILITARIANISM

Although there are multiple theories of punishment, only two stand out as the most popular theories which dominate criminal law textbooks: retributivism and utilitarianism.[105] The retributive theory of punishment can be best described as *an eye for an eye*.[106] This theory of punishment is backward-looking in that the retributivist looks back at the transgression—the crime itself—as the basis for the punishment, and stresses guilt and desert while "denying that the consequences of punishment . . . have any relevance to justification."[107] The retributive theory seeks to punish offenders for

98. *Florida*, *supra* note 90.
99. *Id.*
100. *See Florida Death Penalty Fact Sheet*, FLORIDIANS FOR ALTS. TO DEATH PENALTY, http://www.fadp.org/florida-death-penalty-fact-sheet/ (last visited Dec. 14, 2020).
101. *Id.*
102. *Id.*; *Innocence*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/policy-issues/innocence (last visited Dec. 14, 2020).
103. *Florida Death Penalty Fact Sheet*, *supra* note 100.
104. *Id.*
105. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 16–18 (8th ed. 2018).
106. *See Punishment*, *supra* note 10.
107. *See id.*; Mark A. Michael, *Utilitarianism and Retributivism: What's the Difference?*, 29 AM. PHIL. QUARTERLY 173, 174 (1992).

criminal behavior because criminals deserve to be punished.[108] "Criminal behavior upsets the peaceful balance of society, and punishment helps to restore the balance."[109] The rationale employed by retributivists is that "human beings have free will and are capable of making rational decisions;" therefore, a person who makes a conscious choice to upset the balance of society—absent insanity or incompetency—should be punished.[110]

Conversely, the utilitarian theory of punishment is more forward-looking, as its goal for a justified system of punishment "is one which brings the greatest net benefit to all."[111] As opposed to the retributive theory of punishment, which disregards the consequences of punishment, the utilitarian theory of punishment is "consequentialist" in nature.[112] It recognizes that punishment has consequences for both the offender and society, but maintains that the total benefit produced by the punishment should exceed the total harm done.[113] The utilitarian theory concedes and accepts that a crime-free society is both impractical and non-existent, but even so, its goal is to inflict only as much punishment as necessary to prevent future crime.[114] Moreover, the utilitarian theory of punishment punishes offenders for the purpose of deterring future crime and holds that laws that are meant to punish criminal conduct should be designed to dissuade future criminal conduct, not merely to punish the offender.[115] Deterrence works on both a general and specific level.[116] General deterrence occurs when the punishment of one person deters or prevents other members of society from committing crimes.[117] In order to accomplish general deterrence, the punishment must serve as an example to the rest of society by illustrating that criminal acts will not be tolerated, and in turn, will be punished.[118] On the other hand, specific deterrence is meant to prevent the original criminal from committing any further crimes.[119] The goal of specific deterrence is accomplished in two ways: first, the criminal is placed in jail or prison to physically prevent him or her from committing any other crimes; and second, the incapacitation of the criminal is designed to be so unpleasant as to dissuade the criminal from repeating his or her criminal behavior once

108. *Punishment*, *supra* note 10.
109. *Id.*
110. *Id.*
111. Michael, *supra* note 107, at 174; *Punishment*, *supra* note 10.
112. *Punishment*, *supra* note 10.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Punishment*, *supra* note 10.
118. *Id.*
119. *Id.*

released back into society.[120] Finally, unlike under the retributive theory of punishment, rehabilitation is a massive component under the utilitarian theory of punishment.[121] "The goal of rehabilitation is to prevent future crime by giving offenders the ability to succeed within the confines of the law."[122] "Rehabilitative measures for criminal offenders [may] include treatment for afflictions such as mental illness" and chemical dependency, as well as educational programs that give offenders the knowledge and skills needed to compete in the job market.[123]

While it must be conceded that elements of both retributivism and utilitarianism are found within the United States' criminal justice system—when sentenced to prison, the punishment is, in some form, retribution—there is evidence that supports the assertion that the United States leans considerably towards a utilitarian theory of punishment.[124] "During most of this century utilitarian considerations dominated the discussion of the justification of punishment . . . . When one reads papers from this era, one is left with the distinct impression that retributivism had been completely discredited and quietly laid to rest."[125] Moreover, the American legal system displays its adherence to utilitarian ideologies through its creation of systems such as pretrial diversion programs, probation, and parole, which serve to limit punishment to the extent necessary to protect society.[126] Additionally, the assignment of different punishments for different crimes is derived from utilitarian ideologies, as well as the concept that the punishment a criminal receives should be proportional to the harm caused by the crime committed.[127] For example, murder typically calls for imprisonment of a long duration, or even the death penalty, while a simple assault and battery is typically punished with a short jail sentence or probation and a fine.[128] Thus, although retributive ideals are present within the American legal system, it is clear the American legal system favors utilitarian philosophies when it comes to punishment.[129]

120. *Id.*
121. *See id.*
122. *Punishment*, *supra* note 10.
123. *Id.*
124. *See id.*
125. Michael, *supra* note 107, at 173.
126. *Punishment*, *supra* note 10.
127. *Id.*
128. *Id.*
129. *See id.*

IV. NEW HAMPSHIRE AND WASHINGTON ARE TWO OF THE LATEST STATES TO ABOLISH THE DEATH PENALTY

A. *New Hampshire*

On May 30, 2019, New Hampshire officially became the twenty-first state to abolish the death penalty when the Senate voted to override Governor Sununu's veto of a bill repealing the State's death penalty.[130] The Senate vote, which was tallied at sixteen votes to eight, was exactly the two-thirds supermajority needed to override Governor Sununu's veto.[131] One reason for abolishing the death penalty, according to New Hampshire State Senator Melanie Levesque, is that the practice of capital punishment is "archaic, costly, discriminatory, and final."[132] Specifically, the costly nature of the death penalty seems to have played a large role in the State's abolition of capital punishment as supporters of the abolition movement in New Hampshire say the barbaric practice has cost the State millions of dollars.[133] Pursuing the death penalty is "particularly [costly] when the state must pay to provide defense for indigent defendants in lengthy trials and penalty hearings."[134] For example, lawmakers noted that it had cost the State roughly $2.5 million to prosecute the case of a single defendant on the State's death row.[135]

Prior to its abolition, New Hampshire allowed the death penalty as punishment in capital murder cases, which must have involved: "the murder of police or court officers; murder of judges; murders for hire; [or] murders connected to drug deals, rape, kidnapping, and home invasions."[136]

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130. Eli Watkins, *New Hampshire Repeals Death Penalty After Lawmakers Override Republican Governor*, CNN: POL. (May 30, 2019, 2:42 PM), http://www.cnn.com/2019/05/30/politics/new-hampshire-death-penalty/index.html; Bill Chappell, *New Hampshire Abolishes Death Penalty as Lawmakers Override Governor's Veto*, NPR (May 30, 2019, 12:24 PM), http://www.npr.org/2019/05/30/728288240/new-hampshire-abolishes-death-penalty-as-lawmakers-override-governors-veto; *New Hampshire Becomes 21st State to Abolish Death Penalty*, DEATH PENALTY INFO. CTR. (May 30, 2019), http://deathpenaltyinfo.org/news/new-hampshire-becomes-21st-state-to-abolish-death-penalty.

131. *New Hampshire Abolishes Death Penalty After State Senate Overrides Governor*, GUARDIAN: NEWS (May 30, 2019, 12:34 PM), http://www.theguardian.com/us-news/2019/may/30/new-hampshire-death-penalty-abolished-state-senate-governor; *New Hampshire Becomes 21st State to Abolish Death Penalty*, *supra* note 130.

132. *New Hampshire Abolishes Death Penalty After State Senate Overrides Governor*, *supra* note 131.

133. Chappell, *supra* note 130.

134. *Id.*

135. *Id.*

136. *Death Penalty*, CITIZENS COUNT, http://www.citizenscount.org/issues/death-

Nevertheless, the final version of House Bill 455-FN changed the language of the New Hampshire capital murder statute to now read: "[a] person convicted of a capital murder . . . shall be sentenced to imprisonment for life without the possibility for parole."[137] For comparison, the original language of the New Hampshire capital murder statute stated that "[a] person convicted of a capital murder may be punished by death . . . ."[138] However, House Bill 455-FN also clarified that "this act shall apply to persons convicted of capital murder on or after the effective date of this act."[139] Therefore, the Bill does not apply retroactively, which means that it does not affect the death sentence of Michael Addison, the lone inmate on New Hampshire's death row, "who was convicted of the 2006 killing of [a] Manchester police officer."[140] However, New Hampshire State Senator Sharon Carson believes that courts' interpretations of the new Bill will eventually lead to Mr. Addison being removed from death row, stating "'[i]f you think you're passing this today and Mr. Addison is still going to remain on death row, you are confused' . . . 'Mr. Addison's sentence will be converted to life in prison.'"[141]

B. *Washington*

Prior to New Hampshire, Washington became the twentieth state to abolish the death penalty when the Supreme Court of Washington decided *State v. Gregory*[142] on October 11, 2018.[143] In *Gregory*, the Supreme Court of Washington held that the death penalty in Washington was unconstitutional as administered because it was applied in an "arbitrary and racially biased manner."[144] Moreover, the Court held that because the death

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penalty?gclid=CjwKCAjwxev3BRBBEiwAiB_PWGTBQonh4M7yrm7HIHpKQ2PzArRbyEgbGV0bUTWF8PsTodjSIq_01hoCOOQQAvD_BwE (last visited Dec. 14, 2020); *New Hampshire Abolishes Death Penalty After State Senate Overrides Governor*, *supra* note 131.

137. H.B. 455-FN, 2019 Sess. (N.H. 2019).

138. *Id.*

139. *Id.*

140. Chappell, *supra* note 130; *New Hampshire Abolishes Death Penalty After State Senate Overrides Governor*, *supra* note 131; *New Hampshire Becomes 21st State to Abolish Death Penalty*, *supra* note 131.

141. *New Hampshire Abolishes Death Penalty After State Senate Overrides Governor*, *supra* note 131; *New Hampshire Becomes 21st State to Abolish Death Penalty*, *supra* note 131.

142. 427 P.3d 621 (Wash. 2018).

143. *See id.* at 642; *Washington State Abolishes Death Penalty*, BBC: NEWS (Oct. 12, 2018), http://www.bbc.com/news/world-us-canada-45831849#:~:text=Washington%20has%20become%20the%2020th,arbitrary%20and%20racially%20biased%20manner%22.

144. *Gregory*, 427 P.3d at 627.

penalty was applied in an arbitrary and racially discriminatory manner, it "fail[ed] to serve any legitimate penological [purpose]."[145] In reaching its decision, the Supreme Court of Washington relied heavily on a report that the Court called the "Beckett Report."[146] The Beckett Report was a study conducted by American sociologist Katherine Beckett "on the effect of race and county on the imposition of the death penalty."[147] Three conclusions were supported by the Beckett Report:

> (1) there is significant county-by-county variation in decisions to seek or impose the death penalty, and a portion of that variation is a function of the size of the black population but does *not* stem from differences in population density, political orientation, or fiscal capacity of the county; (2) case characteristics as documented in the trial reports explain a small portion of variance in decisions to seek or impose the death penalty; and (3) black defendants were four and a half times more likely to be sentenced to death than similarly situated white defendants.[148]

Moreover, "[a]fter running various models . . . Beckett summarized her findings regarding race" as follows:

> From December 1981 through May of 2014, special sentencing proceedings in Washington State involving Black defendants were between 3.5 and 4.6 times as likely to result in a death sentence as proceedings involving non-Black defendants after the impact of the other variables included in the model has been taken into account.[149]

In reaching its decision in *Gregory*, the Supreme Court of Washington made sure to clarify that it was the "death penalty, as administered," and not the actual punishment of death that was unconstitutional.[150] This meant that the door was open for Washington lawmakers to modify the Washington death penalty statute so that it conformed with the state's constitutional standards.[151] However, the Washington Senate instead passed a proposal on January 31, 2020, that was submitted by Attorney General Bob Ferguson, to formally repeal the state's death penalty, and instead mandate a sentence of life imprisonment without

145. *Id.*
146. *Id.* at 633.
147. *Id.* at 630.
148. *Id.*
149. *Gregory,* 427 P.3d at 633.
150. *Id.* at 626–27.
151. *See id.*

the possibility of parole.[152] The Bill, which passed the State Senate with bipartisan support after a twenty-eight to eighteen vote, "now heads to the state House for consideration."[153] This is the third time in as many years that the Washington Senate has passed this Bill, which stalled in the state House the previous two years.[154] However, there is optimism among abolition supporters in Washington that the state House will pass the Bill this time around.[155] The reason for this optimism is two-fold: first, new Democratic House Speaker, Laurie Jinkins—whose predecessor "prevented the Bill from coming up for a vote in the House in 2018 and 2019"—"has said she personally supports the Bill"; and second, Washington Governor, Jay Inslee has said he will sign the Bill if it makes it to his desk.[156] Finally, it is also noteworthy that the title of Senate Bill 5339 is "reducing criminal justice expenses by eliminating the death penalty and instead requiring life imprisonment without possibility of release or parole as the sentence for aggravated first degree murder."[157] The title of the Senate Bill clearly illustrates that, like New Hampshire, the Washington legislators' decision to abolish the death penalty is at least partly motivated by the exorbitant costs associated with enforcing the barbaric practice.[158]

152. S.B. 5339, 66th Leg. Reg. Sess. (Wash. 2020); *Senate Passes Bill to Repeal Death Penalty with Bipartisan Support*, WASH. STATE OFF. ATT'Y GEN. (Jan. 31, 2020), http://www.atg.wa.gov/news/news-releases/senate-passes-bill-repeal-death-penalty-bipartisan-support; Rachel La Corte, *Washington Senate Passes Death Penalty Repeal Bill*, U.S. NEWS (Jan. 31, 2020, 4:20 PM), http://www.usnews.com/news/best-states/washington-dc/articles/2020-01-31/washington-senate-passes-death-penalty-repeal-bill.

