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Discrimination Law: The New Franken-Tort

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INTRODUCTION

In a series of cases, the U.S. Supreme Court imported tort law into federal discrimination law.[1] The Court used the language of tort law, relying on concepts like intent, but-for cause, and proximate cause. The Court did not claim to alter these concepts to accommodate the discrimination statutes' texts, purposes, or histories. Rather, the cases purport to apply common law concepts in their traditional forms as described in cases, treatises, and the *Restatement of Torts*.

This pure common law narrative is flawed in two respects. First, the U.S. Supreme Court often purported to rely on traditional tort law but defined tort concepts in ways that were different from how they are traditionally understood. For example, the Court imported the concept of factual cause into discrimination law. It defined factual cause as requiring the plaintiff to establish but-for cause in age discrimination and in retaliation cases.[2] The Court ignored that tort law allows a plaintiff to establish factual cause through a substantial factor standard and that tort law sometimes allows causation burdens to shift to the defendant.[3]

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1. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013); Staub v. Proctor Hosp., 562 U.S. 411 (2011); Gross v. FBL Fin. Servs., Inc. 557 U.S. 167 (2009).

2. *See Nassar*, 133 S. Ct. at 2533 (requiring a Title VII retaliation claim to conform to the but-for causation standard); *Gross*, 557 U.S. at 177–78 (requiring but-for cause in Age Discrimination in Employment Act (ADEA) disparate treatment cases).

3. *See* Sindell v. Abbott Labs., 607 P.2d 924, 928 (Cal. 1980) (discussing ways that plaintiffs could recover despite being unable to establish which defendant caused the harm); Summers v. Tice, 199 P.2d 1, 3–5 (Cal. 1948) ("If defendants are independent tort feasors and thus each liable for damages caused by him alone, but matter of apportionment is incapable of proof, innocent wronged party should not be deprived of redress. The wrongdoers should be left to work out between themselves any apportionment."); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 27 (AM. LAW INST. 2010) (noting that a different factual cause standard exists when multiple sufficient causes exist); *id.* § 27 cmt. a (stating that there is nearly universal recognition that the but-for standard is inappropriate when multiple sufficient causes exist); RESTATEMENT (SECOND) OF TORTS § 430 cmt. d (AM. LAW INST. 1965)

Second, and perhaps more importantly, the Court ignored the ways in which the unique characteristics of the employment discrimination statutes necessarily change the underlying tort concepts. For example, the federal discrimination statutes hold the employer, not individuals, liable for statutory violations. Traditional definitions of tort concepts, such as intent, largely conceptualize wrongful acts perpetrated by one actor who is a person. Importing tort concepts into a statute that provides entity liability changes these concepts in important ways.

This tortification project has transformed federal discrimination law into a new "Franken-tort."[4] This new Franken-tort has component pieces that only vaguely resemble the component pieces from which it was drawn. The U.S. Supreme Court created this new Franken-tort through a series of cases, each of which focuses on one or two distinct tort concepts.[5] This Article is the first to piece together these disparate cases to unveil the new tort the Court has created. When considered together, this new tort only vaguely resembles any tort imagined to date.

When courts radically change an existing cause of action or create a new one, they often disguise the changes by relying on the language and structure of traditional common law doctrines;[6] thus, courts can claim to reason from prior principles and an existing body of law. Although this move is not new, the U.S. Supreme Court's use of tort law in the discrimination context raises three important problems. First, the Court imported tort doctrine in a piecemeal fashion, focusing on small questions like factual cause. The Court has never explained how the pieces fit back together. Second, the Court has failed to connect the new tort regime with either the text of the discrimination statutes or the decades of case law that preceded tortification. Finally, once the individual pieces are put together, it is unclear whether the emerging structure actually determines whether an employer treated an employee differently because of a protected trait. The move to tort law

(noting that there can be more than one source of harm); *id.* § 432 (noting that plaintiffs can still establish factual cause when more than one actor causes harm); RESTATEMENT (FIRST) OF TORTS § 9 cmt. b (AM. LAW INST. 1934) (defining a legal cause as one that is a "substantial factor in bringing about the harm").

4. Mary Shelley's novel *Frankenstein* recounts how Victor Frankenstein created a living monster. In his attempt to create life, Victor pieced together individual body parts from multiple corpses and re-animated them. The resulting monster was grotesque and unlike the form Dr. Frankenstein intended. 1 MARY WOLLSTONECRAFT SHELLEY, FRANKENSETIN; OR THE MODERN PROMETHEUS (1823).

5. *See infra* Part II (discussing the tortification of employment discrimination).

6. *See* Anita Bernstein, *How To Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1545 (1997) (discussing how new torts often emerge by pretending to mirror traditional doctrines but then modifying that doctrine over time).

will inevitably create more confusion in an already complicated discrimination jurisprudence.

This tortification of discrimination law also poses many questions for tort law, especially the *Restatement of Torts*. The *Restatement* is no longer just a restatement of torts; it is now also going to be called on as a "Restatement of Torts and Federal Employment Discrimination." One goal of this Article is to alert torts scholars, judges, and practitioners about the *Restatement*'s new role in discrimination jurisprudence. In many ways, the U.S. Supreme Court has turned the *Restatement of Torts* into the Restatement of Torts and Civil Rights. But, this move is not unidirectional. As the Court is using tort law to redefine discrimination law, it is also changing and restructuring the underlying tort law.

This Article proceeds as follows. Part II briefly outlines the U.S. Supreme Court's move to tortify discrimination law.[7] Parts III, IV, and V discuss the ways the Court is modifying and restructuring tort concepts.[8] Part VI discusses the new tort and discrimination elements as well as the challenges they raise.[9]

II. The Tortification of Employment Discrimination

Since the late 1980s, courts and legal scholars have labeled federal employment discrimination statutes as torts, and courts have increasingly applied tort concepts to these statutes.[10] Over the past decade, this tortification of employment discrimination law has picked up speed. The U.S. Supreme Court has repeatedly invoked tort law to interpret two of the cornerstone federal employment discrimination statutes: Title VII of the Civil Rights Act of 1964 (Title VII)[11] and the Age Discrimination in Employment Act of 1967 (ADEA).[12]

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7. *See infra* notes 10–55 and accompanying text.

8. *See infra* notes 56–115 and accompanying text.

9. *See infra* notes 116–36 and accompanying text.

10. *See* Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. Rev. 1, 70–80 (1990) (discussing decisions from the 1989 U.S. Supreme Court term that applied common law concepts to employment law); *see, e.g.*, Staub v. Proctor Hosp., 562 U.S. 411, 418–19 (2011); Gross v. FBL Fin. Servs., 557 U.S. 167, 176 (2009); Shager v. Upjohn Co., 913 F.2d 398, 404 (7th Cir. 1990); 1 Dan B. Dobbs, The Law of Torts 237 n.2 (2001); David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 Cornell L. Rev. 66, 72 n.33 (1995). *But see* Robert Belton, *Causation in Employment Discrimination Law*, 34 Wayne L. Rev. 1235, 1275–80 (1988) (arguing that common law causation principles should not be robustly applied to discrimination law).

11. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

12. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–34 (2012)). The arguments made in this Article are applicable

In the late 1980s, the Court noted that "common-law principles may not be transferable in all their particulars to Title VII."[13] By 2011, the Court declared: we start from the premise that when Congress creates a federal tort it adopts the background of general tort law."[14] The U.S. Supreme Court now picks words out of discrimination statutes, declares those words to derive from tort law, and then looks up the words' meanings in the *Restatement of Torts* or other sources.[15] In many instances, the *Restatement of Torts* is becoming the default dictionary for certain terms in the discrimination statutes.

