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Transitional (in)Justice as Duration

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Abstract

This study demonstrates that the 'transition' in transitional jurisprudence is a collective imagination that plausibly lays upon the interaction between competing temporal narratives in 'historical cases'—broadly understood as cases that involve the interplay between law's temporality and historical process. The dominant view of transitional jurisprudence is inclined to consider transition as a series of discrete and fragmented events. This view, however, fails to bridge the gap between lived experience and law and policy's mode of representation of past injustices. By contrast, this paper contends that transition should be perceived in pure temporality—transition as a flux or flow of time. This view enables legal actors to better engage in the multitude of temporalities in historical cases. This paper analyzes two issues. First, it juxtaposes the ontological perspective of time as duration and theory of adjudicative reasoning to construe 'transition' as a collective temporal imagination among legal actors. It manifests a theoretical basis for experiential time in law by extrapolating Postema's legal time-mindfulness and Bergson's duration. Second, it examines law's distinctive virtue in micro-level agreement about the (temporal) sense of injustices. By focusing on the statutory limitation discussion in African-American Slave Descendants Litigation case in the United States, this study finds that law's temporality is primarily contested due to the givenness of time. This article concludes that legal actors perceivably capture and disrupt persistent injustices at a micro-level by dislocating the present of atrocious lived experience.

Keywords: *duration, reasoning, racial injustice, temporality, transitional justice*

I. INTRODUCTION

During the last three decades, transitional justice discourse and practices have been shaped by how the United States (or the West generally) exercises democracy, rule of law, and human rights protection.[1] Seeing the U.S as the beacon of democracy, an imaginary demarcation was created to separate authoritarian from democratic state, atrocious past from peaceful future. Such a demarcation is particularly relevant for

[1] Steven E Finkel, Aníbal Pérez-Liñán & Mitchell A Seligson, "The effects of US foreign assistance on democracy building, 1990–2003" (2007) 59:3 World Polit 404–439; Marc Polizzi & Jeffrey King, "Aid for justice? Analyzing the impact of foreign aid on recipient transitional justice implementation" (2021) Int J Hum Rights 1–23.

countries in the South-East Asia region, that at some points are still undergoing the so-called transition to democracy. However, recent inquiries about transitional justice in the U.S somehow affirms the need to contextualize the meaning of transition.[2] The current growing transitional justice 'wave' in the country (e.g., reparation claims, memorialization projects, historical inclusiveness in education, etc.) is a sheer sign of a need to reconfigure the meaning of 'transition' in transitional justice.[3] It is, nevertheless, not an attempt to suggest rolling back to the atavistic debate about the theoretical foundations of transitional justice. Instead, this article would offer an alternate way to understand 'transition' through shifting our temporal frame from a Chronological to Experiential View of transition. This article contends that the latter view enables legal actors in particular to perceivably capture and disrupt persistent injustices at a micro-level of the adjudicative process.

This article is divided into two main parts. Part One discusses an alternate way to understand temporality and legal reasoning of transition. It juxtaposes the ontological perspective of time as duration and theory of adjudicative reasoning to construe 'transition' as a collective temporal imagination among legal actors. It manifests a theoretical basis about experiential time in legal reasoning by reading Gerald Postema's legal time-mindfulness and Henri Bergson's duration. As a result, this study perceives three necessary features of experiential view in legal reasoning: (1) reflective remembrance, (2) intense expectancy, and (3) character alteration. Part Two examines law's distinctive virtue in micro-level agreement about the temporality of transitional injustice. By focusing on the discussion of statutory limitation in the African-American Slave Descendants Litigation case in the U.S, this study finds that law's temporality has been primarily contested due to the givenness of time. This givenness is reflected by the Court's meaning-making of temporal semantic (i.e., timeliness) as a means to temporalize the reparation claim of historical injustice.

II. TRANSITIONAL JUSTICE & LEGAL TEMPORALITY

Scholars have been relentlessly trying to formulate a unified definition of transitional justice. As one of the leading scholars in the field, Ruti Teitel defines transitional justice as "the conception of justice associated with periods of political change, characterized by

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[2] Yuvraj Joshi, "Racial Transition" (2020) 98 Wash UL Rev 1181; Yuvraj Joshi, "Affirmative Action as Transitional Justice" (2020) Wis Rev 1; Jennifer M Page & Desmond King, "Truth and Reparation for the US Imprisonment and Policing Regime: A Transitional Justice Perspective" (2021) Bois Rev Soc Sci Res Race 1–23.

[3] Orville Vernon Burton & Armand Derfner, "Justice Deferred" in *Justice Deferred* (Harvard University Press, 2021); David Lyons, "Unfinished Business: Racial Junctures in US History and Their Legacy" in Lukas H Meyer, ed, *Justice Time Responding Hist Injustice* (Baden-Baden: Nomos Verlagsgesellschaft, 2004) 271. In the Introduction chapter, Burton & Derfner claim that the drama of race and the Supreme Court is shaped by two major actors: Time and Law.

legal responses to confront the wrongdoings of repressive predecessor regimes."[4] Transitional justice has been regarded as either theory, field of study, or practical policies. Stemming primarily from politico-legal discursive themes of society's responses with its atrocious past, context has been seen as a significant variable in analyzing and evaluating transitional justice.[5] Transitional context in this sense insists a clear distinction in terms of temporal dimension—the present is different from the past. As Teitel argues, "[r]ather than an undefined last stage of revolution, the conception of transition advanced here is both more capacious and more defined. What is demarcated is a postrevolutionary period of political change; thus, the problem of transitional justice arises within a bounded period, spanning two regimes."[6]

This section is essentially a critique of such demarcation. As a theoretical underpinning to explain law in (regime) change, such a demarcation is found to be restrictive for several reasons. Moreover, this demarcation or, in Miller's term, 'temporal governance' also confuses time from space.[7] That is, if we are committed to the essential character of time and temporality in transitional justice, this study suggests that 'transition' must be seen in terms of pure time: time and temporality of transition cannot be demarcated or periodized. Transitional time, as does law's time, ought to be seen as duration—it is a flux of lived experience.[8]

In that respect, this study is not the first to study temporalities in transitional justice.[9] Building on and adding to the current conversations, I would like to situate transitional justice into the larger discussion about law's temporality.[10] This section begins by examining how transitional jurisprudence treats 'transition' as a chronological temporality. However, as it is evident, this view fails to capture the multiplicity of

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4 Ruti G Teitel, "Transitional justice genealogy" (2003) 16 Harv Hum Rts J 69 at 59.

5 Laurel E Fletcher & Harvey M Weinstein, "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective" (2009) 163:31 Hum Rights Q 165–220; Colleen Murphy, *The conceptual foundations of transitional justice* (Cambridge: Cambridge University Press, 2017).

6 Ruti Teitel, "Transitional jurisprudence: the role of law in political transformation" (1996) 106 Yale LJ 2009 at 2013.

7 Zinaida Miller, "Temporal Governance: The Times of Transitional Justice" (2021) 21:5 Int Crim Law Rev 848–877.

8 Renisa Mawani, "The times of law" (2015) 40:1 Law Soc Inq 253–263; Tanzil Chowdhury, *Time, Temporality and Legal Judgment* (Oxon, New York: Routledge, 2020).

9 Zinaida Miller, "The injustices of time: Rights, race, redistribution, and responsibility" (2020) 52 Columbia Hum Rights Law Rev 647–737; Natascha Mueller-Hirth & Sandra Rios Oyola, "Defusing time bombs: Towards an understanding of time and temporality in peacebuilding" in Natascha Mueller-Hirth & Sandra Rios Oyola, eds, *Time Temporality Transitional Post-Confl Soc* (Oxon, New York: Routledge, 2018) 180; Alejandro Castillejo-Cuéllar, "Historical Injuries, Temporality and the Law: Articulations of a Violent Past in Two Transitional Scenarios" (2014) 25 Law Crit 47–66.

10 Antoine Garapon, "Judging the past: three ways of understanding time" in Luigi Corrias & Lyana Francot, eds, *Temporal Boundaries Law Polit Time Jt* (Oxon & New York: Routledge, 2018) 15; Castillejo-Cuéllar, *supra* note 9; Noha Aboueldahab, "The Politics of Time, Transition, and Justice in Transitional Justice" (2021) Int Crim Law Rev 1–8.

temporality of past or historical cases.[11] Alternatively, another point of view is provided, arguing that an experiential temporal frame is more capable in fully capturing the temporality of transition.