153. Wash. S.B. 5339; *Senate Passes Bill to Repeal Death Penalty with Bipartisan Support*, *supra* note 152; La Corte, *supra* note 152.

154. *Senate Passes Bill to Repeal Death Penalty with Bipartisan Support*, *supra* note 152; *Washington Senate Passes Bill to Formalize Repeal of Capital Punishment*, DEATH PENALTY INFO. CTR. (Feb. 3, 2020), http://deathpenaltyinfo.org/news/washington-senate-passes-bill-to-formalize-repeal-of-capital-punishment.

155. *Washington Senate Passes Bill to Formalize Repeal of Capital Punishment*, *supra* note 154; *see also* HUGO ADAM BEDAU, THE CASE AGAINST THE DEATH PENALTY 23 (ACLU rev. ed. 1992) (1972); *The Case Against the Death Penalty*, ACLU, http://www.aclu.org/other/case-against-death-penalty (last visited Dec. 14, 2020).

156. La Corte, *supra* note 152; *Washington Senate Passes Bill to Formalize Repeal of Capital Punishment*, *supra* note 154; *see also Senate Passes Bill to Repeal Death Penalty with Bipartisan Support*, *supra* note 152.

157. Wash. S.B. 5339.

158. Chappell, *supra* note 130; *see* Wash S.B. 5339.

V. WHY FLORIDA SHOULD FOLLOW SUIT

A. *Lack of Deterrent Effect*

The argument most often cited in support of the death penalty is that the threat of execution is an effective deterrent of future crime.[159] However, there is no evidence to support this assertion, and as Cesare Beccaria put it, "[t]he death penalty makes an impression that, despite all of its force, cannot compensate for the inclination to forgetfulness, which is natural to man even in the most important matters and is hastened by the passions."[160] In his writing, Beccaria also states "[f]or a punishment to be just, it must have only that degree of intensity that suffices to deter men from crime."[161] However, most capital crimes are committed during situations of extreme emotional duress or under the influence of drugs and/or alcohol—when logical and rational thinking are absent.[162] In these cases, capital offenses are committed by individuals who are "unable to appreciate the consequences" of their actions.[163] But, even when the crime is actually planned, the criminal typically anticipates committing the offense and escaping without detection or arrest.[164] Therefore, it logically follows that the threat of even the severest punishment will have no deterrent effect on someone that fully expects to commit the crime and avoid detection.[165] Nevertheless, if severe punishment can be proven to deter crime, then life imprisonment without the possibility of parole "is severe enough to deter any rational person from committing a [capital offense]."[166] Thus, the critical question is not whether the death penalty would deter capital offenses in and of itself, but whether the death penalty is a more effective deterrent than its alternative—life imprisonment without parole—to justify its costly and final nature.[167]

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159. *The Case Against the Death Penalty*, *supra* note 155; BEDAU, *supra* note 155, at 3.

160. *See* BECCARIA, *supra* note 2, at 53; BEDAU, *supra* note 155, at 3.

161. BECCARIA, *supra* note 2, at 53.

162. *The Case Against the Death Penalty*, *supra* note 155; BEDAU, *supra* note 155, at 4.

163. *The Case Against the Death Penalty*, *supra* note 155; BEDAU, *supra* note 155, at 4.

164. *The Case Against the Death Penalty*, *supra* note 155; *see also* BEDAU, *supra* note 155, at 4.

165. *The Case Against the Death Penalty*, *supra* note 155; *see also* BEDAU, *supra* note 155, at 4.

166. *The Case Against the Death Penalty*, *supra* note 155; BEDAU, *supra* note 155, at 4.

167. *See The Case Against the Death Penalty*, *supra* note 155; BEDAU, *supra* note 155, at 4.

Additionally, a study conducted by Abdorrahman Boroumand Center ("ABC Study") that was released on December 13, 2018, examined eleven countries that have abolished the death penalty at least ten years prior to the conduction of the study.[168] The researchers plotted the changes in the murder rate for these eleven countries over the last ten years.[169] The study found that:

> [D]eath penalty abolition correlated on average with a decline in murder rates in [all] eleven countries . . . . In fact, . . . a country in this set which abolished the death penalty could expect an average of approximately six less murders per 100,000 people a decade after abolition.[170]

Thus, as the study concluded, fears by proponents of the death penalty that abolition will lead to more crime, "or at least weaken deterrence," seem to be "unfounded."[171] Death penalty proponents may see the ABC Study and point out that the eleven countries examined do not necessarily represent America.[172] While this observation may be true, there is evidence to support that the trend extrapolated from the ABC Study is also present within the United States.[173] For example, the murder rate in death penalty states, collectively, has been higher than the murder rate in non-death penalty states, collectively, in every single year since 1990—nearly thirty years.[174] The difference is not particularly close either, as death penalty states have had a 28% higher murder rate on average than non-death penalty states since 1999, with the highest percent difference being 47% in 2007.[175]

Moreover, a study conducted in 2008 by Michael L. Radelet—a sociology professor from the University of Colorado-Boulder—examined the opinions of leading criminology experts on the deterrence effects of the death penalty and found that 88.2% of respondents do not believe that the death

168. ABDORRAHMAN BOROUMAND CTR., WHAT HAPPENS TO MURDER RATES WHEN THE DEATH PENALTY IS SCRAPPED? A LOOK AT ELEVEN COUNTRIES MIGHT SURPRISE YOU (2018).

169. *Id.*

170. *Id.*

171. *Id.*

172. *See id.*

173. *See Murder Rate of Death Penalty States Compared to Non-Death Penalty States*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states (last visited Dec. 14, 2020).

174. *Id.*

175. *See id.*

penalty deters murder.[176] "[A] level of consensus comparable to the agreement among scientists regarding global climate change."[177] In fact, nearly 19% of the experts surveyed believe that the imposition of the death penalty actually leads to a higher murder rate, a phenomenon known as the "brutalization hypothesis."[178] Thus, "[d]eterrence is a function not only of a punishment's severity, but also of its certainty and frequency."[179]

B. *Applied in Arbitrary and Discriminatory Manner*

As was found in both *Furman* and *Gregory*, the practice of the death penalty is unconstitutional when it is applied in an arbitrary and discriminatory manner.[180] However, the death penalty has always been applied in an arbitrary and discriminatory manner, and this still holds true today.[181] "The death penalty is supposed to be reserved for the most culpable. Instead, it's inflicted on the most vulnerable."[182] In the United States, between the years of 1930 and the end of 1996, there were 4220 inmate executions; more than half of which were African American.[183] This should not be surprising, however, as death rows across the country have habitually housed a "disproportionately large population of African Americans, relative to their percentage of the total population."[184] For example, when comparing African American and white offenders over the past century, African Americans were often sentenced to capital punishment for crimes that did not amount to capital offenses for whites, such as rape and burglary.[185] This inequitable distribution of capital punishment is evidenced by the fact that, of the 455 men executed for rape between the years of 1930 and 1976, an astonishing 405—90%—were African American.[186]

176. Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489, 501 (2009); *A Clear Scientific Consensus That the Death Penalty Does Not Deter*, AMNESTY INT'L (June 18, 2009), http://www.amnestyusa.org/a-clear-scientific-consensus-that-the-death-penalty-does-not-deter/.

177. *A Clear Scientific Consensus That the Death Penalty Does Not Deter*, *supra* note 176.

178. *Id.*; Radelet & Lacock, *supra* note 176, at 503.

179. *The Case Against the Death Penalty*, *supra* note 155.

180. State v. Gregory, 427 P.3d 621, 642 (Wash. 2018); *see also* Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

181. *See The Case Against the Death Penalty*, *supra* note 155.

182. *Death Penalty*, EQUAL JUST. INITIATIVE, http://eji.org/issues/death-penalty/ (last visited Dec. 14, 2020).

183. *The Case Against the Death Penalty*, *supra* note 155.

184. *Id.*

185. *Id.*

186. *Id.*

Proponents of the death penalty may argue today that these trends of racial discrimination are things of the past, however, the data clearly illustrates the falsity of such an assertion.[187] "African Americans make up 42% of people on death row and 34% of those executed, but only 13% of the population is [African American]."[188] Moreover, "since the revival of the death penalty" in 1976, about half of the inmates on death row at any given time are African American.[189] Even more notable is the racial comparison of the victims: "[a]lthough approximately 49% of all homicide victims are white, 77% of capital homicide cases since 1976 have involved a white victim."[190] Thus, African Americans who are found guilty of killing a white victim are at the greatest risk, over any other race or demographic, to be sentenced to capital punishment.[191]

These discriminatory influences on the imposition of capital punishment can also be found within the State of Florida.[192] One of the main conclusions derived from the Beckett Report, which led to the Supreme Court of Washington holding that the imposition of the death penalty was unconstitutional, was the finding that "there is significant county-by-county variation in decisions to seek or impose the death penalty, and a portion of that variation is a function of the size of the black population . . . ."[193] Likewise, in Florida, out of sixty-seven total counties, the top three counties when it comes to executions—Miami-Dade County, Orange County, and Duval County—are ranked last, sixth to last, and eighth to last, respectively, in percentage of Whites among the population.[194] Moreover, Miami-Dade County has the largest Hispanic population in the state, where 64.7% of the county is composed of Hispanics, and Duval County ranks third in the State when it comes to percentage of African Americans within the population.[195] Meanwhile, 49.2% of the population of Orange County is composed of a combination of African Americans and Hispanics.[196] These three counties account for more than 35% of all executions in the State of Florida since

187. *See id.*
188. *Death Penalty*, *supra* note 182.
189. *The Case Against the Death Penalty*, *supra* note 155.
190. *Id.*
191. *See id.*
192. *See Execution List: 1976 – Present*, FLA. DEP'T CORRS., http://www.dc.state.fl.us/ci/execlist.html (last visited Dec. 14, 2020); *Race and Ethnicity in Florida (State)*, STAT. ATLAS, http://statisticalatlas.com/state/Florida/Race-and-Ethnicity#figure/county (last visited Dec. 14, 2020).
193. State v. Gregory, 427 P.3d 621, 630 (Wash. 2018).
194. *See Race and Ethnicity in Florida (State)*, *supra* note 192.
195. *Id.*
196. *Id.*

1979, but only make up roughly 23% of the State's total population.[197] Finally, since 1979, the State of Florida has executed ninety-nine individuals, twenty-nine of which—roughly 29%—have been African American.[198] This is despite the fact that the African American population in Florida was 13.8% in 1980, and was still only 16.9% in 2018.[199] Thus, as was the case in Washington, the data supports the assertion that there is a county-by-county variation in decisions to seek or impose the death penalty in the State of Florida.[200] This variation has led to counties with some of the smallest white populations, as well as some of the highest population of minorities, being impacted the most by the imposition of capital punishment.[201]

Lastly, the death penalty unfairly discriminates against the poor, as it is mostly imposed on people who do not have the means to hire an effective attorney.[202] "The failure to provide adequate counsel to capital defendants and people sentenced to death is a defining feature of the American death penalty."[203] "Whether a defendant will be sentenced to death . . . [has a direct correlation] . . . [with] the quality of the defendant's legal team . . . ."[204] This is not to say that there are no competent and effective lawyers that can provide exceptional representation to capital defendants—because that is simply not true.[205] However, as stated previously, most capital defendants cannot afford to hire adequate representation and are, therefore, appointed lawyers that are typically "overworked, underpaid, and inexperienced" in trying capital cases.[206] This typically results in a failure to "adequately investigate cases, call witnesses, and challenge forensic evidence," as capital cases are complex, time-consuming, and financially taxing.[207] Insufficient representation leads to wrongful convictions and death sentences that are difficult to rectify on appeal.[208] Moreover, there is no right to counsel after the first appeal, thereby leaving defendants "sentenced to death with little hope for relief during postconviction proceedings."[209]