In prior work, I explained in detail how the courts infused tort law into federal discrimination law.[16] The following is an abbreviated history, drawing from that prior work. This history can be broken down into three periods: (1) an early period with relatively little use of tort law; (2) a middle period with an increasing but still rare use of tort law; and (3) the present period with a more automatic and robust use of tort law.

In the early period from 1964 until 1988, the courts rarely invoked tort law in the discrimination law context. During this era, courts performed important interpretive work that defined the contours of pattern or practice claims, individual disparate treatment claims, disparate impact claims, and harassment claims. Even though these early cases dealt with concepts such as causation, intent, or harm, they did not invoke tort concepts.[17] These early cases structured the initial contours of discrimination law and began to define and clarify key concepts, such as causation, intent, or harm. Until 1989, the U.S. Supreme Court did not heavily rely on tort analysis or the common law in discrimination cases brought under Title VII or the ADEA.[18]

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to the Americans with Disabilities Act (ADA) context as well. *See generally* Americans with Disabilities Act of 1990, Pub. L. No. 101-36, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.). The ADA is not a primary focus of this discussion because the U.S. Supreme Court cases center on Title VII and the ADEA. I will not make arguments about cases brought pursuant to § 1981.

13. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986), *quoted in* Faragher v. City of Boca Raton, 524 U.S. 775, 791–92 (1998).

14. *Staub*, 562 U.S. at 417.

15. *See, e.g.*, Univ. of Sw. Tex. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2524–25 (2013).

16. *See* Sandra F. Sperino, *Discrimination Statutes, the Common Law and Proximate Cause*, 2013 U. ILL. L. REV. 1; Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014).

17. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971). The Court also suggested that it would be appropriate to apply common law principles of agency to sexual harassment claims but declined to definitively rule on this issue. *Meritor*, 477 U.S. at 72. The Court noted that "such common-law principles may not be transferable in all their particulars to Title VII." *Id.*

18. The minimal role played by tort law during this period is even more remarkable given that the U.S. Supreme Court had conceptualized other civil rights statutes as torts during this period.

The second era in the history of tortification occurred from 1989 until 2008. This era began with the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins*.[19] After *Price Waterhouse*, the Court began to use tort law more often in discrimination cases. However, during this time, the use of tort law was less automatic and less robust than it became in the period from 2009 until the present.

In *Price Waterhouse*, the U.S. Supreme Court considered whether a plaintiff could prevail on a Title VII claim if she could show that both legitimate and discriminatory reasons played a role in the employer's refusal to promote her.[20] In a concurring opinion, Justice O'Connor proclaimed that Title VII is a "statutory employment tort."[21]

Despite Justice O'Connor's labeling of Title VII as a tort, the *Price Waterhouse* plurality opinion ultimately rejected tort principles. A plurality of four justices described the statutory problem before it not through the lens of tort law but, rather, as a broader question about the nature of causation.[22] The issue was not what tort law required but, instead, what kind of conduct violated Title VII. The plurality recognized that this question required the Court to consider how Title VII balanced the interests of employees and employers.[23] It rejected the idea that causation meant that the plaintiff is required to establish but-for cause.[24] The plurality reasoned that "[t]o construe the words 'because of' as colloquial shorthand for 'but-for causation' . . . is to misunderstand them."[25] The plurality held that to prevail on a dis-

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For example, in 1974, the Court characterized the housing discrimination provisions of the Civil Rights Act as "sound[ing] basically in tort." Curtis v. Loether, 415 U.S. 189, 195–96 (1974). The Court was not able to decide what the closest tort analog should be. *See id.* at 195, 195 n.10 (arguing that housing discrimination could be like common law innkeeper duties, defamation, intentional infliction of emotional distress, or a dignitary tort).

19. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–166, § 107(a), 105 Stat. 1071, 1075, *as recognized in* Burrage v. United States, 134 S. Ct. 881, 888–91 (2014).

20. *Id.* at 232.

21. *Id.* at 264 (O'Connor, J., concurring). At the same time, her concurrence did not reflect the rigid formality that would occur in later cases. Although Justice O'Connor believed that causation meant but-for cause, she disaggregated this question from the question of which party was responsible for proving causation. *Id.* at 262–63 (O'Connor, J., concurring). Justice O'Connor viewed the case as requiring the Court to determine "what allocation of the burden of persuasion on the issue of causation best conforms with the intent of Congress and the purposes behind Title VII." *Id.* at 263 (O'Connor, J., concurring). The Court also recognized that given the specific ways employment decisions are made, requiring a plaintiff to prove that a protected trait was a definitive reason for an employment outcome was "tantamount to declaring Title VII inapplicable to such decisions." *Id.* at 273 (O'Connor, J., concurring).

22. *Id.* at 237–38 (plurality opinion).

23. *Id.* at 239.

24. *Id.* at 240.

25. *Price Waterhouse*, 490 U.S. at 240.

crimination claim, the plaintiff must establish that a protected trait is a motivating factor in an adverse employment decision.[26]

In 1991, Congress responded to *Price Waterhouse* and other decisions by amending Title VII.[27] Importantly, the amendments do not mimic tort common law or invoke it.[28] *Price Waterhouse* foreshadowed the importance of tort law in the employment discrimination context, but the immediate period after *Price Waterhouse* did not witness the extensive use of tort principles. During this period, in the few cases when the Court discussed tort law in the context of discrimination, the Court often rejected portions of tort analysis and argued that "common-law principles may not be transferable in all their particulars to Title VII."[29]

Nonetheless, the move to tort law gained momentum in the period from 2009 to the present. Three cases during this time period showed a change in the way that tort law is invoked in discrimination cases: *Gross v. FBL Financial Services, Inc.*,[30] *Staub v. Proctor Hospital*,[31] and *University of Texas Southwestern Medical Center v. Nassar*.[32] In these three cases, the use of tort law commands a majority of the Court. The use of tort law is also tied to textual claims in which certain words or concepts in discrimination law are directly interpreted through the lens of tort law.

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26. *Id.* at 244–45.

27. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2012).

28. Under the amendments, a plaintiff may prevail on a Title VII discrimination claim if she establishes a protected trait was a motivating factor for a decision, and the employer may establish a limited defense to damages only if it shows it would have made the same decision absent a protected trait. *Id.* §§ 2000e-2(m), 2000e-5(g)(2)(B). Congress also amended Title VII's disparate impact provisions, and these amendments do not mimic tort law. *See* 42 U.S.C. § 2000e-2(k)(1)(A). Although Congress did add additional tort-like remedies to Title VII, there is little indication that these remedies were designed to transform Title VII into a tort. When Congress defined compensatory damages under Title VII, it provided a more narrow definition of these damages than the one imposed under common law. *See* 42 U.S.C. § 1981a(b)(2). The damages provision for the ADEA, which is modeled after the Fair Labor Standards Act, provides only limited remedies and not the full panoply of damages that would be available at common law. 29 U.S.C. §§ 216(b), 626(b) (2012).

29. *See, e.g.*, Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544–45 (1999) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986)) (discussing tort law with respect to punitive damages). In some cases, references to tort sources are not used to imbue the statute with tort law. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 650 (1998) (quoting a torts treatise for the idea that medical professionals can deviate from a consensus view). The U.S. Supreme Court has also applied tort reasoning to other federal employment statutes. *See, e.g.*, Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 557 (1994).