1. Bounded Temporality

Ruti Teitel's Transitional Jurisprudence has been influential in shaping transitional justice theorization and practice. In Teitel's view, transitional jurisprudence examines the way law mediates and constructs the transition of illiberal to liberal regime.[12] Transitional justice is generally understood within this 'bounded domain' of temporal change.[13]

This temporally bounded domain implies that transitional justice is essentially working within the Chronological View of time.[14] We find the logical foundation behind it through the way we commonly grasp time as something that we can measure, fragment, or contain. Time in this sense is something natural and given. Time is grasped either in terms of point of time (i.e., the year 1865, 8 PM, ratification of the Fourteenth Amendment, etc.) or points between time (i.e., one week, two minutes, three seasons, etc.).

In a legal system, lawyers manage and order time by employing various legal instruments, be it in the form of Laws, contracts, judges' verdicts, evidence, and so on. Time in these instruments is a discrete object. For instance, in a criminal proceeding, legal actors pick and select a particular point of time insofar as such specific units of time could support their evidentiary claims and arguments. Time as chronology cajoles us to understand that temporality is composed of and flows linearly from the future to the present and from the present to the past. Within this approach, lawyers do not separate time from space or, to be precise, time is essentially framed in terms of space.

The Chronological View works appropriately with the logic of propositional knowledge in legal reasoning. In this mode of knowledge, time and temporality is universal to all legal events—it is simply a reducible unit or measurable metrics. The primary method of reasoning 'to treat similar cases alike,' popular in common law tradition, is arguably based on this mode of knowledge, since we can simply individuate and contain events and locate past cases analogous to the similar present ones.[15] This View fits better with formalist lawyers with an inclination toward mechanical legal reasoning.[16]

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[11] Miller, *supra* note 7.
[12] Teitel, *supra* note 6.
[13] *Ibid* at 2077; Mirza Satria Buana, "A Realistic Perspective to Transitional Justice: A Study of Its Impediments in Indonesia" (2020) 4 JSEAHR 406.
[14] Scott Veitch, Emilios Christodoulidis & Marco Goldoni, *Jurisprudence: Themes and concepts* (Routledge, 2013).
[15] Neil MacCormick, *Legal reasoning and legal theory* (New York: Oxford University Press, 1978); Larry Alexander & Emily Sherwin, "Demystifying legal reasoning" (2008).
[16] James MacLean, *Rethinking law as process: Creativity, novelty, change* (Oxon, New York: Routledge, 2012); James MacLean, "Rhizomatics, the becoming of law, and legal institutions"

To a certain degree, the Chronological View has become the source of what Lefebvre calls 'subsumption' in legal adjudication.[17] That is, instead of delivering deliberative judgment, judges are subsuming their direct perception through memory recollection. They make decisions based on what is already known from the past, in the form of legal rules. Consequently, this extraneous relationship between time and law puts judicial constraints at the forefront. That is, the business of adjudicative judgment at the Court is institutionally not limitless—it deals with the matter of efficiency, among others.[18]

It is manifest that this kind of reasoning springs from the consequentialist argument of law and legal reasoning which fosters stability and predictability through a generalization of rule application.[19] The Chronological View conforms to lawyers' main thrust of law's objectivity and determinacy, especially in transitional contexts—for instance the interplay between time and legal processes in post-war, post colonialism, or regime changes (e.g., post-communist, post-apartheid, and post-authoritarian regimes) settings.[20] This View undertakes a clear separation between previous and present (and quite possibly future) regimes as though this change or transition happens linearly in a predictable manner. Even under the so-called 'democratic transition,' scholars tend to view transitional jurisprudence in terms of this view of time.[21]

Nonetheless, the 'bounded domain' under chronological temporal frame is inadequate to fully capture transition in several senses.[22] This objectivity-oriented approach to law's temporality in times of transition comes up with the peril of exclusivity as a critique. For instance, Melissaris's critique addresses the centrality of state-law

(2012) Deleuze Law 151; Harison Citrawan, "A Deleuzian Reading on Hart's Internal Point of View" (2022) 9:1 Padjadjaran J Ilmu Huk J Law 135–151.

17 Alexandre Lefebvre, "A new image of law: Deleuze and jurisprudence" (2005) 130 telos 103–126.

18 Duncan Kennedy, *Legal reasoning: Collected essays* (Davies Group Publishers, 2008).

19 Emmanuel Melissaris, "The Chronology of the Legal" (2005) 50 McGill Law J 839–862 at 859. I tend to agree with Melissaris' position on this matter, arguing that the chronological view of time supports two claims of law's universality: (1) normative universality, meaning that law treats like cases alike and context-neutral, and (2) epistemological universality, exerting law's pursuit of objective knowledge.

20 Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (Pennsylvania: The Pennsylvania State University Press, 2010); Sarah Maddison & Laura J Shepherd, "Peacebuilding and the postcolonial politics of transitional justice" (2014) 2:3 Peacebuilding 253–269; Paige Arthur, "How 'transitions' reshaped human rights: A conceptual history of transitional justice" (2009) 31:2 Hum Rights Q 321–367; Katharine E McGregor & Ken Setiawan, "Shifting from International to 'Indonesian' Justice Measures: Two Decades of Addressing Past Human Rights Violations" (2019) 49:5 J Contemp Asia 837–861.

21 Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (Hampshire: Palgrave Macmillan, 2014). For instance, in the American context, Joshi argues that "[t]ransition is not only a move toward democracy and the rule of law, but also charts a path toward peace and justice." Joshi, *supra* note 2 at 1200.

22 Pádraig McAuliffe, "Transitional Justice, Institutions and Temporality: Towards a Dynamic Understanding" (2021) 21:5 Int Crim Law Rev 817–847; Miller, *supra* note 9.

monism and ultimately argues for a version of legal pluralism in which temporalities are seen as a shared experience of the people. Melissaris argues that "[o]bjectivity goes hand in hand with exclusivity and exclusivity necessarily leads to a violent monism. That is how violence is done to those who cannot make sense of why and how their freedom or actions can be calculable in time units, because they have different legal commitments that rest on a different normative experience."[23]

We can extend this argument to some other reasons why this view is inadequate to be employed in transitional justice.[24] Three reasons especially stand out. First, the Chronological View cannot make any particularities of cases visible.[25] Since the logic of analogy is applied in chronological legal reasoning, it would be difficult to scrutinize the singularity of legal cases. Generalization of rule application creates what we call mechanical jurists in the formalist sense. In this type of deductive reasoning, law will generally apply to any case without lawyers having to put concern into the particulars. While the Chronological View could increase law's predictability, at the same time, it risks overlooking human experiences. Second, the Chronological View has a restricted capacity to selectively remember the past.[26] It does not allow judges to think of a case cross-temporally that may enable them to be attentive to variegated and sedimented pasts. Therefore, it fails to justify a continuity or completion of an enduring past. Third, in a broader sense, the Chronological View restrains certain channels for law to observe a way for a radical social change.[27] Since this View preserves the dogmatic claim of law and legal reasoning, it is difficult to imagine a law that is 'dynamic' or 'living.' Also, in some instances, it simply does not allow the judges to be sensitive to what we later call the Encounter—something that is unanticipated or unknown.

2. Transition and Experience

As a rejoinder to the inadequacy of chronological time in transitional jurisprudence, this study contends that legal actors can capture and represent temporalities by understanding time as experience. We may call this *experiential temporality, understood as an approach to treating time as an encounter that a human experiences*.[28] While the experiential shares the same feature with the chronological time—which sees time as modalities of future, present, and past—it treats each modality differently. In this

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[23] Melissaris, *supra* note 19 at 860.

[24] Miller, *supra* note 7.

[25] Sinéad Ring, "On delay and duration: Law's temporal orders in historical child sexual abuse cases" in Siân M Beynon-Jones & Emily Grabham, eds, *Law Time* (London: Routledge, 2018) 93.

