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# Arkansas and the War Between the States: Civil Unions and Same Sex Marriage

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One hundred and fifty years ago this country was embroiled in a bitter debate over whether the institution of slavery was compatible with democratic principles that recognized the inalienable right of people to be free. This debate led to the most brutal war in the nation's history and challenged the very survival of a union of states that had very different cultural and moral views on the subject. The scars of that conflagration remain today, but the legal and moral justification for slavery is no longer part of rational discourse. The idea that a large minority of the country's population should be denied fundamental rights cherished by the majority has been repudiated by legislation, court cases, and the Constitution itself. Despite the unequivocal rejection of slavery and institutional segregation, there remains a significant chasm between those who favor government intervention to ensure social or moral equality and those who would relegate the matter to individual conscience.

Today we face another acrimonious dispute that challenges historic fundamental principles regarding one of our most sacred and beloved institutions. The proposition that the definition of marriage transcends the union of a man and woman has been met with

a great deal of skepticism, and even hostility, by many who view themselves sympathetic to the plight of the millions of gay and lesbian Americans who lack legal recourse for the enforcement of critical rights. Already this debate has been at the forefront of presidential elections and has forced numerous states to amend their constitutions in a way that would proscribe same-sex marriages. But just as the slavery question could not be resolved by deferring the matter to the individual states, the issue of same-sex marriage may ultimately come down to a national moral consensus that both protects traditional marriage and accommodates those who, through no fault of their own, are excluded from the basic protections the institution affords. Though it is absurd to think that the current debate will lead to the kind of conflagration experienced in the nineteenth century, there can be no doubt that the continuing discord over this subject will challenge this nation for years to come.

Marriage has long been viewed as an institution created by the state for the benefit of the state and its citizens. Generally the federal government has been reluctant to intervene in a matter that is perceived to be within the exclusive province of the state. State laws regarding marriage have set forth qualifications

and procedures to ensure that important state interests are being met. Some of these laws focus upon the capacity and interests of the parties, while others are designed to protect third parties or society in general. To the extent that a marriage requirement only affects the interests of the parties, states have given the couple wide latitude to define such terms by contract prior to entering into the union. Traditional contract principles will usually dictate whether deviation from legally inferred rights and responsibilities will be permitted. Issues relating to qualifications and capacity to contract remain viable under these circumstances. With respect to matters that affect the benefits the state receives from marriage, each state has been free to scrutinize the relationship from the standpoint of its selfish concerns. It is only when individual liberty takes on Constitutional dimensions that state power to restrict or regulate marriage may be affected.

Arkansas now joins Alaska, Georgia, Hawaii, Kentucky, Louisiana, Kansas, Michigan, Mississippi, Missouri, Montana,

Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Texas, and Utah as states that have adopted Constitutional amendments that specifically ban same-sex marriage.<sup>1</sup> Campaigns for the adoption of these amendments were spawned out of concern that liberal judges would interpret existing laws and even existing constitutional provisions to extend equal rights and equal protections to couples of the same sex. While some states have taken this action to distinguish traditional marriage from other relationships that afford citizens essential rights comparable to those enjoyed by married couples, others have expressed total intolerance for civil unions, domestic partnerships, or any other legal relationship that accommodates gay and lesbian couples.

In 2004 the voters of Arkansas approved Amendment 83 that replicated existing statutory law to define marriage as only being a relationship between a man and a woman.<sup>2</sup> By doing this the state makes it clear that the term marriage may only apply to bi-sexual relationships, and any interpretation of stat-

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1. ALASKA CONST. art. 1, § 25; MISS CONST. art. 14, § 263A; MONT. CONST. art. XIII, § 7; NEV. CONST. art. 1, § 21; OR. CONST. art. XV, § 5(a). ARK. CONST. amend. 83, § 2 (prohibiting recognition of relationships “identical or substantially similar to marital status”); GA. CONST. art. 1, § 4 (prohibiting any “union between persons of the same sex”); KY CONST. § 233A (“A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”); LA. CONST. art. XII, § 15 (providing that “[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized”); NEB. CONST. art. 1, § 29 (nullifying all same-sex partnerships); N.D. CONST. art. XI, § 28 (“Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”); OKLA. CONST. art. II, § 35 (“Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.”); OHIO CONST. art. XV, § 11; UTAH CONST. art. 1, § 29; and 169 HAW. CONST. art. 1, § 23.

2. ARK. CONST. amend. 83, § 1.

utes or the state constitution must be consistent with this definition. Section 2 of the Amendment takes the existing statute one step further by stating that any legal status that is identical to, or substantially similar to marriage by “unmarried persons” will be deemed unconstitutional, except in the case of a couple common law married.<sup>3</sup> It is this language contained in Section 2 that presents the greatest potential for disagreement and litigation.

Because the Arkansas Constitution now prohibits the recognition of a legal status that even resembles marriage, individuals and couples who migrate to this state from states with civil unions and domestic partnerships face uncertainty regarding their status, property rights, and even parental rights. Laws initially designed to protect the integrity of marriage have now created confusion and instability, leaving children and dependent partners without legal recourse for rights that may exist in sister states.

The purpose of this paper is to examine the implications of the Same Sex Marriage phenomenon in Arkansas, and weigh its potential impact upon various aspects of family law. Although debate continues regarding moral and religious implications of sanctioning such unions, the principal focus here will be the ongoing restructuring and recognition of these relationships by other states and how it may impact Arkansas courts and Arkansas

citizens. In particular, there will be a brief glimpse at the kinds of problems that may confront the state, notwithstanding adoption of Amendment 83.

### **Early Battles Challenging Marriage Limitations**

#### **Minnesota**

As early as 1971 courts have confronted the question of whether a same sex couple could procure a marriage license. In *Baker v. Nelson*<sup>4</sup> two adult males applied for a marriage license in Minnesota and the clerk of the court refused. An action for a writ of mandamus was brought challenging the clerk’s action because there was no specific statutory prohibition to same sex marriages. The applicants argued that they were being denied a fundamental right guaranteed by the Ninth Amendment to the United States Constitution, and made applicable to the states by the Fourteenth Amendment. They also contended that they were being deprived of liberty and property without due process and denied the equal protection under the law.<sup>5</sup>

In refusing to accept the couple’s argument, the Minnesota Supreme Court pointed to the historic role of marriage in the preservation of society and discounted an extension of the definition through judicial legislation. The court specifically refuted the applicability

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3. ARK. CONST. amend. 83, § 2.

4. 291 Minn. 310 (1971).

5. 291 Minn. 310, 311.

of *Griswold v. Connecticut* as contrary authority to undermine the general procreative goal of marriage. By distinguishing the privacy surrounding procreative decisions within the marriage from the classification of persons who may be authorized to marry, the court avoided implications on the right to marital privacy. The court also dismissed *Loving v. Virginia* by finding that there is a clear distinction between marital restriction based on race and “based upon fundamental difference in sex.” A “commonsense” definition of marriage which is limited to a man and a woman does not violate the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.<sup>6</sup>

### Washington

In *Singer v. Hara*<sup>7</sup> two males in the state of Washington sought the protection of the state ERA to allow their marriage. They argued that the Amendment makes sex an impermissible legal classification, and therefore state law which permits a man to marry a woman but at the same denies him the right to marry another man is an unconstitutional classification based on gender. The state’s response pointed out that since all same sex marriages are illegal, and marriage licenses are denied equally to both male and female couples, there is no violation of the state’s ERA.<sup>8</sup>

The Washington state Court of Appeals found that the ERA afforded no protection unless the right to marriage was being de-

nied because of an individual’s sex. In *Singer* the court concluded that the denial of the marriage license was not based upon the gender of the applicants but upon the view that marriage is “the appropriate and desirable forum for procreation and the rearing of children.” Because same sex couples offer no possibility for the birth of children, the refusal to permit such unions is based upon the unique physical characteristics of the sexes rather than gender per se. The court further found that the denial of a marriage license did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because the exclusion of homosexual or same sex relationships does not create an inherently suspect legislative classification requiring strict scrutiny of the prohibition. Defining marriage as a union between one man and one woman was found consistent with “interests basic in our society.”<sup>9</sup>

### Hawaii

On May 1, 1991 two female couples and one male couple filed a complaint for injunctive and declaratory relief in the circuit court of the state of Hawaii seeking to declare the Hawaii marriage statute unconstitutional insofar as it is interpreted by the Department of Health to prohibit the issuance of marriage licenses to persons of the same sex.<sup>10</sup> They argued that the denial of marriage licenses to the plaintiffs violates their right to privacy as protected by article I, section 5 of the Hawaii

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6. See *Baker v. Nelson*, 291 Minn. 312-313.

7. 11 Wash. App. 247 (1974).

8. See *Singer v. Hara*, 11 Wash. App. 247, 253-254.

9. See *Singer v. Hara*, 11 Wash. App. 247, 259-260.

10. See *Baehr v. Lewin*, 74 Haw. 530 (1993).

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Constitution, and because they continue to suffer irreparable injury injunctive relief is appropriate.

John C. Lewin in his official capacity as Director of the Department of Health contested the complaint by arguing: 1) that the legislature contemplated marriage between a man and a woman; 2) the only legally recognized right to marry “is the right to enter a heterosexual marriage, there is no cognizable right, fundamental or otherwise, to enter into state-licensed homosexual marriages”; 3) the state’s marriage laws do not “burden, penalize, infringe, or interfere in any way with private relationships”; 4) the state is under no obligation “to take affirmative steps to provide homosexual unions with its official approval”; 5) the state’s marriage laws “protect and foster and may help to perpetuate the basic family unit, regarded as vital to society, that provides status and a nurturing environment to children born to married persons” and, in addition, “constitute a statement of the moral values of the community in a manner that is not burdensome to [the] plaintiffs”; 6) assuming the plaintiffs are homosexuals (a fact not pleaded in the plaintiffs’ complaint), they “are neither a suspect nor a quasi-suspect class and do not require heightened judicial solicitude”; and 7) even if heightened judicial solicitude is warranted, the state’s marriage laws “are so removed from penalizing, burdening, harming, or otherwise interfering with [the] plaintiffs and their relationships and perform such a critical function in society that they must be sustained.”<sup>11</sup>

After the circuit court’s dismissal of the complaint the Hawaii Supreme Court overturned the decision finding that the lower court determination was contrary to the

Hawaii Constitution’s equal protection clause based upon interpreting all of the factual allegations in the complaint as being true. The court rejected the notion that a right to same-sex marriage is so rooted in the traditions and collective conscience that “failure to recognize it violates fundamental principles of liberty and justice that lie at the base of all civil and political institutions.” The majority also refused to see a right to same-sex marriage as “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed,” and therefore refused to recognize a fundamental right to same sex marriage.<sup>12</sup>

Despite the failure to find a fundamental right to same sex marriage, the court decided that the plaintiffs were entitled to an evidentiary hearing to determine whether the state’s refusal to issue same sex couples marriage licenses violated the Equal Protections Clause of the Hawaii Constitution. The court found that homosexuals were indeed a suspect class for purposes of equal protections analysis and that strict scrutiny applies regarding classifications that apply to them. The state’s monopoly on marriage gives rise to a number of rights and benefits that are exclusively reserved to that relationship. Specifically cited by the court were: 1) a variety of state income tax advantages, including deductions, credits, rates, exemptions, and estimates; 2) public assistance from and exemptions relating to the Department of Human Services; 3) control, division, acquisition, and disposition of community property; 4) rights relating to dower, curtesy, and inheritance; 5) rights to notice, protection, benefits, and inheritance under the Uniform Probate Code; 6) award of child custody and support payments in

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11. *See* Baehr v. Lewin, 74 Haw. 530, 543-544.

12. *See* Baehr v. Lewin, 74 Haw. 530, 556-557.

divorce proceedings; 7) the right to spousal support; 8) the right to enter into premarital agreements; 9) the right to change of name 10) the right to file a nonsupport action; 11) post-divorce rights relating to support and property division; 12) the benefit of the spousal privilege and confidential marital communications; 13) the benefit of the exemption of real property from attachment or execution; and 14) the right to bring a wrongful death action. The case was then remanded to the lower court where the state had the burden of overcoming the presumption of unconstitutionality by showing that the restriction furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.<sup>13</sup>

After a finding by the circuit court that the state had not established a compelling state interest to justify denial of marriage licenses to same sex couples, and before the state Supreme Court could act, the Hawaii Legislature enacted laws which gave homosexual couples rights which closely resemble those usually limited to married couples.<sup>14</sup> For example, inheritance rights typically accorded to a spouse, workers' compensation survivorship rights, and wrongful death victim's rights are included. Despite the extension of these and other benefits, there was clearly no attempt to create a parallel institution to marriage. In fact, the state of Hawaii passed a constitutional amendment that preserves the right of the legislature to limit marriage to members of the opposite sex. This amendment led to the reversal of the earlier deci-

sions ruling same sex marriage restrictions unconstitutional.<sup>15</sup>

### Alaska

In 1995 after the Hawaii Supreme Court's decision in *Baehr v. Lewin* two men in Alaska applied for a marriage license based on the gender neutral wording in the statute. When their application was denied, Brause and Dugan sued the state seeking an injunction to prevent the denial of marriage licenses to couples of the same sex. Before a hearing on the matter could be held the state legislature had amended the statute to limit marriage to one man and one woman. The plaintiffs then argued that the state's refusal to issue the license denied them due process and affected their right to privacy under the Alaska Constitution. The superior court judge deciding the case rejected the state's definition of marriage and accepted the notion that the choice of a life partner is a fundamental right and state restriction could only be justified when there was a compelling state interest.<sup>16</sup>

The refusal of the Alaska Supreme Court to overturn the court's ruling, led to an attempt to amend the state constitution to ensure that only heterosexual couples could legally marry in the state. The Declaration of Rights provision in the state constitution was then amended to read that a marriage could only exist between a man and a woman. It further provided that other parts of the constitution must be interpreted to limit the definition of marriage in this way.<sup>17</sup>

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13. See *Baehr v. Lewin*, 74 Haw. 530, 560-561.

14. See HRS §§ 572C *et seq.*

15. 169 HAW. CONST. art. 1, § 23.

16. See Clarkson, Coolidge, and Duncan, *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 216-216 (discussing *Brause v. Bureau of Vital Statistics No. 3AN-95-6562 CI* (1998)).

17. 16 ALASKA L. REV. 213, 219.

### **The Defense of Marriage Act**

In 1996 Congress passed the Defense of Marriage Act<sup>18</sup> in direct response to the concern that marriage would be weakened through the inclusion of same-sex couples, and states would somehow be forced to recognize such unions. President Clinton approved the legislation as a compromise that might derail attempts to pass a federal constitutional amendment that would prohibit same-sex marriage. Passage of the law only brought questions regarding its interpretation and constitutionality under the Full Faith and Credit Clause.

Among the questions immediately presented by D.O.M.A.:

Is the federal government usurping the power of the states to define marriage?

Does the “federal” definition of marriage apply in all instances of matters relating to federal laws?

Will the federal government deprive couples of benefits conferred under state laws?

Must all cases that involve conflicting definitions of marriage be resolved in favor of the federal definition of marriage?

How does the Full Faith and Credit Clause affect rights and benefits derived from relationships inconsistent with the federal definition of marriage?

These and other questions caused even supporters of the law to question its constitutionality and effectiveness, therefore renewing calls for a federal marriage amendment.

### **The Civil Union Movement in Vermont**

Three same sex couples who had been denied marriage licenses in Vermont brought an action to compel state officials to do so. After having their cases dismissed by the trial court, the couples appealed to the Vermont Supreme Court, relying on a broad interpretation of the statute that would permit such unions. In this instance however, the court found the statute to be unambiguous, and ruled that the plain and ordinary meaning of marriage is a union of one man and one woman. To support this position the court pointed to consanguinity statutes which specifically prohibited marriages between males and females who were within close degrees of kinship. The court also pointed to other statutes which specifically referred to “husband and wife.”<sup>19</sup>

Despite the court’s unwillingness to accept a statutory interpretation of marriage that would allow same sex marriage, there remained the question of whether the state and federal constitutions prohibit the denial of marital rights and benefits to those who would otherwise not be ineligible for marriage. Rather than looking to the Equal Protections Clause of the U.S. Constitution, the court found more persuasive the Common Benefits Clause of the Vermont Constitution.<sup>20</sup>

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18. 28 U.S.C. § 1738C (1996).

19. *See Baker v. State*, 170 Vt. 194 (1999).

20. *Baker v. State*, 170 Vt. 194, 224-226.

After arguing that the denial of the marriage license violates their right to the common benefit and protection of the law guaranteed by Chapter I, Article 7 of the Vermont Constitution, the plaintiffs provided a non-exhaustive list of legal benefits to which they were excluded: 1) Access to a spouse's medical, life, and disability insurance policies; 2) Hospital visitation and medical decision making privileges; 3) Spousal Support; 4) Intestate Succession; and 5) Homestead protections.<sup>21</sup> They rejected any notion that their exclusion could somehow be related to a perceived state interest in child rearing and procreation, pointing to the many heterosexual couples who choose not to have children and the increasing number of same sex couples with children.

