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Torts and Civil Rights Law: Migration and Conflict: Symposium Introduction

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Curiously, the connection between civil rights and civil wrongs has not been a topic that has captivated the attention of large numbers of legal scholars over the years. The distance that has developed between the two fields likely reflects their placement on opposite sides of the public–private divide, with Title VII and other anti-discrimination statutes forming part of public law, while torts is a classic, private law subject. To compound the division, both subjects are to some extent still under-theorized. Employment discrimination scholarship is often caught up in the process of analyzing the doctrinal implications of the latest Supreme Court cases, with less attention paid to big picture questions. For its part, torts scholarship still has relatively little to say about social equality or harms related to discrimination, despite the recent growth in tort theory.¹

This Symposium is a product of our conviction that the time is ripe for serious consideration of the intersection of these two fields, owing principally to recent developments in the U.S. Supreme Court. In 2011, the Court expressed its view that when Congress created “a federal tort” through enacting Title VII, it “adopt[ed] the background of general tort law.”² Three years later, the Court reiterated that it regards Title VII as a statutory tort. In a 5–4 opinion adopting the “but-for” causation test for use in retaliation cases, the majority declared that tort rules should be treated as “the default rules [that Congress] is presumed to have incorporated, absent an indication to the contrary”³

The Court has not always been so intrigued by tort law. Up until the late 1980s, the Court hardly mentioned tort law in Title VII cases, instead relying on the purposes underlying Title VII and the language of the Act to guide its interpretations.⁴ From the late 1980s to 2009, it employed a more balanced approach, sometimes using tort as a supplementary tool to help it decide cases in particular contexts, but being careful to adapt tort principles to the purposes and needs of anti-discrimination statutes.⁵ However, since *Gross v. FBL Financial Services, Inc.* was decided in 2009, rejecting mixed-motivation analysis and adopting the “but-for” causation test for ADEA cases,⁶ and

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¹ See MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 30–34 (2010) (discussing “critical torts scholarship” focused on gender and race).

² *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1187 (2011).

³ *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013).

⁴ See Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1052, 1057 (2014).

⁵ See *id.* at 1058–63.

⁶ *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009).

particularly since *Staub v. Proctor Hospital* incorporated the controversial concept of proximate cause into anti-discrimination law in 2011,⁷ the Court has stepped up its project of “taking up” tort law to resolve employment discrimination disputes. Clearly something new is afoot that has taken many academics in both fields by surprise.

As the contributions to this Symposium attest, the Court’s rapid moves have begun to inspire a rethinking of the “basics” in both fields, forcing us to tease out the similarities and dissimilarities in these two regimes ostensibly dedicated to righting wrongs and deterring harms. Several scholars participating in this Symposium deserve credit for initiating the dialogue through their publication of articles examining the Court’s borrowing of tort principles for use in Title VII and ADEA cases,⁸ most notably in 5–4 decisions in favor of employers. Meanwhile, the American Law Institute—the organization responsible for creating the Restatements of Law, including the highly influential *Restatement of Torts*—has been quick to point out the record number of times the *Restatement* had been cited by the U.S. Supreme Court in the past year.⁹ There can be little doubt that this Supreme Court has rediscovered “the common law” and is using it to reshape anti-discrimination law. Even the EEOC has gotten into the act. It refers to tort principles in its new guidance on disparate impact under the ADEA, although the agency gives the importation of tort principles a more plaintiff-friendly twist.¹⁰

This move to incorporate common law principles into statutory anti-discrimination claims has already proven controversial, with several Title VII scholars being openly skeptical or critical of this development.¹¹ We have not heard as much yet from tort scholars, in part because the migration has largely been a one-way street—moving tort principles into civil rights law rather than infusing tort law with civil rights norms and principles. However, we should not lose sight of the fact that the migration occasionally shifts direction when, for example, common law courts take a page from Title VII harassment law to

⁷ *Staub*, 131 S. Ct. at 1193.