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197. *Id.*; *see also Execution List: 1976 – Present*, *supra* note 192.
198. *See Execution List: 1976 – Present*, *supra* note 192.
199. *Florida*, RURAL HEALTH INFO. HUB, (Jan. 12, 2018), http://www.ruralhealthinfo.org/states/florida; *see also* BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION 7, 19 (1982); *Race and Ethnicity in Florida (State)*, *supra* note 192.
200. *See Execution List: 1976 – Present*, *supra* note 192.
201. *Id.*; *see also Race and Ethnicity in Florida (State)*, *supra* note 192.
202. *Death Penalty*, *supra* note 182.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Death Penalty*, *supra* note 182.
208. *Id.*
209. *Id.*

C. *Rate of Error*

Unlike any other criminal punishment, the death penalty is irreversible and final.[210] This finality means an inability to correct any mistakes that may have led to a wrongful conviction.[211] While some proponents of the death penalty may make the absurd argument that the merits of the death penalty are worth the occasional execution of [an] innocent life, most proponents instead try to argue that there is little likelihood of executing an innocent life.[212] As to the first argument, the death of even one innocent life at the hands of the government is one too many, and the mere possibility that an innocent life can be executed should be sufficient to halt this barbaric practice.[213] The second argument, although a bit more rational than the first, still lacks merit.[214] Since 1973, 1522 individuals have been executed in the United States, and in that same time frame, 170 individuals have been exonerated and released from death row.[215] These statistics indicate that for about every nine executions in the United States, one individual is exonerated of all charges that put him or her on death row—roughly an 11% rate of error.[216] However, the numbers in Florida paint an even bleaker picture, as the State leads the nation in exonerations by a considerable margin.[217] As of January 2020, twenty-nine individuals on Florida's death row have been exonerated and released, leading to roughly a 30% error rate—significantly higher than the national error rate of roughly 11%.[218] For comparison, the next closest state when it comes to exonerations is Illinois with twenty-one, and after that, there is a significant drop-off, as the next closest state is Texas with only thirteen exonerations.[219] Finally, one need not look far to find examples of wrongful convictions.[220] In Brevard County, located on Central Florida's east coast, there have been at least three life sentences in which individuals "wrongfully

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210. *The Case Against the Death Penalty*, *supra* note 155.
211. *See id.*
212. *Id.*
213. *See* Marshall Frank, *It's Time to Put Death Penalty to Rest in U.S.*, FLA. TODAY (June 22, 2017, 2:09 PM), http://www.floridatoday.com/story/opinion/2017/06/22/time-death-penalty-abolished/420377001/.
214. *See Death Penalty*, *supra* note 182; *Florida Death Penalty Fact Sheet*, *supra* note 100; *The Case Against the Death Penalty*, *supra* note 155.
215. *Death Penalty*, *supra* note 182.
216. *Id.*
217. *Innocence*, *supra* note 102.
218. *Id.*; *Florida Death Penalty Fact Sheet*, *supra* note 100.
219. *Innocence*, *supra* note 102.
220. *See* Frank, *supra* note 213.

served [twenty-seven] years, [twenty-two] years, and [four] years [in prison] as innocent men."[221] Had these men been sentenced to death, rather than life imprisonment, two would have likely been executed prior to their exoneration due to this imperfect system.[222]

D. *Cost*

Another misconception about capital punishment is that it is cheaper than life imprisonment, and therefore, abolishing the death penalty would be unfair to the taxpayer.[223] However, when all the relevant costs are factored in, just the opposite is true.[224] "The death penalty is not now, nor has it ever been, a more economical alternative to life imprisonment."[225] A murder trial involving the death penalty typically takes considerably longer than a trial that does not involve the death penalty.[226] These litigation costs, including the time of judges, prosecutors, and public defenders, are usually covered by the taxpayers.[227] Moreover, the prolonged period of time between the imposition of the death penalty and the actual execution elevates costs, as taxpayers bear the cost to house these inmates in separate death row housing.[228] However, this delay prior to execution is "unavoidable, given the procedural safeguards [that are mandated] by the courts in capital cases."[229] Thus, the only way to reduce the costs associated with the death penalty would be to remove the procedural safeguards and constitutional protections afforded to capital defendants, thereby increasing the likelihood of executing an innocent defendant.[230] Finally, Florida is not impervious to the high costs associated with enforcing the death penalty.[231] In fact, "Florida, with one of the nation's [most populous] death rows, has estimated that the true cost of each execution is approximately $3.2 million, or approximately six times the cost of a life-imprisonment sentence."[232] This money can be better utilized by the State, as in a paradoxical turn of events, enforcing the death penalty

221. *Id.*
222. *Id.*
223. BEDAU, *supra* note 155, at 20.
224. *Id.*
225. *Id.*
226. *Id.* at 21.
227. *Id.*
228. BEDAU, *supra* note 155, at 3, 21; *see also The Case Against the Death Penalty*, *supra* note 155.
229. BEDAU, *supra* note 155, at 3.
230. *Id.* at 4.
231. *See id.* at 21.
232. *Id.* (internal emphasis omitted).

takes money that can be used to enhance public safety, among other things.[233]

VI. LIFE IMPRISONMENT IS A SUPERIOR ALTERNATIVE TO THE DEATH PENALTY

Rather than continuing the barbaric practice of the death penalty, Florida should instead transition to the more humane alternative of life imprisonment without the possibility of parole for capital punishment.[234] As this Comment has outlined, there are a multitude of reasons to support this transition.[235] First, the threat of life imprisonment without the possibility for parole is severe enough to deter any rational person from committing capital offenses.[236] Moreover, there is no evidence that suggests that the death penalty is a more effective deterrent than life imprisonment without the possibility for parole.[237] In fact, as mentioned previously, death penalty states consistently have higher murder rates than non-death penalty states.[238] Therefore, the death penalty is relegated to an unjustified form of retribution that is inconsistent with the ideologies of punishment utilized within the United States.[239] As Cesare Beccaria put it:

> [T]here is no one who, upon reflection, would choose the total and permanent loss of his own liberty, no matter how advantageous a crime might be: therefore, the intensity of perpetual penal servitude, substituted for the death penalty, has all that is necessary to deter even the most determined mind.[240]

Second, if the death penalty is abolished, life imprisonment without the possibility for parole would be applied universally as capital punishment.[241] This would resolve the issue of arbitrary and discriminatory application of the death penalty that has rendered the death penalty unconstitutional on

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233. *The Case Against the Death Penalty*, *supra* note 155.

234. BEDAU, *supra* note 155, at 1, 7; *see also Florida Death Penalty Fact Sheet*, *supra* note 100.

235. BEDAU, *supra* note 155, at 1–2.

236. *Id.*

237. *Id.* at 4; Radelet & Lacock, *supra* note 176, at 490.

238. *See Murder Rate of Death Penalty States Compared to Non-Death Penalty States*, *supra* note 173.

239. *See Punishment*, *supra* note 10; *The Case Against the Death Penalty*, *supra* note 155.

240. BECCARIA, *supra* note 2, at 53.

241. *See Life Without Parole*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/policy-issues/sentencing-alternatives/life-without-parole (last visited Dec. 14, 2020); *The Death Penalty: Questions and Answers*, *supra* note 11.

multiple occasions.[242] Third, whereas the death penalty is final and irreversible, life imprisonment without the possibility for parole would provide the opportunity to rectify any mistakes before it is too late.[243] It is common knowledge that the American criminal justice system is imperfect, and mistakes happen.[244] However, with the death penalty, the victims must pay the ultimate price for mistakes that result from an imperfect system that, ironically, is supposed to provide justice.[245] Finally, despite the misconceptions, life imprisonment without the possibility of parole is substantially more cost-effective than the death penalty.[246]

VII. CONCLUSION

Simply put, there are no reasons that justify the barbaric, irreversible practice of the death penalty when there is a suitable alternative that is just as effective at deterring crime, if not more effective, and far less costly to the taxpayer.[247]

Despite all its might, the death penalty fails in its ultimate endeavor to deter crime, which relegates the practice to a purely retributive punishment.[248] However, pure retributivism is inconsistent with the philosophies of punishment employed in the United States, especially such an extreme form of retribution.[249] But, even if the United States adhered to purely retributive ideals, that still would not explain why murder is the only crime that is punished in a reciprocal manner.[250] Why are torturers not punished with torture, or rapists punished with rape?[251] Following this principle of punishment is unreasonable, impractical, and leads to an arbitrary imposition of the death penalty.[252]

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242. Furman v. Georgia, 408 U.S. 238, 239–40 (1972); State v. Gregory, 427 P.3d 621, 642 (Wash. 2018); *see also* BEDAU, *supra* note 155, at 8–9.

243. *See* BEDAU, *supra* note 155, at 2; *The Case Against the Death Penalty*, *supra* note 155.

244. *See* Greg Johnson, *A More Perfect Criminal Justice System*, PENN TODAY (Dec. 18, 2014), http://www.penntoday.upenn.edu/2014-12-18/features/more-perfect-criminal-justice-system.

245. *See The Case Against the Death Penalty*, *supra* note 155; *Death Penalty*, *supra* note 182.

246. BEDAU, *supra* note 155, at 2, 20; *The Case Against the Death Penalty*, *supra* note 155.

247. *See The Case Against the Death Penalty*, *supra* note 155.

248. *Id.*

249. *Punishment*, *supra* note 10.

250. *See The Case Against the Death Penalty*, *supra* note 155.

251. *Id.*

252. *Id.*

To be clear, there is no doubt that criminals deserve to be punished, and that the severity of the punishment should reflect the severity of the crime committed.[253] However, it is well-understood that there are limits on the severity of punishments.[254] Governments that understand and respect these limits do not use premeditated homicide as a means to enforce social policy.[255] It is ironic that, despite the centuries of debate and evolution regarding the death penalty, it is the words of Cesare Beccaria, all the way back in 1764, that still carry the most weight:

> The death penalty is not useful because of the example of cruelty that it gives to men. If the passions or the necessities of war have taught us how to shed human blood, the laws, which moderate the conduct of men, should not augment that cruel example, which is all the more baleful when a legal killing is applied with deliberation and formality. It seems absurd to me that the laws, which are the expression of the public will, and which execrate and punish homicide, should themselves commit one, and that to deter citizens from murder they should order a public murder.[256]

Today, the abolition movement is stronger than ever as states continue the trend of abolishing the death penalty.[257] Moreover, it is inevitable that the death penalty will eventually be prohibited in all circumstances, as the law of torture should be interpreted today as prohibiting the barbaric practice of capital punishment.[258] But, Florida should not wait for this tipping point to abolish capital punishment.[259] New Hampshire and Washington have each cited compelling rationales in their respective decisions to abolish the death penalty that are applicable to Florida.[260] These rationales include its excessive cost as well as arbitrary and discriminatory application.[261] Additionally, abolition supporters have pointed to the death penalty's lack of deterrent effect and its astonishing rate of error as grounds to end the barbaric practice.[262] Thus, whether Florida lawmakers are driven by morality, statistical data, or financial reasons, there

253. *Id.*
254. *Id.*
255. *The Case Against the Death Penalty*, *supra* note 155.
256. BECCARIA, *supra* note 2, at 55.
257. *See* Bessler, *supra* note 2, at 47; *State by State*, *supra* note 18.
258. Bessler, *supra* note 2, at 46–47.
259. *See id.* at 46; *Florida Death Penalty Fact Sheet*, *supra* note 100.
260. *See* State v. Gregory, 427 P.3d 621, 642 (Wash. 2018); Chappell, *supra* note 130; *Florida Death Penalty Fact Sheet*, *supra* note 100.
261. *See Gregory*, 427 P.3d at 642; Chappell, *supra* note 130.
262. *See Death Penalty*, *supra* note 182; *The Case Against the Death Penalty*, *supra* note 155.

are a multitude of guiding principles that support the immediate abolition of Florida's death penalty.[263]

263. *See Florida Death Penalty Fact Sheet*, *supra* note 100; *The Case Against the Death Penalty*, *supra* note 155.