Shortly after the Vermont Supreme Court's decision to remand implementation of its interpretation of the Vermont Common Benefits Clause, the Vermont General Assembly enacted the Civil Unions Act.<sup>22</sup> This law created the status of "civil union" whereby two eligible persons could establish a relationship in which the rights, benefits, protections, and responsibilities would mirror those of heterosexual spouses. To be eligible for such a status the parties must be of the same sex, not be a party to an existing marriage or existing civil union, and fully meet all other requirements of a couple entering marriage.<sup>23</sup>

Essentially participants to a civil union enjoy all the "benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law," as a couple who are married.<sup>24</sup> Any reference at law made to a spouse, immediate family, dependent, or next of kin must now include a civil union partner. Common law and statutory obligations of spousal support extend to such partners. Laws relating to annulment, separation and divorce, child custody and support, and property division apply to civil union partners in the same fashion as married couples.<sup>25</sup> The law also mandates that civil union participants are treated as spouses under existing wrongful death, workers compensation, loss of consortium, and other tort actions.<sup>26</sup>

Vermont law makes it clear that a civil union couple must be treated as married in all matters within the state's authority and jurisdiction. Although the law remains silent on the extension of federal benefits to civil union partners, public assistance benefits apply, as do state and municipal tax laws.<sup>27</sup> Laws relating to spousal testimonial privilege, family and medical leave, decedent's estates, and adoption have equal application to civil union couples.<sup>28</sup>

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21. Baker v. State, 170 Vt. 194, 221.

22. VT. STAT. ANN. tit. 15, § 1202 (Supp. 2002).

23. VT. STAT. ANN. tit. 15, §§ 1202, 1203, 1204.

24. VT. STAT. ANN. tit. 15, § 1204(a).

25. VT. STAT. ANN. tit. 15, § 1204(d).

26. VT. STAT. ANN. tit. 15, § 1204(e).

27. VT. STAT. ANN. tit. 15, § 1204(e).

28. VT. STAT. ANN. tit. 15, § 1204(e).

**The Massachusetts “Shot  
Heard Round the World”**

In May 2004, Massachusetts accepted the notoriety of being the first and at the time, the only state in the union to recognize same-sex marriages. The Massachusetts Supreme Judicial Court’s decision that “a ban on marriage between same-sex couples works a deep and scarring hardship on a very real segment of the community for no rational reason” generated widespread alarm, discussion, debate, and celebration.<sup>29</sup> By finding that limits on protections, benefits, and obligations afforded through marriage deprived same sex couples of fundamental liberty and freedom, the court elevated the stakes, and changed the hypothetical to reality.<sup>30</sup>

One year after state recognition of same-sex marriage, more than four thousand seven hundred gay and lesbian couples were reported to have been married in Massachusetts.<sup>31</sup> In order to prevent couples from other states from rushing to Massachusetts to take advantage of this liberal interpretation of marriage law, the state made it clear that the status is reserved for its residents.<sup>32</sup>

**Same Sex Marriage in California**

Four years after the Massachusetts Supreme Court upheld same sex unions, the California Supreme Court followed suit by concluding that the “substance and significance of the fundamental constitutional right to form a family relationship” the California Constitution guaranteed this basic civil right to all its citizens, both heterosexual and homosexual.<sup>33</sup> The court’s ruling was met with joy by thousands and fear and disdain by many thousands more. The 4-3 decision by the court resulted in the issuance of thousand of marriage licences to gay and lesbian couples and legal recognition of same sex unions celebrated in California, without regard to permanent residence in the state.<sup>34</sup>

Even before the court’s ruling, conservative groups were organizing to pass an initiative that would ban same sex marriages.<sup>35</sup> Proposition 8, known as California Marriage Protection Act was submitted to the state’s voters for consideration in the 2008 general election. This proposition changed the state constitution to limit the definition of marriage to couples of the opposite sex, but left intact earlier laws that allowed for the for-

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29. Opinions of the Justices to the Senate, 440 Mass. 1201 (2004).

30. Opinions of the Justices to the Senate, 440 Mass. 1201, 1209.

31. *Same Sex Marriage*, THE BOSTON GLOBE, May 5, 2005, at 4.

32. Massachusetts has adopted the Uniform Marriage Evasion Act that provides “If a resident prohibited from marrying under the law of the state goes to another state for the purpose of avoiding this prohibition” such marriage will be deemed void.

33. *In re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384 (2008).

34. *See Blame Utah?*, LAS VEGAS LAW REVIEW-JOURNAL (Nevada) November 21, 2008 (placing the number of marriage licences granted to same sex couples in California six months after legalization at 18,000).

35. *See Prop. 8 Among Costliest Measures in History: Same Sex Marriage*, THE SAN FRANCISCO CHRONICLE, February 3, 2009, at B1.

mation of domestic partnerships.<sup>36</sup> Despite the fact that the proposition passed by a vote of 52% to 47% litigation ensued regarding whether the proposition constitutes a revision of the state constitution, requiring a two-thirds vote of both houses of the legislature, or merely an amendment to the constitution, obviating any need for legislative action.<sup>37</sup> The California Supreme Court recently found that the Proposition, as approved by the citizens of the state, represented an amendment to the state constitution and did not deprive the gay and lesbian community a fundamental right.<sup>38</sup> The court also concluded that such a change did not require legislative participation in the amendment process.<sup>39</sup> After considering the impact of Proposition 8 on same sex marriage, the court found the initiative to be a permissible amendment to the state constitution. In holding that Proposition 8 did not violate the separation of power doctrine nor infringe upon an inalienable right, the court effectively allowed same sex marriage in that state to end. The court did leave in effect the more than 18,000 same sex marriages that had taken place before its passage.<sup>40</sup>

As Massachusetts, California, and other states accept the inevitability of same sex marriage or alternative identical relationships, the time has come to evaluate the practical effects of broadening the traditional

institution of marriage on states which may be reluctant to embrace such unions. While some may view the matter as resolved by the Defense of Marriage Act (D.O.M.A.), it seems clear that interstate enforcement questions go well beyond state self-determination in defining marriage as a relation between a man and a woman. Personal and economic rights that accompany the civil status of marriage transcend state borders and bring into play Constitutional questions that will challenge our legal system for quite some time.

### **States Joining Massachusetts to Adopt Same Sex Marriage**

In *Varnum v. Brien* the Iowa Supreme Court affirmed a district court finding that the exclusion of gay and lesbians from civil marriage was a violation of equal protections under the state constitution. The Iowa statute that limited marriage to heterosexual couples deprived gay and lesbian partners benefits of marriage was not substantially related to any important governmental interest.<sup>41</sup>

Vermont became one of the first states to enact marriage equality through legislative action when the state General Assembly overrode a governor's veto and legalized same-sex marriage in that state. The law goes into effect on September 1, 2009.<sup>42</sup>

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36. Proposition 8 adds language to the state constitution that provides: "Only marriage between a man and a woman is valid or recognized in California."

37. See Goodwin Liu, *The Next Verdict on Prop. 8* LOS ANGELES TIMES, November 10, 2008, at A19.

38. *Strauss v. Horton*, 2009 Cal. Lexis 4626 (Cal. May 26, 2009).

39. *Id.*

40. *Id.*

41. *Varnum v. Brien*, 762 N.W.2d 862 (Iowa 2009).

42. 2009 Bill Tracking VT S.B. 115. General Assembly of the State of Vermont.

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In *Kerrigan v. Commissioner of Public Health* the Connecticut Supreme Court held that historic discrimination against gay men and lesbians did not permit the state to segregate heterosexual and homosexual couples into the separate institutions of civil unions and marriage.<sup>43</sup> Acknowledging sexual orientation as a quasi-suspect classification, the court found insufficient state justification for excluding same sex couples from marriage.<sup>44</sup>

On May 6, 2009 Maine's state legislature enacted a law redefining marriage to be a "legally recognized union of two people."<sup>45</sup> All references to marital partners in statutes, administrative or court rules, public policy, or common law were modified to be construed to be gender-neutral.<sup>46</sup> The statute also provides for the recognition of a same sex marriage validly created in another jurisdiction that permits such marriages.<sup>47</sup>

On June 3, 2009 New Hampshire became the sixth state to adopt same sex marriage when its governor signed into law legisla-

tion extending civil marriage to couples of the same gender.<sup>48</sup> The law exempts church-related organizations that serve charitable or educational purposes from providing insurance and other benefits to spouses of same sex marriage employees.<sup>49</sup> Couples who were already joined in civil unions will automatically be converted to civil marriage.<sup>50</sup>

### **Interstate and International Enforcement of Rights Stemming from Civil Unions and Same Sex Marriage**

The Full Faith and Credit Clause of the United States Constitution has been the guarantor of interstate recognition of court orders rendered by the sister states.<sup>51</sup> Because this provision only relates to judicial orders and has no application to legislative enactments, interstate recognition of marriage has had no Constitutional mandate.<sup>52</sup> In fact, states have routinely refused to acknowledge marital unions which were validly entered into in

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43. *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135 (Conn. 2008).

44. *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 173.

45. Sec. 2. 19-A ME. REV. STAT. ANN. § 650-A.

46. Sec. 2. 19-A ME. REV. STAT. ANN. § 650-A.

47. Sec. 3. 19-A ME. REV. STAT. ANN. § 650-B.

48. 2009 N.H. A.L.S. 59, 1.

49. 2009 N.H. A.L.S. 61, 2.

50. 2009 N.H. A.L.S. 59, 5.

51. Article IV, Section 1 providing "Full Faith and Credit shall be given in each State to the Public Acts, Records, and Proceedings of every other State."

52. See *Sutton v. Leib*, 342 U.S. 402 (1952) (holding that although an annulment compels other states to treat a marriage as void, it does not require elimination of other rights granted by law).

another state that may offend strong public policies of the forum.<sup>53</sup> When this occurs the parties' status remains fluid and dependent upon the laws and the policies of the state asserting jurisdiction.

Despite the latitude given to a state regarding recognition of the status, nonmodifiable orders, rendered by a court in another state and stemming from the status, would seem to require full faith and credit under the U.S. Constitution. For example, a property division, a probate court order, and an order stemming from a wrongful death or workers' compensation claim would be entitled to enforcement, without regard to the state law or public policies of the forum relating to the underlying marital status. Ex parte orders and other orders in which the court reserves the right to modify or accept jurisdictional challenges may not be accorded the same degree of respect.<sup>54</sup> Orders pursuant to marriages outside the United States are not entitled to the same Constitutional protections as their domestic counterparts.

Enforcement of a foreign order is not tantamount to recognition of the status. Other rights which may be enforceable in the state creating the status may not be protected when the strong state interests of another are adversely affected. For example, enforcement of a foreign order dividing property upon divorce can be accomplished without formal recognition of the status itself. On the other hand, enforcement of an ongoing "spousal" support obligation seems dependent on acknowledgment of the public policies embraced by the state through the status. In the same way an

Arkansas court may consider enforcement of a "premarital" contract arising out of the laws of a sister state as enforceable without offending the proscriptions in the Arkansas Constitution.

Of course there are any number of other questions that remain unanswered as Arkansas attempts to reconcile its position with states according legal rights to same-sex couples. For instance, if someone has entered into such a relationship in a state recognizing a legal status, is that person qualified to enter into marriage in Arkansas without first obtaining a divorce or dissolution of the status? How would Arkansas resolve child custody and child support matters of same-sex couples from these states? To what extent would Arkansas be unwilling to enforce a support obligation when the immediate implication is state responsibility for a dependent partner? In a wrongful death automobile accident occurring in Arkansas involving a same sex couple from Vermont or Massachusetts, would the Arkansas court allow a survivor the status of a beneficiary spouse?

### Pure Speculation

States have traditionally recognized out of state marriages that did not comply with local law so long as they did not offend some strong public policy. Underage marriages and common law marriages are two examples of such tolerance, while incestuous marriages have generally been viewed as repugnant, without regard for their legality in the place of celebration. Amendment 83 seems to be a clear

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53. Each state is free to enact its own laws regarding qualifications for marriage. Arkansas has specifically provided in 9-11-107 that "All marriages contracted outside this state which would be valid by the laws of the state or country in which the marriages were consummated and in which the parties then actually resided shall be valid in all the courts of this state." The statute goes on to say, "This section shall not apply to a marriage between persons of the same sex."

54. *Williams v. North Carolina*, 317 U.S. 287 (1942).

## CIVIL UNIONS AND SAME SEX MARRIAGE

articulation of a strong public policy against same sex marriage and marriage-like relationships. If we assume that such relations will be viewed in the same light as incestuous marriages, there is little hope that critical legal rights emanating from those relationships may be enforced in this state.

On the other hand, the degree of repugnance for same sex relationships, though not favored in this state, may be considerably less than incestuous marriages and therefore does not mandate the same degree of intolerance. Whereas incestuous marriages have been rejected by every state and most Western nations, same sex unions are becoming common in the United States and Canada. Quite possibly Arkansas courts could interpret Amendment 83 as allowing enforcement of rights that have little or no impact upon the state or Arkansas residents. Another alternative interpretation would allow for the enforcement of economic rights and obligations generated by relations existing outside the state.

In dealing with incestuous marriages, Arkansas has taken the position that marriages between first cousins, though specifically prohibited by statute in this state, will be recognized if valid in the state where it was celebrated.<sup>55</sup> It should, however, be noted that the court's decision was based upon the fact that such marriages do not create "much social alarm" and can therefore be tolerated.<sup>56</sup> With the growing number of states enacting constitutional amendments and statutory provisions banning same sex marriage, it is

doubtful that the social alarm from recognition of the marriage itself can be ignored. On the other hand, the growing trend to extend legally enforceable rights to same sex partners suggests that there may be room for the enforcement of rights without acknowledgment of the status. The critical concern here is separating the rights from the status.

Although it is clear that Arkansas' Constitution will not permit recognition of same sex marriage or "relations that resemble marriage," it is possible that the state's courts and governmental agencies will enforce rights that accrue in a state that creates and embraces the status. The status of marriage exists where either spouse resides. When one spouse is domiciled in a state that recognizes same sex marriage and the other spouse has sought a "safe haven" in Arkansas, it seems incomprehensible that this state would permit such a sanctuary. On the other hand, when both parties leave the jurisdiction that conferred the status to take up residence in Arkansas, will Arkansas courts hold that they left the status behind? Certainly when they bring judicial orders from such states based on the status, there seems to be no choice but to enforce them.

Recently the voters of Arkansas approved a measure that bans adoption and foster care parenting for "unmarried couples."<sup>57</sup> This initiative was primarily targeted toward gay and lesbian couples, but also applied to unmarried heterosexual couples. An early test of the parameters of the Arkansas Constitutional Amendment banning same sex marriage may

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55. *Ethridge v. Shaddock*, 288 Ark. 481 (1986).

56. *Ethridge v. Shaddock*, 288 Ark. 481, 482.

57. Arkansas Initiated Act 1 of 2008.

come when a same sex couple from out of state with an adopted child attempts to enforce parental rights in Arkansas. Of course Arkansas would be bound to accord full faith and credit to the adoption, but would rights of the couple now residing in Arkansas be governed by the laws of this state, even when such application may necessitate recognition of the foreign union? Although a court would likely conclude that the law prohibits the couple from adopting a child in this state, the enforcement of rights and responsibilities stemming from the out of state adoption seems obvious.

To date, Arkansas' appellate courts have been silent on whether a contract between unmarried couples may be enforced. In 2002 the Arkansas Supreme Court ruled that criminal statutes penalizing adults for consensual sexual behavior is an unconstitutional violation of the state equal protections clause. One year later the U.S. Supreme Court found a similar violation of the U.S. Constitution. Decriminalization of sexual conduct makes problematic a deprivation of fundamental liberties based upon sanctioned behavior. It can be argued that one such right given to a competent adult is the freedom to contract. Isolating meretricious services from contracts entered into by unmarried cohabitants offers the state an opportunity to protect the legitimate expectations of the parties without involvement in the more intimate intricacies of the relationship.

### **Conclusion**

Through its Constitutional Amendment ban of gay marriage, Arkansas has drawn a line in the sand that was designed to ex-

press intolerance for foreign, legally sanctioned same-sex relationships of any kind. This myopic approach discounts the fact that marriage and similar relations are not just about rights and privileges, but they allow for the delegation of numerous responsibilities, and they promote and facilitate social order. States recognizing same-sex relationships through civil unions and domestic partnerships acknowledge the potential benefits of interpersonal accountability, realizing that any deleterious impact that there may be on heterosexual marriage is more imagined than real.

Arkansas and the other states that have constitutionally prohibited same sex marriages cannot escape the reality that the genie is now out of the bottle. Whether these marriages are celebrated in the state or not, courts must be prepared to deal with the legal issues facing these unique families as they migrate here. Recognition that strong, lasting marriages based on mutual support and commitment strengthen our society will make acceptance of the new paradigm easier.

Just as this country's first Civil War was due to our reluctance to see the futility and immorality of slavery, the national furor over same-sex marriage-like relationships may someday seem incomprehensible and irrational. As there were once free states and slave states, for the next several years we are likely to see two irreconcilable approaches to marriage and family in this country. Ultimately the matter will be resolved by the realization that an institution that is valued by so many should be extended to all who are willing to abide by its tenets.

## Arkansas' Sargasso Sea<sup>1</sup> of Lesser-Included Offenses: The Difficulty In Applying the Elements Test for Admissibility of a Lesser Included Jury Instruction to Arkansas' Sexual Assault Statutes



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Any parent would have difficulty imagining this scenario: a nine-year-old girl named Christy went swimming at her grandmother's pool. While she was there, the pool man arrived to service the pool. According to Christy, the pool man cornered her, placed a plastic bag in front of her face, put his hand in the bottom of her swimsuit, and inserted his finger into her vagina. Christy testified that he also "took his

other hand and put it inside his pants, . . . moving his hand around." She said the assault lasted between five and ten minutes. After it was over, she said the pool man grabbed her and told her not to tell anyone what had occurred.