[26] Tanzil Chowdhury, "Temporality and Criminal Law Adjudication's Multiple Pasts" (2017) 38:2 Liverp Law Rev 187–206.

[27] Chowdhury, *supra* note 8; Kathryn McNeilly, "Are Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change" (2019) 28:6 Soc Leg Stud 817–838.

[28] Jenann Ismael, "Temporal experience" in *Oxf Handb Philos Time* (Oxford University Press, 2011).

approach, time is seen as a continuity, albeit composed of different events. Under this temporal frame, lawyers should prima facie reject the idea of similar cases, as they need to treat each case as a singularity. Thus, a case may only 'happen' once.

Our examination of experiential time embarks upon Henri Bergson's theory of la durée or duration. According to Bergson, time is *la durée*, meaning that time is lived experience construed upon the juxtaposition between perception and memory.[29] In this lens, time is in its pure form, disconnected from our spatial configuration (in a way, we may claim that the chronological view explained above is our way of understanding time in terms of space, not time in itself). We need to understand two characteristics in this approach: (1) time is multiplicity; we are experiencing time in a rather dynamic flux. The multiplicity of time implies that it is variegated and sedimented—it rejects the idea of linear or static time as the sole reality, and (2) time is homogeneity, signifying that there is a single back-and-forth process of recollection of the virtual past that leaps to (and shapes) the actual present.[30] It also entails that there are no two identical moments in life, or life is always in singularity. Based on these two characteristics, we can argue that people experience events (e.g., continuity, persistence, discontinuity, etc.) within which their perception and memory are embedded. This perception/memory assists legal actors in making meaning of the present reality with respect to its difference from the reality of the past and future.

Consequently, we need to reconfigure the traditional extraneous nexus between law and time pervaded in transitional justice discourse.[31] As it is understood in the chronological frame, the law/time nexus has been generally seen in terms of cause and effect—law is external to time and vice versa. For instance, any historical frame in law always puts law as a product of history (read: time) as though any changes in law and legal system are the effects of history.[32] This article, nonetheless, suggests that through Bergsonian duration, we can understand that law is embedded in time, and time is immanent in law. In a way, the Experiential View escapes from the static or container view of time by understanding the continuity of future-present-past while acknowledging that all the three modalities of time are real. The actual present is part of the virtual past and the becoming future. This temporal frame does not completely reject the existence

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[29] Henri Bergson, *Time and free will: An essay on the immediate data of consciousness* (Routledge, 2014).

[30] Giles Deleuze, "Bergsonism (H. Tomlinson & B. Habberjam, Trans.)" (1991) N Y Zone.

[31] Joachim J Savelsberg & Ryan D King, "Law and Collective Memory" (2007) 3:1 Annu Rev Law Soc Sci 189–211 Law may affect collective memory indirectly as it regulates the production of, access to, and dissemination of information about the past.; Austin Sarat & Thomas R Kearns, "Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction" in Austin Sarat & Thomas R Kearns, eds, *Hist Mem Law* (The University of Michigan Press, 2005) 1 How the anti-communist laws treat history, how history appears in legal decisions, and how the authority of history is used to authorize legal decisions.

[32] Reva Siegel, "The Nineteenth Amendment and the Politics of Constitutional Memory" (2022) Georget J Law Public Policy Forthcom.

of time as the Chronos, indeed. It posits the chronological view as both law's constitutive framework and part of human experience.[33]

Literatures that examine law within specific temporalities claim that the diverse forms of historical fact—from post-colonial and racial legacy, past atrocity and violence, criminal evidence, or temporal pressures in medical law—are shaped by law.[34] These studies specifically highlight the treatment of legal rules and judgment towards certain *types* of pasts. Several studies, building upon Bergson's duration, fetch our attention to probe legal temporality as *durée*, acknowledging that law "synthesizes past, present, future" and, therefore, its "internal dynamics influence the conceptions of time in imposes on the world."[35]

For instance, building on works from philosophers such as Hans-Georg Gadamer and Elizabeth Grosz, Chowdhury conceives *types of pasts* produced by a particular form of adjudicative temporalities. He makes a distinction between abstract legal judgment and concrete legal judgment.[36] Based on these categories, two points in Chowdhury's work are appropriately relevant to our current investigation. *First,* he argues about an abstract legal judgment that represents a decision when "one observes pasts which imbue features of space—divisible, uniform, juxtaposed and simultaneous—that lend themselves to chronologizing."[37] Meanwhile, the concrete judgment produces *variegated* pasts built upon enduring and sedimented pasts.[38] In this type of legal judgment, one might observe a way for a radical social change, for such judgment recognizes the legal subject as "one which constitutes and is constituted by its socio-economic ecology."[39] The variegated pasts in this concrete legal judgment reveal contingency and situatedness that may "reveal facts with potentially exculpatory effects which are worth considering as well as illustrating how and why certain pasts are excluding from judicial-factual analysis."[40] Specifically in criminal law, legal temporality ties with fact construction, "wherein the broad timeframes have a tendency to causally connect events to a more remote point in the past, and the

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33 Melissaris, *supra* note 19.

34 John Harrington, "Time as a dimension of medical law" (2012) 20:Autumn Med Law Rev 491–515; Mariana Valverde, *Chronotopes of law: Jurisdiction, scale and governance* (Oxon, New York: Routledge, 2015); Franz von Benda-Beckmann & Keebet von Benda-Beckmann, "Places that come and go: A legal anthropological perspective on the temporalities of space in plural legal orders" in Irus Braverman et al, eds, *Expand Spaces Law Timely Leg Geogr* (Stanford, CA: Stanford University Press, 2014) 30.

35 Mawani, *supra* note 8 at 256; Renisa Mawani, "Law As Temporality: Colonial Politics and Indian Settlers" (2014) 4:1 UC Irvine Law Rev 65–95. Recalling back to law's authority and sovereignty during the racial-colonial experience articulates that law's presumed timelessness has been capable of shrouding the heterogeneity of temporal experience, thus compelling the racial-colonial power relations to perpetual.

36 Chowdhury, *supra* note 8.

37 *Ibid* at 146.

38 *Ibid*.

39 *Ibid* at 152.

40 Chowdhury, *supra* note 8.

narrow time frames as singular and disconnected from causally proximate event."[41] *Second*, following the time frame and fact construction argument, time frame indeterminacy precedes the central claim of legal judgment, specifically on "the tension between rules and standards as different forms of legal directives," in which "a legal norm's degree of *formal realizability* is conditioned on the time frames adopted."[42] Thus, some phenomena describe time frames adopted by the judges to apply legal norms either as a rule (*sensed* norm) or a standard (*senseless* norm). The former applies in real-life situations that subsumes fact patterns into preexisting legal norms, while the latter is tailored to a unique case. [43]

These observations could be persuasive for us to understand that temporality displays an important element of law and, vice versa, there is always a legal dimension in time—time/law is inseparable. Consequently, given the heterogenous comprehension on the relation between time and law, it would be unwarranted to uphold the time-taming capability of law in transition as an exclusive view amongst lawyers. Through this alternative view of time and temporality, time-taming should now also be understood as 'time-sorting,' 'time-ordering,' or 'time-brewing.'[44] As Mawani argues, "[w]hile retaining the past as a critical element in law's time, law as temporality moves beyond history and historicity and invites an exploration into law's own deployment of time as a means of capturing and obscuring, albeit not always successfully, the densities of lived time."[45]

III. TEMPORALIZING INJUSTICES

As we have delineated two approaches to time and temporality of transition, our subsequent query is to understand injustice in a temporal frame. In this sense, temporalizing injustice builds upon temporal realities and how those realities are reflected in the meaning-making process in judicial decision. This Part is divided into two sections. First section construes three experiential temporal realities based on several historical cases under the U.S. jurisdiction. Historical cases here are better viewed, and loosely defined, as cases involving the intersection between law's time and historical processes. Some thematic legal issues are covered including racial discrimination and exclusion, same-sex marriage, and rape shield rules-related cases. Second section situates these temporal realities to explain transitional justice in the U.S. Here, this study views the Court's expression of 'timeliness' of a claim for historical reparation in the African-American Slave Descendants case as a judicial semantic technique to 'temporalize'

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[41] Tanzil Chowdhury, "Time frames and legal indeterminacy" (2017) 30:1 Can J Law Jurisprud 57–76 at 67.