THE RIGHT TO A SPEEDY TRIAL IN FLORIDA: ANOTHER VICTIM OF COVID-19

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I. INTRODUCTION

On March 16, 2020, the Supreme Court of the United States announced that the Court was postponing upcoming oral arguments for the first time in over 100 years.[1] The last time the Court did so was in response to the Spanish flu epidemic of 1918, which only delayed the Court one month.[2] The only other postponements were more than 200 years ago in 1793 and then again in 1798 in response to the yellow fever.[3] The ever-developing novel coronavirus ("COVID-19") has provided United States citizens with a first-hand look into how overwhelmingly disruptive a pandemic can be on the criminal justice system and society as a whole.[4]

The first confirmed case in the United States appeared on January 21, 2020.[5] In less than six months, there were over 3.7 million confirmed domestic cases and over 140,000 domestic deaths as a result of the virus.[6] Further, there is currently no foreseeable quarantine end date, but when things do return to some form of normalcy, the devastating effects will be felt for many years to come.[7] This is especially true for the United States' criminal justice system.[8] The unanticipated halt of the judiciary has led to one of the biggest disruptions in our nation's history, resulting in a backlog of thousands of individuals who remain incarcerated without a court date in sight.[9] Many constitutional rights are being affected by this standstill, but none as prevalent as the Sixth Amendment right to a speedy trial.[10]

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1. Melissa Chan, *'It Will Have Effects for Months and Years.' From Jury Duty to Trials, Coronavirus Is Wreaking Havoc on Courts*, TIME (Mar. 16, 2020, 4:44 PM), http://www.time.com/5803037/coronavirus-courts-jury-duty.

2. *Id.*; Richard Altieri & Hayley Evans, *The Supreme Court's Coronavirus Postponement: Pandemics, Precedent and National Risks*, LAWFARE (Mar. 31, 2020, 8:00 AM), http://www.lawfareblog.com/supreme-courts-coronavirus-postponement-pandemics-precedent-and-national-risks.

3. Altieri & Evans, *supra* note 2.

4. *See Pandemic Disrupts Justice System, Courts*, A.B.A. NEWS (Mar. 16, 2020), http://www.americanbar.org/news/abanews/aba-news-archives/2020/03/coronavirus-affecting-justice-system.

5. Derrick B. Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (July 15, 2020), http://www.nytimes.com/article/coronavirus-timeline.html.

6. *United States COVID-19 Cases and Deaths by State*, CDC (July 21, 2020), http://www.cdc.gov/covid-data-tracker/#cases.

7. *See* James Paton, *When, and How, Does the Coronavirus Pandemic End?*, BLOOMBERG (Apr. 3, 2020, 12:16 PM), http://www.bloomberg.com/news/articles/2020-04-03/when-and-how-does-the-coronavirus-pandemic-end-quicktake; *Pandemic Disrupts Justice System, Courts*, *supra* note 4; Chan, *supra* note 1.

8. *See* Chan, *supra* note 1.

9. *Id.*

10. *See id.*

In 1967, the Court established that a criminal defendant's right to a speedy trial was a constitutionally protected fundamental right that applied to all fifty states in *Klopfer v. North Carolina*.[11] The seminal decision, however, is the 1972 holding of *Barker v. Wingo*.[12] In *Barker*, Justice Powell discusses the societal disadvantages of pretrial incarceration and further provides factors that courts must consider to alleviate these disadvantages by ensuring that a defendant has not been deprived of their right to a speedy trial.[13] The interests articulated in *Barker* expand on the concept that the right to a speedy trial benefits not only the accused, but also society as whole—recognizing that the right "exists separate from, and at times in opposition to, the interests of the accused."[14]

The idea of obtaining justice in a timely fashion and affording the accused this right derives its foundation from English law.[15] The right to a speedy trial's earliest known origin is from the Assize of Clarendon of 1166, in which King Henry II of England initiated a transformation of old English law into the various concepts that the United States' legal system recognizes today.[16] This led not only to jury trials, but also to the inception of timely justice:

> And when a robber or murderer or thief or receiver of them has been arrested through the aforesaid oath, if the justices are not about to come speedily enough into the country where they have been taken, let the sheriffs send word to the nearest justice by some well-informed person that they have arrested such men, and the justices shall send back word to the sheriffs informing them where they desire the men to be brought before them; and let the sheriffs bring them before the justices.[17]

Similar concepts regarding the right to a speedy trial were subsequently recorded in the Magna Carta in 1215, and became the first articulation of the right in modern jurisprudence.[18] Chief Justice Warren's opinion in *Klopfer* noted that the ideas introduced by the Assize of Clarendon and the Magna Carta were cardinal to the rights introduction in

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11. 386 U.S. 213, 223 (1967).
12. 407 U.S. 514, 536 (1972).
13. *See id.* at 519, 530.
14. *Id.* at 519.
15. *Klopfer*, 386 U.S. at 223.
16. *Id.*; Patrick Ellard, *Learning from Katrina: Emphasizing the Right to a Speedy Trial to Protect Constitutional Guarantees in Disasters*, 44 AM. CRIM. L. REV. 1207, 1209 (2007).
17. *Klopfer*, 386 U.S. at 223 n.9 (quoting the Assize of Clarendon of 1166).
18. *Klopfer*, 386 U.S. at 223.

the Sixth Amendment, which now applies to all fifty states through the Due Process Clause of the Fourteenth Amendment.[19]

This Comment will consider the right to a speedy trial's applicability during the COVID-19 pandemic, and whether the rule can adequately adapt without diminishing the meaning of the constitutional guarantee.[20] Specifically, this Comment will address the Supreme Court of Florida's orders tolling the speedy trial clock that continues to delay a criminal defendant's day in court.[21] First, this Comment will discuss the four factors articulated in *Barker* for determining whether a criminal defendant has been deprived of their Sixth Amendment right to a speedy trial.[22] Second, this Comment will discuss how Florida's statutory speedy trial rule functions under normal circumstances.[23] Specifically, the time frames prescribed under Florida Rule of Criminal Procedure 3.191.[24] Third, this Comment will discuss how Florida's speedy trial rule is currently functioning during the COVID-19 pandemic and conduct an analysis of the administrative orders that continue to suspend the speedy trial clock.[25] Finally, this Comment will apply the *Barker* factors to the continued suspension of the speedy trial clock and address the ramifications that Florida's indefinite court closure may have on criminal defendants' constitutional right to a speedy trial.[26]

II. SPEEDY CONSIDERATIONS

The speedy trial clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . "[27] The clause "is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution."[28] Further, indictment is not needed for invocation of the provision, but the Court has held that the protection does not extend to any period prior to arrest.[29] Therefore, the right attaches and

19. *See id.*
20. *See* discussion *infra* Part V.
21. *See* discussion *infra* Part IV.
22. *See* discussion *infra* Part II; Barker v. Wingo, 407 U.S. 514, 530 (1972).
23. FLA. R. CRIM. P. 3.191; *see also* discussion *infra* Part III.
24. *See* FLA. R. CRIM. P. 3.191.
25. *See* discussion *infra* Part IV.
26. *See* discussion *infra* Part V; *Barker*, 407 U.S. at 530.
27. U.S. CONST. amend. VI.
28. United States v. Marion, 404 U.S. 307, 313 (1971).
29. *Id.* at 321.

may be invoked at the time of arrest or formal charge, whichever comes first.[30]

Unlike other amendments found within the Bill of Rights, the Sixth Amendment has had a history of discrepancy regarding its several provisions and their applicability to the states.[31] This is especially true when it comes to the right to a speedy trial; in fact, the right to a speedy trial was not declared fundamental until 1967.[32] Furthermore, one author argues that the Court's delayed declaration as fundamental and ambiguous precedent concerning the right, has led to the right of a speedy trial being seen as a "'second-class' citizen . . . not worthy of equal treatment with other comparable safeguards afforded criminal defendants."[33] However, one would think that the right to a speedy trial would be scrupulously examined since its deprivation may lead to dismissal of a case in its entirety.[34]

Nevertheless, the Court has refused to provide a bright-line test for determining whether a speedy trial violation has occurred, and has left that up to each state's discretion.[35] The Court did, however, establish four factors that should be considered when assessing whether a violation did occur: (A) length of delay; (B) reason for delay; (C) the defendant's assertion of their rights; and (D) prejudice to the defendant.[36] No single factor is determinative; instead, all the factors must be considered together.[37]

A. *The Length of Delay*

The first factor, length of delay, is a two-prong test that functions as a triggering mechanism for the four-prong analysis of whether there has been a violation of a defendant's right to a speedy trial.[38] First, the defendant must allege that the elapsed time between their arrest—or formal charge—and a trial has crossed the threshold of ordinary, thus making the delay "presumptively prejudicial."[39] Courts have generally held that a delay in

30. *See id.* at 320–21; Dillingham v. United States, 423 U.S. 64, 64–65 (1975) (per curiam) (holding if arrest precedes indictment or arraignment, time must be calculated from date of arrest).

31. *See* Stein v. New York, 346 U.S. 156, 195 nn.38–40 (1953).

32. Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

33. ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE 177 (1992).

34. *See* Barker v. Wingo, 407 U.S. 514, 522 (1972).

35. *Id.* at 523.

36. *Id.* at 530.

37. *Id.* at 533.

38. Doggett v. United States, 505 U.S. 647, 651–52 (1992); *see also Barker*, 407 U.S. at 530.

39. *Barker*, 407 U.S. at 530; *see also* Dillingham v. United States, 423 U.S. 64, 65 (1975) (per curiam).

excess of one year is considered presumptively prejudicial.[40] On the other hand, the "length of delay that will provoke such an inquiry . . . [depends] upon the peculiar circumstances of the case."[41] Once the defendant has shown the delay is presumptively prejudicial, the court must then consider how far the delay has extended past this threshold.[42] "This latter enquiry is significant to the speedy trial analysis because . . . the presumption that pretrial delay has prejudiced the accused intensifies over time."[43]

B. *The Reason for the Delay*

The second factor, reason for the delay, is closely related to the first factor in that different weight is given for different reasons.[44] For example, intentional attempts to hamper the defense is weighed heavily against the prosecution.[45] While more neutral reasons, including overloaded courts and negligence, are weighed less heavily, "but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."[46] Further, delays that result from valid reasons such as case complexity and good-faith interlocutory appeals will not weigh against the government at all.[47] Finally, if there are multiple causes for several delays, they are all considered in the aggregate, with consideration for whether an earlier delay is the cause of a later delay.[48]

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40. *See* United States v. Muñoz-Franco, 487 F.3d 25, 60 (1st Cir. 2007) (finding a five-and-a-half-year delay on a conspiracy charge was presumptively prejudicial); United States v. Bass, 460 F.3d 830, 836 (6th Cir. 2006) (holding a thirteen-month delay on conspiracy to distribute cocaine was presumptively prejudicial).

41. *Barker*, 407 U.S. at 530–31; *see also Muñoz-Franco*, 487 F.3d at 60–61 (holding no speedy trial violation because the complexity of the case required numerous pre-trial motions).

42. *See* Doggett v. United States, 505 U.S. 647, 651–52 (1992).

43. *Id.* at 652.

44. *Barker*, 407 U.S. at 531.

45. *Id.*

46. *Id.*

47. *See* United States v. Casas, 425 F.3d 23, 33–34 (1st Cir. 2005) (finding delay from the complexity of a sixty-person drug conspiracy case with over 350 pretrial motions filed did not weigh against the government).

48. *See* Vermont v. Brillon, 556 U.S. 81, 91–92 (2009) (holding that subsequent delays by the government were still weighed heavily against the defendant because their cause was the defendant's prior disruption of proceedings).