Christy did not tell anyone about the assault for years, during which time she suffered from anxiety and nightmares from the attack. Five years later, Christy told her story to a

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1. The phrase was used by Chief Justice Rehnquist as he described the difficulty in determining both the application and the availability of lesser included offenses under the Supreme Court's statutory elements test: they are "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Chief Justice Rehnquist, *Albernaz v. United States*, 450 U.S. 333, 343 (1981).

friend, who alerted her parents, and eventually the pool man was arrested. The defendant told the investigating officers that he remembered touching her, and rubbing his hand over her vagina, but denied penetrating her with his finger.<sup>2</sup>

If this crime had happened in Arkansas, the pool man would have been arrested and charged with rape: the victim was under the age of 14, and penetration would qualify as that sort of deviate sexual activity contemplated under the statute.<sup>3</sup> Rape is a class Y felony, the most serious felony classification. If the defendant's version of events that penetration did not occur was the one the jury believed, he would not be guilty of rape, although he would be guilty of a lesser sexual assault crime. Under current Arkansas law, however, it would be difficult for this defendant to get a jury instruction on an appropriate lesser charge.

The Arkansas sexual assault statutes describe several quite specific offenses for sexually based crimes.<sup>4</sup> The statutes contain a variety of specifically graduated offenses, with several sections and subsections drafted to apply to conduct against minors.<sup>5</sup> In many of these strict liability provisions, the statute defines the minimum or maximum age of either the perpetrator, or the victim, or both, as a specific element of the crime. In the scenario above, Christy, at age nine, would fall within the specified age to be a victim of either statutory rape or of several lesser sexual assault crimes. The defendant's age, however, would be relevant, and perhaps determinative, of whether a lesser included instruction would be allowed. The Code provisions contain both overlaps and gaps that make it difficult to determine which charge would be appropriate. Even a difference of one or two years could be significant.

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2. These facts were the basis for the charges in *Friley v. State*, 856 So. 2d 664 (Miss. Ct. App.), *rev'd on appeal*, 879 So. 2d 1031 (Miss. 2004). There, the defendant was indicted for sexual battery. The trial court allowed defendant's requested jury instruction on a lesser charge of molestation. Believing his story, the jury convicted defendant of molestation rather than sexual battery. The State appealed, arguing that defendant should not have received the lesser included instruction. The Court of Appeals agreed, claiming that while the elements overlapped, the lesser charge was not appropriately a lesser included offense of the greater one. 856 So. 2d at 665. In a cogent dissent, three judges argued that molestation was a lesser included offense of sexual battery, despite the differing statutory language of the offenses, and asserted that the court should allow the instruction to "give proper construction to these statutes that provide for progressive punishment for progressively worse crimes." *Id.* at 666. The Mississippi Supreme Court adopted the dissent's analysis in its entirety, noting that defendant "was indicted for sexual battery, which requires penetration. He was convicted of molestation, which requires touching. A plain reading of the statutes shows that sexual battery (penetration) includes molestation (touching). It is impossible to penetrate without touching." 879 So. 2d at 1034. The court drew a "reasonable inference" that the defendant acted to gratify his lust, and although the molestation statute required a showing of intent and the sexual battery statute did not, by grabbing Christy, touching her genital area, and touching himself, he was gratifying his lust. "There is absolutely no other reason why defendant would have performed these acts." *Id.* The court allowed his conviction for the lesser charge of molestation to stand.

3. ARK. CODE ANN. § 5-14-103.

4. ARK. CODE ANN. §§ 5-14-101 *et seq.* The General Assembly specifically drafted the statutes to both proscribe particular conduct, as well as classify perpetrators and victims based on age, status, and relational elements. Many of the statutes contain specific age limits, rather than age ranges. A review of the overall statutory coverage for sexual assault crimes indicates that the related statutes contain both gaps and overlaps. If the General Assembly were to revise the statutes so that they described age ranges rather than age limits for each offense, the statutes would be more clear.

5. *Id.*; see *infra* note 122 and accompanying text.

## ARKANSAS' SARGASSO SEA OF LESSER-INCLUDED OFFENSES

If, for example, the pool man were age 18 or older, he might obtain an instruction of sexual assault in the second degree, a Class B felony, for touching Christy's genital area but not digitally penetrating her, as he would have engaged in sexual contact with someone under age 14.<sup>6</sup> If he were a minor, under age 18, and had sexual contact with someone age 14, it would be a class D felony.<sup>7</sup> And if he were over age 20, he might seek an instruction for the lesser charge of sexual assault in the fourth degree, for engaging in sexual contact with someone who is less than 16.<sup>8</sup> That degree of sexual assault is a Class A misdemeanor.

The misdemeanor charge would not be available to him if he were 18 or 19 years old; it is only available to someone over the age of 20 who engages in the proscribed conduct, due to a gap in the statutory coverage.<sup>9</sup> One of the more troubling gaps in the Arkansas statutes is demonstrated when a nineteen-

and-a-half-year old perpetrator of a sexual assault against a 15-year old victim could be convicted of a more serious offense than a twenty-year old perpetrator doing the same thing.<sup>10</sup>

Any discussion as to which lesser instruction might be allowed is an academic one, however, under current Arkansas law. The pool man likely would not be allowed a lesser included instruction at all, since Arkansas has adopted the "elements" test<sup>11</sup> to determine when to allow a lesser included instruction, and the elements of rape, sexual assault in the second degree, and sexual assault in the fourth degree differ. Because the lesser degree sexual assault statutes contain an element—the age of the perpetrator—not found in the rape statute, a court is likely to disallow the instruction, even if the evidence presented at trial suggests that defendant's conduct more appropriately fits the lesser crime.<sup>12</sup>

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6. *Id.* at § 5-14-125. "Sexual contact" is defined in § 5-15-101(9) as "any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female." "Deviate sexual activity" requires some finding of penetration. *Id.* at § 5-14-101(1).

7. *Id.* at § 5-14-125(b)(2).

8. *Id.* at § 5-14-127.

9. Arkansas State Senator Ailes proposed a statutory amendment to the sexual assault in the fourth degree statute in the General Assembly's 2009 legislative session in S.B. 21 which would have closed this particular gap by increasing the threshold age of victims to age 17, but the bill died in Senate Committee at Sine Die adjournment. *See* Arkansas State Legislature website at <http://www.arkleg.state.ar.us> Other sections of the Arkansas sexual assault statutes were amended as recently as April 2009, in S.B. 410 (now Act 748), to define a "minor" as someone "over age 18," but to date, a more comprehensive review of the statutes to address these confusing gaps and overlaps has not occurred. *See id.*

10. Affirmative defenses based on the proximity in age between perpetrator and victim are included in Arkansas' other sexual assault statutes. For example, if the perpetrator is a minor and is charged with sexual assault in the third degree, he is entitled to an affirmative defense that he is three or four years older than the victim, depending on the victim's age. ARK. CODE ANN. § 5-14-125(a)(5)(B)(i)-(ii). There is not an affirmative defense to this crime available to those over the age of majority, defined as over age 18.

11. The Arkansas Code defines a lesser included offense as one that "is established by proof of the same or less than all of the elements required to establish the commission of the offense charged." ARK. CODE ANN. § 5-1-110(b)(1). Arkansas also recognizes two other categories of lesser included instructions, as described *infra* at note 96, which do not impact this analysis.

12. *See infra* text accompanying notes 130-141.

In addition, if the pool man had denied touching Christy at all, he would not be allowed a lesser included instruction under current law. Arkansas courts have determined that if a defendant denies a charge in its entirety, there is no rational basis to allow a lesser instruction.<sup>13</sup>

The illustration above demonstrates the inherent conflict between Arkansas' sexual assault statutes and the state's lesser included instruction doctrine. Arkansas courts have repeatedly stated that they liberally allow lesser included instructions, and numerous decisions suggest that a lesser-included charge should always be included in a charge to a jury to enable it to convict a defendant based on the specific criminal conduct described at trial.<sup>14</sup> Under Arkansas law, the doctrine of lesser included offenses authorizes a jury to convict a defendant of any offense "included in another offense" in a crime charged in an indictment.<sup>15</sup>

But the courts have demonstrated the difficulty in applying this standard to Arkansas' sexual assault statutes. Over the past two decades, Arkansas courts have disallowed lesser included instructions in sexual assault crimes several times based on a narrow comparison of statutory language,<sup>16</sup> declining to analyze the availability of a lesser included instruction in sexual assault cases beyond a comparison of the statutory elements of the age of the perpetrator or the victim of a

sexual crime. Defendants who meet the statutory definition or age range to be charged under a lesser offense are typically precluded from obtaining an instruction on that lesser charge, if the larger offense does not contain a corresponding age range as well, even if the evidence at trial describes conduct that more properly is described in the lesser charge.<sup>17</sup>

It may be impossible to reconcile the current lesser included instruction standard, which allows a lesser charge "included within another offense," with the sexual assault statutes, where the lesser crimes contain additional status-based requirements not found in the greater charge. A strict reading of the lesser included instruction standard would therefore disallow the lesser included instruction, limiting courts in their ability to allow a lesser charge. The goals of the lesser included instruction doctrine are frustrated if a lesser charge in a larger statutory scheme cannot ever be given.

Policy favors a more flexible approach than the strict application of the elements test currently employed by the courts to determine whether to allow a lesser included instruction in a sexual assault case. Because the General Assembly specifically drafted the statutes to both proscribe particular conduct and classify perpetrators and victims based on age, status, and relational elements, many of the statutes contain minimum and maximum age limits, rather than age ranges. But

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13. See *infra* text accompanying notes 142-178.

14. See *infra* text accompanying notes 96-119.

15. See ARK. CODE ANN. § 5-1-110(b). The full text of that subsection is set out *infra* at note 96.

16. See *infra* text accompanying notes 130-141.

17. *Id.*

a review of the entire sexual assault provisions reveals that the overall statutory coverage for sexual assault crimes contains some gaps and overlaps.

Courts should be allowed to apply an integrated approach that furthers the goals of both the lesser included instruction doctrine and the sexual assault statutes. A conviction should rest on evidence supporting a particular charge of a violation of a specific statute. Juries should be allowed to hear and review the evidence and determine which crime best fits the facts presented to it. Therefore, the jury should be instructed on lesser-included offenses, where the evidence supports them, to preserve the integrity of a jury trial and the reliability of its outcome.

A comparison of the lesser included doctrine and the Arkansas sexual assault statutes presents a second concern. Currently, Arkansas courts routinely disallow lesser included instructions to criminal defendants who are accused of a serious sexual assault charge, and who assert innocence to the charges, under the theory that their denial does not provide a “rational basis” to allow a lesser included instruction. The unavailability of a lesser charge conflicts with a principal function of the lesser-included offense doctrine, which is to allow a jury to associate the defendant’s conduct with the crime.

This Article suggests, first, that Arkansas courts’ strict adherence to specific age-based classifications or elements of a sexual assault charge under the elements test is too limit-

ing. Further, the courts’ denial of a lesser included instruction where a defendant has pleaded innocent to the charges is not rational. Both situations conflict with Arkansas’ liberal lesser included offense doctrine. Part I of the Article will explain the doctrine of lesser included offenses in general. Part II will consider competing definitions of lesser included offenses and will examine problems with the elements test. Part II will discuss Arkansas’ approach to lesser included offenses in general. Part III will describe the problems that have developed as the doctrine is applied to Arkansas’ sexual assault statutes under the elements test, and when a defendant pleads not guilty to a sexual assault charge. Part IV will offer proposals for change.

## I. The Doctrine of Lesser-Included Offenses

### A. Background and Overview

Both commentators and courts have noted that few areas of the law have caused as much confusion as when and under what circumstances a judge should put forth an instruction to a jury on a lesser-included offense.<sup>18</sup> The doctrine of lesser included offenses, developed at common law, provides that a criminal defendant may be convicted at trial of any crime supported by the evidence which is “less than, but included within, the offense charged by the prosecution.”<sup>19</sup>

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18. LAFAVE, *CRIMINAL PROCEDURE*, 2d ed., § 24.8(D), *Lesser-Included Offenses Generally*; see also Amanda Peters, *Thirty-One Years in the Making: Why the Texas Court of Criminal Appeals’ New Single Method Approach to Lesser-Included Offense Analysis Is A Step In The Right Direction*, 60 *BAYLOR L. REV.* 231, 232 (2008); Michael H. Hoffheimer, *The Future of Constitutionally Required Lesser Included Offenses*, 67 *UNIV. PITT. L. REV.* 585, 588 (2006) [hereinafter *The Future*]; Koenig, *The Many-Headed Hydra of Lesser-Included Offenses: A Herculean Task for the Michigan Courts*, 1 *DET. C.L. REV.* 41, 52 (1975); Comment, *The Lesser Included Offense Doctrine in Iowa: The Gordian Knot Untied*, 59 *IOWA L. REV.* 684, n.5 (1974).

19. James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 *MARQ. L. REV.* 1, 6 (1995).

The doctrine developed as a way of limiting multiple prosecutions because most criminal conduct violates more than one section of a state's criminal code. A lesser included offense instruction allows a jury to find a defendant guilty of an offense which is supported by the evidence and "included in another offense with which he or she is charged."<sup>20</sup> It serves a number of functions. It enables a jury to consider if a defendant is guilty of less serious crimes than those named in the indictment, provided the crimes are lesser included offenses. Thus, depending on a particular state's law, a jury may find a defendant who is charged with armed robbery guilty of simple robbery; a defendant charged with robbery guilty of larceny or assault; or a defendant charged with aggravated assault guilty of simple assault, based upon the evidence presented.<sup>21</sup> It allows for joinder of offenses without requiring a separate indictment, and it gives defendants notice that they may be tried for a lesser charge that is not specifically named in an indictment for a greater one.<sup>22</sup> It also prevents multiple prosecutions for some closely related crimes.<sup>23</sup>

The doctrine benefits both parties to a criminal proceeding. It benefits prosecutors by allowing them to proceed to trial without reindicting or amending indictments.<sup>24</sup> It also benefits defendants by allowing them to request an instruction on a lesser crime that

may be more appropriate, which can reduce the pressure on juries to convict on a more serious crime.<sup>25</sup>

But the doctrine can cause problems. For example, given the option of convicting on either a greater or a lesser charge, a jury could avoid its responsibility to evaluate the facts presented by the witnesses at trial, and could compromise the verdict by convicting of the lesser offense rather than finding all of the elements of the charged offense. In cases with strong inculpatory evidence, prosecutors typically want to avoid lesser included offense charges to reduce this risk. And in cases with strong exculpatory or mitigating evidence, a defendant may want to avoid a lesser included offense charge, hoping the jury, faced with the all-or-nothing choice of convicting of the serious crime, will acquit.<sup>26</sup>

In addition, the doctrine is confusing and can be difficult to apply. Although it provides the benefits described above, its primary weakness may be that it also provides insufficient protection against convictions for crimes where the jury could reasonably have found for the defendant on a lesser charge, but is unable to do so as the lesser offense fails to qualify as a lesser included offense. This is often the case where the lesser crime does not meet the statutory definition of a lesser included instruction, as shown below.

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20. ARK. CODE ANN. § 5-1-110(b); see *infra* note 96 and accompanying text.

21. See generally Michael H. Hoffheimer, *Lesser Included Offenses in Mississippi*, 74 MISS. L.J. 135, 140 (2004)[hereinafter *Lesser Included*].

22. *Id.* at 141.

23. The Double Jeopardy Clause prevents a defendant from being tried twice for the same offense. U.S. Const. amend. V ("(N)or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . ."). In addition, the United States Supreme Court held in *Blockburger v. United States*, 284 U.S. 299 (1932), that greater and lesser included offenses are part of the "same offense" under the clause. *Id.* at 304. Accordingly, a defendant could not be first tried for armed robbery and later tried for larceny, or vice versa.

24. Hoffheimer, *Lesser Included*, *supra* note 21, at 144-45.

25. *Id.* at 145.

26. See *infra* note 171, describing an Arkansas case analyzing this scenario.

## B. Defining Lesser Included Offenses

### 1. The Various Approaches

Jurisdictions split over both the definition and application of lesser related offense rules.<sup>27</sup> Adding to the confusion are the numerous definitions for the doctrine. Commentators cannot agree on the number of approaches available to define lesser included instructions. Some have identified three methods to analyze lesser-included offenses,<sup>28</sup> others describe four methods,<sup>29</sup> and still others have said there are as many as

five,<sup>30</sup> although the fourth and fifth methods appear to be variations on three primary approaches. The first two are commonly referred to as the “statutory-elements” and the “cognate-pleadings” tests. The third focuses on the proof that is presented at trial, so is referred to as the “evidence” approach.<sup>31</sup>

The statutory elements approach is the original common law approach,<sup>32</sup> and is now the approach used by the federal courts and a majority of state courts,<sup>33</sup> including Arkansas. It is described as the simplest and most straightforward approach. Under this approach, a greater charged offense must con-

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27. See generally Russell G. Donaldson, Annotation, *Lesser-Related State Offense Instructions: Modern Status*, 50 A.L.R. 4th 1081 (1986 & Supp. 2004).

28. The following commentators have identified three approaches: Shellenberger & Strazzella, *supra* note 19, at 8-13 (describing the “statutory elements approach,” the “pleadings approach,” and the “evidence approach”); Christen R. Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM. CRIM. L. REV. 445, 447-52 (1984) (discussing the strict statutory interpretation, “cognate theory, and Model Penal Code” approaches).