[42] *Ibid* at 71.

[43] *Ibid* at 72.

[44] Emily Grabham, *Brewing legal times: Things, form, and the enactment of law* (Toronto, Buffalo, London: University of Toronto Press, 2018); Bruno Latour, *We have never been modern (trans. by Catherine Porter)* (Cambridge, Massachusetts: Harvard University Press, 1993).

[45] Mawani, *supra* note 35 at 93.

injustices. From the Court's reasoning, we may understand that timeliness, as a form of temporality of transitions, is perceived by the judges under the tension between Chronological and Experiential View of time.

1. Temporal Reality

As a rule of thumb, experiential temporality understands time as continuity.[46] As we already noted before, borrowing from Henri Bergson, duration is a continuity of materialization of memory. Through Bergson, we may find out that "[o]ur perceptions, sensations, emotions, and ideas occur under two aspects: the one clear and precise, but impersonal; the other confused, ever-changing, and inexpressible."[47] The former is divisible and susceptible to measurement mathematically, while the latter is qualitative and ever-changing. Applying the two aspects to law, I maintain three forms of temporal reality that signify the perspectival nature of law and adjudication within the dual character of duration.

The first reality is that temporality flows through perception/memory that is essentially transitory and always pegged to certain moments as an impetus toward legal change. Through Bergson's duration, we can find the significance of perception/memory in experiential temporality. Take, for instance, several 'moments' reflected by the U.S. Court's reference to the year 1868 and 1896, Brown v. Board of Education, ratification of the Fourteenth Amendment, Lucas v. Michigan, Korematsu v. United States, and so on. These moments of reference, or circuits or layers of memory in Bergsonian terms, are memories to which judges' perception leaps and recollects, back and forth, into the actual the present case encountered. Those references are not something given, but rather, I would say, an impetus toward change.

In fact, the further the memory leaps, the larger perception the judges may have. This process expands the time experienced and makes time to be more contingent. Understood this way, the judge's 'turn back the clock' metaphor, which we can easily find in some court decisions, could be grasped in terms of an 'expanding actual'—since memory leaps further and comes back from the virtual. As a result, the actual present becomes more contingent and the way law treats legal subjects is no longer as an abstract but rather as a concrete, singular subject with variegated experiences. The rather open-textured clauses under the U.S. Constitution, e.g., "Equal protection clause" or "Establishment clause," are naturally discursive instead of merely executive, that is, judges' equivocal views on social discrimination or racial division are best seen as a process of becoming. Through the memory recollection process, law's 'cross-temporally' projectable shape is manifested—as opposed to or complementary to the 'cross-sectional' shape—[48] with the view to repair and restructure the damage done and to avoid repetition

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[46] Ismael, *supra* note 28.
[47] Bergson, *supra* note 29 at 129.
[48] David A Super, "Temporal Equal Protection" (2019) 98:1 N C Law Rev 59–122.

of failure. Based on this explanation, it would be fair to say that perception/memory construes the transitory nature of events and the changing selves of legal subjects in historical cases. Duration involves transition being prioritized to the homogenous multiplicity (succession of gapless discrete experiences) as continuity in a spatial array.[49] Therefore, we may glean from this experiential reality that memory is a normative object within our temporal device.

The second reality, time as duration is experienced in the intensity of anticipating for the law. As in almost all events, anticipating the unknown compels us to expect both the expectable and unexpected. It is a distinct category of the reality of time, highlighting the multiplicity of temporalities. Take, for example, experiential time of same-sex couple's right of marriage defended by the judges in *Obergefell v. Hodges* (2015).[50] The court highlights expectancy as duration amid variegated and sedimented perceptions and memories against same-sex couples in the country. Intensity of expectancy, in this case, could be reflected by the claimants' narratives of "hurtful for the rest of time," "continuing uncertainty their unmarried status creates in their lives," and "endur[ing] a substantial burden." The court in *Obergefell* recollected these experiences from the virtual pasts into the actual present. Historical facts in the court's decisions about prolonged, enduring injustices were not understood as a mere timeline—a chronology to assist them in categorizing and subsuming fact patterns. Rather, they should be grasped as layers of memory guiding the judges to construe and designate Plaintiff's, such as Obergefell, waiting or expecting in the actual present.[51]

Additionally in another setting, anticipating as duration is also represented as the urge to accelerate the court's proceeding found in, for instance, rape shield rules-related cases. In the Bergsonian sense, duration of the victim's trauma in this kind of legal plot is contingent upon the call for witnesses to be made by the authority, who, through an eye of an 'intellect' outsider, then decides and contains the slices of victim's temporality. Here, we could propound Expectancy as a normative object within the device experienced through waiting for the law. As a part of the temporal device, Expectancy could be vividly reduced or increased to law. And importantly, the foregrounding of intensity within duration may exhibit both the interval and simultaneity of necessity, tradition, and suffering.

The third reality is time as duration that inhabits the character/personality alteration. Back to Bergson's conceptualization of duration, character or personality is considered

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[49] Kennedy, *supra* note 18; Fernando Atria, *On law and legal reasoning* (Oxford, Portland: Bloomsbury Publishing, 2002); Carol J Greenhouse, "Just in time: Temporality and the cultural legitimation of law" (1988) 98 Yale LJ 1631.

[50] *Obergefell v Hodges BT - S Ct*, 2015 2071.

[51] Waiting as law's device at some point borrows from Kafkaesque narrative about guardian before the law in his The Trial. Franz Kafka, "Devant la loi" (2005) 15 Portique Rev Philos Sci Hum; Henk Van Houtum, "Waiting before the law: Kafka on the border" (2010) 19:3 Soc Leg Stud 285–297.

as the trajectory of self-creation emanating from the past.[52] In this sense, there are two types of character/personality, according to Bergson, namely: personal and impersonal. Any attempts to be mindful to the former should require something personal, in which "the movement of a durational reality requires an immediate and absolute knowledge that is lost with the generalizing tendency of language and concepts."[53] In this personal type, intuition in adjudicative decisions could be grasped as "sympathizing with the object to be known involves entering into it, ... thereby gaining a "personal" and immediate knowledge of it."[54] Whereas the latter, the impersonal type, gains knowledge from an 'outside' intellect, conceptualizing the object in terms of space and movement into a static being.[55] Simply put, the former emanates from intuition and the latter from intellect. What we can understand from historical legal cases is a clear tension between the two—tension between judges who, on the one side, are assertive toward intellect and on the other side, attentive toward intuition. Bergson mentions, as quoted by Landes, that "our personality is a certain continuity of change; but this continuity of change is indivisible ... and its indivisibility constitutes its substantiality."[56] Personality is therefore seen as part of self-creation within the duration. We may exhibit that Personality is another normative object within the device experienced through alteration.

Thus far, theoretical justification and temporal devices have been glossed as the basic structures of experiential temporalities. Three important things we may conclude at this point. *First*, the reality of time is translated into three modalities of temporal inquiry (pastness, futurity and presentness). *Second*, temporal inquiry is made of a temporal device, defined as a series of interrelated normative objects (memory, expectancy, and personality) built upon judges' intuition regarding the reality and their attitude toward time. *Third*, from these normative objects we may extract three salient features of experiential temporality in legal reasoning: reflective remembrance, intense expectancy, and character alteration. In the following section, we proceed to situate these features into the context of Reparation Claim cases to renavigate what we mean by transition.