C. *The Defendant's Assertion of Their Rights*

The third factor is whether the defendant asserts the right.[49] The Supreme Court in *Barker* overturned the rule that a defendant who fails to demand a speedy trial forever waives their right.[50] This was otherwise known as the demand-waiver rule, which relied on the assumption that delay solely benefits the defendant.[51] As a result, the Court provided a more workable analysis and held that whether the defendant asserts the right should weigh differently based on the facts of each case.[52] For example, a defendant who does demand a speedy trial serves as strong evidence that the defendant has been deprived of their right.[53] In contrast, "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."[54]

D. *Prejudice to the Defendant*

The fourth and final factor is prejudice, which is assessed in light of the interests of defendants which the speedy trial right was designed to protect: Oppressive pretrial incarceration, anxiety, and concern of the accused, and impairment of the defense.[55] The burden of showing prejudice is on the defendant, and the mere "possibility of prejudice is not sufficient to support [the] . . . position that . . . speedy trial rights [are] violated."[56] Further, as with the first three factors, prejudice is neither "a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial."[57] Therefore, if the defendant cannot show actual prejudice, it is an error not to consider the other three factors.[58] However, lower courts have been reluctant to find a violation and grant dismissal without a showing of prejudice.[59] This is likely because, in 1992, the Court in *Doggett v. United*

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49. *Barker*, 407 U.S. at 528, 531.
50. *Id.* at 528.
51. *Id.* at 525.
52. *Id.* at 528–29.
53. *Id.* at 531–32; *see also* United States v. Muñoz-Franco, 487 F.3d 25, 61 (1st Cir. 2007) (holding repeated demand weighed heavily in defendant's favor).
54. *Barker*, 407 U.S. at 532.
55. *Id.*
56. United States v. Loud Hawk, 474 U.S. 302, 315 (1986).
57. *Barker*, 407 U.S. at 533.
58. *See* United States v. Jackson, 473 F.3d 660, 664–65 (6th Cir. 2007); United States v. Bergfeld, 280 F.3d 486, 490–91 (5th Cir. 2002).
59. *See* United States v. Knight, 562 F.3d 1314, 1324 (11th Cir. 2009) (finding no speedy trial violation because defendant would have been imprisoned despite delay; thus, no actual prejudice could be found); United States v. Muñoz-Franco, 487 F.3d 25,

States[60] focused solely on the three prejudicial interests of prong four in evaluating whether a violation had occurred.[61] As a result, some commentators argue that the four-prong analysis should be abandoned, and a violation should be assessed relative to which interests were harmed and to what degree.[62]

Absent any decision to the contrary, the balancing of all four prongs is still required for an adequate evaluation of a violation.[63] However, the three interests have an importance beyond the *Barker* analysis in that the interests provide a baseline for states to prescribe their own speedy trial rules that adequately uphold constitutional standards.[64] Thus, the Court in *Barker* went to extensive lengths to define and give context to all three.[65] Unlike the four factors, however, the interests are more abstract and provide justifications for this constitutional guarantee.[66] This is because the Sixth Amendment right to a speedy trial differs from other constitutional guarantees because it benefits society as a whole and not solely the defendant.[67] "It does not preclude the rights of public justice."[68]

First, oppressive pretrial incarceration is only applicable when the defendant is in jail awaiting trial, and does not apply when the defendant has been released on bail.[69] This is because post-accusation delay, accompanied by pretrial incarceration, affects several things beyond the accused themselves.[70] For example, imprisonment often leads to disruption of family life, job loss, lost earnings, and contributes to the issues of jail overcrowding.[71] Furthermore, the ability to rehabilitate an individual whose case was unduly delayed diminishes as the length of their pretrial

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61 (1st Cir. 2007) (finding no speedy trial violation because delay only caused a normal amount of anxiety and did not impair the defense; thus, no actual prejudice could be found).

60. 505 U.S. 647 (1992).

61. Doggett v. United States, 505 U.S. 647, 658–59 (1992) (O'Connor, J., dissenting); *Doggett*, 505 U.S. at 659–64 (Thomas, J., dissenting).

62. *See* Brian P. Brooks, *A New Speedy Trial Standard for* Barker v. Wingo*: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. CHI. L. REV. 587, 595–96 (1994).

63. Barker v. Wingo, 407 U.S. 514, 530 (1972).

64. *See id.* at 523.

65. *See id.* at 532–33.

66. *See id.*

67. *Id.* at 519.

68. Beavers v. Haubert, 198 U.S. 77, 87 (1905).

69. *See* United States v. Muñoz-Franco, 487 F.3d 25, 61 (1st Cir. 2007).

70. *See* Barker v. Wingo, 407 U.S. 514, 519 (1972).

71. *Id.* at 520–21, 532; *see also* United States v. Marion, 404 U.S. 307, 320 (1971).

incarceration increases.[72] It is especially harmful to impose these burdens on someone who will ultimately be found innocent.[73]

Second, anxiety and concern of the accused is designed to address and protect those released on bail and awaiting trial.[74] Further, the speedy trial guarantee is designed to limit the "impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges."[75] Specifically, to reduce anxiety and concern accompanying public accusation.[76] However, defendants must make a particularized showing that the anxiety suffered is distinguishable from similarly situated defendants since anxiety will be found to some degree in every case.[77] This usually comes in the form of public condemnation and communal suspicion.[78] Although this interest is directed toward an accused released on bail, it may also be applicable to those incarcerated awaiting trial if it is distinguishable.[79]

The final interest, impairment of a defense, was noted by the Court as being the most important of the three interests "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."[80] Witnesses die, evidence may be lost or destroyed during the period of delay, but the most damaging is the loss of memory because it is not always reflected on the record.[81] However, much like the other interests, it is entirely dependent upon the facts of the particular case, and therefore, is "best considered only after the relevant facts have been developed at trial."[82] As such, some courts are reluctant to declare that the defense was impaired if they cannot identify specific evidence that was made unavailable, or less persuasive, because of the delay.[83]

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72. *See Barker*, 407 U.S. at 520.

73. *See id.* at 533.

74. *See* United States v. Loud Hawk, 474 U.S. 302, 312 (1986) (citing United States v. Ewell, 383 U.S. 116. 120 (1966)); Klopfer v. North Carolina, 386 U.S. 213, 222 (1967).

75. United States v. MacDonald, 456 U.S. 1, 8 (1982).

76. *Barker*, 407 U.S. at 533.

77. United States v. Yehling, 456 F.3d 1236, 1245 (10th Cir. 2006); Morris v. Wyrick, 516 F.2d 1387, 1391 (8th Cir. 1975).

78. *See Barker*, 407 U.S. at 527.

79. *See* Smith v. Hooey, 393 U.S. 374, 379 (1969) (finding that a prisoner who is in prison serving time for an unrelated offense may still be prejudiced by anxiety and concern).

80. *Barker*, 407 U.S. at 532.

81. *Id.*

82. United States v. MacDonald, 435 U.S. 850, 858 (1978), *cert. denied* 140 S. Ct. 282 (2019).

83. *See* Castro v. Ward, 138 F.3d 810, 820 (10th Cir. 1998).

III. THE RIGHT TO A SPEEDY TRIAL IN FLORIDA

A criminal defendant in the State of Florida has the constitutional guarantee of a speedy trial under both the Sixth Amendment of the United States Constitution and the Florida Constitution.[84] Further, Florida courts use the *Barker* factors to analyze a constitutional speedy trial claim.[85] The Court in *Barker* noted that there is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise."[86]

As such, rule 3.191 of the Florida Rules of Criminal Procedure ("Florida rule") prescribes that in the absence of demand for a speedy trial, criminal defendants charged with a felony are entitled to be brought to trial within 175 days after they have been taken into custody.[87] Whereas criminal defendants charged with a misdemeanor are entitled to be brought to trial within ninety days after they have been taken into custody.[88] Further, custody for the purposes of the Florida rule, occurs when the person is either formally arrested or provided with a notice to appear in lieu of a physical arrest.[89] Moreover, the Florida rule provides for the right, both with or without demand, and provides different lengths of time.[90] Therefore, if a defendant has a bona fide desire to demand a speedy trial and obtain a trial sooner, the defendant has the right to be brought to trial within sixty days by filing a demand for a speedy trial.[91] However, if the provided time period expires, the defendant may file a notice of expiration, which requires the trial court to hold a hearing to determine whether the failure to bring the defendant to trial is attributable to the defendant.[92] If the court determines that it is not attributable to the defendant, it must then schedule a trial within ten days of the hearing.[93] If the defendant is not subsequently brought to trial within this ten-day period, they may then be entitled to dismissal and discharge.[94] The purpose of such a drastic remedy is to ensure that "persons

84. U.S. CONST. amend VI; FLA. CONST. art. I, § 16.
85. *See* Fletcher v. State, 143 So. 3d 469, 471–72 (Fla. 5th Dist. Ct. App. 2014); Niles v. State, 120 So. 3d 658, 663 (Fla. 1st Dist. Ct. App. 2013) (per curiam).
86. Barker v. Wingo, 407 U.S. 514, 523 (1972).
87. FLA. R. CRIM. P. 3.191(a).
88. *Id.*
89. *Id.* 3.191(d)(1)–(2).
90. *Id.* 3.191(a), (b), (g).
91. *Id.* 3.191(b).
92. FLA. R. CRIM. P. 3.191(p)(2)–(3).
93. *Id.* 3.191(p)(3).
94. *Id.*

charged with crimes are not allowed to languish in jail or otherwise suffer the indignities of a pending prosecution for an unreasonable length of time" and to promote judicial efficiency.[95]

However, Florida criminal court proceedings have been anything but judicially efficient since the onset of the novel Coronavirus.[96] On March 17, 2020, Florida's Chief Justice Charles Canady ordered state circuit court judges to cancel, postpone, or reschedule all but "essential" court proceedings.[97] As of July 22, 2020, there have been forty-four statewide pandemic—including amended—orders issued by the Supreme Court of Florida setting a statewide framework for emergency response within Florida's court system.[98] The large majority of which affect the Florida speedy trial rule.[99]

IV. SPEEDY TRIAL RIGHTS AND THE CORONAVIRUS

On March 9, 2020, Florida Governor Ron DeSantis declared a state of emergency for the entire State of Florida.[100] Four days later, on March 13, 2020, the Supreme Court of Florida issued its first administrative order addressing the right to a speedy trial.[101] The Court stated that it was the intent of the order to suspend the speedy trial procedure in the manner described in *Sullivan v. State*[102] and *State v. Hernandez*.[103] Although many amendments and clarifications have been made in the subsequent orders, all

95. State v. Smail, 346 So. 2d 641, 644 (Fla. 2d Dist. Ct. App. 1977); *see also* State v. Jenkins, 389 So. 2d 971, 974 (Fla. 1980).

96. *See In re* Comprehensive COVID-19 Emergency Measures for the Florida State Courts, Fla. Admin. Order No. AOSC 20-23, Amend. 5 (Fla. July 2, 2020), http://www.floridasupremecourt.org/content/download/639134/file/AOSC20-23-Amendment-5.pdf (suspending the speedy trial clock on July 2, 2020 and noting that it has been suspended since March 13, 2020).

97. *In re* COVID-19 Essential and Critical Trial Court Proceedings, Fla. Admin. Order No. AOSC 20-15 (Fla. Mar. 17, 2020), http://www.floridasupremecourt.org/content/download/631996/7181425/AOSC20-15.pdf.

98. *Information on COVID-19 Emergency Orders & Advisories*, FLA. SUP. CT., http://www.floridasupremecourt.org/Emergency (last visited Dec. 14, 2020).

99. *See* Fla. Admin. Order No. AOSC 20-23, Amend. 5, *supra* note 96; discussion *infra* Section IV.B.1.

100. Fla. Exec. Order No. 20-52 (Mar. 9, 2020).

101. *In re* COVID-19 Emergency Procedures in the Florida State Courts, Fla. Admin. Order No. AOSC 20-13 (Fla. Mar. 13, 2020), http://www.floridasupremecourt.org/content/download/631744/7178881/AOSC20-13.pdf.

102. 913 So. 2d 762 (Fla. 5th Dist. Ct. App. 2005).

103. 617 So. 2d 1103 (Fla. 3d Dist. Ct. App. 1993); *see also* Fla. Admin. Order No. AOSC 20-13, *supra* note 101; Fla. Admin. Order No. AOSC 20-23, Amend. 5, *supra* note 96.

of the subsequent orders that address speedy trial apply the suspension in the same manner described in *Sullivan* and *Hernandez*.[104]

A. *Speedy Tolling*

There are numerous reasons why the pretrial time period may be extended without breaching one's constitutional right, and under normal circumstances, "[a] trial judge has enormous discretion in deciding whether to grant an extension of the speedy trial time limitations."[105] This extension is otherwise known as "tolling" the speedy trial period.[106] For example, the otherwise applicable time periods may be extended for "exceptional circumstances" like unexpected illness,[107] a showing by the state that the complexity of the case requires more time,[108] a showing by the state that specific evidence is unavailable but will become available at a later date,[109] a showing by either the defendant or state that a delay is necessary due to unforeseen developments,[110] a showing of necessity to accommodate a co-defendant,[111] or a showing by the state that the accused has caused a major delay or disruption preventing the attendance of witnesses or otherwise.[112] Once a defendant has demanded a speedy trial, they essentially waive their right to obtain a further continuance, and alternatively, the state may not ask for a further continuance unless one of these exceptional circumstances exist.[113] However, above all of this lies the administrative power of the Supreme Court of Florida.[114]

In *Sullivan*, the defendant "filed a notice for Expiration of Speedy Trial on which the [lower] court took no action until January 3, 2005."[115] However, the defendant's recapture period expired on December 30, 2004, during Seminole County's two-week holiday recess which was noted as not being an official holiday by the appellate court.[116] Appellant filed a motion

104. Fla. Admin. Order No. AOSC 20-23, Amend. 5, *supra* note 96.

105. *See* FLA. R. CRIM. P. 3.191(i), (*l*); Burns v. State, 433 So. 2d 997, 998 (Fla. 2d Dist. Ct. App. 1983).

106. *See* State v. Jenkins, 389 So. 2d 971, 973 (Fla. 1980).