29. At least one commentator identified a fourth approach: Peters, *supra* note 18, at 231 (describing the differences between the strict-statutory, cognate-pleading, cognate-evidence, and inherently-related approaches to lesser-included offense analyses). This approach, a “cognate test,” identifies lesser-related offenses (as opposed to lesser-included offenses) using either the evidence approach or the pleadings approach. Patrick D. Pflaum, Comment, *Justice is Not All or Nothing: Preserving the Integrity of Criminal Trials Through the Statutory Abolition of the All-or-Nothing Doctrine*, 73 U. COLO. L. REV. 289, 297 & n.40 (2002); Catherine L. Carpenter, *The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 AM. J. CRIM. L. 257, 266 (1999); Shellenberger & Strazzella, *supra* note 19, at 13 & n.25 (citing *United States v. Schmuck*, 489 U.S. 705 (1989)). Under this approach, the lesser offense is “not necessarily included within” the greater offense although lesser-included offenses have all of the elements that the greater offense has. *Id.*

30. Others describe a “hybrid approach,” a two-tiered approach combining aspects of the other four approaches. Pflaum, *supra* note 29, at 295-98 & n.44; Carpenter, *supra* note 29, at 269-71. Under the first tier, a trial judge must give a statutorily defined “necessarily-included offense” instruction if the parties properly request it. *Id.* Under the permissive second tier, a judge could instruct on those lesser-related cognate offenses “that bear a sufficient relationship to the principal charge in that ‘they are in the same class or category, protect the same societal interests as that offense, and are supported by the evidence adduced at trial.’” *Id.* Such lesser-related offenses, however, must have support in the evidence and be consistent with the defendant’s theory of the case. This approach has only been adopted in a limited number of jurisdictions, including Michigan and Florida. Pflaum, *supra* note 29, at 297-98.

31. LAFAVE, *supra* note 18, at § 24.8(D). For a more detailed analysis of the various approaches to the lesser-included offense instruction, see generally Carpenter, *supra* note 29, at 262-73; Shellenberger & Strazzella, *supra* note 19, at 7-13; Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOK. L. REV. 191, 191 (1984).

32. Carpenter, *supra* note 29, at 265 n.20 (citing 4 WHARTON’S CRIMINAL LAW AND PROCEDURE § 1799 (12th ed. 1932)).

33. LAFAVE, *supra* note 18, at § 24.8(e); see also Shellenberger & Strazzella, *supra* note 19, at 8; Carpenter, *supra* note 29, at 265.

tain every single one of the elements of a lesser offense.<sup>34</sup> In other words, under a state's criminal code, the lesser offense will have all but one or two of the elements of the greater offense. Lesser-included offenses within this definition are sometimes called necessarily included offenses because it is almost impossible to commit the greater offense without committing the lesser offense.<sup>35</sup> The test was first adopted by the United States Supreme Court in *Blockburger v. United States*,<sup>36</sup> and the test is now applied throughout the federal system and adopted in Federal Rule of Criminal Procedure 31(c) based on the Court's decision in *Schmuck v. United States*.<sup>37</sup> In *Schmuck*, the Court praised the elements approach for judicial economy:

[T]he elements test is far more certain and predictable in its application than the inherent relationship approach. Because the elements approach involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial, the elements approach permits both sides

to know in advance what jury instructions will be available and to plan their trial strategies accordingly. The objective elements approach, moreover, promotes judicial economy by providing a clearer rule of decision and by permitting appellate courts to decide whether jury instructions were wrongly refused without reviewing the entire evidentiary record for nuances of inference.<sup>38</sup>

Similarly, lower courts have noted the "significant advantages of judicial economy and certainty" provided by the elements test.<sup>39</sup>

Under the elements test, courts look only at the legal definition of the crimes. The trial court must break down each offense by reference to its elements, without looking to how the offense may have been committed in the particular case, and ask whether it would be impossible to commit the higher offense without also committing the lesser offense.<sup>40</sup> Therefore, a lesser crime may or may not be a lesser included offense depending on what crime was charged and how the particular statute defined the crime, because the elements of the lesser included instruction must

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34. One commentator described the elements approach as a "bright line" test, necessary to put criminals on "notice" as required by the Due Process Clause. Carpenter, *supra* note 29, at 265.

35. Carpenter, *supra* note 29, at 301 & n.20

36. 284 U.S. 299 (1932). The test is frequently referred to as the "*Blockburger* test." The federal courts applied the *Blockburger* test as the standard for determining when related crimes form part of the same offense so that the Constitution prohibits a state from imposing separate punishments. The *Blockburger* test establishes that offenses are the "same offense" for purposes of double jeopardy analysis unless "each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. See Hoffheimer, *Lesser Included*, *supra* note 21, at 178 & n.191.

37. 489 U.S. 705, 716-17 (1981) ("We now adopt the elements approach to Federal Rule of Criminal Procedure 31(c)."). The Court repeated prior definitions that a lesser included offense must include some but not all of the elements of the greater offense and must require proof of no element that the greater offense does not, holding "[w]here the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c)." See also Pflaum, *supra* note 29, at 289; Ettinger, *supra* note 31, at 198-99.

38. *Schmuck*, 489 U.S. at 716-17.

39. See generally LAFAYE, *supra* note 18, at § 24.8(e).

40. *Id.*

be included within the statutory definition of the crime charged.

Constitutional implications of the lesser included doctrine have led the Supreme Court to adopt the elements test in many contexts. The Court has employed the test for purposes of double jeopardy analysis in *Blockburger*;<sup>41</sup> to set limits on cumulative punishment and multiple prosecutions; to prohibit an all-or-nothing situation in capital cases in *Beck v. Alabama*,<sup>42</sup> and as a part of Sixth Amendment right to counsel analysis in *Texas v. Cobb*.<sup>43</sup> Although the elements test is now a settled principle in these constitutional contexts, it is also difficult to understand or apply in those cases.<sup>44</sup> Despite the constitutional implications in some contexts, the elements text is not necessarily the most appropriate

standard to use in routine criminal cases.<sup>45</sup> It reduces the scope of crimes that qualify as lesser included offenses, thereby reducing the range of cases in which constitutional principles interfere with state criminal process.

Until quite recently, the elements test was the minority approach. It is now utilized in the majority of state courts today.<sup>46</sup> Its growing popularity may be a result of the Supreme Court's adoption of the test in constitutional contexts,<sup>47</sup> either as state courts became familiar with the test as it related to double jeopardy challenges, or because it was adopted as the test in federal criminal cases.<sup>48</sup> States may also have adopted the test to avoid the unpredictable results of the pleadings and evidence tests. This overall shift from the minority approach into the predomi-

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41. See Pflaum, *supra* note 29, at 299.

42. 447 U.S. 625 (1980). In *Beck*, the Supreme Court held that, under certain circumstances, lesser included offense instructions are constitutionally required. *Id.* at 638. There, the defendant was convicted of capital murder for the intentional killing of a robbery victim. Under Alabama law, non-capital felony murder was a lesser included offense, but Alabama criminal procedure prohibited the submission of lesser offense instructions in a capital case. *Id.* at 627-28. The Court held that a lesser instruction was required, *id.* at 638, based on its concern that its omission would present the jury with the all-or-nothing choice of either convicting or acquitting. *Id.* at 626.

43. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. 351, 405 (2005) [hereinafter *Rise and Fall*].

44. See, e.g., *infra* note 82 and accompanying text.

45. Hoffheimer, *Rise and Fall*, *supra* note 43, at 405, in which the author provides a thorough analysis of the constitutional dimensions of the elements test, and suggests that although the test plays a distinct role in constitutional jurisprudence, and there are compelling arguments for the Court to adopt such restrictive test of lesser included offenses in constitutional contexts, it may be too restrictive for state criminal cases.

46. See *id.* at 411-412, citing to several commentators who described the shift in the elements test from the minority position in the early 1970s to an established position in the mid-1990s. Professor Hoffheimer notes that as recently as 1995, commentators did not identify the elements test as the majority approach, nor did they recognize any trend towards the adoption of the elements test, and courts discussing splits among jurisdictions also failed to identify either a clear majority or strong trend. See *id.* at 411-12 & nn. 252-53.

47. See *id.* Although many commentators suggest that, based on *Blockburger* and its progeny, the elements test for lesser included instructions is a constitutional mandate requiring states to adopt the *Blockburger* double jeopardy test as their state law approach for discerning lesser included instructions, that standard is probably inappropriate. See, e.g., Ettinger, *supra* note 31, at 21. Professor Ettinger suggests that many of the cases decided since *Blockburger* have misread that opinion, as the conclusion reached by the Court is just as likely an application of the specific facts of that case, rather than a constitutional mandate. *Id.*; see also Hoffheimer, *Lesser Included*, *supra* note 21, at 173-74.

48. Hoffheimer, *Rise and Fall*, *supra* note 43, at 412-13.

nately adopted test has occurred with little scholarly attention.<sup>49</sup> However, a minority of states still apply one of the other tests, namely, the pleadings approach or the evidence approach.<sup>50</sup>

Under the pleadings test, courts look at how the greater crime was described in the formal charge. Under this test, assault with a deadly weapon would be a lesser included offense of murder if the indictment or information alleges the elements of that crime.<sup>51</sup> Under this approach, the availability of a lesser included offense is based primarily on the prosecutor's theory of the case, rather than the statutory language of the offense.<sup>52</sup> Rather than reviewing the language of the statute to see if a lesser-included offense exists, a court reviews the facts as alleged in the pleadings to see if those facts support any lesser-included offenses.<sup>53</sup> Typically, under the pleadings approach, if the allegations in the pleading that charges the higher offense include all of the elements of the lesser offense, the lesser included instruction would be allowed.<sup>54</sup>

Academics have sharply criticized this approach because it could allow a prosecutor to unfairly control the proceedings of the trial

simply through the charges filed against the defendant.<sup>55</sup> For instance, in an information or charge sheet, a prosecutor might only allege facts that support first-degree murder, as opposed to alleging facts that support first- and second-degree murder, as well as manslaughter. Despite these concerns, this approach has been adopted by several jurisdictions.<sup>56</sup>

Under the third approach, the evidence test (or the "cognate evidence approach"), courts look to the actual proof submitted at trial, rather than to the elements of the statute or to the pleadings filed by the prosecutor, to determine if a lesser included charge is available. The lesser offense may have elements that are not part of the higher offense; all that is required is that some or all of the proof actually admitted to establish elements of the higher offense also establish the lesser offense.<sup>57</sup>

Courts applying this approach have imposed limitations to its availability: in general, the same basic conduct must provide the foundation for both the higher charge and the lesser charge.<sup>58</sup> Some courts have required the charged offense and the lesser-included offense to have an "inherent relationship" or

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49. *Id.* at 414 & n.260.

50. *See* Shellenberger & Strazzella, *supra* note 19, at 10-11.

51. Pflaum, *supra* note 29, at 296; *see also* Carpenter, *supra* note 29, at 266; Ettinger, *supra* note 31, at 203-04; Shellenberger & Strazzella, *supra* note 19, at 11.

52. Pflaum, *supra* note 29, at 296; Shellenberger & Strazzella, *supra* note 19, at 11; Carpenter, *supra* note 29, at 266-67.

53. Pflaum, *supra* note 29, at 296; Carpenter, *supra* note 29, at 266-67; Ettinger, *supra* note 31, at 204.

54. LAFAVE, *supra* note 18, at § 24.8(e).

55. *See id.*; *see also* Pflaum, *supra* note 29, at 296; Shellenberger & Strazzella, *supra* note 19, at 11-12; Carpenter, *supra* note 29, at 267-68; Ettinger, *supra* note 31, at 206. Because the pleadings determine whether any lesser-included offenses exist, a prosecutor may control the presence of lesser-included offenses by defining the offense narrowly or broadly in the wording of the pleadings.

56. Pflaum, *supra* note 29, at 296; Shellenberger & Strazzella, *supra* note 19, at 12 n.21 (citing several cases applying the pleadings approach).

57. LAFAVE, *supra* note 18, at §§24.8(e).

58. MODEL PENAL CODE § 1.07(4) (1985).

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to protect the “same interests.”<sup>59</sup> Additionally, courts typically require the relationship between the offenses to be so close that the same evidence establishing the greater offense would necessarily show the commission of the lesser. The limitation “is intended to preclude abuse of the lesser-included offense doctrine by defense counsel seeking to appeal to the jury’s sense of mercy by requesting instructions on every lesser offense arguably established by the evidence.”<sup>60</sup>

This approach is the most flexible and is the approach that most closely matches the actual criminal conduct of the defendant.<sup>61</sup> Here, courts look at the inculpatory evidence introduced at trial.<sup>62</sup> In applying this approach, a court considers all of the evidence presented at trial to see if that evidence supports any lesser-included offense charges.<sup>63</sup> The evidence must be such that a jury can

convict a defendant on the included offense, and the evidence must also provide a rational basis for the jury to acquit the defendant on the charged offense.<sup>64</sup> This approach also allows parties to control the inclusion of lesser-included offenses through their presentation of evidence at trial.

The Model Penal Code has adopted this approach,<sup>65</sup> but it has only been adopted in a limited number of jurisdictions.<sup>66</sup> This approach provides limited precedent, as the existence of a lesser-included offense within the greater charge depends solely on the evidence presented at each trial. It also gives the trial judge a tremendous amount of discretion. Some commentators have asserted that under this approach, it can be difficult to guarantee the accused proper Sixth Amendment notice of the charges against him or her.<sup>67</sup>

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59. Carpenter, *supra* note 29, at 269.

60. *Id.* (quoting *United States v. Johnson*, 637 F.2d 1224, 1239 (9th Cir. 1980)).

61. Shellenberger & Strazella, *supra* note 19, at 12-13; *see also* Pflaum, *supra* note 29, at 296-97; Ettinger, *supra* note 31, at 208 (“[T]he results of the application of this standard are entirely grounded in, and unique to, the case before the court.”).

62. Pflaum, *supra* note 29, at 296; Shellenberger & Strazella, *supra* note 19, at 12; Carpenter, *supra* note 29, at 266-67.

63. *See* Pflaum, *supra* note 29, at 296 n.34; *see also* Shellenberger & Strazella, *supra* note 19, at 12; Carpenter, *supra* note 29, at 266-67; Ettinger, *supra* note 31, at 205.

64. Pflaum, *supra* note 29, at 296; Carpenter, *supra* note 29, at 268 (citing various state court decisions, most notably, *State v. Brent*, 644 A.2d 583, 586 (N.J. 1994), *State v. Keffer*, 860 P.2d 1118, 1129 (Wyo. 1993), and *Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998)).

65. MODEL PENAL CODE § 1.07(4) (1985); *see also* Pflaum, *supra* note 29, at 297; Carpenter, *supra* note 29, at 268.

66. Carpenter, *supra* note 29, at 268 n.32; *see also* Pflaum, *supra* note 29, at 297 (citing MONT. CODE ANN. § 46-16-607 (1999), N.J. STAT. ANN. § 2C: 1-8(d) (West 1995) and TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 1998)); *see also* HAW. REV. STAT. ANN. § 701-109.

67. Ettinger, *supra* note 31, at 208.

## 2. The Evidence Requirement

Once a court has applied one of these tests to determine the availability of a lesser instruction, it must then evaluate whether the evidence will support the lesser charge. A court may not instruct a jury on a lesser charge unless sufficient evidence is admitted at trial to support the instruction.<sup>68</sup> The Supreme Court has determined that “the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.”<sup>69</sup> Most analysts describe this requirement

as an “independent prerequisite” for a lesser-included offense instruction.<sup>70</sup>

Various jurisdictions require different types and amounts of evidence to be sufficient to support a lesser-included offense instruction.<sup>71</sup> Some require a court to give a lesser-included offense instruction upon a showing of even the most limited amount of evidence.<sup>72</sup> Still others require substantial evidence before the instruction will be allowed.<sup>73</sup> As a result, depending on the jurisdiction, the type and amount of evidence determine whether a court will allow a lesser-included offense instruction.<sup>74</sup> Regardless, in some cases, the jury will have an all-or-nothing choice.<sup>75</sup>

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68. Pflaum, *supra* note 29, at 300; Shellenberger & Strazella, *supra* note 19, at 6-7; Carpenter, *supra* note 29, at 271; Ettinger, *supra* note 31, at 210. In *Hopper v. Evans*, 456 U.S. 605, 611 (1982), the Supreme Court held that “due process requires that a lesser-included offense instruction be given only when the evidence warrants such an instruction.” In other words, if the charged offense is first-degree murder, and there is no evidence of manslaughter, then a judge cannot instruct the jury on the lesser-included offense of manslaughter. *See generally* Pflaum, *supra* note 29, at 298 & nn.50, 51.

69. Ettinger, *supra* note 31, at 208. Although it sounds similar to the evidence approach, this is actually a separate required part of the availability of a lesser included instruction under any of the tests. *Id.*; *see also* Pflaum, *supra* note 29, at 200-300.

70. Pflaum, *supra* note 29, at 299 & nn.52, 53; *see also* Carpenter, *supra* note 29, at 271 (citing *Keeble v. United States*, 412 U.S. 205, 208 (1973)).

71. *See* Carpenter, *supra* note 29, at 271.

72. *Id.* (citing *State v. Palmer*, 687 N.E.2d 685, 702 (Ohio 1997); *People v. Novak*, 643 N.E.2d 762, 770 (Ill. 1994); *Rouse v. United States*, 402 A.2d 1218, 1220 (D.C. 1979); *State v. Wright*, 618 S.W.2d 310, 314-15 (Tenn. Crim. App. 1981)); *see also* Pflaum, *supra* note 29, at 299. Arkansas has adopted this language. *See Weber v. State*, 933 S.W.2d 370, 374 (Ark. 1996).