2. Timeliness of Reparation Claims

As a way of temporalizing transitional injustice, this study reflects from cases about remedy/reparation against enduring harms encapsulated, among many, in the *African American Slave Descendant Litigation* case. In this 2004 case law, the District Court of Illinois dealt with a civil suit complaint of reparation for slaves' descendants resulting from chattel slavery more than centuries ago. Our object of investigation in this case is

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52 Donald Landes, "From a privileged image of durée to the core of a new metaphysics" in Mark Sinclair & Yaron Wolf, eds, *Bergsonian Mind* (Oxon & New York: Routledge, 2021) 99.
53 *Ibid* at 101.
54 *Ibid*.
55 Henri Bergson, "Creative Evolution" in *Henri Bergson Key Writ* (Bloomsbury, 2002).
56 Landes, *supra* note 52 at 106.

the idea of timeliness, proffered by the Court as a crucial temporal feature of the reparation claim. I would argue that the meaning-making process of timeliness is basically an assertion of how legal actors in the U.S legal system perceive transitional (in)justice. By focusing on the Court's explication on the concept of statute of limitation, I would suggest that time and temporality in transition has been perspectival, in the sense that adjudicative decisions have been contentiously foregrounding one view of time over the other.[57]

In this historical reparation case, the Court enshrines four underlying principles to answer the feasibility of Plaintiff's' claims: (1) there should be a specific connection between the Plaintiffs and the Defendants, in which the former lack constitutional standing to bring the claim; (2) the Court is restricted by prudential limitations that prohibit it from giving answer to such broad inquiry of social importance; (3) the issue of slavery reparation falls within the ambit of authorities outside the Court—the political question doctrine; (4) the reparation claims should be timely, meaning it should be within the applicable statutes of limitations.[58]

I would submit that the temporal aspect of the claim, enshrined under Principle (4), underpins all other aspects of procedures, political questions, authority, and social importance of this reparation inquiry.[59] This principle insists that the Plaintiffs should have demonstrated that their claims are timely or fall within the applicable temporal limitations. We may ask *when*, or rather *how*, is a complaint timely? As the answer to this, the Court of Appeals sheds light by primarily scrutinizing the concept of statutory limitations.

In its general proposition about statutory limitation, the Court approaches the case under a strict Chronological temporal frame. Two important concepts frequently addressed by litigants when dealing with statutes of limitations, the Court argues, are: accrual and tolling. The Court says that,

> "A cause of action 'accrues' when a suit may be maintained thereon, and the law in this regard differs from state-to-state and by nature of action." *The proverbial clock starts to run when the action accrues. It is not the date on which the wrong that injures the plaintiff occurs, but the date — often the same, but sometimes later — on which the plaintiff*

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[57] My usage of 'perspectival' embarks upon my understanding of two terms from two authors: Mawani's *doubling temporality* and Maclean's *dualism*. Although the two authors essentially discuss two different things, but I think the logic behind their understanding about time and the effect it causes to law's ontology and normativity bring a comparable resonation. *See* Mawani, *supra* note 8; MacLean, *supra* note 16.

[58] *In Re African-American Slave Descendants Lit BT - F Supp 2d*, 2004 1027 at paras 780–781.

[59] Raff Donelson, "Reparations, Responsibility, and Formalism: A Reply to Carnes" (2021) 49:2 Philosophia 643–649. My claim is a sort of temporalization of Donelson's argument about historical responsibility that rather focuses on justificatory claim on the political questions, authority, and social importance of reparation inquiry. *See* also Janna Thompson, *Should current generations make reparation for slavery?* (John Wiley & Sons, 2018).

> *discovers that he has been injured*. While discovery of the injury in some cases may be complex, in others it would be immediately obvious, as in the case of the brutal application of the lash, the turning of the screw, or the tightening of the leg chains nightly to a post. As a complement to accrual, *tolling is a concept which suspends the running of a limitations period to an accrued action. The proverbial clock is stopped when the action is tolled*."[60]

In relation to the merit of the case, the Court states that "[g]iven that the institution of chattel slavery in the United States ended in 1865, Plaintiffs' century-old claims would have accrued by 1865 at the latest. The longest limitations period for any of Plaintiffs' century-old claims is five years, which would have run well over a century prior to the filing of the instant Complaint. If cognizable claims ever existed, those claims were owned by former slaves themselves, and became time-barred when the statutes of limitations expired in the nineteenth century. As such, Plaintiffs' century-old claims are barred by the statutes of limitations in every jurisdiction."[61] Furthermore, the Court insists that the plaintiffs who claim that slavery persists caused by the Defendants' misrepresentation about their involvement in slavery, "... reveal no more than that Defendants have made generalized denials of the merits of Plaintiffs' lawsuit."[62] As a general observation, I would argue that the judges view this Reparation Claim as exclusively a chronicle of events.[63] It is primarily represented by the work of proverbial clock seen as the judge's technique to contain and fragment time that could bar reparation claims.

Nevertheless, the statute of limitation inquiry in this case reflects, to use Bergsonian terms, a suspension to the spontaneous link between perception and recollection (of memories) in adjudication. From a Chronological View, the judge is undeniably justified not to reason further from a strict approach to the statute of limitations, insisting that law's time bars any narratives of lived experiences provided within the claim. A broader canvass, however, is broached by the Court by probing the possibility of extending the temporal limitation to three theories of discovery rule, continuing violation doctrine, and equity theories (i.e., estoppel and tolling). Referring to our previous concept of law's transition as *duration*, I would suggest that this theoretical observation by and large showcases law's capacity to attain power through 'judges' experimentation.' It is the way in which the judges face the Encounter, that is, the unexpected found in the tension between law's time and the multiple temporalities of plaintiffs' time.

Firstly, the discovery rule is primarily a rule that "postpones the beginning of a limitations period until such time as the plaintiff discovers the injury, or through

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60 *In re African-American Slave Descendants Litig BT - F Supp 2d,* 2005 721 at paras 771–2. (emphasis added)
61 *Ibid* at 773.
62 *Ibid* at 774.
63 Janna Thompson, *Taking responsibility for the past: Reparation and historical injustice* (JSTOR, 2002) at 81–83.

reasonable diligence should have discovered the injury."[64] In this case, the Court claims that the mere fact that plaintiffs' ancestors did not know exactly how much profit was made from their slave labor is not enough to establish that the discovery rule should apply in this case. Quoting Brademas v. Indiana Housing Finance Authority, the Court asserts that "[t]he federal common law discovery rule does not permit the plaintiff to delay filing its lawsuit until all foreseeable harms arising from the injury are actually experienced, but only until the plaintiff discovers the predicate injury."[65] The Court furthermore claims that

> "The predicate injury in this instance was the institution of slavery itself. Plaintiffs make a veiled attempt to tie the beginning of the statutes of limitations periods to the discovery of the damages that flowed from slavery, rather than the predicate injury itself. Again, the discovery doctrine only extends the statutes of limitations until the predicate act is discovered, not until all discovery of its consequences is completed."[66]

Law's time in this reasoning distinguishes foreseeable harms arising from (actual) experienced injury and from predicate injury. The important element in this theory, however, is not necessarily the experience itself, but rather the timeliness to file the suit based on the discovery of the predicate act.

Secondly, the continuing violence, as the Court stipulates, "allows the plaintiff to file an action when there is a continuous series of injuries stemming from the same injury. Under this doctrine, the statutes of limitations are not tolled per se, but rather *left open until a final injury has accrued.*"[67] In temporalizing injury as a continuation, the Court essentially creates a distinction between the (final) injury and the alleged effects of injury. The Court furthermore claims that "[a]ll of the other ills and consequences that flowed from this injury, no matter how dreadful, do not constitute new or continuing claims. *They are merely the alleged effects of an injury that occurred over a century ago, and not a continuing series of acts.*"[68] Continuing violence, as angle to vision timeliness, is grasped by the Court in a narrow sense, chiefly by containing its effects into final injury and consequences of injury. This is obviously a failure to draw historical reparation in a broader canvass of injustices.