30. 557 U.S. 167 (2009).

31. 562 U.S. 411 (2011).

32. 133 S. Ct. 2517 (2013).

In each case, the Court purports to simply import common law doctrines into the statutory regime. There is almost no discussion suggesting that the Court modified the concepts in any way to specifically fit the employment discrimination context or to mold these concepts given the specific histories or purposes of the employment discrimination statutes.

Importantly, each case deals with only one or two specific tort elements. None of the cases pull together the individual elements to describe how these new tort-like understandings work together with other tort-like principles or with the rest of the statutory regime, which does not have a language or a structure that mimics traditional torts.

In *Gross*, the Court focused on factual cause.[33] The Court held that the ADEA required a showing of but-for cause.[34] In so holding, the Court appeared to rely on a simple textual analysis. The majority isolated the "because of" language in the ADEA and found sources to support the idea that "because of" means but-for cause.[35] In support of this proposition, Justice Thomas cited two cases outside the employment discrimination context as well as a torts treatise.[36] The Court rejected the idea that the ADEA should use the same causal standard as Title VII and largely disregarded its earlier holding in *Price Waterhouse*.

The *Gross* opinion purported to apply tort causation principles, but the Court changed tort law in two important ways. The majority insisted that causation only referred to but-for cause, while tort law does not always require proof of but-for cause.[37] The Court did not consider whether discrimination cases are like cases in which the common law would refuse to apply but-for cause.

The Court also placed the burden of proving causation entirely on the plaintiff.[38] The Court did not discuss how tort law allows for causation burdens to be allocated differently in some scenarios. The opinion did not grapple with whether the but-for standard furthers the

33. *Gross*, 557 U.S. at 176.

34. *Id.* at 177.

35. *Id.* at 176.

36. *Id.* (citing Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639, 653–54 (2008) and Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 63–64, 64 n.14 (2007)).

37. *See, e.g.*, 2 RESTATEMENT (SECOND) OF TORTS § 432(2) (AM. LAW INST. 1965) ("If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.").

38. *Gross*, 557 U.S. at 176–77.

goals of the ADEA and did not explain how the but-for cause element related to any other required element for proving discrimination.[39]

The U.S. Supreme Court also invoked common law tort principles in *Staub v. Proctor Hospital*,[40] in which the Court interpreted the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The Court's short analysis began with the statement: "we start from the premise that when Congress creates a federal tort it adopts the background of general tort law."[41] Lower courts have applied, and are likely to keep applying, this reasoning in the Title VII context because in the *Staub* decision, the U.S. Supreme Court emphasized the similarities between USERRA and Title VII.[42]

Staub used two common law ideas: intent and proximate cause. The Court noted that intent requires a person to intend the consequences of her actions or believe that consequences are substantially certain to occur.[43] The Court cited the *Restatement (Second) of Torts'* (*Restatement (Second)*) definition of intent and also cited a case that refers to the *Restatement (Second)*.[44] Strangely, the Court also introduced a proximate cause element into its discussion even though the statute does not use the term "proximate cause."[45]

In *Staub*, more than in any other tort-based discrimination case, the Court struggled with how to put all of the elements of the discrimination claim together. The Court recognized the claim as an intent-based claim, but it also recognized that the employer is the entity liable for the harm caused.[46] The Court considered agency principles as a possible way to solve the intent issue but found the available law indeterminate.[47]

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39. Justice Breyer's dissent argued that but-for cause is problematic in cases involving motives as opposed to physical forces. *Id.* at 190–91 (Breyer, J., dissenting). He also recognized that the defendant is in the better position to understand why an employment decision was made. *Id.* at 191 (Breyer, J., dissenting).

40. 562 U.S. 411 (2011).

41. Staub v. Proctor Hosp., 562 U.S. 411, 417 (2011).

42. *See id.* at 417; Jajeh v. Cty. of Cook, 678 F.3d 560, 572 (7th Cir. 2012); Davis v. Omni-Care, Inc., 482 F. A'ppx 102, 109 n.8 (6th Cir. 2012).

43. *Staub*, 562 U.S. at 417, 419 n.2.

44. *Id.* at 417 (citing Kawaauhau v. Geiger, 523 U.S. 57, 61–62 (1998) and 2 RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (AM. LAW INST. 1965)); *see also id.* at 422 n.3 (citing 2 RESTATEMENT (SECOND) OF TORTS § 8A cmt. a ("Intent," as it is used throughout the Restatement of Torts, has reference to the consequences of an act rather than the act itself . . . . Intent is limited, wherever it is used, to the consequences of the act.")).

45. *Id.* at 419–20 (citing Hemi Grp., LLC v. City of New York, 559 U.S. 1, 9 (2010), Sosa v. Alvarez-Machain, 542 U.S. 692, 704 (2004), and Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 837 (1996)).

46. *Id.* at 417–18.

47. *Id.* at 418–20.

Without a very thorough or convincing discussion, it appears the Court gave up piecing together a carefully constructed tort-based analysis. Instead, it used tort words like "intent" and "proximate cause" and threw them together in a one sentence holding with almost no discussion of how the pieces fit together. The Court held: "We therefore hold that if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable. . . ."[48]

As discussed throughout this Article, the Court's difficulty is understandable. It is using tort words and partial tort meanings to describe discrimination concepts without realizing the many ways that traditional tort frameworks are unsuitable to the task. It also combines intentional tort language with proximate cause, even though the latter concept has its primary use in negligence claims.

Nassar continued the recent trend of using tort concepts in discrimination cases. In that case, the Court answered the question of whether a plaintiff proceeding on a Title VII retaliation claim is required to establish but-for cause.[49] As with *Gross*, the opinion partially relied on the complex relationship between past U.S. Supreme Court precedent and the 1991 amendments to Title VII.[50] However, this does not detract from the importance of torts in this case. Once the Court decided not to follow *Price Waterhouse* and the 1991 amendments to Title VII, it must make a choice regarding what the causation standard should be. The choice the Court makes—but-for cause—is largely driven by the majority opinion's narrow view of tort law and by *Gross*, which also relied on tort law.[51]

Nassar invoked tort law from the beginning of the opinion, defining the case as one involving causation and then noting that causation inquiries most commonly arise in tort cases.[52] The majority engaged in a lengthy discussion of causation's role in tort law with numerous citations to the *Restatement* and a torts treatise.[53] The Court indicated that "textbook tort law" requires but-for cause.[54] As with *Gross*, the

48. *Id.* at 422 (footnote omitted).

49. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2522–23 (2013).

50. *See id.* at 2525–28.

51. *Id.* at 2525–28, 2534; Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–77 (2009).

52. *Nassar*, 133 S. Ct. at 2522.

53. *See id.* at 2524–25 (citing 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 cmt.b (AM. LAW INST. 2010), 2 RESTATEMENT (SECOND) OF TORTS § 432(1) (AM. LAW INST. 1965), and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 265 (5th ed. 1984)).

54. *Id.* at 2525.

Nassar Court's description of factual cause is narrower than that concept is defined at common law.