73. *Id.* (citing *Wright v. State*, 658 N.E.2d 563, 567 (Ind. 1995); *State v. Jeffries*, 430 N.W.2d 728, 737 (Iowa 1988); *People v. Flannel*, 603 P.2d 1, 10-11 (Cal. 1979)); *see also* Pflaum, *supra* note 29, at 299.

74. *Id.* at 272 (“In jurisdictions that prohibit the use of the All-or-Nothing Doctrine, the test employed to determine the sufficiency of the evidence can meaningfully alter the mandatory nature of the duty to instruct.”).

75. In an “all-or-nothing” trial strategy, the jury is left to choose only one verdict without considering any other factually possible offenses or lesser-included offenses. The jury’s only choice is between guilty or not guilty. *See* Carpenter, *supra* note 29, at 258. Both prosecutors and defense counsel have employed the strategy, depending on the facts of a particular case. Many commentators have been sharply critical of the strategy, including Carpenter, *id.* at 282; *see also* Pflaum, *supra* note 29 (critiquing the ability of juries to make such all-or-nothing choices, even when desired by trial counsel); Michael G. Pattillo, Note, *When “Lesser” Is More: The Case for Reviving the Constitutional Right to a Lesser Included Offense*, 77 TEX. L. REV. 429, 462 (1998); Tracy L. Hamrick, Note, *Looking at Lesser Included Offenses on an “All or Nothing” Basis: State v. Bullard and the Sporting Approach to Criminal Justice*, 69 N.C. L. REV. 1470, 1479 (1990).

Generally, in a jury trial, the judge who instructs the jury on all possible verdicts under the charges must include all lesser included offenses warranted by the evidence.<sup>76</sup> Different jurisdictions follow different rules about whether the judge is required to instruct on lesser included instructions. Some states only allow a defendant to request a lesser included instruction; others allow them if also requested by the state; and still others allow a trial judge to instruct *sua sponte* on any lesser included instruction warranted by the evidence, even if neither party requested a lesser charge.<sup>77</sup>

### C. Criticisms of the Majority's Use of the Elements Test

The elements approach has been criticized because many lesser crimes fail to qualify as lesser included offenses.<sup>78</sup> Many assert that an element is often difficult to identify and define. Statutes may set out multiple ways to commit a crime, and it may be difficult to apply to qualitatively different mental states. Others suggest that the test raises policy con-

cerns, as the all-or-nothing scenario that results can preclude a jury from performing its essential function.

#### 1. It is Often Difficult to Identify and Define an "Element."

Some of the primary benefits of the elements test was its promised simplicity, clarity, and ease of application. The *Schmuck* Court promised greater certainty and predictability<sup>79</sup> when it adopted the elements test for federal courts, and promoted the test as one that would simplify the work of judges and promote the uniform administration of legal rules. Many states quickly followed suit.<sup>80</sup>

But the test is not as simple to apply as courts had hoped. In fact, the elements test has been criticized as being too "mechanical and inflexible."<sup>81</sup> In several decisions, the Supreme Court struggled with the application of the test in constitutional issues, especially in capital crimes.<sup>82</sup> But the analytical confusion carries over to state criminal cases as well, for several reasons.

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76. See Shellenberger & Strazzella, *supra* note 19, at 6.

77. See *id.* at 6 & n.5, citing 8A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 31.03, at 31-15 n.1 (1992); 2 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 498, at 800 (1982).

78. Hoffheimer, *Lesser Included*, *supra* note 21, at 191; Hoffheimer, *Rise and Fall*, *supra* note 43, at 366-73.

79. 489 U.S. at 720-21.

80. Hoffheimer, *Lesser Included*, *supra* note 21, at 191; Hoffheimer, *Rise and Fall*, *supra* note 43, at 366-73.

81. LAFAYE, *supra* note 18, at § 24.8(e) & n.59, citing Hoffheimer, *Rise and Fall*, *supra* note 43, at 410-12; Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM. CRIM. L. REV. 445, 448-449 (1984) (analyzing the problem of excluding lesser offenses that reflect the true criminal nature of the committed conduct).

82. See Hoffheimer, *Rise and Fall*, *supra* note 43, at 412. Justice Breyer, criticizing the administration of the elements test in practice, commented on the Chief Justice's "Sargasso Sea" characterization in *Albernaz*, 450 U.S. at 343: "Some [courts] will apply the test successfully; some will not. Legal challenges are inevitable. The result, I believe, will resemble not so much the Sargasso Sea as the criminal law equivalent of Milton's 'Serbonian Bog . . . Where Armies whole have sunk.'" *Texas v. Cobb*, 532 U.S. 162, 185 (2001) (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting) (quoting JOHN MILTON, *PARADISE LOST*, II, 592). (*see infra* note 1 and supporting text). "[M]ore to the point, the simple-sounding *Blockburger* test has proved extraordinarily difficult to administer in practice. Judges, lawyers, and law professors often disagree about how to apply it." *Id.* For a comprehensive analysis of the constitutional issues arising under *Blockburger*, the double jeopardy clause, and the "all or nothing" doctrine, especially in capital murder cases, see Hoffheimer, *Rise and Fall*, *supra* note 43, at 390-407.

First, the test assumes that elements of crimes are easily identified. In fact, a great deal of uncertainty often surrounds the meaning of elements, and the elements test may create additional uncertainty.<sup>83</sup> Many criminal statutes were written before the modern idea of elements, and others have been drafted without clearly indicating elements. As a result, it can be difficult to identify the “elements” under the elements test.

Second, even when the elements are clearly designated, many statutes identify alternative methods of committing a crime. For example, in Arkansas, forcible rape and statutory rape reside in the same statute,<sup>84</sup> and different specific actions or conduct can satisfy the sexual conduct element in various lesser sexual assault statutes.<sup>85</sup> It can be difficult to apply the elements test to crimes with compound elements. In some situations, it could be possible to commit a more serious crime without committing a less serious one.<sup>86</sup>

Third, many state codes contain specific offenses designed to fill gaps. These crimes often impose specific additional requirements that prevent them from qualifying as lesser included offenses under the elements test.

And finally, it can be difficult to apply the elements test to statutes that contain qualitatively different culpable mental states.<sup>87</sup> Many state codes define the culpability components of different crimes in ways that prevent their ready comparison. Some serious crimes may require only general intent, while less serious harms of the same general sort may require proof of specific intent. If a court were to apply the elements test strictly to these types of offenses, it could generally find some additional or different element that supported the conclusion that the less serious crime was not a lesser included offense. But this conclusion would neither promote a coherent construction of the criminal code nor advance the policies served by the doctrine of lesser included offenses.

## 2. As a Matter of Policy, the Elements Test is too Restrictive.

The inflexible results that develop under the elements test are often in direct conflict with a primary goal of the lesser-included offense doctrine, which is to allow a jury to more closely match any criminal conviction with the actual crime a defendant committed.

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83. Hoffheimer, *Lesser Included*, *supra* note 21, at 197.

84. ARK. CODE ANN. § 5-24-103.

85. *Id.* at § 5-4-113 *et seq.*

86. See generally Hoffheimer, *Rise and Fall*, *supra* note 43, at 369 (describing *Harris v. Oklahoma*, U.S. 682, 686 (1977)), where a defendant was convicted both of felony murder and robbery. The felony murder statute required proof of homicide caused during the commission of a number of felonies, including robbery. Because other listed felonies would also satisfy the felony element, no single felony would ever satisfy a formal elements test for a lesser included offense that required that it be impossible to commit the charged offense without simultaneously committing the lesser included offense). Nevertheless, the Court held that the robbery was a lesser included offense of felony murder). Professor Hoffheimer points to the difficulty commentators have had difficulty reconciling this situation with the elements test because it would be possible, looking just at elements in the abstract, to commit the more serious crime (i.e., murder) without committing the less serious crime (i.e., robbery). See Hoffheimer, *Lesser Included*, *supra* note 21, at 199.

87. Hoffheimer, *Lesser Included*, *supra* note 21, at 199.

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As such, many have criticized the elements test, claiming it negatively impacts the integrity of the trial system.<sup>88</sup>

The fundamental purpose of a trial is to determine the defendant's guilt or innocence with respect to a specified crime.<sup>89</sup> This goal cannot adequately be served by a standard that treats all cases involving a particular offense the same way, and precludes a review of the specific events that gave rise to the charged offense. The elements test lacks the flexibility to fit the charge to the actual crime that was committed because it focuses on semantics instead of facts.

The facts of a particular case that may be introduced at trial often describe a link between two offenses that might be proscribed under one general section of a legislative code but that may not necessarily contain identical criminal elements. Those facts would not be relevant to a determination of the charged offense under this test. Offenses that are related based on the evidence, but not related under the elements as defined, would not be allowed as a lesser-included offense. For example, a burglary that occurred by a breaking and entering, and an unlawful entry, are both intended to protect the same interest—a homeowner's property.<sup>90</sup> Depending on the facts of a particular case, the unlawful entry

charge might logically be a lesser included offense of the larger burglary crime. But the elements test would not allow the unlawful entry instruction to go to the jury, as the exact wording of the two statutes would not qualify it to be a lesser included offense.<sup>91</sup> Accordingly, the elements test draws an artificial distinction between laws that are ultimately intended to protect the same interest.<sup>92</sup>

The declared purpose of the lesser included offense doctrine is to permit the parties to react to the proof presented at trial. Many commentators suggest that it is inappropriate for the standard to employ this purely semantical and mechanical process to define which lesser crimes are lesser included offenses for a more serious crime. Therefore, many suggest that the elements approach is too narrow,<sup>93</sup> and suggest that juries should be allowed to consider the relevant evidence introduced at trial. A conviction should rest on evidence supporting a particular charge of a violation of a specific statute. The jury should be instructed on lesser-included offenses, where the evidence supports them, to preserve the integrity of a jury trial and the reliability of its outcome.<sup>94</sup> The resulting all-or-nothing situation that will result when lesser included offenses are not allowed impacts the integrity of the jury system.<sup>95</sup>

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88. See Carpenter, *supra* note 29, at 266 (“The rigid results mandated by the strict statutory interpretation theory conflict with a principle function of the lesser-included offense doctrine, which is to enable the jury to correlate more closely the criminal conviction with the act committed.”).

89. See Ettinger, *supra* note 31, at 201-02.

90. *Id.* at 202-03 (providing this example of the relationship between those crimes).

91. *Id.*

92. *Id.* at 202.

93. *Id.*

94. See Pflaum, *supra* note 29, at 303.

95. See *id.* at 303-27 (arguing for a system that puts “far more emphasis on truth, and far less on gambling and winning and losing” and noting that an all-or-nothing situation “strikes at the very heart of a credible and fair justice system.”); see also *supra* note 95 and accompanying text.

## II. Arkansas' Traditionally Liberal Approach to Lesser Included Instructions

Arkansas has enacted statutory guidelines for allowing lesser included instructions. The Arkansas Code identifies three situations where a trial court can give a lesser included instruction.<sup>96</sup> In subsection 5-1-110(b)(1), the General Assembly adopted the elements test originally applied to prior jeopardy claims in *Blockburger v. United States*.<sup>97</sup> Here, if each offense requires proof of an element not required for proof of the other, the two offenses are not the same for double jeopardy purposes,

and the instruction will not be allowed.<sup>98</sup> However, if the elements are identical, or if all of the elements for proof of one are included in the other so that both a "lesser" offense and a "greater" one exist, the offenses then are the same for double jeopardy purposes.<sup>99</sup>

Subsection 5-1-110(b)(2) allows a lesser included instruction for the attempt to commit a larger offense.<sup>100</sup> Subsection 5-1-110(b)(3) describes the situation in which the severity of the offense is graded on the degree of injury to a person or property, or the same act may be committed with greater or lesser degrees of culpability.<sup>101</sup>

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96. Under ARK. CODE ANN. § 5-1-110(b), a defendant may be convicted of one offense included in another offense with which he or she is charged. An offense is included in an offense charged if the offense:

- (1) Is established by proof of the same or less than all of the elements required to establish the commission of the offense charged;
- (2) Consists of an attempt to commit the offense charged or to commit an offense otherwise included within the offense charged; or
- (3) Differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish the offense's commission.

97. 284 U.S. 299, 304 (1932).

98. *Id.*

99. J. Thomas Sullivan, *The Perils of Online Legal Research: A Caveat for Diligent Counsel*, 29 AM. J. TRIAL ADVOC. 81, 89 n.30 (2005)[hereinafter *Perils*], citing *Sansone v. United States*, 380 U.S. 343, 349-50 (1965) (applying the lesser-included offense analysis). Professor Sullivan described a typical example of an elements-based lesser-included offense: the accused is charged with an aggravated or armed robbery, which is usually distinguished from robbery by the additional element of proof that the defendant committed the offense while using a deadly weapon or threatening the use of a deadly weapon or physical violence in order to effect the robbery. *Id.* If there is evidence in the record on which a jury could rationally conclude that the defendant neither used nor threatened use of a weapon or serious injury, the trial court should instruct the jury on the lesser offense of simple robbery if requested by either party. *Id.* at 81, citing *Hamilton v. State*, 556 S.W.2d 884, 888-89 (Ark. 1977).

100. "Attempt" as a lesser included instruction appears to be a situation that should obviously be allowed, but commentators have suggested that under this standard, it is unclear how the evidence of the larger offense and the attempted offense could rationally give rise to either of the two necessarily competing inferences. Sullivan, *Perils, supra* note 99, at 90 n.30. If the evidence (apart from the accused's own testimony) gives rise to the inference that the offense of burglary was only attempted, that inference almost necessarily means that the objective evidence would require acquittal on the burglary charge because, by definition, the offense was not completed. It would seem that the objective evidence could not support either of these conclusions if proof of an unlawful entry was required for conviction for burglary and the physical evidence shows only an attempt to gain entry without consent. *Id.*

101. See also Sullivan, *Perils, supra* note 99, at 81 (describing the *Beck* rule as it applies to murder and manslaughter cases).

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In *McCoy v. State*,<sup>102</sup> the Arkansas Supreme Court clarified these three methods for giving a lesser included instruction: an offense must meet one of these statutory tests to qualify.<sup>103</sup> The Court conceded that its earlier analysis of lesser-included instructions was too restrictive in light of the statutory definition of included offenses under § 5-1-110(b).<sup>104</sup> Noting that the statute provides alternative means of defining offenses as lesser included offenses, the court recognized it had applied the statute incorrectly in precluding an instruction on second degree murder and manslaughter in felony murder prosecutions.<sup>105</sup>

Under subsection (c), “[t]he court is not obligated to charge the jury with respect to an included offense unless there is a rational

basis for a verdict acquitting the defendant of the offense charged and convicting him or her of the included offense.”<sup>106</sup> Although this section limits application of a lesser charge, Arkansas courts have stated on numerous occasions that this rational basis approach should be liberally construed.<sup>107</sup> Arkansas case law generally favors instruction on a defendant’s theory that is supported by any testimony, however slight.<sup>108</sup> Even if a particular conviction appears to be “irrational” due to improbable evidence supporting the lesser-included offense, the conviction will likely not be reversed on appeal.

Courts consistently note that when the evidence shows a possible lesser included offense, the trial judge must instruct on it.<sup>109</sup>

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102. 69 S.W.3d 430, 347 Ark. 913 (2002).

103. *McCoy* clarified prior decisions in *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001); *Goodwin v. State*, 342 Ark. 161, 27 S.W.3d 397 (2000); *Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999); *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997); *Brown v. State*, 325 Ark. 504, 929 S.W.2d 146 (1996); *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989); *Henderson v. State*, 286 Ark. 4, 688 S.W.2d 734 (1985); and *Thompson v. State*, 284 Ark. 403, 682 S.W.2d 742 (1985), that failed to clearly articulate the three statutory methods allowing a lesser included instruction.

104. 69 S.W.3d at 433, 347 Ark. at 917, *see also* *Sullivan*, *Perils*, *supra* note 99, at 98.

105. *Id.*

106. *Caton v. State*, 252 Ark. 420, 479 S.W.2d 537 (1972); *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980). *See generally* 3A JOHN WESLEY HALL, JR., TRIAL HANDBOOK FOR ARKANSAS LAWYERS § 81:24 (2008-2009 ed.). The question of whether the trial court should have instructed on a lesser included offense usually arises when the defendant complains that the trial court should have but did not. Therefore, there need only be a fact issue for the jury to decide on a lesser included offense. If there is not one, it is not error to refuse an instruction. *Sargent v. State*, 272 Ark. 336, 614 S.W.2d 503 (1981); *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *Walker v. State*, 262 Ark. 331, 556 S.W.2d 655 (1977).

107. *Sullivan*, *The Culpability, or Mens Rea, “Defense” in Arkansas*, 53 ARK. L. REV. 805, 834 n.112 (2000)[hereinafter *Culpability*]. The purpose of this statute is to allow conviction of a lesser included offense when the accused is not convicted of the greater offense. *Akins v. State*, 278 Ark. 180, 644 S.W.2d 273 (1983). The statute does not prohibit separate charges for each offense committed in a course of conduct. *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981); *Britt v. State*, 261 Ark. 488, 549 S.W.2d 84 (1977).

108. *See Williams v. State*, 17 Ark. App. 53, 56, 702 S.W.2d 825, 827 (1986)(allowing a lesser instruction for manslaughter because “there was evidence presented on which the jury might have found that appellant recklessly caused the death of his brother. While it appears most unlikely, the jury could have believed appellant’s testimony and found that the criminal intent required for conviction of the larger offense was lacking. It is the jury’s sole prerogative to evaluate the conflicting evidence and to draw its own inferences.”).