Third, the equity theories register two branches: estoppel and equity tolling theories. Equity in this sense enables an individuated scrutiny of fairness and if it succeeds may provide discretionary relief. (1) The estoppel theory, which according to the Court, "allows a plaintiff to bring a cause of action after a statute of limitations has expired when

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[64] *In re African-American Slave Descendants Lit. BT - F. Supp. 2d, supra* note 60 at 775.
[65] *Ibid* at para 92; *Brademas v Indiana Housing Finance Authority, F3d*, 2004 681 at para 776.
[66] *In re African-American Slave Descendants Lit. BT - F. Supp. 2d, supra* note 60 at 775–6. (emphasis added, citation omitted)
[67] *Ibid* at para 776. (emphasis added)
[68] *Ibid*. (emphasis added)

the defendant takes active steps to prevent the plaintiff from suing on time."[69] Arguably, timeliness touches the experiential character of time in this theoretical elaboration that attempts to sensitize temporal claim beyond the chronology bar.[70] Nevertheless, the Court propounds that the plaintiffs

> have not asserted any facts alleging that any Defendant concealed information in a way that would have prevented Plaintiffs' ancestors from asserting their claims within the proscribed statutes of limitations periods. Plaintiffs do not allege that Defendants concealed the injury. In fact, the injury was not concealed, but rather obvious when inflicted. Plaintiffs merely make vague generalizations about Defendants and their perceived practices. Plaintiffs' vague assertions are not enough to satisfy the requirements for equitable estoppel.[71]

(2) The equitable tolling, which is applicable when "a plaintiff, despite due diligence, is unable to obtain enough information to conclude that there is a basis for a claim."[72] Theoretically distinct from the previously equitable estoppel, equitable tolling "permits a plaintiff to sue after the statute of limitations has expired if through no fault or lack of diligence on his part he was unable to sue before, even though the defendant took no active steps to prevent him from suing."[73] The Court, however, argues that the doctrine of equitable tolling does not apply in this instance because the basis for a claim cannot be concluded by a mere chronicle the social inequities and injustices. The Court maintains that,

> Plaintiffs' ancestors knew of their injury at the time that it occurred. *They knew, or should have known, that they were wrongfully being forced to work without compensation, and that somebody was making a profit from their labor. Yet, neither Plaintiffs nor their ancestors ever asserted these claims in a court of law until now.* Plaintiffs have not shown that they acted with all due diligence in attempting to obtain vital information about their claims, and assert them timely. ... Plaintiffs merely make vague assertions and generalizations as to their claims and the state of the legal system. Plaintiffs' vague assertions and generalizations are not enough to toll the statutes of limitations on their claims. Plaintiffs' Complaint is nothing more than an attempt to by-pass the various statutes of limitations by chronicling the social inequities and injustices that have befallen African-Americans as a result of slavery. The statutes of limitations,

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69 *Ibid* at para 777.

70 T Leigh Anensom, "From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law" (2007) 11 Lewis Clark Rev 633.

71 *In re African-American Slave Descendants Litig. BT - F. Supp. 2d, supra* note 59 at para 778. (emphasis added)

72 *Ibid* at para 97.

73 *Ibid*.

> however, "*are not to be disregarded by courts out of a vague sympathy for particular litigants.*[74]

The case temporalization ostensibly resonates with the Court's broader argument in determining the 'standing or personal stake doctrine.' The doctrine of standing ensures that a litigant is the proper party to bring a matter before a federal court for adjudication, primarily by asking if that specific litigant has a sufficient stake in the matter to invoke the federal judicial process.[75] This injury therefore should be particularized only to the claimant.[76] The Court, however, found that the plaintiffs do not satisfy the doctrine's conditions, thus failing to support their standing to maintain the suit as required by Article III of the U.S. Constitution. They fail, according to the Court, for five reasons: (1) Plaintiffs cannot satisfy the first and most basic requirement of constitutional standing — a concrete and particularized personal injury; (2) Plaintiffs cannot establish a personal injury sufficient to confer standing by merely alleging some genealogical relationship to African-Americans held in slavery over one-hundred, two-hundred, or three-hundred years ago; (3) In attempting to litigate the unopposed issue of slavery rather than their personal injuries, Plaintiffs also cannot satisfy the second requirement of constitutional standing — injury that is fairly traceable to the conduct of the defendants; (4) Plaintiffs do not allege that they had any present property interest that was injured as a result of these specific Defendants' actions, nor that any action of the Defendants wronged them in any way that would be cognizable under tort theory; and (5) Plaintiffs fail to allege any conduct by the seventeen specifically named Defendants that individually affected any of the Plaintiffs.[77]

We could also discover corresponding instances in the case's appellate level at the United States Court of Appeals Seventh Circuit. The Court of Appeals (CoA) explains the want of plaintiffs' standing interestingly by employing a scenario that carries temporal imagination in it.

> ... if there were a legal wrong, it would not be a wrong to any living persons unless they were somehow the authorized representatives to bring suits on behalf of their enslaved ancestors. With some exceptions to be noted, the plaintiffs are suing to redress harms to third parties (their ancestors), without being authorized to sue on behalf of those parties. *It is like a suit by a descendant of a Union soldier, killed in battle, against a Civil War era gun manufacturer still in business that sold guns to the Confederacy in violation of federal law.*[78]

In its conclusion, the CoA argues that,

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[74] *Ibid* at para 771. (emphasis added)
[75] *Ibid* at para 744.
[76] *Ibid* at para 745.
[77] *Ibid* at para 752.
[78] *In re African-American Slave Descendants Lit BT - F 3d,* 2006 754 at para 760.

> ... although most of the plaintiffs and class members are suing as descendants rather than as representatives of their ancestors' estates authorized to sue on those ancestors' behalf, a few do claim to be suing in such a representative capacity. It is highly unlikely that the estate of anyone who died a century or more ago, or indeed more than half a century ago (*for although many former slaves survived into the twentieth century, very few would still have been alive 50 years ago, which is to say in 1956, 91 years after the end of the Civil War),* has not yet been closed. But the district judge accepted that the purported representatives had a right to sue on behalf of their ancestors, and the defendants offer only a perfunctory rebuttal. We shall assume without deciding that some of the plaintiffs are legal representatives of their slave ancestors. These plaintiffs not only escape the objection to standing that the suits seek damages for injuries actually suffered by third parties (the ancestors — no longer third parties, but the real parties in interest, merely represented by the plaintiffs), but have less to prove. They just have to prove the injury to the ancestors; the trickle-down question is elided.
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> *In all likelihood it would still be impossible for them to prove injury, requiring as that would connecting the particular slavery transactions in which the defendants were involved to harm to particular slaves.* But in any event, suits complaining about injuries that occurred more than a century and a half ago have been barred for a long time by the applicable state statutes of limitations. *It is true that tolling doctrines can extend the time to sue well beyond the period of limitations — but not to a century and more beyond.*[79]

The African American Slave Descendant Litigation case observed above exerts a categorial inquiry that enables legal actors to temporally engage in the meaning-making process of procedures, political questions, authority, and social importance of reparation inquiry. It is manifest that the idea of timeliness of a complaint or claim, as the two courts exhibit, is intuitively rendered upon chronologizing the accrual and tolling, in which time plays as a natural force that affects law's temporality. Such an approach to accrual and tolling creates three implications: (1) chronological temporal limitation is always in the background of all legal doctrines and theories; (2) the chronology of history surmises the state of likelihood over time either in terms of an individual's well-being or of the diminishing properties and it somehow shrinks the possibility to see the anew; and (3) the individual or group's self-identification may be seen as an extended character to represent harm. This kind of subjectivity can be seen from the court's recognition to some of the plaintiffs' status as the legal representative of their slave ancestors.

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[79] *Ibid* at 762. (emphasis added)

Conceiving from these implications, timeliness itself entails several, sometimes contradictory, premises in law's attempt to temporalize claims for reparations. In this sense, there are some instances in the court's reasoning where we may find the judges attempting to sensitize the encounter upon which they approaching the claim through an Experiential View. The subsequent Final Part examines such an alternate reading of the courts' decisions, asserting a kind of shift in the courts' reasoning from Chronological to Experiential View.

IV. LAW'S EXPERIENTIAL VIEW AND THE TIMELINESS

Before we read the Court's reasoning from an experiential view, I would like to restate that this study mainly investigates the way law and legal reasoning can perceivably capture and disrupt persistent injustices at a micro-level by attending to an experiential view of time. It basically aims to explore a novel 'direction' of transitional justice. This novel direction, not to be understood in a linear sense, is a process of becoming. It exploits the past as its resources to anticipate the unknown future. Another principal proposition to make at this point is that timeliness of transitional justice should be read in terms of duration: it is about overwhelming injustices in the past, disrupting them in the present, and overcoming the anticipated in the future. Since law predominantly puts weight on the 'presentness' of a case, this novel view could engender law's openness to (temporal) imagination within transitional jurisprudence without having to recourse to strict and predictable transitional justice mechanisms.