107. FLA. R. CRIM. P. 3.191(*l*)(1).

108. *Id.* at 3.191(*l*)(2).

109. *Id.* at 3.191(*l*)(3).

110. *Id.* at 3.191(*l*)(4).

111. *Id.* at 3.191(*l*)(5).

112. FLA. R. CRIM. P. 3.191(*l*)(6).

113. *Id.* at 3.191(g), (i)(2), (*l*).

114. *See* Sullivan v. State, 913 So. 2d 762, 763 (Fla. 5th Dist. Ct. App. 2005); State v. Hernandez, 617 So. 2d 1103, 1103 (Fla. 3d Dist. Ct. App. 1993).

115. *Sullivan*, 913 So. 2d at 763.

116. *See id.* The recapture period is the short period of time in which the state is given to bring the accused to trial after the accused files a motion for discharge, notifying

for discharge, which the lower court denied, finding that the holiday was an "exceptional circumstance" under the Florida rule 3.191(*l*).[117] Subsequently, on appeal, the appellate court found the holiday recess was not an exception circumstance.[118] However, during the defendant's arrest and the expiration of the speedy trial period, there were three different administrative orders issued by the Supreme Court of Florida.[119] All of which tolled the speedy trial clock in Seminole County for a cumulative period of fifteen days as a result of three different hurricanes.[120] Thus, the appellate court ultimately concluded the notice of expiration was premature.[121]

Similarly, in *Hernandez*, the defendant filed a motion for discharge in Dade County, was not brought to court, and was subsequently discharged because the ten-day period lapsed.[122] However, when hurricane Andrew hit Florida, the Supreme Court of Florida issued an administrative order tolling the speedy trial clock in Dade County.[123] Five days had run prior to the Order and only three days had run after the two-week tolling period commenced.[124] Thus, only eight of the ten days had run and the defendant's discharge was ultimately reversed.[125] The appellate court held that pursuant to Article V, Section II of the Florida Constitution, the Supreme Court of Florida has the power to administer the judiciary, allowing for the tolling of the speedy trial clock.[126]

B. *Administrative Decisions*

"Florida's state courts system first began extensive emergency preparedness planning for infectious diseases in 2002 following the anthrax attacks in Florida a year earlier. Those plans were updated and deployed during the 2009 H1N1 influenza pandemic."[127] The justification is "[t]he pandemic scenario is distinct from other emergency scenarios, hurricanes for

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the state that the basic speedy trial time has expired; the recapture period is provided by rule 3.191(p)(3) which gives the state ten days to bring the defendant to trial or face discharge. *See* FLA. R. CRIM. P. 3.191(p)(3).

117. *See Sullivan*, 913 So. 2d at 763; FLA. R. CRIM. P. 3.191(*l*).
118. *Sullivan*, 913 So. 2d at 763.
119. *Id.*
120. *Id.*
121. *Id.*
122. State v. Hernandez, 617 So. 2d 1103, 1103 (Fla. 3d Dist. Ct. App. 1993).
123. *Id.*
124. *See id.*
125. *Id.*
126. *Id.*; *see also* FLA. CONST. art. V, § II(a).
127. *Chief Justice Suspends Most Face-to-Face Legal Proceedings Due to COVID-19*, FLA. BAR NEWS, (Mar. 13, 2020), http://www.floridabar.org/the-florida-bar-news/chief-justice-suspends-most-face-to-face-legal-proceedings-due-to-covid-19/.

example, recently impacting the Florida State Courts System."[128] One major difference is that "court operations may be dramatically impacted for potentially an extended period of time," which was hypothesized as being anywhere from twelve to eighteen months.[129] Yet the emergency procedures being applied to the speedy trial clock are the same procedures that are applied to hurricanes.[130] As a result, the numerous emergency orders and subsequent amendments have continued to suspend the speedy trial clock, which has now been nonoperational since March 13, 2020.[131] However, not all criminal defendants are in the same position because depending upon which Judicial Circuit a defendant is located, the right to a speedy trial may not exist for the foreseeable future.[132]

1. Guiding Rules and Tolling Progression

On March 13, 2020, Chief Justice Charles Canady issued the first suspension of the speedy trial clock for two weeks.[133] Additionally, the Court amended the Florida Rules of Judicial Administration to provide the chief judge of each circuit authority to deal with the effects of the emergency.[134] This includes the implementation of procedures, specifically "those affecting speedy trial."[135] On March 19, 2020, all emergency orders previously issued were extended for "at least another three weeks," and on March 24, 2020, Chief Justice Canady further suspended the speedy trial clock through April 20, 2020.[136]

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128. GEN. SERVS. UNIT, OFF. OF THE STATE COURTS ADM'R, STRATEGY FOR PANDEMIC INFLUENZA AND OTHER INFECTION DISEASE OUTBREAKS: KEEPING THE COURTS OPEN IN A PANDEMIC 8 (2002).

129. *Id.*

130. *See* Fla. Admin. Order No. AOSC 20-13, *supra* note 101 (applying the tolling of speedy trial periods in the same manner as *Sullivan v. State* and *State v. Hernandez* to COVID-19, which both tolled the speedy trial clock due to hurricanes); *Hernandez*, 617 So. 2d at 1103; Sullivan v. State, 913 So. 2d 762, 763 (Fla. 5th Dist. Ct. App. 2005).

131. *See* Fla. Admin. Order No. AOSC 20-23, Amend. 5, *supra* note 96.

132. *See infra* Section IV.2.; *In re* Comprehensive COVID-19 Emergency Measures for the Florida State Courts, Fla. Admin. Order No. AOSC 20-23, Amend. 4 (Fla. June 16, 2020), http://www.floridasupremecourt.org/content/download/637809/file/AOSC20-23-Amendment-4.pdf; Fla. Admin. Order No. AOSC 20-23, Amend. 5, *supra* note 96.

133. Fla. Admin. Order No. AOSC 20-13, *supra* note 101.

134. *In re* Amendments to Florida Rule of Judicial Administration 2.205, Fla. Admin. Order No. SC 20-346 (Fla. Mar. 13, 2020), https://efactssc-public.flcourts.org/casedocuments/2020/346/2020-346_disposition_149072_d29.pdf.

135. *Id.*

136. Press Release from Fla. Supreme Court Spokesman, Craig Waters, Tallahassee (extending all prior orders another three weeks) (Mar. 19, 2020), http://www.floridasupremecourt.org/content/download/632165/7183384/03-19-2020_Canady-Covid-Emergency.pdf; *In re* COVID-19 Emergency Measures in the Florida State Courts, Fla.

On April 6, 2020, the Supreme Court of Florida issued the first order on COVID-19 emergency procedures, which essentially combined the provisions of several previous administrative orders into a single document.[137] Further, Chief Justice Canady emphasized that "[t]he overarching intent of those orders has been to mitigate the impact of COVID-19, while keeping the courts operating to the fullest extent."[138] The order also included "guiding principles."[139] The first of which states that "[t]he presiding judge in all cases must consider the constitutional rights of crime victims and criminal defendants."[140] Despite the emphasis on constitutional rights, and in consideration for the safety of all participating, the order further suspended the speedy trial clock more than a month past the initial end date through June 1, 2020.[141]

On May 4, 2020, the Court amended the COVID-19 emergency procedures order ("Amendment I") and suspended the speedy trial clock another full month through July 6, 2020.[142] Throughout the month of May, however, Florida began to see a flattening of the COVID-19 curve, and as a result, Governor DeSantis began to greenlight a reopening strategy.[143] On May 21, 2020, the judiciary also formulated a reopening plan that further amended and expanded on the comprehensive emergency procedures in the prior amended order ("Amendment II").[144] The plan consisted of four anticipated phases for the pandemic: Phase 1, "in-person contact is inadvisable," thus the most restrictive limits are placed on in-person contact to avoid COVID-19 spread; Phase 2, "limited in-person contact . . . for certain purposes," but protective measures still will be required; Phase 3, "in-

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Admin. Order No. AOSC 20-17 (Fla. Mar. 24, 2020), http://www.floridasupremecourt.org/content/download/632431/7186205/AOSC20-17.pdf.

137. *See In re* Comprehensive COVID-19 Emergency Measures for the Florida State Courts, Fla. Admin. Order No. AOSC 20-23 (Fla. Apr. 6, 2020), http://www.floridasupremecourt.org/content/download/636183/7227828/AOSC20-23-original.pdf.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id*.

142. *In re* Comprehensive COVID-19 Emergency Measures for the Florida State Courts, Fla. Admin. Order No. AOSC 20-23 Amend. 1 (Fla. May 4, 2020), http://www.floridasupremecourt.org/content/download/636182/7227821/AOSC20-23-amendment1.pdf.

143. *See* David Fleshler, *After Biggest One-day Coronavirus Total, How Bad Could It Get In Florida?*, S. FLA. SUN SENTINEL, June 17, 2020, at 1.

144. *See In re* Comprehensive COVID-19 Emergency Measures for the Florida State Courts, Fla. Admin. Order No. AOSC 20-23 Amend. 2 (Fla. May 21, 2020), http://www.floridasupremecourt.org/content/download/633282/file/AOSC20-23-amendment2.pdf.

person contact is more broadly authorized and protective measures . . . relaxed"; and Phase 4, "COVID-19 no longer presents a significant risk to public . . . safety.[145] In addition, there was no further suspension made to Amendment I's speedy trial clock in Amendment II.[146]

The reopening plan was the result of the work done by the Court Operations Subgroup ("Workgroup") that was "created to develop findings and recommendations on the continuation of all court operations and proceedings statewide . . . that addresses each of the following anticipated phases of the pandemic."[147] The seventeen-member workgroup consists of an array of individuals who work within Florida's judicial system, including several judges, court staffers, a public defender, a state attorney, a clerk of court, and a former member of the Bar of Board of Governors.[148] The Workgroup accounts for a variety of factors, researches best practices, and then presents their findings and recommendations to Chief Justice Canady for approval and subsequent order.[149]

When Amendment II was released, all Florida courts were in Phase 1.[150] In order to transition to Phase 2 in a manner consistent with parameters set forth in Amendment II, Chief Justice Canady issued a separate order on May 21, 2020, establishing health and safety precautions to be used for the expansion of court operations.[151] The transition from Phase 1 to Phase 2 can only occur once each appellate court and each trial court within the circuit has met five benchmark criteria: (a) no COVID-19 cases in the courthouse within fourteen days or applicable self-quarantine of the infected and deep cleaning if such cases have occurred; (b) local and state restrictive orders permit the activity; (c) surrounding community shows fourteen-day improvements in case reporting; (d) an increase in adequate testing programs; and (e) other building occupants and justice system partners have

145. *Id.*

146. *See id.*

147. *In re* COVID-19 Public Health and Safety Precautions for Phase 2, Fla. Admin. Order No. AOSC 20-32 (Fla. May 21, 2020), http://www.floridasupremecourt.org/content/download/636079/file/AOSC20-32.pdf.

148. *See In re* Workgroup on the Continuity of Court Operations and Proceedings During and After COVID-19, Fla. Admin. Order No. AOSC 20-28 (Fla. Apr. 21, 2020), http://www.floridasupremecourt.org/content/download/634099/7204903/AOSC20-28.pdf.

149. *See id.*; Fla. Admin. Order No. AOSC 20-32, *supra* note 147.

150. Press Release from Fla. Supreme Court Spokesman Craig Waters (addressing case backlog and remote civil jury trials) (May 22, 2020), http://www.floridasupremecourt.org/content/download/636108/7226957/05-22-2020-Press-Release-Pandemic-Remote-Jury-Pilot.pdf.

151. *Id.*; *See* Fla. Admin. Order No. AOSC 20-32, *supra* note 147; Fla. Admin. Order No. AOSC 20-23, Amend. 2, *supra* note 144.

been consulted.[152] In addition to the five benchmark criteria, the circuit must develop an operational plan addressing the implementation of the workgroup's report.[153]

On June 8, 2020, the Supreme Court of Florida further amended the COVID-19 emergency procedures order ("Amendment III") to extend the suspension of the speedy trial clock through July 20, 2020.[154] Amendment III was also followed by a memorandum from Chief Justice Canady issued to the chief judges of each circuit regarding the transition to Phase 2.[155] The memo acknowledged that the workgroup was re-evaluating the five-benchmark system and encouraged the chief judges "to proceed judiciously in moving into or operating under Phase 2, in the event refinements are made."[156] This inauspicious foresight from Chief Justice Canady was also presented at a time when Florida had liberally loosened up restrictions and subsequently saw the largest single-day count of cases—since the pandemic began—on June 13, 2020.[157]

On June 16, 2020, the speedy trial clock was suspended indefinitely in the fourth amended COVID-19 emergency procedure order ("Amendment IV").[158] Amendment IV stated that all time periods involving the right to a speedy trial were suspended until ninety days after Chief Justice Canady has approved the certification of a chief judge's transition into Phase 3.[159] Furthermore, the ten day period in Florida Rule 3.191(p)(3) was increased to thirty days until the circuit has transitioned to Phase 4.[160] In other words, adding twenty days to the time period that would remedy a failure to be tried within the—now indefinite—speedy trial period.[161] Interestingly, on the

152. Fla. Admin. Order No. AOSC 20-32, *supra* note 147.

153. *See id.*

154. *See In re* Comprehensive COVID-19 Emergency Measures for the Florida State Courts, Fla. Admin. Order No. AOSC 20-23, Amend. 3 (Fla. June 8, 2020), http://www.floridasupremecourt.org/content/download/637271/7239420/AOSC20-23%20Amendment%203.pdf.