109. *MacKool v. State*, 363 Ark. 295, 213 S.W.3d 618 (2005).

The Arkansas Supreme Court has noted that it is reversible error to refuse to instruct on a lesser-included offense when there is the slightest evidence to support the instruction.<sup>110</sup> The court has stated on numerous occasions that “[w]here there is the slightest evidence tending to disprove one of the elements of a higher offense,”<sup>111</sup> or the facts are susceptible to more than one interpretation,<sup>112</sup> it is error for the trial court to refuse to give an instruction on the lesser included offense.<sup>113</sup>

The court’s basic premise is that lesser included instructions should be liberally allowed, as no right has been more zealously protected than the right of an accused to have the jury instructed on lesser included offenses.<sup>114</sup> The court has advised trial courts to do so, regardless of how strongly the trial judge feels that the evidence weighs in favor of find-

ing the defendant guilty of the most serious charge. Where the slightest evidence tends to disprove one of the elements of a larger charge, it is error to refuse to give an instruction on the lesser included one. That evidence can come solely from the defendant’s own testimony.<sup>115</sup>

But this liberal construction has limits. The trial judge is not obligated to instruct on lesser included offenses that have no supporting evidence. If there is no rational basis for a lesser included offense instruction, it is not error to refuse one.<sup>116</sup> Therefore, there need only be a fact issue for the jury to decide on a lesser included offense. If there is no fact issue on a lesser included offense, it is not error to refuse an instruction.<sup>117</sup>

Beyond this statutory restriction, Arkansas courts have also begun to impose other restrictions. For example, courts have

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110. See, e.g., *MacKool v. State*, 363 Ark. 295, 213 S.W.3d 618 (2005); *Boyle v. State*, 363 Ark. 356, 214 S.W.3d 250 (2005); *Morris v. State*, 351 Ark. 426, 94 S.W.3d 913 (2003); *Gaines v. State*, 354 Ark. 89, 118 S.W.3d 102 (2003); see generally 3A JOHN WESLEY HALL, JR., TRIAL HANDBOOK FOR ARKANSAS LAWYERS § 91:7 (2008-2009 ed.).

111. *Harshaw v. State*, 344 Ark. 129, 39 S.W.3d 753 (2001); *Fudge v. State*, 341 Ark. 759, 20 S.W.3d 315 (2000); *Mallett v. State*, 17 Ark. App. 29, 702 S.W.2d 814 (1986); *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982).

112. *Henson v. State*, 296 Ark. 472, 757 S.W.2d 560 (1988).

113. *Wyles v. State*, 2004 WL 1172969 (Ark. 2004) (stating that under *McCoy*, the trial court should have given lesser on second degree murder and manslaughter because there was some evidence of extreme indifference or recklessness rather than purpose); *Gaines v. State*, 354 Ark. 89, 118 S.W.3d 102 (2003). See generally 3A JOHN WESLEY HALL, JR., TRIAL HANDBOOK FOR ARKANSAS LAWYERS § 81:24 (2008-2009 ed.).

114. *Wyles v. State*, 2004 WL 1172969 (Ark. 2004); *Williams v. State*, 17 Ark. App. 53, 702 S.W.2d 825 (1986); see also 3A JOHN WESLEY HALL, JR., TRIAL HANDBOOK FOR ARKANSAS LAWYERS § 81:24 (2008-2009 ed.).

115. *Id.*

116. See generally ARK. CODE ANN. § 5-1-110( c); see also *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *Caton v. State*, 252 Ark. 420, 479 S.W.2d 537 (1972).

117. *Sargent v. State*, 272 Ark. 336, 614 S.W.2d 503 (1981); *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *Walker v. State*, 262 Ark. 331, 556 S.W.2d 655 (1977). See generally 3A JOHN WESLEY HALL, JR., TRIAL HANDBOOK FOR ARKANSAS LAWYERS § 81:24 (2008-2009 ed.).

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noted that where a defense is inconsistent with a lesser-included offense, the lesser should not be given.<sup>118</sup> In addition, as shown below, if a defendant denies the criminal act at all, Arkansas courts have held that no rational basis exists for a lesser included offense instruction.<sup>119</sup>

### III. Applying the “Elements” Test to Arkansas’ Sexual Assault Crimes

The Arkansas General Assembly drafted many of the sexual assault statutes to include specific age and status-based requirements for both the perpetrator and the victim of a sexual assault. Often, a lesser crime includes more specific requirements or limits than

does a more serious offense. Consequently, these statutes conflict with Arkansas’ lesser included instruction requirements, which only allow a lesser charge that is “included within another offense.” Several Arkansas court decisions have struggled to reconcile this inconsistency.

#### A. The Sexual Assault Statutes—Strict Liability Crimes which Include Specific Age and Status Requirements for Culpability

In 2001 and again in 2003, the Arkansas General Assembly revised the state’s sexual assault statutes to describe and define several quite specific offenses for sexually based

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118. See *supra* notes 155-168 and accompanying text for a discussion of *Brown v. State*, 321 Ark. 413, 903 S.W.2d 160 (1995)(finding possession of cocaine is not a lesser-included offense of delivery of cocaine when the defense is alibi); see also 3A JOHN WESLEY HALL, JR., TRIAL HANDBOOK FOR ARKANSAS LAWYERS § 81:24 (2008-2009 ed.), *citing* *Cobb v. State*, 340 Ark. 240, 12 S.W.3d 195 (2000) (finding defendant’s admission of shooting paralyzed victim a second time precluded reliance on recklessness of manslaughter); *Washington v. State*, 319 Ark. 583, 892 S.W.2d 505 (1995) (finding possession instruction could not be given in delivery case on this evidence); *Cook v. State*, 77 Ark. App. 20, 73 S.W.3d 1 (2002), *aff’d*, 350 Ark. 398, 86 S.W.3d 916 (2002). Compare *Harshaw v. State*, 344 Ark. 129, 39 S.W.3d 753 (2001) (distinguishing *Cobb* and finding that court should have given lesser manslaughter instruction).

119. See *supra* notes 142-178 and accompanying text for a discussion of *Brown v. State*, 321 Ark. 413, 903 S.W.2d 160 (1995); *Fry v. State*, 309 Ark. 316, 829 S.W.2d 415 (1992); *Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986); *Flurry v. State*, 290 Ark. 417, 720 S.W.2d 699 (1986). See also 3A JOHN WESLEY HALL, JR., TRIAL HANDBOOK FOR ARKANSAS LAWYERS § 81:24 (2008-2009 ed.), *citing* *Chapman v. State*, 343 Ark. 643, 38 S.W.3d 305 (2001); *Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993); *Nichols v. State*, 69 Ark. App. 212, 11 S.W.3d 19 (2000).

crimes.<sup>120</sup> The statutes describe the crimes of rape,<sup>121</sup> four degrees of sexual assault,<sup>122</sup> and three distinct provisions for sexual indecency or indecent exposure.<sup>123</sup> They also include other extensive specifically precluded conduct. The statutes regulate an array of sexual conduct, including particularly specific conduct as it relates to crimes against minors.

There are separate offenses for sexual contact between adults and minors, including adults who stand in a position of trust and authority over minors (such as teachers, clergy, and other defined professionals), and for sexual contact between teenagers.<sup>124</sup> Although the various sections contain an array of definitions, descriptions of precluded

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120. *See generally* ARK. CODE ANN. § 5-14-101 *et seq.* The language of some of the sections has been updated since that time, but the substantive provisions have not been amended since 2003. In April 2009, in the most recent amendment, the General Assembly defined a “minor” as someone “under the age of 18,” so that the description could be shortened in the text of several sections. S.B. 410 (now Act 748), Arkansas General Assembly 2009 Legislative Session.

121. Rape is described in § 5-14-103. This statute precludes sexual intercourse or deviate sexual activity with another by force, or with another who is incapable of giving consent. Rape is a Class Y felony. *Id.* It includes a statutory rape provision precluding any sexual intercourse or deviate sexual activity with someone under age 14. *Id.* The statutory rape provision contains an affirmative defense if the assailant was not more than three years older than the victim or is related to the victim. If the victim is under age 14, the minimum term of imprisonment is 25 years. *Id.*

122. Sexual assault in the first degree is committed by a person who has sexual intercourse or deviate sexual activity with a minor, defined as someone under age 18, who is not a spouse, if the assailant is either employed by the state departments of correction or human services, or a jail or juvenile detention facility, and the victim is in the custody of any of those institutions; or if the assailant abuses a position of trust or authority, particularly a professional or a school employee with authority over the victim, to engage in the precluded conduct. Consent is no defense, but an age difference of three years or less is a defense. *See* ARK. CODE ANN. § 5-14-124. It is a Class A felony.

Sexual assault in the second degree is similar to the crime of rape as described in § 5-14-103, but the precluded conduct is “sexual contact” rather than “sexual intercourse or deviate sexual activity.” *See* ARK. CODE ANN. § 5-14-125. Here, a person is precluded from having sexual contact with another by force, or with another who is incapable of giving consent. *Id.* It also describes statutory rape violations for persons who have sexual contact with any person under 14 who is not a spouse; or has sexual contact with a minor if the assailant is the minor’s guardian or is employed by the state departments of correction or human services, or a jail or juvenile detention facility and the victim is in the custody of any of those institutions; or if the assailant abuses a position of trust or authority, particularly a professional or a school employee with authority over the victim. It precludes a minor from having sexual contact with someone who is younger than 14. It includes affirmative defenses if the minor assailant is four years older than a victim over age 12 or is three years older than a victim under 12 or if the assailant is a teacher with a student under age 21. Consent is not a defense. It is a Class D felony if the assailant is a minor, and a Class B felony if the assailant is over age 18.

Sexual assault in the third degree prohibits both state employees and professionals and clergy who stand in a position of trust or authority over others and abuse their trust or authority by engaging in sexual intercourse or deviate sexual activity with them. *See* ARK. CODE ANN. § 5-14-126. It also prohibits minors from having sex with someone, not a spouse, under age 14. *Id.* It is an affirmative defense if the minor assailant is not more than three years older than the victim. Consent is not defense. It is a Class C felony. *Id.*

Fourth-degree sexual assault precludes someone who is age 20 or older from engaging in sexual intercourse or deviate sexual activity with someone who is less than 16, or from engaging in sexual contact with someone who is less than 16. *See* ARK. CODE ANN. § 5-14-127(a).

Depending on the conduct, this is either a Class D felony or Class A misdemeanor. *See id.* at § 127(b).

123. Sexual indecency with a minor is a Class D felony. Public sexual indecency is a Class A misdemeanor, and, for a first offense, so is indecent exposure. *See* ARK. CODE ANN. §§ 5-14-110-112.

124. *See supra* note 122.

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conduct, and defenses, there is considerable overlap among the statutes, particularly as they apply to minors.<sup>125</sup>

The General Assembly drafted the statutes to both proscribe particular conduct, and classify perpetrators and victims based on age, status, and relational elements.<sup>126</sup> Each of the offenses that describe conduct with minors include age-based categories or classifications. Age, status, and the relationship between the perpetrator and the victim are described with particularity in many of the statutes. Many of the statutes include specific age limits, rather than age ranges. Technically, these age limits allow a perpetrator to satisfy the requirements of more than one offense, and allow a victim to be protected under more than one offense, based strictly on their ages. And, unlike a typical statutory scheme, where a lesser crime is wholly contained within a larger one, in these statutes, the level of detail increases in some of the offenses as the level of culpable conduct decreases. Adding to the confusion, the classifications of the perpetrator or the victim varies among the lesser crimes.

The statutes against minors are strict liability offenses. The most serious sexual assault crime, rape, precludes forcible sexual intercourse or deviate sexual activity against anyone. It also includes a provision for statutory rape which precludes sexual intercourse or deviate sexual activity with anyone under age 14.<sup>127</sup> As the severity of a crime against a

minor decreases among the various offenses, the level of specificity as to who can either commit them, or who can be a victim of them, often increases.

The sexual assault statutes are complex. They are particularly confusing in those situations where overlaps in the coverage indicate that a perpetrator or victim would fit within more than one statutory definition, based upon age. In some situations, gaps in the statutory coverage make it difficult to determine if a defendant has actually committed an offense, based solely on his age. This has led to uncertainty as to what crime has actually been committed or on what crime a prosecutor should indict.<sup>128</sup> Although these gaps and overlaps give prosecutors a great deal of latitude in deciding what charge to assign, they also produce a great deal of uncertainty as to what crime has actually been committed and which crime is appropriately the basis for indictment or prosecution.<sup>129</sup>

### **B. Arkansas Courts' Denial of Lesser Included Instructions in Sexual Assault Cases**

Over the past two decades, Arkansas courts have declined to allow a lesser included instruction in several sexual assault cases based on a strict reading of the statutory elements. The courts note that because age-based elements in some less serious crimes are not

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125. See generally Steve Sheppard, *Arkansas 1, Texas 0: Sodomy Law Reform and the Arkansas Law*, 2003 ARK. L. NOTES 87, 94-95 (2003)(describing the revised sexual assault statutes and their impact on Arkansas sodomy law). See *infra* notes 9-10 and accompanying text, describing one overlap.

126. See, e.g., §§ 5-14-125, 126, 127.

127. ARK. CODE ANN. § 5-14-103.

128. *Id.* at 94.

129. *Id.*

included in more serious crimes, the lesser crimes are not lesser included offenses of the more serious one. Often, the court's analysis is limited to a cursory review of the statutory language, although some courts have noted that the evidence might have suggested that a lesser charge might have been appropriate. This strict adherence to statutory language has been raised as error numerous times.

In addition, Arkansas courts have denied a lesser included instruction in several other sexual assault cases where the defendant claimed to be innocent of the charges. The courts have moved away from a position of allowing a lesser included instruction where a defendant denies the charges even if it is supported by the evidence. This creates a situation where the courts disallow the instruction as a matter of law.

Both lines of decisions have been criticized as incompatible with the practice of liberally allowing a lesser included instruction when supported by the evidence.

**1. Arkansas Courts' Strict Definition of the Age-Based Classifications in the Sexual Assault Statutes and the Resulting Denial of Lesser Included Instructions**

Applying the elements test, Arkansas appellate courts have upheld the trial court's denial of a requested lesser included jury in-

struction based on a strict application of the age based categories of perpetrators or victims in the sexual assault statutes. In some cases, courts have denied the request after only comparing the age requirements of the statutes at issue. If the higher charge does not contain a minimum or maximum age requirement, and the lesser charge does, courts have simply noted that the elements differ, found that the lesser charge is not included within the greater one, and have denied the instruction, even when the culpable conduct could qualify as a lesser charge.

In these cases, the courts do not remove underlying confusion about whether the criminal conduct described in a lower crime would qualify as a lesser included offense under the lesser included offense doctrine. The limited focus on whether there are "different" elements may be too narrow to allow the jury to properly exercise its mandate to reach a result based on the evidence presented to it.

For example, in 1996, in *Weber v. State*,<sup>130</sup> the court recognized Arkansas' adherence to the elements test, and applied that standard to the newly-revised sexual assault statutes. After analyzing the holdings in several prior carnal abuse cases,<sup>131</sup> the court held that first-degree sexual abuse, as it might have been proven by the evidence in the case, was not a lesser included offense of rape because it contained an element that was not included in the rape statute, the age of the perpetrator. The *Weber* court noted that the defendant was

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130. 326 Ark. 564, 933 S.W.2d 370 (1996).

131. The Court noted in *dicta* that Arkansas courts had previously determined that first-degree sexual abuse is a lesser included offense of rape. *Id.* at 572-73, citing *Langley v. State*, 315 Ark. 472, 868 S.W.2d 81 (1994) (defendant was charged with rape, and "the trial court correctly charged the jury on the lesser included offense of sexual abuse"); *Curtis v. State*, 279 Ark. 64, 648 S.W.2d 487 (1983) ("The jury also found the appellant not guilty of rape but guilty of the lesser included offense of sexual abuse in the first degree..."); *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980) (where defendant was charged with rape and the trial court failed to instruct on first-degree sexual abuse, the Supreme Court affirmed because there was no rational basis for the instruction; the Court did not dispute the contention that sexual abuse was included in rape); *Speer v. State*, 18 Ark. App. 1, 8, 708 S.W.2d 94, 98 (1986) (stating first-degree sexual abuse is a lesser included offense of *attempted* rape but that "sexual abuse in the first degree is proven by a finding of the same or less than all of the elements of rape"); *see also* *Leshe v. State*, 304 Ark. 442, 448, 803 S.W.2d 522, 526 (1991); *Kester v. State*, 303 Ark. 303, 308, 797 S.W.2d 704, 706 (1990); *Sullivan v. State*, 289 Ark. 323, 328-30, 711 S.W.2d 469, 472-73 (1986).

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not entitled to an instruction on lesser charge under Arkansas Code Annotated Section 5-1-110(b). The court declined to establish a bright line test, however, limiting its decision to the facts of that case.<sup>132</sup>

However, *Weber* has been cited as controlling authority in several subsequent decisions. In 2003, in *Cantrell v. State*,<sup>133</sup> the court quoted the *Weber* decision extensively, and applied the analysis in its entirety. There, the appellant was charged with rape in 2001, two months after the Arkansas sexual assault statutes had been amended. The State alleged that between 1999 and 2001, the appellant assaulted his adopted daughter, C.C., who was less than fourteen years of age at the time. At the close of the case, the appellant requested lesser-included instructions under both the repealed and revised statutes.