Together *Staub*, *Gross*, and *Nassar* represent a shift in the way that the U.S. Supreme Court uses tort law. A reliable majority of Justices are comfortable using tort law with little additional argument about why tort law is appropriate. Tort law is no longer just persuasive authority that serves as one source of potential meaning in discrimination cases; rather, the Justices can use tort law to find a specific meaning to particular statutory words or ideas. The tort law framework is not used for all interpretive questions, but the trend is toward a more automatic and robust use of tort law.[55]

III. The Actor

The U.S. Supreme Court's recent discrimination cases purport to apply common law tort doctrines as enunciated in the *Restatement of Torts*, cases, and treatises; they do not claim to specifically mold tort concepts for the discrimination context.

However, the resulting tort and discrimination doctrine differs in profound ways from the tort law that preceded it. In some instances, the Court itself modifies the underlying tort doctrine without any explicit indication that it is doing so. The Court claims to apply tort common law but, instead, describes the tort law in ways that modify it. In other instances, other aspects of the discrimination statutes necessarily impact the tort doctrine, but the case law fails to recognize this impact. Using the *Restatement of Torts* as the doctrinal model for tort law, this Part discusses how the discrimination statute's use of entity liability alters tort concepts.

The *Restatement (Second)* begins with a definition section. In that section, a definition for the word "actor" appears. The *Restatement* defines the word "actor" as "*the person* whose conduct is in question as subjecting him to liability toward another, or as precluding him from recovering against another whose tortious conduct is a legal cause of the actor's injury."[56]

Two words in this definition require emphasis: "the person." These two words convey two concepts that are important to understand how the *Restatement* applies to discrimination law. The definition assumes that a person is acting. It also assumes that only one person is acting.

55. This Article does not argue that tort reasoning is required to reach the results in each of these cases. This Part makes a descriptive claim about how the Court invoked tort law.

56. 1 Restatement (Second) of Torts § 3 (emphasis added).

This definition poses significant problems for the use of the *Restatement* in the federal discrimination context.

Under Title VII, the ADEA, and the ADA, the employer is typically the entity liable for violating the statutes.[57] If a supervisor sexually harasses a subordinate, the employer is potentially liable for this conduct, but the harassing supervisor is not. If a supervisor makes a decision to terminate an employee because of race, only the employer is potentially liable for that conduct.

For many traditional torts, the *Restatement* model first assumes that an individual actor is liable for a particular tort. Employers might be liable for these torts through some kind of derivative liability, but this liability typically depends first on establishing the actor's violation of tort law and then a secondary analysis about whether the employer should be liable for such an action. The *Restatement (Second)* does not exclude direct entity liability, but the way it conceives and explains the actor in the intentional tort context largely regards the acts of individuals not entities.[58]

Federal employment discrimination law is not so divided. The employer, and only the employer, is potentially liable for violating the statute. The employer's liability can arise in many different contexts, some of which look like direct liability, others that are based on derivative liability, and some that are a combination of the employer's acts (or failures to act) and a person's actions.

For example, in some instances there might be a single bad actor who commits sexual harassment that is contrary to company policy and culture. In these instances, the employer is not liable for its own intent or actions but, rather, vicariously liable for the acts of its employees.[59] The U.S. Supreme Court has created a derivative liability analysis that will sometimes hold the employer liable in these instances. This derivative liability does not mimic agency principles traditionally used in the tort context.

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57. *See* 42 U.S.C. §§ 2000e-2(a)–(c) (2012) (indicating that employers, employment agencies, and certain labor organizations are prohibited from acting in similar ways); *id.* § 2000e-2(a); 29 U.S.C. §§ 623(a)–(c) (2012) (indicating that employers are prohibited from discriminating against potential employees); *see, e.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (indicating that Title VII applies to former employees); Creusere v. Bd. of Educ., 88 F. App'x 813, 822 n.12 (6th Cir. 2003) (holding that two named defendants were not "employees" under Title VII); Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1179 (9th Cir. 2003) ("Title VII does not provide a cause of action for damages against supervisors or fellow employees."). *See generally* 42 U.S.C. § 2000e(f) (defining "employee"); *id.* § 12111(2) (defining covered entity to include "an employer, employment agency, [or] labor organization").

58. 1 RESTATEMENT (SECOND) OF TORTS § 3 (focusing on the acts of a single "person").

59. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 780, 807 (1998).

However, in some discrimination scenarios, the corporate culture or corporate policies perpetuate or aid the discrimination. Tort law that focuses on what people are doing will miss the crucial role that the employer plays as an entity. From the plaintiff's viewpoint, a *Restatement* intentional tort model that focuses on what people do will unnecessarily limit discrimination by failing to recognize the role that corporate policies and informal norms play in shaping discrimination. It also will not properly account for how the employer, as an entity, plays a role in discrimination if it fails to stop repeated acts of discrimination. From the employer's perspective, this person-centered model fails to fully consider whether the employer's efforts to identify and correct discrimination should affect liability.

The *Restatement*'s definition of actor is also problematic in the discrimination context because it assumes that there is only one actor. Additionally, when it provides examples of an actor's conduct, the examples only involve one individual committing an act. For example, when the *Restatement (Second)* gives examples of intent, those examples are all of individual people committing an act. In one example, a person pulls the trigger of a gun in the Mohave Desert.[60] Other examples involve a person throwing a bomb into a building and one person recklessly driving a car.[61]

This single actor model does not fully capture how discrimination occurs. Consider two examples. First, consider a law firm's decision to invite associates to become partners or members of the firm. Many people are allowed to provide input into the partnership decision. This input may be collected over years as the cumulative result of formal performance reviews and informal impressions about the associate's performance. Some members of the decision-making body have more influence over the decision than others, and some members have more interest in seeing that a particular associate does or does not get promoted. At the end of the decision-making process, there is a decision about whether to promote the associate, but there may be no definitive reason for that decision. Indeed, the individual people in the group may have different reasons for reaching the result.

Or consider a second example of cases that are known as cat's paw cases. The name "cat's paw" is based on a story in which a monkey wants to get nuts out of a fire. The monkey convinces a cat to obtain the nuts and then the monkey steals them, the result being that the monkey obtains the nuts and the cat ends up with a burnt paw. Thus,

60. 1 RESTATEMENT (SECOND) OF TORTS § 8A cmt. a.

61. *Id.* § 8A cmt. b, illus. 1–2.

the term "cat's paw" refers to one person being used as the tool of another.[62]

In cat's paw cases, the employer alleges that it cannot be held liable for discrimination because a person acting without intent actually made the employment decision. The plaintiff typically argues that the decision maker relied on biased information, served as a conduit for the discrimination of others, or merely rubber stamped a discriminatory decision made by another person. In other words, while intent is present in these cases, the ultimate decision maker is not the person who possesses this intent. One example of this kind of case is when an unbiased human resources professional decides to terminate an individual based on the biased input of another individual.

The *Restatement* model of a single actor neither adequately describes multi-actor or multi-tiered decision making nor recognizes that each actor may be acting with a different intent. As we will see later in the intent and causation discussion,[63] this has important implications for the *Restatement*'s usefulness in discrimination cases.

The *Restatement (Third): Liability for Physical and Emotional Harm* (*Restatement (Third)*) continues to rely on the definitions contained in the first division of the *Restatement (Second)*, which would include the definition of "actor."[64] While the *Restatement (Third)* continues to use the person and actor language, the comments in Section 1 make it clear that an actor can be an entity, and some of the comments generally recognize that an entity can possess intent.[65] However, the *Restatement (Third)* does not directly address multi-tiered or multi-party decision making. And, the *Restatement (Third)* provides almost no guidance on what it means for an entity to know something, to possess intent, or to cause something to occur.