This article aims to temporalize the 'transition' in the U.S. context. Specifically, in most discussions about reparation of past injustices in the U.S., the idea of 'transition' revolves around the issue of compensating the nation's guilt—e.g., eligibility, compensation, and calculation of 'the debt.' To enable law's creativity and inventiveness, the concept of 'transition' in transitional justice should be understood in a pure temporal sense—transition that is formed by the timeliness of claims for reparation. Timeliness of reparation claims should be understood accordingly in the frame of duration, that is, it is both a singular and a multiplicity. In the first sense, timeliness is better grasped as a continuity—a single and indivisible whole. In the latter sense, timeliness compounds of multiple and variegated simultaneous durations.

The idea of timeliness investigated in the *African American Slave Descendant Litigation* case reflects the way judges engage with the three experiential features (i.e., reflective remembrance, intense expectancy, and character alteration). This engagement, at the same time, exerts a kind of novel direction in understanding transition in the U.S. For that reason, rather than restricting ourselves on the bounded domain of transitional justice, an engagement to an experiential view of time will flourish law's capacity to be attentive to the richness of transition, which is seen as a collective (temporal) imagination among legal actors. The past, read in this way, is "always already contained in the present, not as its cause or its pattern but as the present's latency, virtuality, and potential for being

otherwise."[80] Radical social transformation requires us to 'dislocate' the present, bringing the past as resourceful modality to challenge and granting the Encounter to the present injustices. There are two leaps which take place at this point, to the present and to the future, and I think transition should be understood as any struggles materialize within these leaps.

First, the Court asserts that historical injustice is a chronicle of events or a natural temporal artifact, while simultaneously tries also to capture the link between the past and present in the transition. This kind of, I would call, Reflective Remembrance involves judges' perception and memory, that is, leaping to virtual injuries of the slave ancestors and going forth to the actual alleged harm of the descendants. Memories are therefore containing past virtual injuries, while the actual perception is shaped by alleged experienced harm. References to chronological historical moments and precedents are essentially attempts done by the court to process what we call 'memory recollection' that shapes the judge's perception in the actual case. In a way, "[m]emory rush back not as they were, that is, as former presents, but instead as they inhabit the perception that solicited them. Actualized in the perception, they entertain new and unprecedented relations."[81] As we may see in the court's rulings, the past is not diminished; rather, it coexists with the present—a court decision is somewhat a creation of the past. There is a kind of perpetual exchange between the past and the present from which the court finds them indiscernible, yielding convolutions between the question of when and how did harms and injuries occur.

Some conceptual implications to transitional jurisprudence can be briefly addressed at this point. The theoretical commitment to Gerald Postema's legal time-mindfulness manifests a refutation of the claim that states that law essentially ascribes its normative texture independently from its temporal normativity.[82] Based on the concept of law's time-mindfulness, we could argue that law's normativity sources from its temporality. Legal theorist, HLA Hart for instance, is attentive to the temporal dimension of law, explaining that the validity of law's normative force is justified by the continuous, persistent practice of the principle of recognition regarding past legal norms.[83] Although Hart does not hold claim about the temporal force of law, one essential qualification in his theory is the critical and reflexive acceptance of the people to the rules. As guidance of peoples' behavior, these rules should not be merely executive but also discursive: in fulfilling its role as a 'deliberative frame' to guide members of the public, law, therefore,

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[80] Elizabeth Grosz, *The nick of time: Politics, evolution, and the untimely* (Durham & London: Duke University Press, 2004) at 254.
[81] Lefebvre, *supra* note 17 at 189.
[82] Gerald J Postema, "Melody and Law's Mindfulness of Time" (2004) 17:2 Ratio Juris 203–226; Greenhouse, *supra* note 49.
[83] HLA Hart, *The Concept of Law*, 3rd ed (Oxford: Oxford University Press, 2012).

should be intelligible, accessible, and coherent.[84] In this sense, we can see the law's time-ordering when it reflects a cross-temporally projectable shape, meaning that law makes it "possible for the agents of that public to orient their deliberation to it and integrate it into their own temporally mindful deliberations."[85]

But how do agents orient and integrate their deliberation to law? I think it would be fair to put short reference at the moment to Holmes's legal philosophy, who asserts that "[t]he life of the law has not been logic; it has been experience. The felt of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law ... cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[86] Reading Holmes's rejection of logic through Bergson's temporal pragmatism could yield three indications: (1) logic serves calculation and prediction of law, (2) logic is atemporal, and (3) logic forecloses life's creativity.[87] This is where experience takes part in law and legal reasoning. We could synthesize law's cross-temporally projectable shape to Bergson's duration in that legal actors purport that adjudicative decision as a sub-species of duration: to anticipate the unknown and understand legal event as unique in itself or as an unrepetitive experience.[88] Such a shape is not to suggest the judges to break with legal tradition, but rather, for judgments to "actualize a temporally mobile basis of interest and desire in conjunction with tradition."[89] Or, in Holmes's words, "... the rule adapts itself to the new reasons which have been found for it, and enters on a new career."[90]

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84 George Pavlakos, "Practice, reasons, and the agent's point of view" (2009) 22:1 Ratio Juris 74–94; Stephen Perry, "Hart on social rules and the foundations of law: liberating the internal point of view" (2006) 75:1 Fordham Rev 1171.

85 Gerald J Postema, "Time in Law's Domain" (2018) 31:2 Ratio Juris 160–182 at 175.

86 Oliver Wendell Holmes, "The common law" in *Common Law* (Harvard University Press, 2009) at 1.

87 Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza* (Stanford: Stanford University Press, 2008) at 98.

88 Jingjing Wu, "Justifying Particular Reasoning in a Legal Context" (2020) 40:3 Informal Log. This statement might lead us to question the coherency of the particularity in legal reasoning (as opposed to the general universal legal reasoning). However, I would argue that the experiential temporalities reasoning is applicable in the context of universalizable particular reasoning. Jingjing Wu outlines that "only particulars that are universalizable are justifiable particulars." (428) Thus, thinking about rules and fact situation in terms of temporality suggest that "the justification rules of particular reasoning only articulate the salient feature(s) that make the case sufficiently particular to be excluded or allowed to deviate from universal rules or principles." (432)

89 Lefebvre, *supra* note 84 at 101; Anensom, *supra* note 68. In particular, Anensom applies three methods of legal reasoning to equitable estoppel to evaluate the defense in practice, namely precedent, tradition, and policy analysis. Anensom particularly highlights the significance of tradition.

90 Holmes, *supra* note 83 at 5.

Second, the Court's endeavor to search for narratives of harmful 'material representation' wields the futurity of transition. The Court sensitizes Intense Expectancy of reparation of the claimants through a sort of experimentation by expanding the statute of limitation. I would argue, therefore, that the four theories of the discovery rule, the continuing violation doctrine, equitable estoppel, or equitable tolling are matters for the Court to anticipate the 'future' of reparation claims. They do so by invoking various scenarios, for instance, by stating that "They [the ancestors] knew, or should have known, that they were wrongfully being forced to work without compensation, and that somebody was making a profit from their labor. Yet, neither Plaintiffs nor their ancestors ever asserted these claims in a court of law until now."[91] Or, another scenario conveyed by the CoA, which reads,

> Suppose a class member could prove that he was descended from one of the slaves insured by Aetna or transported by the Union Pacific Railroad (another defendant) or bought with money lent to the buyer by the predecessor of the JPMorgan Chase Bank (still another defendant), and that these transactions were illegal and that the descendants of slaves are among the people whom the laws were intended to protect. Had he not been insured or transported or bought with a bank loan, how would the financial welfare of his remote descendant be affected? Would the ancestor have been freed, or perhaps never enslaved in the first place? As the plaintiffs stress, slavery was profitable; is it conceivable that slaveholders would have been unable to insure, transport, and finance the purchase of slaves if northern companies had been excluded from the provision of these services or had refused to violate their states' laws that sought to keep them from providing the services?[92]

Scenarios of timeliness in Reparation Claims are a significant feature for future projections within the transition.[93] These scenarios open a conversation that persuades legal actors to enter into a certain 'epistemic frame,' in which new responses to each scenario might be provided by future judges dealing with similar reparation claims.[94] At the same time, this sort of imaginative process also broadens our spectrum in analyzing law in transition as something that is projectable to the future. Informed by our theoretical commitment to legal time mindfulness and duration, futurity of transition may enable and enhance the quality of the social. This dimension exhibits two branches of reasoning, namely: interactive and collective. At the interactive level, law's time-mindfulness claims that human experience in time is inherently subjective at the most basic level. Human brains process information as representational wholes with cross-temporal dimensions and yield *significance* to present experience. It certainly does not