⁸ See, e.g., William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447, 455 (2013); Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 34; Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1467 (2012).

⁹ 2014 *Supreme Court Citations*, AM. L. INST., http://www.ali.org/_news/2014-sc-citations.html, (last visited Sep. 5, 2014), archived at <http://perma.cc/7B79-8A7K>.

¹⁰ 29 C.F.R. § 1625.7(e)(1) (2012) (“A reasonable factor other than age is a non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances.”).

¹¹ See William R. Corbett, *What Is Troubling About the “Tortification” of Employment Discrimination Law*, 75 OHIO ST. L.J. 1027, 1030 (2014) (noting that “scholarly commentary on the subject since *Staub* has ranged from cautious to suspicious to highly critical”).

inform the tort concept of “outrageous” conduct¹² or use anti-discrimination principles to prohibit the use of gender-based or race-based economic data in computing loss of future earning capacity in garden-variety tort actions.¹³ Additionally, although we have recently come to associate the incorporation of tort principles with pro-business, pro-defendant outcomes, the contributions in this Symposium demonstrate that such a simple equation is not inevitable as a matter of theory or doctrine, given that tort law has the potential to expand remedies for discrimination victims as well.

The unique aspect of this Symposium is that it brings together civil rights and torts scholars for the first time to analyze the intersection of their fields. Some of us have used this opportunity to step back and reflect, while others have sharpened and deepened our critiques. Because of its cross-field nature, the Symposium has taken many of us into uncharted waters, generating a mix of theory and doctrine, blending references to discrimination based on race, sex, age, disability, and genetics and taking differing approaches to tort law. It focuses simultaneously on big questions about the compatibility of public and private law and the limits of the judicial interpretive process as well as on smaller, practical questions related to the integration of specific civil rights and tort doctrines and principles.

Although the articles in this Symposium are far too diverse and wide-ranging to summarize in a paragraph, there are some recurring themes that break through the surface and deserve particular attention. There seems to be wide agreement that incorporating tort principles into anti-discrimination law is (or at least should be) a complex process, going well beyond labeling Title VII a statutory tort.¹⁴ At a minimum, if done well, the tortification process requires identifying the precise elements of tort law to be taken up, critically examining the content of those strands of tort law, and being aware of the high degree of selectivity in the process, whereby only some strands of tort law are chosen for incorporation while other possible features of the common law are not so selected.¹⁵ Indeed, the selectivity of the incorporation process has prompted several contributors to speculate about the effect on Title VII (and other anti-discrimination laws) if different tort doctrines were incorporated or different tort analogies were drawn,¹⁶ demonstrating the indeterminacy of both

¹² See Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2176 (2007).

¹³ See Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 75 (1994).

¹⁴ See Corbett, *supra* note 11, at 1030; Sandra F. Sperino, *Let's Pretend Discrimination Is a Tort*, 75 OHIO ST. L.J. 1105, 1105–07 (2014).

¹⁵ See Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 OHIO ST. L.J. 1311, 1311–14 (2014); Charles A. Sullivan, *Is There a Madness to the Method? Torts and Other Influences on Employment Discrimination Law*, 75 OHIO ST. L.J. 1077, 1087–88 (2014).

¹⁶ See Deborah L. Brake, *Tortifying Retaliation: Protected Activity at the Intersection of Fault, Duty and Proximate Cause*, 75 OHIO ST. L.J. 1371, 1371–74 (2014); Catherine E.

bodies of law. This Symposium has also sharpened the debate over the potential costs of privileging private law principles and modes of reasoning over more “purposive” interpretive approaches that emphasize the distinctive civil rights or public policy objectives of anti-discrimination laws.¹⁷ In particular, several contributions in this Symposium note that tortification has mainly served to solidify the regime of at-will employment, placing management prerogatives ahead of the equality interests of employees.¹⁸ In favor of torts and common law, however, many contributors see torts as a valuable resource for certain discrimination victims who find the remedies under the status-bound statutory schemes inadequate.¹⁹