The *Restatement (Second)* largely ignores entities when defining torts and their elements. It is easy to imagine that if the *Restatement* and tort law had started with a different model of the wrongful actor that the torts themselves might be different. These torts might focus more on harms that entities can create, and they likely would have a better discussion about how an entity can harm people. Tort law might recognize that groups of people organized together in certain

62. *See, e.g.*, Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990).

63. *See infra* notes 71–115 and accompanying text.

64. 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM 1 (AM. LAW INST. 2010) (intro).

65. *See, e.g.*, *id.* § 1 cmt. c, illus. 3 (providing an example of a company that releases chemicals into the air).

ways, such as corporations, act together in ways that are different than the types of joint action imagined by the *Restatement*.

To more directly state the point, if the *Restatement* originally focused on entities as actors, we would likely have different torts with different elements, different ideas of intent, and different notions of harm. These new torts, or new ways of thinking about old torts, would require the *Restatement* to grapple more deeply with fundamental questions about the nature of entities, their duties, and their responsibilities, rather than relegating these issues to agency analysis.[66]

The federal discrimination statutes place responsibility at the entity level rather than at the individual level. This is a fundamental difference between most intentional tort law and discrimination law. It is difficult to map an individual-actor tort model onto a statute focused on entity liability. Nonetheless, the entity liability model is the one Congress created for discrimination. Difficulties emerge when the Court tries to use tort ideas that largely developed in the context of the individual actor tort.

A good example of these difficulties is found in *Staub*. In that case, the plaintiff alleged that his supervisors disapproved of his taking leave for military training.[67] He alleged that two supervisors falsely reported job performance issues to the human resources department.[68] An unbiased person in the human resources department then made the decision to fire him.[69]

If we were to follow a tort model of intent, we would be largely looking at two possible models. First, does the employer, as an entity, possess the required intent (direct liability model)? Second, do the employer's employees possess the required intent for which the company is liable under some model of derivative liability (the derivative liability model)?

In *Staub*, neither construct is helpful in answering whether the required intent exists. The employer has delegated its authority to multiple actors, giving one set of actors the ability to recommend termination and giving the human resources department the ability to make the final decision. It is impossible to tease out the employer's intent in such a case. But, the derivative liability model does not fully work here either. This is because it is unclear what the individual would need to intend and to accomplish for derivative liability to at-

66. *See also, e.g.*, Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 579–81 (1990) (discussing corporate personhood).

67. Staub v. Proctor Hosp., 562 U.S. 411, 413–14 (2011).

68. *Id.* at 414–15.

69. *Id.*

tach. Must the biased supervisors possess both intent and the ability to fire an employee before the employer faces possible derivative liability? A strict application of tort law's intent standard does not provide a clear answer.

This is why, even though the Court in *Staub* used a tort definition of intent, it must connect that idea to different notions of the actor, harm, and causation to make sense in the discrimination context. *Staub* may involve tort words, but these tort words necessarily change to accommodate entity-based liability rather than the direct liability or derivative liability models imagined by traditional tort law.[70]

IV. Intent and Harm

Individual disparate treatment claims are often described as requiring intent, and it may seem easy to apply the *Restatement*'s intentional tort paradigm to these claims. This Part outlines some of the key challenges posed by mapping the *Restatement*'s intent analysis onto discrimination claims.

Problems begin with the scope of the *Restatement*'s intentional torts. The *Restatement (Second)* defines the intentional torts as intentional harm to persons, land, or chattels. The *Restatement (Second)* further defines the scope of harms to persons to include the following: (1) "the interest in freedom from harmful bodily contacts"; (2) "the interest in freedom from offensive bodily contacts"; (3) "the interest in freedom from apprehension of a harmful or offensive contact"; (4) "the interest in freedom from confinement"; and (5) "the interest in freedom from emotional distress."[71]

It is difficult to place the harms of discrimination law within this frame. This problem continues into the *Restatement (Third)*, which contains different sections organized by type of harm.[72] When the courts apply traditional common law notions of intent to discrimination law, they are necessarily applying intent standards designed to protect different interests.

Employment discrimination law protects various interests. The harms of discrimination are often economic in nature but also involve harms to personal dignity, equality norms, and group harms. As Martha Chamallas, Professor at the Ohio State University's Moritz College of Law, has noted: "such claims often articulate a type of in-

70. *See id.* at 419–20 (presenting a confusing analysis that mentions ideas of agency, factual cause, and proximate cause without explaining how they fit together).

71. Restatement (Second) of Torts 1–8 (Am. Law Inst. 1986) (appendix).

72. *See, e.g.*, 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 4 (Am. Law Inst. 2010) (liability for physical harm).

jury—disproportionately experienced by members of subordinated groups—that cannot be pinned down as psychological, economic, or physical in nature, or as either individual or group based."[73] The "multidimensional quality of the harm" in employment discrimination cases "defies categorization under traditional headings" and makes it problematic to map traditional tort causes of action onto discrimination.[74]

The intentional tort harms do not fully capture all of the harms of discrimination. Perhaps, more importantly, tort law typically protects different interests through different torts. Thus, torts involving the unlawful taking of chattels look very different than torts involving the interest in freedom from harmful bodily contacts, such as battery. Because discrimination often involves multiparadigmatic harms, it is difficult to understand how to apply tort law to discrimination claims. In other words, what is the correct model: battery, trespass to chattels, other intentional torts, or some combination of multiple intentional torts? More fundamentally, it is unclear whether discrimination law belongs in the intentional tort category at all.

Another broad conceptual problem involves how the *Restatement* defines intent and connects it to harm. The *Restatement (Second)* defines "intent" to denote "that the actor desires to cause [the] consequences of [her] act, or that [she] believes that the consequences are substantially certain to result from it."[75] But, strangely, even fifty years after Title VII's enactment, courts have not clearly defined the concept of harm in employment discrimination cases. Is harm the manifested intent used to treat an employee differently because of a protected trait? Or, does harm not occur until that intent manifests itself in certain kinds of employment actions, such as termination or failure to promote?

This question is especially important in the discrimination context in which some courts require an employee to prove that an adverse action occurred before assigning liability.[76] In other words, the plaintiff is required to establish that the actions taken against her rose above a court-defined seriousness threshold before liability attaches. If an employer takes an action because of a protected trait but the

73. Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2147 (2007).

74. *Id.* at 2146–47.

75. 1 RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965).

76. *See, e.g.*, Devin v. Schwan's Home Serv., Inc., 491 F.3d 778, 786 (8th Cir. 2007), *abrogated by* Torgerson v. City of Rochester, 643 F.3d 1031, 1043 (8th Cir. 2010); Johnson v. Frank, 828 F. Supp. 1143, 1153 (S.D.N.Y. 1993) (holding that a rating of "unacceptable" at a mid-year review was not an adverse employment action).

action does not meet the definition of an adverse action, the employer will not face liability. For example, courts often hold that employees have not been discriminated or retaliated against if the employee receives a negative evaluation or write-up as long as that evaluation does not result in some other kind of harm.[77]

If a supervisor writes such an evaluation for a discriminatory reason, the *Restatement of Torts* is not helpful in answering whether the supervisor had the proper intent. In the discrimination context, we do not know what consequences the supervisor would need to intend. Would he need to intend to write the evaluation because of a protected trait or would he need to intend a more serious consequence, such as termination, to result from writing the evaluation? These questions become even more difficult in the modern employment context in which multiple people and departments often participate in employment outcomes.