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[91] *In re African-American Slave Descendants Lit. BT - F. Supp. 2d, supra* note 60 at para 98.
[92] *In re African-American Slave Descendants Lit. BT - F. 3d, supra* note 75 at para 760.
[93] Maksymilian Del Mar, *Artefacts of legal inquiry: the value of imagination in adjudication* (Bloomsbury Publishing, 2020).
[94] *Ibid*.

align with chronological time, given that human brains structure subjective time into patterns, and importantly, it is subject to revision. Only by positing humans as *temporally extended* or enduring selves could we grasp time as neither static nor possessed but rather as experienced. At the collective level, time-mindfulness manifests the enduring of a political community along with its commitments and members' responsibility. Law arranges common life resources and provides a disciplined framework in the community. At this moment, it is vital to borrow Bergson's views of humans as socio-biological creatures. We could read this element from his concept of *élan vital* or an evolutionary power. *Élan vital* is understood as the "impulse to improvise, experiment, make mistakes, reverse the previous moment, be lucky, have accidents and then to reincorporate them as events through memory."[95] The basic premise established at this point is that "[f]or a conscious being, to exist is to change, to change is to mature, to mature is to go on creating oneself endlessly,"[96] "life, like conscious activity, is invention, is unceasing creation."[97] In a way, creativity is, therefore, the principal modality in transition as duration. Moreover, since the concept of *élan vital* is also seen as the part of Bergson's *duration*, it may open the possibility of political transformation and could be disruptive and discontinue the past.

Third, the personal stake doctrine provides a way to understand transition beyond the binaries of innocence/guilt, wrongdoer/victim (and their agencies), good/bad victimhood, and so on. Such agents and agencies queries, or I called Character Alteration, in our observed court's decision are reflected through a kind of legal subjectivity addressed by the court. As a claimant, so the Court suggests, a subject should have experienced injury or any foreseeable harm that is final and accrued. That said, it's not that the voice of litigant directly determines the outcome of a decision or duration, but rather, as the Court contends, the temporal dimensions, in the form of statute of limitations, "are not to be disregarded by courts out of a vague sympathy for particular litigants."[98] Victimhood, so to speak, is thus not built upon any vague assertions and generalizations.[99]

To recall, an experiential temporality insists on 'a simulated experience' that goes beyond individual or group interests. As a part of normative dimensions of transition, I think the question about identity/character (and their personal stakes) asks the core idea of 'presentness' in transitioning Americans. In this sense, we need to denote Postema's law's time-mindfulness that maintains the value of Dworkinian integrity as an enabling normative environment for law's cross-temporally projectable shape. We understand

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[95] Stephen Linstead & John Mullarkey, "Time, creativity and culture: Introducing Bergson" (2003) 9:1 Cult Organ 3–13 at 9.

[96] Bergson, *supra* note 55 at 7.

[97] *Ibid* at 23.

[98] Cheryl Lawther, "'Let Me Tell You': Transitional Justice, Victimhood and Dealing with a Contested Past" (2021) 30:6 Soc Leg Stud 890–912.

[99] Cheryl Lawther, "'Let Me Tell You': Transitional Justice, Victimhood and Dealing with a Contested Past" (2021) 30:6 Social & Legal Studies 890–912.

that the adjudicative principle of integrity is an evaluative dimension of expression of justice and coherence.[100] Two views are important to note here. First, according to Postema, an approximation toward justice is found upon a link between integrity and fidelity—such as friendship or loyalty. Postema writes that, "[s]triving for law's systemic and temporally extended integrity is an expression of that fidelity. Time-oriented, time-ordering law gives focus, direction, and content to this fundamental obligation of fidelity of each member to each other."[101] Second, reading Bergson guides us to posit 'moral aspiration' as an appeal to justice based on the enactment of a myth. Reading the two thinkers together, we could argue that justice is an extended value in this ethical dimension. Justice could be grasped as both moral and physical personalities which emerge from social institutions and habits. Social 'moral obligation' is then understood as an external process that presses an individual from outside. Justice is then to be extended so that personal morality could break from static morality to a more open one. From here, we may claim that 'timeliness'—and accordingly transition—should be understood as a process within the ambit of Postema's fidelity as integrity (an expression toward the trajectory of creative repetition) and Bergson's duration (the facet of open movement and becoming).

All things considered, my main assertion in construing 'timeliness' is not necessarily based on the outcome of the judgment—i.e., whether the claim for historical reparation succeeds or not. Rather, I put emphasis on the necessity to appreciate the shift from 'the regularity and expediency of adjudication' into a sort of 'stymied and experimental judgment.'[102] We may contend that, after all, the Encounter in Reparation Claim has made the case a singularity. Despite the Court's rejection of almost all the Plaintiffs' claims, the judges ostensibly sensitize the Encounter, that is, the persistent or continuing injustice against a certain group of people from which they attempt to decide attentively on using the details of rules and principles relevant to the case.[103] Arguably, this kind of analytical approach could become one of the contributions of an Experiential View of time in the transitional justice field. In this sense, legal actors can perceivably capture (and disrupt) persistent injustices at a micro-level by attending to such a view of time. Or, perhaps they cannot, since the essential element in law as duration is its internal temporalities, that is, "while opening the future as a site of novelty, a recognition that law will always be other than it is, that change is always already happening."[104] Ultimately, this view could engender law's openness to (temporal) imagination within transitional jurisprudence without having to recourse to strict, yet equivocal, transitional justice mechanisms. By rendering the untimeliness, our faith in law, as one of the conceptual

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100 Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts, London: The Belknap Press of Harvard University Press, 1986).
101 Postema, *supra* note 82 at 177.
102 Lefebvre, *supra* note 84 at 173–95. Or, borrowing from McNeilly, we may see this as the way legal actors embrace the untimeliness from the timeliness. McNeilly, *supra* note 27.
103 Lefebvre, *supra* note 84 at 193–195.
104 Mawani, *supra* note 8 at 262.

foundations of transitional justice,[105] will have the chance to re-emerge—to understand transition as more than what McNeilly writes as a "political blunt discourse."[106] That said, it is the way legal actors can shift the way they treat race as political to lived experience.

V. CONCLUSION

This paper is a critique of the bounded domain approach to transitional justice that temporally demarcates the 'before and after' transitional moment. Such an approach, which is underpinned by a Chronological View of time, is insufficient to address the experiential character of injustices. As an alternative, this study proposes an Experiential View of time in transitional justice. It treats time and temporality as a flux, a multiplicity of experiences from which we may grasp three salient features of experiential time (i.e., reflective remembrance, intense expectancy, and character alteration). This approach can take us to a richer conversation about the interplay between law and transitional justice in the established democracies—an interaction that is open to any (either desirable or undesirable) future possibilities. In this sense, transition should be understood within *duration*, that does not only juxtapose, but also extrapolates the past to the present and the future. Such an extrapolation of time is the main ground of the Experiential View of time in transitional justice. As we have observed in the Reparation Claim case in the U.S, transition is essentially a collective imagination that plausibly lays upon the interaction between competing temporal narratives in historical cases. Legal change in transitioning society, including those in the South-East Asia region, is therefore not an effect of a certain 'transitional' momentum, but rather, it is part of the ontology of law itself: It is within this nature of change, that is happening at the micro-level, we might want to furthermore develop a kind of need-based model of transitional justice that is capable of promoting peace and justice at the macro-level.[107]

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[105] Murphy, *supra* note 5 at 149–50.

[106] McNeilly, *supra* note 27 at 18.

[107] Christine Lillie & Ronnie Janoff-Bulman, "Macro versus micro justice and perceived fairness of truth and reconciliation commissions" (2007) 13:2 Peace Confl J Peace Psychol 221–236; Susanne Karstedt, "Between micro and macro justice: Emotions in transitional justice" in Susan A Bandes et al, eds, *Res Handb Law Emot* (Edward Elgar Publishing, 2021) 460.

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