Four contributions in the Symposium present broad overviews and reflections on the tort incorporation process. The opening selection, *What Is Troubling About the Tortification of Employment Discrimination Law?* by William R. Corbett, provides a comprehensive retrospective on the incorporation controversy, examining the various ways in which an employment discrimination claim is or is not “tortlike.”²⁰ Calling the tortification process “potentially pernicious” and responsible for producing an “asymmetrical and chaotic” body of employment discrimination law, Corbett nevertheless holds out hope for reform through more careful analysis and adaptation of tort law to the employment discrimination context.²¹ Charles A. Sullivan’s contribution, *Is There a Madness to the Method?: Torts and Other Influences on Employment Discrimination Law*, meditates on the judicial interpretive process and offers the core insight that courts “can draw on only a limited number of concepts,” making resort to basic tort principles understandable and unexceptional.²² Taking the varying judicial constructions of the term “employee” as his example, however, Sullivan asks the probing question why the Court sometimes reaches for “more technical, common law meaning[s,]” rather than interpreting the law in line with an “ordinary, contemporary, [or] common meaning” derived from real-world experiences and social practices.²³ In a penetrating thought experiment, Sandra F.

Smith, *Looking to Torts: Exploring the Risks of Workplace Discrimination*, 75 OHIO ST. L.J. 1205, 1205–06 (2014); Sperino, *supra* note 14, at 1121–25.

¹⁷ See Maria L. Ontiveros, *Title VII as Fundamental Law*, 75 OHIO ST. L.J. 1163, 1171–72 (2014).

¹⁸ See W. Jonathan Cardi, *The Role of Negligence Duty Analysis in Employment Discrimination Cases*, 75 OHIO ST. L.J. 1127, 1142–55 (2014); Corbett, *supra* note 11, at 1039–43.

¹⁹ See Ifeoma Ajunwa, *Genetic Testing Meets Big Data: Tort and Contract Law Issues*, 75 OHIO ST. L.J. 1223, 1240–49 (2014); L. Camille Hébert, *Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort*, 75 OHIO ST. L.J. 1341, 1341–44 (2014); Laura Rothstein, *Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment?*, 75 OHIO ST. L.J. 1261, 1275–81 (2014).

²⁰ See Corbett, *supra* note 11, at 1035–39.

²¹ See Corbett, *supra* note 11, at 1030, 1050, 1058.

²² Sullivan, *supra* note 15, at 1078.

²³ Sullivan, *supra* note 15, at 1090.

Sperino's *Let's Pretend Discrimination Is a Tort* spells out how very different the body of employment discrimination law might look if courts took the tort analogy seriously.²⁴ Her observation that tort law is "both a set of substantive choices and a methodology" opens up the possibility of infusing civil rights statutes with a dynamic version of tort law that responds to changing circumstances, including "new understandings about the way that discrimination is perpetrated."²⁵ Finally, torts scholar W. Jonathan Cardi looks beneath recent judicial rulings to discover an "embrace of tort concepts [that] runs even deeper than [courts] have expressly stated."²⁶ *The Role of Negligence Duty Analysis in Employment Discrimination Cases* asserts that the all-important tort concept of "duty"—along with policy considerations commonly relied on to limit duties—may help explain the outcomes of employment discrimination cases, with concern for employer freedom and at-will employment functioning as the equivalent of a "no-duty" rule.²⁷