The intent standard is useful in the *Restatement*, in part, because the necessary consequences are better articulated for the intentional torts covered by the *Restatement*. Because the consequences for discrimination are not defined in the *Restatement*, the *Restatement* becomes less helpful in responding to discrimination problems. In the discrimination context, the *Restatement* leaves one important part of the intent question unanswered: What consequences must the actor intend?

Looking at the *Restatement*'s intent examples illustrates some of the problems of applying its idea of intent to discrimination problems. Here is one of the examples provided for intent in the *Restatement (Second)*: "A throws a bomb into B's office for the purpose of killing B. A knows that C, B's stenographer, is in the office. A has no desire to injure C, but knows that his act is substantially certain to do so. C is injured by the explosion."[78]

This example illustrates an intent that has several key traits. First, the intent refers to that of an individual. Second, the individual in question has the ability to carry out the entire act of throwing the bomb. Third, the intent described in the example contemplates immediate, known consequences. Fourth, there are no actions by others that can mediate or intervene in the intent. Finally, all of the illustrations in § 8A of the *Restatement (Second)* are of individuals doing a single act.

The traits underlying these examples fail to fully capture the factual realities of discrimination in the modern workplace, which makes it

77. *See, e.g.*, *Johnson*, 828 F. Supp. at 1153.

78. 1 RESTATEMENT (SECOND) OF TORTS § 8A cmt. b, illus. 1.

difficult to apply these examples to the discrimination context. Imagine the following hypothetical. A law firm makes compensation decisions using a multifactor scale, including billable hours, future potential, and fit with the firm, as primary criteria. Most of the members of the compensation committee are men. A review of compensation decisions made over the past three years shows that female associates are paid less than male associates and that the compensation levels are not explained by billable hours. There is evidence that one of the members of the compensation committee always votes against female associates for partner, never works with female associates, and has made demeaning comments about female employees' commitment to the firm.

In this example, the *Restatement*'s intent model is not helpful in determining whether the resulting compensation decisions were intentional in a traditional tort sense. Multiple people are contributing to the decision and may have made decisions based on different criteria. It is not clear what role, if any, the biased partner played in the ultimate compensation decisions and what effect his comments had on others. Given the discrimination statutes' focus on entity liability, it is unclear whether the firm might be held derivatively liable for intent-based actions of individual actors or whether its liability exists because of its own failure to monitor its compensation practices. None of the *Restatement*'s examples help us resolve this employment discrimination problem.

V. CAUSATION

Similar problems occur when applying the common law causation doctrine to discrimination law. The U.S. Supreme Court has repeatedly claimed to apply traditional tort causation principles to discrimination law while at the same time describing a causation doctrine that is very different from its *Restatement* analog. Additionally, just like with intent, the causation question is also affected by other elements of the discrimination claim. It is important to know who must cause what.

At common law, causation often embraces two different kinds of issues: (1) cause in fact and (2) legal or proximate cause.[79] "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct."[80] In some tort cases, such as negligence cases,

79. The distinction between these two concepts is often blurred. Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 944–45 (2001).

80. 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (AM. LAW INST. 2010).

factual cause is a necessary but not sufficient basis for imposing liability on a defendant for harm. In these cases, courts require legal cause, also called proximate cause. The U.S. Supreme Court has applied both factual cause and proximate cause ideas to discrimination claims.

A. Factual Cause

In both *Gross* and *Nassar*, the Court purported to apply a tort factual cause standard to discrimination cases.[81] The factual cause element in discrimination law differs in three important ways from its common law analog defined in the *Restatement of Torts*.

First, the employment discrimination substantive standard is much narrower than that provided by the *Restatement* and does not provide any flexibility for shifting some or all of the causation burden to the defendant. Second, the U.S. Supreme Court uses the but-for cause standard from the *Restatement* section on negligence even though the Court continues to refer to individual disparate treatment cases as intentional torts. Finally, the causation element in negligence cases links together other elements of the cause of action. In the discrimination context, the Court has not clearly defined how the causation element links to other elements. This question becomes increasingly important in the discrimination context in which the employer is the entity responsible for the legal violation and the harm element has not yet been adequately defined.

In *Gross* and *Nassar*, the U.S. Supreme Court stated that tort law requires the plaintiff to prove factual cause, and the required factual cause standard is but-for cause.[82] The factual cause standard provided by the *Restatement (Second)* is much more flexible than the rigid standard applied by the Court in the discrimination context.

The *Restatement* contemplates that the but-for cause standard is not appropriate in cases in which an outcome is overdetermined.[83] The classic example of overdetermined outcomes is the two fires hypothetical. The *Restatement (Second)* provides the following example of when a strict application of but-for cause would not be appropriate.

> Two fires are negligently set by separate acts of the A and B Railway Companies in forest country during a dry season. The two fires coalesce before setting fire to C's timber land and house. The normal spread of either fire would have been sufficient to burn the house and timber. C barely escapes from his house, suffering burns

81. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–78 (2009).

82. *See Nassar*, 133 S. Ct. at 2533; *Gross*, 557 U.S. at 177–78.

83. 2 RESTATEMENT (SECOND) OF TORTS § 432(2) (AM. LAW INST. 1965).

> while so doing. It may be found that the negligence of either the A or the B Company or of both is a substantial factor in bringing about C's harm.[84]

The U.S. Supreme Court only imported but-for cause into ADEA and Title VII retaliation claims without explaining why it did not apply the full definition of factual cause found in the *Restatement (Second)*, including the possibility of a different causal standard for overdetermined causation cases.

The truncated standard is problematic because some discrimination cases are similar to the two fires hypothetical but have one key difference: in discrimination or retaliation cases stemming from multiple sources, all of the actors and their acts are typically under the control of the employer. The two fires hypothetical anticipates that the defendant negligently set one of the fires and a separate actor set the second fire.

An example is helpful in illustrating how some discrimination cases fit within this overdetermined factual cause construct. Suppose that an employee complains about discriminatory conduct by a supervisor. The accused supervisor then begins to micromanage the employee's work and finds mistakes with it. The supervisor terminates the employee for making mistakes. Even though the supervisor harbors animus toward the employee for complaining, the supervisor would not have been able to terminate the employee without showing that she made the mistakes.

Under the at-will employment doctrine, the employer can fire the employee for making mistakes. In one sense, the employee's termination is caused by her mistakes. But, the supervisor would not have learned about the mistakes unless the employee complained about discrimination. In this scenario, it is possible that there is only one of two possible causes for the employee's termination: mistakes or retaliation. But, it is also possible that there are two causes for the employee's termination: both the retaliatory motive and the mistakes combined to lead to the termination. Further, in the retaliation context, it may be even more difficult to ferret out whether the retaliatory motive caused the termination if the supervisor terminated other non-complaining employees for making similar mistakes but also continued to employ some workers who made those same mistakes.

The but-for cause standard is not the correct substantive standard for determining employer liability in this situation. It fails to take into

84. *Id.* § 432 cmt. d, illus. 3.

account that multiple reasons may lead to an employment outcome.[85] It also fails to take into account that supervisors may not fully understand why they are acting or that a supervisor may both find mistakes with an employee's work and also be acting for retaliatory reasons. Traditional tort law would allow a court to use a substantial factor cause standard in situations when the but-for cause standard is problematic. In this respect, the tort standard for developing factual cause is much more capacious than the standard the U.S. Supreme Court applied in *Gross* and *Nassar*.