155. Memorandum from Charles Canady, C.J., Sup. Ct. Fla. to Chief Judges Dist. Ct. App. et al. (June 8, 2020) (on Resumption of In-person Proceedings), (available at http://www.floridasupremecourt.org/content/download/637273/7239447/06-08-2020-Memorandum-In-Person-Proceedings.pdf.).

156. *Id.*

157. Julie Bosman & Mitch Smith, *Infections Rise in Many States that Reopened*, N.Y. TIMES, June 14, 2020, at A1.

158. *See* Fla. Admin. Order No. AOSC 20-23, Amend. 4, *supra* note 132.

159. *Id.*

160. *Id.* Recall that rule 3.191(p)(3) states that "[a] defendant not brought to trial within the 10-day period through no fault of the defendant, on motion of the defendant or the court, shall be forever discharged from the crime." FLA. R. CRIM. P. 3.191(p)(3).

161. *See* Fla. Admin Order No. AOSC 20-23, Amend. 4, *supra* note 132; FLA. R. CRIM. P. 3.191(p)(3).

same day, the workgroup published a guide to "best practices" for court re-openings.[162] The first page of the guide provided priority recommendations in which circuits should consider in determining which cases should be heard first when jury trials resume.[163] The number one recommended priority was speedy trials.[164]

On July 2, 2020, the fifth amended COVID-19 emergency procedure order ("Amendment V") did not alter Amendment IV's speedy trial guidelines despite the fact that no circuit had begun transition to Phase 3.[165] The Workgroup's second amended order seemed somewhat hopeful because the Workgroup established a criteria for transitioning from Phase 2 to Phase 3, which requires continual operation under Phase 2 for at least one month.[166] However, just five days prior, Florida set a record for the most confirmed new cases in a single day—9585.[167] As a result, in addition to establishing a certification process for transitioning to Phase 3, the Workgroup also provided new criteria for circuits to follow if the circuit needs to revert back to Phase 1.[168] Especially noteworthy, the latest orders made no mention of transitioning to Phase 4.[169]

2. Circuit Application

Hypothetically, if a judicial circuit made the Phase 1 to Phase 2 transition on May 21, 2020, when the available transition was first imposed, and subsequently made the transition from Phase 2 to Phase 3 on July 2, 2020, when it was first imposed, the criminal defendant's speedy trial clock

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162. Memorandum from Charles Canady, C.J., Sup. Ct. of Fla., to C.Js. Cir. Cts. & Trial Ct. Admins. (June 16, 2020) (on Guidance and Best Practice Materials), (available at http://www.floridasupremecourt.org/content/download/637816/7251530/06-16-2020-Best-Practices-Guidelines.pdf.).

163. *Id.*

164. *Id.*

165. *See* Fla. Admin. Order No. AOSC 20-23, Amend. 5, *supra* note 96; Press Release from Fla. Supreme Court Spokesman, Craig Walters (addressing case backlog and remote civil jury trials) (July 2, 2020) http://www.floridasupremecourt.org/content/download/639139/7265664/07-02-2020-Press-Release-Pandemic-Procedures-Amendments.pdf. Recall that Phase 3 transition was required before the ninety-day speedy trial suspension even began. *See* Fla. Admin. Order No. AOSC 20-23, Amend. 4, *supra* note 132.

166. *In re* COVID-19 Public Health and Safety Precautions for Operational Phase Transitions, Fla. Admin. Order No. AOSC 20-32, Amend. 2 (Fla. July 2, 2020), http://www.floridasupremecourt.org/content/download/639136/file/AOSC20-32-Amendment-2.pdf.

167. Robles Frances, *A 'Scary' Fivefold Surge in Cases Over Two Weeks*, N.Y. TIMES, June 29, 2020, at A7.

168. Fla. Admin. Order No. AOSC 20-32, Amend. 2, *supra* note 166.

169. *See id.*; Fla. Admin. Order No. AOSC 20-23, Amend. 5, *supra* note 96.

would not begin until September 30, 2020—ninety days after the transition from Phase 2 to Phase 3 occurred.[170] In other words, the constitutional guarantee to a speedy trial would be suspended for 201 days, or six months and seventeen days.[171] If the hypothetical criminal defendant's speedy trial clock then ran out, the criminal defendant could then file a motion for discharge.[172] However, if the circuit was still in Phase 3 when the motion for discharge is filed, the criminal defendant would then be subject to the thirty-day extended recapture period.[173]

Unfortunately, this hypothetical calculation does not exist, seeing as one of the earliest circuits to transition to Phase 2 was the Nineteenth Judicial Circuit on June 1, 2020.[174] Despite being in Phase 2 for over three months, at the time of this writing, the Nineteenth Circuit has not made the transition to Phase 3.[175] In fact, as of September 2, 2020, no circuit has made the transition to Phase 3.[176] Several circuits, including the Ninth and the Eleventh Judicial Circuits, have had to revert out of Phase 2 and back into Phase 1, while several circuits, including the Fifth and Thirteenth Judicial Circuits, have not made the transition out of Phase 1.[177] Further, the Seventh

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170. *See* Fla. Admin. Order No. AOSC 20-32, *supra* note 147; Fla. Admin. Order No. AOSC 20-32, Amend. 2, *supra* note 166; Fla. Admin. Order No. AOSC 20-23, Amend. 4, *supra* note 132.

171. *See* Fla. Admin. Order No. AOSC 20-32, *supra* note 147; Fla. Admin. Order No. AOSC 20-32, Amend. 2, *supra* note 166; Fla. Admin. Order No. AOSC 20-23, Amend. 4, *supra* note 132. There are 201 days between March 13, 2020, and September 30, 2020. *See* Fla. Admin. Order No. AOSC 20-32, *supra* note 147; Fla. Admin. Order No. AOSC 20-32, Amend. 2, *supra* note 166; Fla. Admin. Order No. AOSC 20-23, Amend. 4, *supra* note 132.

172. *See* FLA. R. CRIM. P. 3.191(j).

173. *See* Fla. Admin. Order No. AOSC 20-23, Amend. 4, *supra* note 132; FLA. R. CRIM. P. 3.19(i)(5).

174. *See COVID-19/Coronavirus Updates*, NINETEENTH JUD. CIR., http://www.circuit19.org/covid19 (last visited Dec. 14, 2020).

175. *See id.*

176. *Courts Phase Status*, FLORIDA COURTS, http://www.flcourts.org/Publications-Statistics/Publications/Courts-Phase-Status (last visited Dec. 14, 2020).

177. *See 9th Circuit Court Reverts from Phase 2 to Phase 1 of Opening; Public Access to Osceola County Courthouse Limited Again*, POSITIVELY OSCEOLA, (June 26, 2020), http://www.positivelyosceola.com/9th-circuit-court-reverts-from-phase-2-to-phase-1-of-opening-public-access-to-osceola-county-courthouse-limited-again/; *In re* COVID-19 Emergency Procedures, Court Operations Reverting to Phase 1 in the Eleventh Judicial Circuit of Florida, 11th Jud. Cir. Fla. Admin. Order No. 20-13 (Fla. June 25, 2020), http://www.jud11.flcourts.org/docs/1-20-13%20Courthouse%20revert%20to%20Phase%201%20-Covid-19%20-%20CONFORMED.pdf; *In re* Face Coverings & Social Distancing Requirements in Courthouse Facilities During COVID-19 Mitigation Efforts, 13th Jud. Cir. Fla. Admin. Order No. S-2020-029 (Fla. June 30, 2020), http://www.fljud13.org/Portals/0/AO/DOCS/S-2020-

Judicial Circuit transitioned many of its court facilities into Phase 2, while various other court facilitates remain in Phase 1.[178]

Regardless of which phase the circuit is currently situated, a speedy trial calculation would not be measurable until the circuit has made the transition to Phase 3 and has some sense of positivity that the circuit would not revert back to Phase 2.[179] Even then, however, a proper time estimate would require a calculation of the backlog of criminal cases that have developed since the courts closed on March 13, 2020.[180] The issue of case backlog has been a topic of discussion for the Workgroup, seeing as it directly correlates to the speedy trial clock being lifted in Phase 3.[181] Although it was noted that the resumption and backlog "should be addressed in the Phase 3 operational plan," the Phase 3 operational plan did not have a clear instruction.[182] However, despite the indefinite suspension of the statutorily mandated speedy trial period under the Florida rule, the constitutional right to a speedy trial does not disappear because COVID-19 makes it impossible to meet the statutory deadlines.[183] It is still the State's responsibility to conduct trials and hearings within a reasonable time after the judicial system reopens.[184]

V. THE RECOMMENCEMENT OF THE COURTS AND THE RAMIFICATIONS OF THE DELAY TO THE PEOPLE OF THE STATE

The Court in *Barker* posed an overarching emphasis on the interests that society shares with the accused when evaluating whether a criminal defendant has been deprived of their right to a speedy trial.[185]

029.pdf; *Latest Update from the Fifth Circuit*, FIFTH JUD. CIR., http://www.circuit5.org/coronavirus/ (last visited Dec. 14, 2020).

178. *In re* Phase 2 Transition for Court Facilities, 7th Jud. Cir. Fla. Admin. Order No. Z-2020-050 (Fla. July 2, 2020), http://www.circuit7.org/Communications/Phase_2.pdf.

179. *See* Fla. Admin. Order No. AOSC 20-23, Amend. 4, *supra* note 132. Phase 3 is the final tolling period allotted by the Supreme Court of Florida. *Id.*

180. *See id.*; Waters, *supra* note 150.

181. Workgroup on the Continuity of Court Operations and Proceedings During and After COVID-19, Meeting Minutes 2 (June 18, 2020), available at http://www.flcourts.org/content/download/638453/file/covid-wg-minutes-200618.pdf.

182. *Id.* "[V]ariations in caseloads, dockets, facilities, resources, and available employees make it difficult to establish functional and effective statewide directives." Fla. Admin. Order No. AOSC 20-32, *supra* note 147.

183. *See* Fla. Admin. Order No. AOSC 20-23, Amend. 5, *supra* note 96; Barker v. Wingo, 407 U.S. 514, 529 (1972); U.S. CONST. amend. VI.

184. *Barker*, 407 U.S. at 529. Placing "the primary burden on the courts and the prosecutors to assure that cases are brought to trial." *Id.*

185. *Id.* at 519–21.