Standing back from the current incorporation debate, Maria L. Ontiveros and Catherine E. Smith envision alternative models for Title VII liability that would set the law on a more progressive course.²⁸ Rather than reach for tort law for guidance, Ontiveros argues that courts should be mindful of the powerful history of the Civil Rights Act of 1964, which "gave life to basic, fundamental principles upon which our Constitution and overall systems of laws are based and which the country demanded."²⁹ *The Fundamental Nature of Title VII* sets out a broader vision of Title VII by placing it in the context of the other important titles of the 1964 legislation, treating it as a "super-statute," and considering the equal right of individuals to own and use their labor as an aspect of human rights law.³⁰ By way of contrast, Smith believes that "tort law is a logical and valuable" source of principles for courts in employment discrimination cases.³¹ In *Looking to Torts: Exploring the Risks of Workplace Discrimination*, however, Smith argues for a new approach to torts borrowing that would authorize courts to address and regulate implicit bias as part of its torts-like function of "rooting out conduct in the workplace that poses risks of discrimination."³² Finally, with respect to disability and genetic discrimination, Ifeoma Ajunwa and Laura Rothstein take a "both/and" approach, arguing that vigorous enforcement of broadly-conceived tort and anti-discrimination statutory protection is necessary to capture the wide range of harms in these relatively new areas of civil rights. In *Genetic Testing Meets Big Data: Tort and Contract Law Issues*, Ajunwa addresses the harms, in the

²⁴ See Sperino, *supra* note 14, at 1116–18.

²⁵ Sperino, *supra* note 14, at 1107.

²⁶ Cardi, *supra* note 18, at 1128.

²⁷ See Cardi, *supra* note 18, at 1129–32, 1138–40.

²⁸ See Ontiveros, *supra* note 17, at 1202–03; Smith, *supra* note 16, at 1231.

²⁹ Ontiveros, *supra* note 17, at 1164.

³⁰ See Ontiveros, *supra* note 17, at 1172–74.

³¹ Smith, *supra* note 16, at 1206.

³² Smith, *supra* note 16, at 1207.

workplace and beyond, arising from inadvertent disclosure of genetic information obtained by genetic testing.³³ In *Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment?*,³⁴ Rothstein discusses the complex legal landscape facing wheelchair users and other individuals with mobility impairments when they attempt to use law to make the physical environment more accessible.

The final three Symposium contributions tackle two discrete, fast-moving areas of civil rights law: the law of harassment and retaliation law. In *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, Martha Chamallas criticizes the Court's importation of common law tort and agency principles to narrow the scope of employer vicarious liability in Title VII harassment cases.³⁵ Reminding us of the infamous "fellow servant" rule that virtually closed off tort recovery for employees injured on the job—and the markedly different structural features of torts versus Title VII law—she maintains that incorporation is "anomalous" because "[t]here is really little of value to borrow here."³⁶ Gravitating towards tort law, in *Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort*, L. Camille Hébert borrows from French, Canadian, and E.U. law to explore whether discrimination victims might benefit from treating sexual harassment as a "dignitary tort."³⁷ Mapping the elements of the tort of intentional infliction of emotional distress onto fact patterns in hostile environment cases, she finds potential in using a dignity tort frame to supplement, but not supplant, Title VII's discrimination frame.³⁸ The Symposium concludes with a contribution by Deborah L. Brake who excavates dozens of lower court cases to reveal "how tort principles have quietly taken root in retaliation law[.]"³⁹ In *Tortifying Retaliation: Protected Activity at the Intersection of Fault, Duty and Causation*, Brake's assessment is that "tort analogies may have more staying power in retaliation than the rest of employment discrimination[.]" as courts increasingly rely on no-duty and proximate cause reasoning to limit the threshold of what counts as protected activity and which employees are protected from retaliatory measures.⁴⁰

³³ See Ajunwa, *supra* note 19, at 1223–29.

³⁴ See Rothstein, *supra* note 19, at 1265–73.

³⁵ See Chamallas, *supra* note 15, at 1319–27.

³⁶ Chamallas, *supra* note 15, at 1334.

³⁷ See Hébert, *supra* note 19, at 1345–47.

³⁸ See Hébert, *supra* note 19, at 1368–69.

³⁹ Brake, *supra* note 16, at 1371.

⁴⁰ Brake, *supra* note 16, at 1377.