The court analyzed appellant's request under both the repealed statute and the revised one, and affirmed the trial court's denial of the lesser included charge. The court expressly applied *Weber*, finding that, for both the repealed and the amended statutes, the inclusion of the age element in the lesser offense "requires an additional element of proof, namely, that the defendant be over eighteen years of age."<sup>134</sup> Therefore, the court determined that the appellant was not entitled to a lesser included charge. As in *Weber*, the court determined that the age distinction

was sufficient to find no rational basis existed to consider a lesser included instruction under 5-10-110(c).

The *Weber* standard remains controlling precedent: defendants are precluded from obtaining a lesser included instruction based solely on the age-based classifications in the statutory language. In *Pratt v. State*,<sup>135</sup> appellant was charged with raping a 14-year-old victim. He requested a lesser included instruction of sexual indecency with a child. The court affirmed the trial court's denial of the lesser instruction, noting that the lesser charge is not a lesser-included offense of rape because it requires additional elements which are not required to prove rape. Specifically, the court noted that to establish the lesser charge under the statutes in place at the time, the state had to show that the appellant was eighteen years of age, and the victim was less than fifteen years of age. Those elements were not required to establish rape.<sup>136</sup>

In 2003, in *Gaines v. State*,<sup>137</sup> the Court determined that third-degree carnal abuse was not a lesser-included offense of rape, because the offenses required proof of different elements. As the carnal abuse statute required proof that the victim was less than 16 years old, and the rape statute required proof that the victim was less than 14 years old, the differing elements precluded a lesser included instruction.

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132. "We note that first-degree sexual abuse may be proven by facts other than those evident in this case, and we decline to say that it may not be a lesser included offense in rape in any case. Our holding in this instance is solely that first-degree sexual abuse ... is not a lesser offense included in rape as charged here." 326 Ark. at 572, 933 S.W.2d at 375.

133. 2003 WL 21350752 (Ark. Ct. App. 2003). The analysis in *Cantrell* is complicated by the fact that the prohibited conduct, as described by the complaining witness, took place over an extended period, during which time the sexual assault statutes went through an extensive revision. The court therefore analyzed the conduct under the prior and the newly-revised statutes. *Id.*

134. *Id.* at \*5, citing ARK. CODE ANN. § 5-14-125(a)(3) (Supp. 2001).

135. 359 Ark. 16, 194 S.W.3d 183 (2004).

136. *Id.* at 32, 194 S.W.2d at 197.

137. 118 S.W.3d 102, 354 Ark. 89 (2003).

The most recent decision applied the *Weber* “rule” with almost no citations to authority. In a 2009 case, *Joyner v. State*,<sup>138</sup> the Arkansas Supreme Court again set out a rigid application of the elements test. The defendant was charged with rape, but he claimed he should have been allowed a lesser included instruction of sexual assault in the second degree based on testimony at trial that tended to refute the allegation that he had had intercourse with the victim.<sup>139</sup> Reciting the Arkansas statutes for both rape and sexual assault,<sup>140</sup> as well as the statute describing the three ways that a lesser included instruction may be allowed<sup>141</sup> the court noted that sexual assault requires proof of two elements that the rape statute does not - the defendant’s age and marital status with respect to the victim. Sexual assault is not “established by proof of the same or less than all of the elements required” to establish rape. Sexual assault does not consist of an attempt to commit rape or to commit an offense otherwise included within rape. Sexual assault does not differ from rape “only in the respect that a less serious’ injury or risk of injury [would occur] to that same person . . . .” Thus, the court noted that under *McCoy*, the appellant failed to establish that sexual assault is a lesser-included offense to rape. Therefore, even though the evidence might have shown that the conduct was more properly charged as a lesser offense, the court affirmed the appellant’s conviction.

## 2. Defendant’s Denial of Criminal Conduct Precludes a Lesser Included Instruction: Justice Newbern’s Critique of an “Irrational Basis” to Deny a Lesser Included Instruction

At approximately the same time that Arkansas courts began to strictly apply the elements test to sexual assault crimes, they also altered their position about allowing lesser included instructions in criminal cases, including sexual assault cases, where the defendant has denied the factual basis of the charges. The courts now deny lesser included instructions under the theory that there would be no “rational basis” to allow a lesser charge under § 5-1-110(c). The courts suggest that because a defendant has entered a plea of not guilty, he has forfeited his right to a lesser included instruction.

Arkansas’ original position was articulated in *Flurry v. State*,<sup>142</sup> where the Court of Appeals reversed the trial court’s denial of a lesser included instruction of carnal abuse in the third degree based on the evidence presented at a rape trial. Appellant denied the events occurred. The court found a rational basis to allow the lesser instruction, because “the jury has the sole prerogative to accept all or any part of a witness’ testimony whether controverted or not. Therefore, the jury had the absolute right, as the trier of the facts,

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138. 2009 Ark. 168, \_\_ S.W.3d \_\_, 2009 WL 887752 (2009).

139. Specifically, he testified that he had difficulty consummating intercourse, and the victim testified that he “press(ed) against my private with his private,” but did not testify that there was any penetration. *Id.*

140. ARK. CODE ANN. § 5-14-103(a)(3)(A) provides that a person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age. A person commits sexual assault in the second degree if the person, being eighteen years or older, engages in sexual contact with another person who is less than fourteen years of age and not the person’s spouse. ARK. CODE ANN. § 5-14-125(a)(3)(A)-(B).

141. Under ARK. CODE ANN. § 5-1-110(b), as clarified in *McCoy v. State*, 347 Ark. 913, 919, 921, 69 S.W.3d 430, 433, 435 (2002), there are three independent ways in which an offense can qualify as a lesser-included offense under the Arkansas statute.

142. 18 Ark. App. 64, 711 S.W.2d 163, *rev’d* 290 Ark. 417, 720 S.W.2d 699 (1986).

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to evaluate the evidence, and consider only whether an unlawful assault was committed.”<sup>143</sup> The court noted that the “mere fact” that a defendant testifies and denies committing the alleged criminal act does not justify refusing to instruct on a lesser included offense “when there is evidence providing a rational basis for acquitting the defendant on the offense charged and convicting him of a lesser included offense.”<sup>144</sup> The court emphasized the longstanding rule that:

No right has been more zealously protected by this court than the right of an accused to have the jury instructed on lesser offenses included in the more serious offense charged. Where there is the slightest evidence to warrant such an instruction, we have consistently held that it is error to refuse to give it. This is so, no matter how strongly the trial judge feels that the evidence weighs in favor of a finding of guilty on the most serious charge.<sup>145</sup>

That same year, in *Doby v. State*,<sup>146</sup> the companion case to the *Flurry* appeal to the Arkansas Supreme Court, a sharply divided Arkansas Supreme Court expressly overruled the Court of Appeals’ decision in *Flurry*. In a 4-3 opinion, the Court upheld the trial court’s denial of defendant’s request for a lesser included instruction of possession of a controlled substance, rather than the higher intent to sell charge. There, the appellant based his entire defense on his credibility against that of the officers, denying the charged offense occurred. His testimony contradicted an officer who said appellant admitted to him that he had large amounts of controlled substances and that he had been selling them.<sup>147</sup> Noting that it was a case of all or nothing,<sup>148</sup> the court set out the following principle: a lesser included offense instruction need not be given unless there is a rational basis to do so, and it was not rational to allow a lesser included instruction where a defendant denies the charges in their entirety.

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143. *Id.* at 68, 711 S.W.2d at 166, quoting *Fike v. State*, 255 Ark. 956, 504 S.W.2d 363 (1974)(reversing defendant’s rape conviction and finding it was error to refuse a requested instruction on the lesser included offense of assault).

144. *Id.* at 70, 711 S.W.2d at 166.

145. *Id.*, quoting *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980).

146. 290 Ark. 408, 720 S.W.2d 694 (1986).

147. *Id.* at 410, 720 S.W.2d at 695. The court noted that, “as a practical matter, it came down to whom should the jury believe. There would be no rational basis to find the officers lied in part in this case. Their testimony so sharply conflicted with Doby’s that it would not be reasonable to expect a jury to pick and choose and come up with a finding of a lesser offense when to do so would require a finding that Doby was a liar and the officers liars in part. If Doby had admitted possessing the drugs, it might make sense to require the charge of the lesser offense. But his defense was that he was entirely innocent of any crime: he possessed nothing. Therefore, the jury only had one question to decide, whether he was guilty as charged.” *Id.* at 413.

148. *Id.* at 414, 720 S.W.2d at 697.

In a stinging dissent joined by Justices Purtle and Dudley, Justice Newbern found the majority opinion unjustified, as it suggests that if the jury disbelieves the appellant's testimony it must believe all of the testimony presented by the state's witnesses if any of it is credible. The only justification offered for this conclusion is the sharp contrast between the police testimony and that of the appellant.<sup>149</sup>

Justice Newbern argued that the court should overrule *Roberts v. State*,<sup>150</sup> relied upon by the majority, asserting that the decision was wrong, and as "illogical as the majority opinion here." He found no rational basis for requiring a jury to take an all-or-

nothing approach, as the appropriate rational basis analysis would consist of evaluating the state's evidence against the accused's.<sup>151</sup> He noted: "I do not subscribe to the majority opinion's conclusion that jurors will just be "confused" when a lesser included offense instruction is given. I believe them capable of making the required distinctions."<sup>152</sup>

He asserted that the opinion "subtly shifted the emphasis to the evidence presented by the accused."<sup>153</sup> Instead, he advocated returning to the "reasonable practice of determining whether there is a rational basis for instructing on a lesser included offense by looking to the state's evidence to determine whether, as a matter of fact, an instruction on a lesser

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149. *Id.* Justice Newbern correctly forecast the precedential effect of the decision: "If we are to be consistent in following this justification, we will presumably require a lesser included offense instruction when the contrast in testimony is less stark. However, I do not believe that is the reading to be given the majority opinion. It will be construed as holding that anytime a criminal defendant denies having committed any of the acts with which he is charged he is entitled to no instructions on lesser included offenses. That construction will deprive the jury of avenues it might take in its search for the truth." *Id.* at 412, 720 S.W.2d at 696.

150. 281 Ark. 218, 663 S.W.2d 178 (1984). In *Roberts*, the appellant was charged with burglary and theft of property. The Court upheld the lower court's denial of a lesser instruction on theft by receiving because the appellant's defense was one of alibi—specifically, that he was elsewhere when the burglary occurred, that he had committed no theft, and that he had received the allegedly stolen goods several years before they were stolen. The *Roberts* court found appellant's request for a lesser charge not rational, since appellant claimed he was innocent of any theft. *Id.* at 220, 663 S.W.2d at 179.

151. "The lack of logic in the majority opinion's position is amply demonstrated by considering its fundamental proposition: Because the jury (and the trial judge) thought everything the appellant said was untrue, everything said by the state's witnesses was true." 290 Ark. at 414, 720 S.W.2d at 697.

152. *Id.* at 415, 720 S.W.2d at 697-98.

153. Justice Newbern argued that "[t]he result of this kind of thinking is that a plea of not guilty obviates the necessity of giving a lesser included offense instruction. The response to that assertion may be that we will only decline to require it when the accused testifies or presents other evidence denying his guilt. Again, this has the effect of denying the jury an opportunity to evaluate the state's evidence except to say it is all true or all false." *Id.* at 417, 720 S.W.2d at 698.

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included offense would be justified,”<sup>154</sup> and noted that it “surely does no harm” to require instruction on lesser included offenses, unless under no construction of the law with respect to the facts presented by the prosecution could a lesser included offense have been committed.

Nine years later, in *Brown v. State*,<sup>155</sup> another divided court<sup>156</sup> applied the rationale from *Doby* to uphold the trial court’s denial of defendant’s request for an instruction of possession as a lesser included offense of delivery of a controlled substance. The defendant put forth an alibi defense. In another strongly worded dissent, Justice Newbern restated the objections he made in *Doby*. Pointing out a striking contradiction made in the majority opinion and in a companion case filed the same day, where the state made an eloquent argument that “the function of a jury in our society is to ascertain the truth,”<sup>157</sup> Justice

Newbern argued that if the State’s evidence supported a finding that a lesser offense was committed by the defendant, the jury should be allowed to convict on that offense and not be limited to acquittal or conviction of the offense charged, so long as the lesser offense is, by definition, included in the offense charged.<sup>158</sup>

Justice Newbern asserted that the jury could easily have decided that the State had not proved its case, and it was wrong for the majority to find that, because the appellant presented alibi evidence, the jury has to believe all of the State’s evidence or none of it. It is wrong to say that appellant’s alibi evidence is in any way relevant to the State’s burden of proof.

Commenting on the sharply divided *Doby* opinion, he criticized the mistake the Court made in *Doby* and *Flurry*,<sup>159</sup> based upon flawed analysis in *Roberts*, which should have

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154. *Id.* at 416, 720 S.W.2d at 699. Justice Newbern also dissented in the *Flurry* appeal, a shorter opinion referencing his analysis in *Doby* and restating the same objections he made there: “Whether [the complaining witness] consented is a factual determination which, in this case, the jury should have been allowed to make. The general assembly has established fourteen as the age of consent, and [whether it is “inconceivable to us” that this 14-year-old child actually consented] is thus irrelevant unless the facts presented by the state showed forcible compulsion and no rational alternative. If the state had, for example, [compulsion,] then I would agree there would have been no rational basis for any instruction on a lesser included offense. That was not the case here.... [W]e should not determine the propriety of lesser included offense instructions on the basis of the accused’s denial of guilt.” 290 Ark. at 421, 720 S.W.2d at 701.

155. 321 Ark. 413, 903 S.W.2d 160 (1995).

156. The *Brown* court was even more fractured. *Id.* Three justices wrote for the majority; three justices dissented, with Newbern, joined by Brown, writing one dissent and Roaf writing another. Justice Dudley wrote a concurrence in which he stated that he agreed with the “unassailable” reasoning in the dissenting opinions and described subsequent holdings applying the *Doby* rationale “perplexing.” *Id.* at 418, 903 S.W.2d at 163. Dudley declined to overrule precedent, however, “without a clear warning to the bench and bar,” which he gave when he stated he would join in the reasoning of the dissent in all future cases. Noting the sharp differences of opinion in both the *Doby* dissent and in this one, the majority made a point to note that it was validating its decision in *Doby* based on the principle of *stare decisis*. *Id.*, 903 S.W.2d at 164.

157. *State v. Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995)(describing the State’s argument that a criminal defendant should not be allowed to gamble by having a jury instructed only on the offense charged without instructions on lesser included offenses in the hope that the jury will find the proof lacking and acquit).

158. 321 Ark. at 412, 720 S.W.2d at 164.

159. 290 Ark. 417, 720 S.W.2d 699 (1986).

been limited to its facts.<sup>160</sup> Noting that *Doby* has already been cited in a number of decisions,<sup>161</sup> he nonetheless stated emphatically that the analysis was incorrect: it “foreclosed the jury from avenues it might follow in its search for the truth.”<sup>162</sup> He asserted that the majority was again “subtly shifting the emphasis” away from a rational basis determination of evaluating the state’s evidence to the evidence presented by the accused.<sup>163</sup>

Justice Newbern asserted that a plea of not guilty, evidence of denial by the defendant, or an alibi evidence presented by the defendant has nothing to do with the strength or weakness of the state’s evidence. He noted that the state has the burden of proving each element of an offense, where (1) there is separable evidence about those elements, and (2) there is evidence from which a jury could conclude, based on credibility of the witnesses or conflicts in their testimony, that the state had not proven all of the elements, and (3) there should be an instruction on the lesser included offense when the failure with respect to one of the elements could result in conviction

of a lesser included offense. He argued that if the jury believes a part of the state’s proof, enough to sustain a lesser included offense but not enough to sustain the original charge, “an untruthful decision” would result if a jury were “limited to choices of conviction on the original charge or acquittal just because the defendant has denied his or her guilt or offered an alibi defense.”<sup>164</sup>

He also asserted that there is no rational basis for denying a lesser included offense instruction simply because the defendant denied the charged offense occurred. In his opinion, if a jury could believe part of the State’s evidence sufficient to render a conviction of a lesser included offense, then that constitutes a rational basis for instructing on the offense, and the Court “should favor truthful verdicts rather than the untruthful ones which will surely result in some cases from the playing of a legalistic game.”<sup>165</sup>

Justice Roaf, writing separately and joined by Justice Brown, began her dissent by noting that a basic premise of our justice system is that the state must prove, beyond a rea-

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160. *Roberts v. State*, 281 Ark. 218, 663 S.W.2d 178 (1984).

161. Specifically, in *Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993); *Fry v. State*, 309 Ark. 316, 829 S.W.2d 415 (1992); *Watson v. State*, 308 Ark. 444, 825 S.W.2d 569 (1992); and *Flurry v. State*, 290 Ark. 417, 720 S.W.2d 699 (1986).

162. 321 Ark. at 423, 903 S.W.2d at 424.

163. *Id.* As a result, he noted, “a plea of not guilty obviates the necessity of giving a lesser included offense instruction.... [T]his has the effect of denying the jury an opportunity to evaluate the state’s evidence except to say it is all true or all false.” *Id.*

164. “If the State charges, for example, capital felony murder and the defendant testifies he was not at the scene of the crime when it was committed, should the trial court refuse an instruction on a lesser degree of homicide if the State presents no evidence of any underlying felony? I suggest the refusal to instruct on the lesser included offense in that instance would be preposterous; yet that is just the sort of situation to which the majority opinion could lead.” *Id.* at 429-30, 903 S.W.2d at 169.

165. *Id.* at 430, 903 S.W.2d at 170.