The Court's interpretation of the ADEA and the Title VII retaliation provision also ignores the possibility for shifting the burden of proving all or some causation to the defendant. The *Restatement (Second)* allows the causation burden of proof to shift to the defendant in certain instances.[86] However, the U.S. Supreme Court rejected this possibility in both *Gross* and *Nassar*. This failure to even discuss tort law's burden-shifting possibilities in detail is strange because the Court explicitly recognized this possibility in the Title VII discrimination context.[87]

Current factual cause analysis is also unsatisfactory because the Supreme Court has not explained how its causation jurisprudence intersects with intentional discrimination. Although there is a strong argument that plaintiffs should not be required to prove intent in discrimination cases, courts often require intent in individual disparate treatment cases.[88] Courts have never carefully articulated how the causal standards interact with the intent requirement. This issue is further confused because courts have not clarified what intent means in discrimination cases and whether the intent required in discrimination cases is synonymous with the common law definition of the term.[89] A further textual problem arises in the discrimination context because the courts have interpreted the "because of" language in the

85. See *Weber v. City of New York*, for an example of a court grappling with how to apply the but-for cause standard in the retaliation context. *See* 973 F. Supp. 2d 227, 272 (E.D.N.Y. 2013).

86. 2 RESTATEMENT (SECOND) OF TORTS § 433B.

87. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

88. *See, e.g.*, Lewis v. City of Chicago, 560 U.S. 205, 214–15 (2010); Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

89. Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 914–15 (2005); *see* D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. CAL. L. REV. 733, 736–37 (1987) (suggesting that Title VII should examine motive not intent). Further, the meaning of intent is less clear after *Ricci v. DeStafano*, 557 U.S. 557 (2009). Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 7 (2011) (arguing that the case moved away from an animus-based notion).

statutes to relate to both intent and causation.[90] It also remains unclear how the causation element intersects with the other elements of the discrimination claim. Questions remain as to which actor must cause the consequence and what consequence must result.

Likewise, there are questions about how much the employer's efforts to prevent or correct discrimination should affect the employer's liability. The courts created a convoluted agency-like analysis for determining when an employer is liable for harassment.[91] This analysis allows an employer to escape liability for harassment by a supervisor if the harassment does not result in a tangible employment action and the employer is able to establish an affirmative defense to liability.[92] This court-created, discrimination-specific agency doctrine is different from negligence-based ideas of culpability when an actor is not able to escape liability by engaging in negligent activity and then attempting to mitigate the harm caused by the negligent conduct.[93] The courts have not explored how this discrimination-specific agency analysis changes common law ideas of causation.

The U.S. Supreme Court narrowed the scope of factual cause when it imported this concept into discrimination law. It also failed to explain how factual cause intersects with intent, the remaining elements of a discrimination claim, and the court-created agency analysis. Although the Court's discrimination jurisprudence changed common law factual cause in important ways, the cases did not explicitly recognize these changes.

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90. Rich, *supra* note 89, at 45–47; *see* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1374–76 (2009) (discussing causation in disparate treatment cases). There are strong arguments that discrimination should not be concerned with the narrow concepts of motivation, intent, or causation. *See* Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 94–97 (1991). Depending on the underlying claim, factual cause questions may play varying roles in each case. In pattern or practice cases, the causal requirement plays diminished significance because the plaintiff is required to demonstrate that discrimination was the standard operating procedure of the company. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977).

91. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

92. *Burlington Indus.*, 524 U.S. at 765.

93. *See* 2 RESTATEMENT (SECOND) OF TORTS § 437 (AM. LAW INST. 1965) ("If the actor's negligent conduct is a substantial factor in bringing about harm to another, the fact that after the risk has been created by his negligence the actor has exercised reasonable care to prevent it from taking effect in harm does not prevent him from being liable for the harm.").

B. Proximate Cause

In *Staub*, the U.S. Supreme Court purported to apply proximate cause to a discrimination claim;[94] however, the proximate cause concept applied to discrimination law cannot be coterminous with the concept of proximate cause as that term is understood at common law. When applying proximate cause in the discrimination context, courts must consider congressional judgments about liability. Also, the U.S. Supreme Court has not recognized that if an individual disparate treatment claim is an intentional tort, it would be inappropriate to apply a negligence-based proximate cause doctrine to it.

Proximate cause is a difficult doctrine to apply because it has evolving, contested underpinnings and goals.[95] Thus, it is difficult to state that there is one proximate cause doctrine. The concept of proximate cause also changes dramatically depending on the underlying tort to which it is appended.

Nonetheless, proximate cause is ultimately a judgment call about where liability should end, and its definition depends on the underlying claim to which it is attached. Importantly, Congress has already spoken about the limits of discrimination law and has provided a statute that narrowly circumscribes the available cause of action. When the U.S. Supreme Court imports proximate cause ideas into discrimination law, the resulting discrimination and proximate cause doctrine must be different than its common law counterpart because, in the discrimination context, courts must take into account Congress's expressions about where liability should end. Given the significant limits found in the discrimination statutes, it is questionable whether proximate cause is even needed.

The employment discrimination statutes and related court-created agency doctrine already address many of the questions that proximate cause handles in a common law analysis. The federal statutes address questions regarding the foreseeability of the plaintiff and reasonably anticipated consequences by limiting the types of plaintiffs who have viable claims and by requiring those plaintiffs to have certain statuto-

94. *See* Staub v. Proctor Hosp., 562 U.S. 411, 419 n.2 (2011).

95. PROSSER AND KEETON ON THE LAW OF TORTS § 41 (W. Page Keeton et al. eds., 5th ed. 1984) ("There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which opinions are in such a welter of confusion."). The *Restatement* has recently started to use the words "scope of liability" to refer to proximate cause and has also focused the inquiry on the scope of risk. 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 (AM. LAW INST. 2010). Using *Restatement* sections applicable to physical harm cases may not be appropriate in statutes when the harms are emotional or economic in nature.

rily defined relationships with the defendant.[96] For the most part, the aggrieved party must be an employee, or former employee, and the liable entity is typically an employer, an employment agency, or a labor organization.[97]

Congress also severely limited the time frame that an aggrieved party has to start a claim. A plaintiff must file a charge of discrimination with a federal or state agency within a specified time and must then file the lawsuit within a specified time period.[98] If a plaintiff does not file the charge within the required period, the claim is usually barred.[99]

In some instances, federal employment statutes, or court interpretations of those statutes, also prescribe the types of conduct that result in liability. For example, courts only allow recovery in a harassment case if the harm is severe or pervasive, and, in discrimination cases, courts require the plaintiff to establish that the harm is serious enough to rise to the level of an adverse employment action.[100] Further, the statutes provide instances when it is lawful to take a protected trait into account when making an employment decision.[101] Thus, by statute, employment discrimination law deals with a narrow universe of victims and actors and, in some cases, a limited set of actionable conduct. The potential scope of federal employment discrimination law is also limited by court-created doctrine that restricts the circumstances under which an employer will be held liable for discriminatory conduct.

Unlike traditional common law torts, the major federal employment discrimination regimes contain damages provisions that explicitly limit

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96. *See supra* note 57 (discussing federal statutes).