> The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.[186]

The Court's recognition of this interest came at a time when there was no mass pandemic or natural disaster, but rather applied society's interest for a timely trial to a fully functioning court system.[187] The emphasis of society's interest in a functioning court system was also recognized by the Supreme Court of Florida when the general public began to be known as "justice stakeholders" in referencing the Workgroup's considerations on moving forward.[188] *Barker* enumerated several interests the right was designed to protect, several of which are much more applicable to the given situation than others.[189] For example, the lack of a prompt trial contributes to case backlog, resulting in an overcrowding issue that leads to oppressive prison conditions and subsequently affects prisoner rehabilitation.[190] Further, lengthy pretrial incarceration is costly to the accused, their families, and the taxpayers.[191] For the accused, imprisonment often leads to job loss and disruption to family life.[192] Furthermore, the lost earnings not only affect the defendant's family, but society as a whole loses wages that may have been earned if the defendant was not awaiting trial.[193] Finally, the tax payer is paying the cost of keeping a prisoner in jail, which in 2015, averaged $19,000.00 a year per prisoner in Florida.[194]

The *Barker* factors have been applied in Florida courts to determine whether a defendant has been deprived of their constitutional right to a

186. *Id.* at 519.
187. *See id.* at 516–21.
188. Fla. Admin. Order No. AOSC 20-32, *supra* note 147.
189. *See Barker*, 407 U.S. at 519–21; Ellard, *supra* note 16, at 1211 (placing heavy emphasis on the interests affected by oppressive pretrial incarceration during post-hurricane Katrina in Louisiana).
190. *See Barker*, 407 U.S. at 519–20, 532–33.
191. *Id.* at 520–21.
192. *Id.* at 532.
193. *Id.* at 521.
194. *See id.* at 520–21; Jeremy Thompson & Chanelle Artiles, *Dismantling the Sexual Abuse-to-Prison Pipeline: Texas's Approach*, 41 THURGOOD MARSHALL L. REV. 239, 252 (2016).

speedy trial.[195] However, because Florida has a speedy trial rule with specified time constraints, a criminal defendant may be entitled to relief under a statutory deprivation or a constitutional deprivation.[196] Florida courts generally balance the first three *Barker* factors that directly deal with delay—length of delay, reason for delay, and assertion of the right—against each other, and then conduct an analysis of the prejudice suffered as a result of the delay.[197] Although "[n]one of the individual categories are determinative by themselves . . . certain inquiries (i.e. length and prejudice) can carry greater weight when viewed together."[198]

A. *Delay*

"Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."[199] However, regarding the statutory time periods, the Supreme Court of Florida has held that "the legislature intended to establish a 'triggering mechanism,' which establishes presumptive prejudice and requires consideration of the other factors."[200] Absent an assertion of the right to a speedy trial that invokes the statutory time periods of Florida Rule 3.191, Florida courts will generally not find delays to be presumptively prejudicial unless the delay is in excess of one year.[201] With regard to the delays posed by COVID-19, the analysis for whether a defendant's right to a speedy trial was compromised will be different depending upon whether the defendant alleges a procedural violation under Florida Rule 3.191, or a constitutional violation under the Sixth Amendment.[202] Nevertheless, even if a 3.191 violation is not found from the outset, a defendant may still be entitled to dismissal from a constitutional standpoint.[203]

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195. *See, e.g.*, Fletcher v. State, 143 So. 3d 469, 471–72 (Fla. 5th Dist. Ct. App. 2014); Niles v. State, 120 So. 3d 658, 663 (Fla. 1st Dist. Ct. App. 2013) (per curiam).

196. U.S. CONST. amend. VI; FLA. R. CRIM. P. 3.191(p)(3).

197. *See* Morel v. Wilkins, 84 So. 3d 226, 246, 247 (Fla. 2012) (per curiam); Szembruch v. State, 910 So. 2d 372, 376 (Fla. 5th Dist. Ct. App. 2005) (per curiam); *Fletcher*, 143 So. 3d at 471–72.

198. *Szembruch*, 910 So. 2d at 376.

199. Barker v. Wingo, 407 U.S. 514, 530 (1972).

200. R.J.A. v. Foster, 603 So. 2d 1167, 1171 (Fla. 1992).

201. *See* State v. Bonamy, 409 So. 2d 518, 519 (Fla. 5th Dist. Ct. App. 1982); FLA. R. CRIM. P. 3.191.

202. *Szembruch*, 910 So. 2d at 376; *see also* U.S. CONST. amend. VI; FLA. R. CRIM. P. 3.191.

203. *See* King v. State, 468 So. 2d 510, 511 (Fla. 1st Dist. Ct. App. 1985); FLA. R. CRIM. P. 3.191.

The length of delay will differ for each defendant depending upon the facts of the specific case.[204] Moreover, the delay will depend on which circuit the defendant was arrested in because of the different phases each circuit is in currently.[205] Furthermore, absent an assertion under Florida's rule, it is likely that the one-year minimum threshold will be met for many criminal defendants because criminal proceedings stopped on March 13, 2020, and no circuit has entered Phase 3 as of September 13, 2020.[206] The issue defendants will face, however, is that mandated court closure is a good reason for delay that is no fault of the state.[207] Further, when courts do eventually open, Florida courts have held that overcrowded court dockets are a neutral reason that does not weigh against the state at all.[208] Other than the length of delay, the only fact that may weigh in the defendant's favor is complexity of the case.[209] For instance, if the case is relatively simple, it should be resolved in a more timely fashion.[210] However, the Workgroup's recommendation suggests that when courts do reopen, capital offenses should take priority over less severe matters.[211] As a result of the unique circumstance and balance of the first three factors, the decision of whether a defendant has been constitutionally deprived of their right to a speedy trial will ultimately hang on the prejudice suffered.[212]

B. *Prejudice*

Prejudice is "determined in light of the purpose of the speedy trial rule. It was designed to prevent oppressive pretrial incarceration, minimize the accused's anxiety and concern, and limit the possibility of impairing the

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204. United States v. MacDonald, 435 U.S. 850, 858 (1978), *cert. denied* 140 S. Ct. 282 (2019).

205. *See, e.g.*, *COVID-19/Coronavirus Updates*, *supra* note 174. For instance, the Nineteenth Judicial Circuit entered Phase 2 on June 1, 2020, while the Eleventh Circuit reverted to Phase 1 on June 25, 2020. *Id.*; Fla. Admin Order No. AOSC 20-13, *supra* note 177; *COVID-19/Coronavirus Updates, supra* note 174.

206. *See* Fla. Admin. Order No. AOSC 20-23, Amend. 5, *supra* note 96; Waters, *supra* note 136; *Courts Phase Status*, *supra* note 176.

207. *See* Sullivan v. State, 913 So. 2d 762, 763 (Fla. 5th Dist. Ct. App. 2005); State v. Hernandez, 617 So. 2d 1103, 1103 (Fla. 3d Dist. Ct. App. 1993).

208. State v. Bonamy, 409 So. 2d 518, 520 (Fla. 5th Dist. Ct. App. 1982).

209. *See* State v. Polk, 993 So. 2d 581, 584 (Fla. 1st Dist. Ct. App. 2008) (per curiam).

210. *See id.*

211. *See* Memorandum from Charles Canady, C.J, Sup. Ct. Fla., *supra* note 162.

212. *See* State v. Jenkins, 899 So. 2d 1238, 1240, 1242 (Fla. 4th Dist. Ct. App. 2005) (holding that although the other three *Barker* factors were found, the lack of actual prejudice does not warrant dismissal of the case).

defense."[213] Of the possible ways a defendant may be prejudiced, impairment of a defense is the most important of the three interests "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."[214] The obvious theme surrounding the prevention of prejudice is the societal interests that the Florida rule, and the Constitution, protect.[215]

Examining each of these areas separately under the present circumstances, oppressive pretrial incarceration is only applicable to defendants who are presently incarcerated awaiting trial, not those that have been released on bail.[216] With this in mind, "[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness."[217] The economic pitfalls of pretrial incarceration are also coming at a time when the United States is experiencing the first economic recession since the economic collapse of 2009.[218] Furthermore, imposing long exposure to an overcrowded prison system on someone who has not been convicted yet is oppressive under normal circumstances.[219] Imposing this burden on an individual while a deadly virus spreads throughout the jail system would obviously attribute to the oppressive nature of a pretrial incarceration with unknown length.[220] It would be especially unfortunate to impose these burdens "on those persons who are ultimately found to be innocent."[221]

Second, anxiety and concern are applicable to defendants released on bail because they can often be disadvantaged by restraints on their liberty and "by living under a cloud of anxiety, suspicion, and often hostility" from

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213. *Id.* at 1241.

214. Barker v. Wingo, 407 U.S. 514, 532 (1972*).*

215. *See id.* at 519; State v. Bonamy, 409 So. 2d 518, 519–20 (Fla. 5th Dist. Ct. App. 1982).

216. *See Bonamy*, 409 So. 2d at 520.

217. *Barker*, 407 U.S. at 532.

218. Jeanna Smialek, *It's Official: The U.S. is in a Recession*, N.Y. TIMES, June 9, 2020, at B2.

219. *See* Michael Levenson & Alan Yuhas, *Inmate Released Amid Pandemic Killed Someone the Next Day, Officials Say*, N.Y. TIMES (Apr. 15, 2020), http://www.nytimes.com/2020/04/15/us/florida-inmate-coronavirus-murder.html; *Barker*, 407 U.S. at 532–33.

220. *See Barker*, 407 U.S. at 520. "Lengthy exposure to these [poor prison] conditions 'has a destructive effect on human character and makes rehabilitation of the individual offender much more difficult.'" *Id.* (quoting *Federal Bail Procedures: Hearings on S. 2838, S. 2839, and S. 2840 Before the Subcomm. on Const. Rts. and the Subcomm. on Improvements in Jud. Mach. of the S. Comm. on the Judiciary*, 88th Cong., 2d Sess., 46 (1964) (testimony of James V. Bennett, Director, Bureau of Prisons)); *see also* Levenson & Yuhas, *supra* note 219.

221. *Barker*, 407 U.S. at 533.

the surrounding community.[222] This anxiety increases as pretrial delay grows longer.[223] Further, COVID-19 presents a unique situation since one of the biggest difficulties that the general public is facing is the mental anguish and anxiety caused by the current situation.[224] Although no Florida court has found anxiety and concern to be applicable to incarcerated individuals, an unknown court date for an elongated period, in addition to COVID-19's prevalence in Florida's jail system, may warrant the analysis in the future.[225]

Finally, and most significantly, is the possibility that the passage of time will hinder a defendant's ability to defend himself.[226] As more time progresses, "witnesses' memories fade, witnesses and victims disappear or are hard to locate, and documents get lost, destroyed, or misplaced."[227] Although "[a] defendant must do more than simply allege that memories fade or that evidence may be lost," the daily increase in positive cases and death may very well make a defense impossible.[228] As of July 17, 2020, there were 327,241 total cases within the state of Florida, resulting in 4,805 deaths.[229] As the speedy trial clock remains suspended, the likelihood that a key witness will become sick—and potentially die—continues to increase as more and more people test positive every day.[230] Although all three of these factors must be examined in the aggregate, the obvious concern is that all three of them are affected by the passage of time.[231]

VI. CONCLUSION

Since Florida's Governor declared a state of emergency on March 9, 2020, the Supreme Court of Florida has consistently provided guidance and leadership addressing how to adapt and prevent the spread of COVID-19

222. *Id.*

223. *See* Dickey v. Florida, 398 U.S. 30, 54 (1970) (Brennan, J., concurring) (quoting United States v. Mann, 291 F. Supp. 268, 271 (1968)).

224. Jane E. Brody, *Fear of the Virus Can Be Just as Dangerous*, N.Y. TIMES, Apr. 14, 2020, at D9.

225. *See* Smith v. Hooey, 393 U.S. 374, 379 (1969); Levenson & Yuhas, *supra* note 219.

226. Szembruch v. State, 910 So. 2d 372, 379 (Fla. 5th Dist. Ct. App. 2005) (per curiam).

227. *Id.*

228. State v. Bonamy, 409 So. 2d 518, 520 (Fla. 5th Dist. Ct. App. 1982); *see also* Frances, *supra* note 167, at A7.

229. Michelle Marchante, *Florida Adds More than 100 Deaths for Fourth Day in a Row as COVID-19 Cases Pass 327,000*, MIAMI HERALD (July 17, 2020), http://www.miamiherald.com/news/coronavirus/article244296557.html.

230. *See* Fla. Admin. Order No. AOSC 20-23, Amend. 5, *supra* note 96; Marchante, *supra* note 229.

231. *Szembruch*, 910 So. 2d at 379, 381.

within the judicial system.[232] This transparency and progressive outlook on public health cannot be overlooked.[233] The "justice stakeholders" of Florida can rest easy, knowing there are still leaders that have their best interests in mind.[234] On the other end, however, is the unavoidable victim that this has created, the right to a speedy trial.[235] Attorneys and defendants may begin pursuing negotiated settlements rather than tolerate the uncertainty of when they will see a court room.[236] For some this may be sensible, but there may be individuals who see no other option than to plead guilty rather than wait for the chance of acquittal at trial—a day that is seemingly unattainable in Florida's current state.[237] Regardless of the outcome in an individual case, the legal maxim, "[j]ustice delayed is justice denied," will be the heartbeat of many criminal matters for years to come.[238]

232. Fla. Exec. Order No. 20-52 (Mar. 9, 2020); *see also Information on COVID-19 Emergency Orders & Advisories*, *supra* note 98.

233. *See* Fla. Admin. Order No. AOSC 20-32, Amend. 2, *supra* note 144.

234. *See id.*; Fla. Admin. Order No. AOSC 20-32, *supra* note 147.

235. *See* Fla. Admin. Order No. AOSC 20-23, Amend. 5, *supra* note 96.

236. *See* Brooks, *supra* note 62, at 600.

237. *See* Chan, *supra* note 1; Fla. Admin. Order No. AOSC 20-23, Amend. 5, *supra* note 96; discussion *supra* IV.B.2.

238. Lake v. Lake, 103 So. 2d 639, 641 (Fla. 1958); *see also* Chan, *supra* note 1.


NOVA SOUTHEASTERN UNIVERSITY
NOVA LAW REVIEW

Vol. 45 No. 1 NOVA LAW REVIEW Nova Southeastern University Pages 1-170 2020