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sonable doubt, every element of its case. In her opinion, the discrepancy in the testimony of the state's witnesses injected the element of doubt in this case.<sup>166</sup> She argued that the requested instruction should have been given and the jury allowed to weigh all the evidence including the issue of credibility presented by this conflict in testimony."<sup>167</sup> She sharply criticized the majority's interpretation of *Doby*, in that it held that a defendant who presents a complete denial or an alibi defense is an "all or nothing" situation, and can:

*never* receive a lesser included instruction, regardless of any weakness in the evidence or in the credibility of the witnesses in the state's presentation of its case. It is 'never' that makes this interpretation illogical because an

unsuccessful alibi defense in no way establishes the credibility of the state's witnesses or the elements of the greater offense charged . . . . Even so sacrosanct a concept as *stare decisis* should not stand in the way of correcting such a clear mistake.<sup>168</sup>

A decade later, the *Doby* rationale had become well settled, and cases were decided in accordance to it without extensive analysis. For example, in 1999, in *Fry v. State*,<sup>169</sup> the court applied the *Doby* standard to a sexual assault case, noting that because the defendant denied entirely any sexual encounter with the purported victim, there was no rational basis for a lesser included instruction.<sup>170</sup>

Despite Justice Newbern's strong objection and the two sharply divided courts, this

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166. "The discrepancy in the testimony of the state's only two witnesses to the drug transaction in question can be said to have injected at least the element of doubt in this case—unless it also defies common sense that policemen can be untruthful or in error, or that drug informants—most often recruited from the seamier elements of our society—can be the same. In this case, one or the other, or perhaps both of these witnesses either fabricated or were mistaken about an aspect of the drug transaction." *Id.* at 430-31, 903 S.W.2d at 170.

167. *Id.*

168. *Id.*

169. 309 Ark. 316, 829 S.W.2d 415 (1999).

170. The court also noted, without analysis, that the elements of the two crimes differ in that in there is an age based element in the lesser charge of third degree carnal abuse that is not present in the larger one of rape, so the instruction was properly disallowed. *Id.* at 318, 829 S.W.2d at 417.

position has become the accepted position in Arkansas.<sup>171</sup> Arkansas courts have reiterated the *Doby* rationale numerous times where the defense theory was based on a complete denial of the defendant's participation in the act charged.<sup>172</sup> In several recent unreported decisions, the Court of Appeals affirmed the rationale without extensive analysis. In *Sain v. State*,<sup>173</sup> the Court of Appeals held that because the appellant claimed that he was innocent of the charge against him, there was no rational basis that the jury be instructed on the lesser-included offense. The court noted the general proposition that if there is no evidence tending to disprove one of the elements of the larger offense, the trial court is not required to give an instruction on a lesser one. In addition, if after viewing the facts in the light most favorable to appellant, there is no rational basis for a verdict acquitting him of the greater offense and convicting him

of the lesser one, it is not error for the trial court to refuse to give the instruction on the lesser-included-offense. The court concluded that "the mere fact that the proof would have sustained a conviction on the lesser offense of fourth-degree sexual assault did not make it a lesser-included offense and mandate that the jury be instructed on it."<sup>174</sup>

In 2006, in *Jones v. State*,<sup>175</sup> and in *Garcia v. State*<sup>176</sup> in 2008, the Court of Appeals relied on *Fry* and determined that no rational basis existed in either case for a lesser-included offense instruction because both defendants denied entirely any sexual encounter with the purported victims. In *Jones*, appellant's thirteen year old niece accused him of engaging in sexual intercourse with her. Appellant denied the accusations. He was convicted of rape. On appeal, he asserted that the trial court erred by refusing to give jury instructions for lesser sexual assault offenses. The

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171. *Doby* has also been limited in several cases. In *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003), the Court upheld a capital murder conviction. Appellant hoped for an all-or-nothing jury charge, but the trial court instructed on a lesser charge. He had denied all liability for capital murder, and asserted under *Doby*, that it was error to provide an lesser instruction based on his absolute denial that he committed any crime. The court upheld his conviction on the lesser offense, and found it was appropriate to instruct on the lesser charge because the evidence indicated that a murder had been committed, although the extent of the defendant's involvement as an accomplice was not conclusively established. *Id.* at 319-20, 107 S.W.3d at 151-52; *see also* *State v. Jones*, 321 Ark. 451, 456, 903 S.W.2d 170, 174 (1995) (reversing a murder conviction based on trial court's error in refusing to give the state's proffered instructions. The court distinguished *Doby*, because in this case, the appellant did not deny shooting the victim, but instead defended his actions, then sought to employ an all-or-nothing strategy rather than request a lesser charge); *Fladung v. State*, 292 Ark. 510, 514, 730 S.W.2d 901, 905 (1987) (reversing defendant's conviction for attempted capital murder due to trial court's error in refusing to instruct on lesser included offenses. The court distinguished *Doby*'s "all or nothing" situation; this appellant testified, giving a different version of events than the arresting officer. The court noted that the two versions of events could prove both appellant's intent to commit the greater charge and whether appellant either purposely or recklessly in committed the lesser crimes. Therefore, the evidence was not the same as *Doby*'s "all or nothing" case).

172. *See, e.g.*, *Vickers v. State*, 320 Ark. 437, 898 S.W.2d 26 (1995); *Franklin v. State*, 314 Ark. 329, 863 S.W.2d 268 (1993); *Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993); *Fry v. State*, 309 Ark. 316, 829 S.W.2d 415 (1992); *Watson v. State*, 308 Ark. 444, 825 S.W.2d 569 (1992).

173. 2005 WL 3307322 (Ark. Ct. App. 2005).

174. *Id.* at \*6.

175. 2006 WL 933546 (Ark. Ct. App. 2006).

176. 2008 WL 4939739 (Ark. Ct. App. 2008).

court noted that because appellant denied ever touching his niece in an inappropriate or sexual way, his denial made the trial court's refusal of the requested instructions entirely proper.<sup>177</sup> In *Garcia*, appellant denied that he had any sexual contact with the twelve-year-old victim. The court was unpersuaded by the appellant's argument that *Fry* placed an unreasonable burden upon him, as he was not entitled to a lesser charge unless he confessed to some type of sexual contact. The court noted without analysis that because he denied the charges, there could be no rational basis for giving a lesser-included instruction on another sexual offense.<sup>178</sup> In both cases, the court found it unnecessary to determine if the lesser charges were lesser included offenses as a matter of law, because they found no error below.

#### **IV. Navigating through the Confusion: The Case for Allowing Lesser Included Instructions in Sexual Assault Cases**

The General Assembly has provided a standard framework to analyze overlapping offenses. It codified the common law doctrine of lesser included offenses. In applying that framework, Arkansas courts have consistently stated that lesser included instructions

should be liberally allowed, even suggesting that a lesser-included charge should always be included in a jury charge to enable the jury to convict a defendant based on the specific criminal conduct described at trial.

But that goal has proven to be elusive, especially in its application to Arkansas' sexual assault statutes. Courts have demonstrated the difficulty in applying the standard to those statutes in two separate lines of decisions that limit the availability of a lesser included offense. First, the courts' overly mechanical and rigid application of the elements test to the uniquely drafted sexual assault statutes should be slightly modified to allow a lesser included instruction for a logically related crime if the evidence suggests it is appropriate. This is especially important if the only element missing in the greater offense is the age of the perpetrator or victim of the crime. Further, Arkansas courts should not preclude a defendant from obtaining a lesser included instruction merely because the defendant has denied the charges or introduced an alibi defense; a jury should be allowed to evaluate the testimony and determine if the facts support a conviction of a lesser offense rather than a more serious one, if justified by the evidence.

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177. 2006 WL 933546 at \*1.

178. 2008 WL 4939739 at \*4.

**A. The Elements Test Should be Expanded to Allow a Lesser Included Instruction for a Logically Related Sexual Offense or a Lower Degree Sexual Offense if Supported by the Evidence**

Over the past two decades, Arkansas courts have disallowed lesser included instructions in numerous sexual assault cases based on a narrow comparison of statutory language. Courts have declined to analyze the availability of a lesser included instruction in sexual assault cases beyond a comparison of the statutory elements of the age of the perpetrator or the victim of a sexual crime. Defendants who meet the statutory definition or age range to be charged under a lesser offense are typically precluded from obtaining an instruction on that lesser charge if the larger offense does not contain a corresponding age range as well, even if the evidence at trial best describes the lesser charge.

The sexual assault statutes are unique. Unlike a typical criminal offense, where a greater offense contains more requirements than a less serious one, and the misconduct escalates with the degrees of culpable conduct, many of the lesser sexual assault statutes contain more specific requirements that must be met than do the more serious charges. For example, in a statute that contains intent standards, which under Arkansas law escalate through the four increasingly culpable mental states of “negligent,” “reckless,” “knowing,” and “purposeful” conduct,<sup>179</sup> the

less culpable conduct is contained within the higher charge: in order to act recklessly, a defendant would also have to act negligently, to act knowingly, a defendant would have to act recklessly, and so on. The conduct described in the lesser statute is therefore typically “contained within” the larger as required in section 5-1-110(b) of the lesser included statute.

But that rationale does not apply in the strict liability sexual assault crimes. Those statutes include additional descriptions of either the perpetrator or the victim in the smaller charge, not in the larger one. Under these uniquely drafted offenses, the lesser charge will never fit within the larger one, so there is not a lesser instruction available for lower degrees of harm.

Certainly, the Arkansas Code’s descriptions of the various forms of sexual assault are complicated and sometimes confusing. Despite their common name and location in the same section of the code, the crime of rape (both statutory and forcible)<sup>180</sup> shares only one element (i.e., the specific conduct of sexual intercourse or deviate sexual activity) with other crimes.<sup>181</sup> In contrast, the Code defines two different forms of statutory rape, and the less serious forms might be considered lesser included offenses of the more serious ones. For example, a defendant might be indicted for statutory rape in violation of § 5-14-103(a)(3). This subsection requires proof that the victim was under fourteen. It allows an affirmative defense for a perpetrator who is not more than three years older than the

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179. ARK. CODE ANN. § 5-2-202.

180. ARK. CODE ANN. § 5-14-103.

181. Sexual assault in the first, third, and fourth degree. *See* ARK. CODE ANN. §§ 5-1-124, 126, 127.

182. ARK. CODE ANN. § 5-14-103(a)(3)(B).

victim.<sup>182</sup> A factual dispute about the date or time of the criminal act might raise a question about the age of the victim, yet the evidence might still support a conviction under § 5-13-103(a)(3). Sexual assault in the fourth degree under § 5-14-127(a)(1)(A) precludes the same conduct described in the rape statute with persons under age 16, if the perpetrator was over age 20. If there is a dispute as to whether the assault occurred when the victim was 13½, or 14½, the impact on the perpetrator is significant.

The elements approach precludes some sexual assaults from qualifying as a lesser included offense of a greater charge based on defendant's minimum or maximum age, not based on age ranges. It therefore would prevent, for example, a 19-year-old from obtaining a lesser included instruction available to someone age 20 in certain situations, and would prevent rape of a 15-year-old from being a lesser included offense of rape of a child under age fourteen. It prevents a jury from evaluating the testimony of the witnesses to determine if the events as described meet the definition of a lesser charge of sexual conduct or a more serious form of sexual assault. Because the statute defines the age requirements in exclusive rather than inclusive terms, the less serious offense requires additional proof of something not required by the more serious one.

A review of the problems created when courts have applied the lesser included offense doctrine to the sexual assault statutes illustrates the need for an integrated analytical framework that takes account of all of the issues and balances the competing factors between the two statutory frameworks. The current elements approach to a lesser included sexual assault crime should be expanded to allow a more flexible consideration of whether a lesser crime was, in fact, committed as charged in a particular case. It is impossible to reconcile the lesser included instruction

standard, which allows a lesser charge "included within another offense," with the sexual assault statutes, where the lesser crimes contain additional status-based requirements not found in the greater charge. A strict reading of the lesser included instruction standard currently disallows any lesser included instruction, and courts are therefore limited in their ability to allow a lesser charge.

Courts should instead apply an integrated approach that furthers the goals of both the lesser included instruction doctrine and the sexual assault statutes. The goals of the lesser included instruction doctrine are frustrated if a court cannot ever allow a lesser charge within a larger statutory scheme. Policy favors a more flexible approach than the strict application of the elements test currently employed by the courts. The courts' current focus on semantical comparisons of age or status classifications of the defendant or the alleged victim in a sexual assault, instead of evidence, precludes a jury from fulfilling its primary responsibility, which is to determine the defendant's guilt or innocence with respect to a specified crime. The testimony admitted at trial is critical to the process.

An integrated approach would permit juries to determine whether a defendant is guilty of a crime based on its review of the evidence before it. Arkansas should adopt a modified version of the Model Penal Code evidence-based approach, with significant limitations. As with the Model Penal Code's statute, the same basic conduct must provide the foundation for both the higher charge and the lesser charge. Lesser included offenses should include, but need not be limited to, crimes that satisfy the elements test. In fact, it is not necessary to move entirely away from the elements test to the evidence test, but the strict reliance on the elements test should be expanded as applied to the sexual assault statutes. The General Assembly has not expressed any displeasure with the ele-

ments test in general, and it is beyond the scope of this analysis to suggest a wholesale revision to the entire lesser included instruction doctrine in Arkansas.<sup>183</sup> But if the elements test were broadened in its application to the sexual assault statutes, it would allow lesser included offenses where appropriate.

The test should be limited, of course, by prohibitions against spurious arguments, and should not be allowed until both definitional and evidentiary thresholds have been met. The relationship between the greater and the lesser offense is, of course, important, and any modified test must include restrictions to ensure that the lesser offense is, logically, sufficiently related to the greater one. The relationship between the two offenses must show that they were legislatively designed to protect the same interest, but they should not be required to share identically worded elements. Courts should look to the nature of the offense to evaluate whether other crimes are appropriately a lesser included offense, even if they do not fit squarely within the specifically graduated descriptions within the current sexual assault statutes.

In deciding what lesser sexual assault offenses would qualify, the standard should turn on the nature of the offense such that lesser included instructions for sexual assault crimes are not precluded merely based on the age or status of the defendant or the victim in these strict liability crimes. The age-based distinctions in the statutes should not be the determining factor.

The crimes that should be allowed as a lesser included offense could be identified in several ways. One method would be to allow a lesser included instruction in those situations where a defendant's age qualifies him or her to be charged under a lesser crime based on the age limits in the lower offense, if the evidence allowed it. Another method would be to allow a lesser instruction for those offenses described as a lesser degree offense within the Code. Under either approach, the trial court should be allowed to assess whether a lesser included instruction should be given based on the evidence presented.

The Arkansas General Assembly has designed a comprehensive set of sexual assault statutes that are designed to protect people, and in particular, children, from sexual assault. Protecting that interest does not require the existence of identical criminal elements. What is critical is protecting the public, and especially children, from sexual assault while ensuring the integrity of the jury system to insure that a defendant is punished for the actual crime he or she committed. An artificial distinction between degrees of a sexual assault statute based on a classification, rather than based upon conduct, does not further the goals of the sexual assault statutes. It is illogical to evaluate the availability of a lesser included instruction using this mechanical assessment.

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183. In fact, a wholesale adoption of the evidence test could create a new set of problems, as that approach raises the concern that a defendant might not receive fair notice of the charges against him or her, or raises the possibility that a defendant would raise spurious arguments in an effort to obtain a lesser included instruction.

**B. Arkansas Courts Should Not Deny a Lesser Included Instruction Merely Because a Defendant Denies the Charges or Offers an Alibi Defense**

Defendants accused of a serious sexual assault charge who assert their innocence to the charges should not be denied a lesser included instruction merely because of that denial. The court's refusal to allow the jury to evaluate the evidence also conflicts with the goals of the lesser included doctrine.

Criminal defendants who are accused of a serious sexual assault charge, and who assert innocence to the charges, are routinely denied any lesser included instructions to be given to the jury, as their denial does not provide a "rational basis" to allow a lesser included instruction. But a denial of the charge does not provide a rational basis to prohibit a lesser included instruction. It is more rational for a jury to be allowed to evaluate the evidence, in that it accomplishes the goals of the lesser included doctrine. Courts should allow evidence of the underlying facts to come in even if the defendant has denied the charges, so that the jury, as Justice Newbern noted, can do its job. The current practice of disallowing the lesser charge results in a judicially created all-or-nothing scenario which causes unreliable fact-finding, a circumvention of trial integrity, and a contradiction of the goals of the lesser included doctrine.

The fact that the *Doby* and *Brown* cases prompted such vigorous debates among members of the Court should cause a reex-

amination of this issue. Defendants continue to raise this issue on appeal, indicating that the issue is not well settled. In fact, the issue may remain subject to review and reconsideration.

**Conclusion**

The elements test is too narrow for Arkansas courts to give a lesser included instruction in many sexual assault crimes where the evidence would otherwise allow it. It does not meet the goals of the lesser included instruction doctrine to allow appropriate convictions under the statutes. Either Arkansas courts should modify the strict elements test, or the General Assembly should amend the sexual assault statutes, to allow lower degree offenses or logically related offenses to qualify as lesser included offenses if supported by the evidence. Further, the General Assembly should eliminate the confusing gaps and overlaps in the statutes. Finally, Arkansas courts should reevaluate the current practice of disallowing a lesser charge instruction to defendants who plead innocent to a charge or provide an alibi defense. A conviction should be based on evidence supporting a particular charge of a violation of a specific statute. Juries should be allowed to hear and review the evidence and determine which crime best fits the facts presented to it. The jury should be instructed on lesser-included offenses, where the evidence supports them, to preserve the integrity of a jury trial and the reliability of its outcome.