97. *See id.*

98. 42 U.S.C. § 2000e-5(e)(1) (2012). The requirements under the ADEA vary slightly but still require the filing of a charge. *See* Lowe v. Am. Eurocopter, LLC, No. 1:10CV24-A-D, 2010 WL 5232523, at *2 (N.D. Miss. Dec. 16, 2010) (noting that Title VII requires plaintiffs to receive a right to sue letter from the Equal Employment Opportunity Commission while the ADEA does not contain this requirement). The time frame varies depending on the type of harm alleged. 42 U.S.C. § 2000e-5(e)(1); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 (2002). The period begins when the plaintiff has notice of the discriminatory action. *See* Del. State Coll. v. Ricks, 449 U.S. 250, 259 (1980); *see also* 42 U.S.C. § 2000e-5(e)(3)(A) (providing limits for compensation decisions); Lewis v. City of Chicago, 560 U.S. 205, 208 (2010) (describing how limits work in disparate impact cases); *Morgan*, 536 U.S. at 117 (discussing the procedures for a harassment claim).

99. *See* 42 U.S.C. § 2000e-5(e)(1) (setting forth the required times for filing a charge of discrimination).

100. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

101. *See, e.g.*, 42 U.S.C. §§ 2000e-2(e), (h).

and calibrate damages to each particular regime.[102] Further, the statutes provide a fairly limited set of damages. For example, under the ADEA, the only monetary relief that a plaintiff may be awarded is front pay, back pay, and a liquidated damages award.[103] The plaintiff may not obtain compensatory or punitive damages.[104] Both Title VII and the ADA cap the total combined compensatory and punitive damages a plaintiff may recover.[105] The size of the cap depends on the number of employees.[106] The highest cap, which applies to employers with more than 500 employees, is $300,000 and has not been adjusted since 1991.[107] These limits are important because they minimize concerns that employers will face liability that is disproportionate to the conduct at issue.

The *Restatement (Third)* notes that an actor is liable when she intentionally causes harm even if the harm was unlikely to occur. Additionally, intentional actors are liable for a broader range of harms than negligent actors.[108] In deciding the scope of liability, the *Restatement (Third)* notes that the following factors play important roles in the analysis: "the moral culpability of the actor, . . . the seriousness of harm intended and threatened by those acts, and the degree to which the actor's conduct deviated from appropriate care."[109] When applying each of these factors to the statutory context, Congress's views on culpability, harm, and the appropriate duty of care necessarily impact the resulting limits.

One problem with the Court's use of tort-derived proximate cause in the discrimination context is the Court's failure to recognize that discrimination-derived proximate cause is not coterminous with how

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102. *See, e.g.*, *id.* § 2000e-5(g) (providing that courts may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate"); Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071–73 (codified as amended at 42 U.S.C. § 1981) (amending Title VII to provide for compensatory and punitive damages); *see also* EEOC v. Waffle House, Inc., 534 U.S. 279, 295–96 (2002) (noting the similarity between ADA and Title VII remedies).

103. 29 U.S.C. §§ 216(b), 626(b) (2012).

104. *See id.* § 216(b). *But see* Carol Abdelmesseh & Deanne M. DiBlasi, *Why Punitive Damages Should Be Awarded for Retaliatory Discharge Under the Fair Labor Standards Act*, 21 HOFSTRA LAB. & EMP. L.J. 715, 748 (2004) (discussing whether punitive damages are available for retaliation claims).

105. 42 U.S.C. § 1981a(b)(3).

106. *Id.*

107. *See id.* § 1981a(b)(3)(D).

108. 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 33 (AM. LAW INST. 2010).

109. *Id*. The *Restatement* view is even more nuanced, noting that when intent is established by showing that the defendant was substantially certain, proximate cause should not be as narrow as it is with other intent cases. *Id.* § 33 cmt. d.

that concept is understood at common law. A second problem is that the U.S. Supreme Court has not recognized that proximate cause rarely plays a role in intentional tort cases.

Common law courts apply proximate cause differently depending on the nature of the underlying tort. *Staub* purported to apply the negligence proximate cause doctrine, but it also described discrimination as requiring intentional conduct.[110] Proximate cause rarely plays a decisive role in intentional tort cases.[111] There are many reasons for this. In intentional tort cases, "the defendant's wrongful conduct is [usually] closely linked—temporally and conceptually—to the plaintiff's harm."[112] Few intentional tort cases involve multiple causes.[113] Conduct intended to cause harm is considered more "blameworthy," and courts have had fewer qualms about the scope of liability.[114] Thus, the necessity and strength of the proximate cause doctrine severely diminishes in the intentional tort context. When proximate cause is relevant in intentional tort cases, the proximate cause analysis may cut off liability for the defendant in fewer circumstances than it would when applied to negligence.[115] The Court does not explicitly discuss why it is appropriate to apply a negligence-based proximate cause analysis to a cause of action it describes as requiring intent.

VI. THE NEW FRANKEN-TORT

When the U.S. Supreme Court relies on the common law of torts to interpret discrimination statutes, it appears to rely on a rich tradition of settled doctrine. It seems as if the Justices are not making any choices about the trajectory of discrimination law. Rather, tort law demands a particular result. This analytical trope is nothing new.

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110. Staub v. Proctor Hosp., 562 U.S. 411, 419 (2011).

111. 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 33 cmt. e (noting the paucity of legal opinions discussing proximate cause in intentional tort cases).

112. Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 832 (2009).

113. *Id.*

114. *Id.* at 832–33.

115. 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 33 ("An actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently."); *see id.* § 33 cmt. a (noting that the scope of risk standard is inadequate with respect to intentional torts); *see also* 57A AM. JUR. 2D *Negligence* § 421 (2004) (noting that proximate cause applies to strict liability cases). *But see* Michael L. Rustad & Thomas H. Koenig, *Parens Patriae Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of Crimtorts*, 29 UCLA J. ENVTL. L. & POL'Y 45, 68 (2011) (asserting that courts do not typically apply proximate cause to strict liability cases).

Nonetheless, when the Court employs the trope, it is necessary to point out the choices the Court made.

Importantly, the U.S. Supreme Court has imported tort law in the context of smaller skirmishes about particular aspects of the discrimination doctrine. What should the factual cause standard be? Should an employer face liability in cat's paw cases? When should this liability attach?

The Court has ignored the more important issues. The Court has failed to recognize how its articulation of tort law is different from the common law doctrine. It ignored how the statutory context necessarily changes traditional tort concepts. It has not provided any framework for how all of these new tort elements fit together. It has not aligned the new tort doctrines with the decades of court-created discrimination doctrine that preceded tortification. It has failed to explain whether its new tort-based frame actually answers the question of whether a person has been treated differently because of a protected trait.

In *Gross*, *Staub*, and *Nassar*, the Court focused on individual tort concepts, such as intent, factual cause, and proximate cause.[116] It imported these concepts into discrimination jurisprudence. None of these cases discussed how these concepts should work together to form a proof structure for establishing a discrimination claim. This Part pieces together the rough outlines of the new, court-created Franken-tort. It then discusses some of this new tort's implications.

A. The Discrimination Tort

Reading *Gross*, *Staub*, and *Nassar* together, it is possible to cobble together the pieces of the emerging tort-like discrimination standard for individual discrimination claims. Because the Title VII discrimination analysis is different from the analysis under the ADEA,[117] I use an age discrimination claim to model the new tort and discrimination elements. To establish this claim, the Court appears to require some combination of the following elements: (1) some undefined kind of intent involving age; (2) an actor who intended some consequence (perhaps an adverse action); and (3) a causation element involving both but-for factual cause and an amorphously defined proximate cause. The new Franken-tort has component pieces that vaguely resemble the tort elements from which they are drawn. But, each of

116. *See supra* notes 33–55 and accompanying text.

117. *See* 42 U.S.C. § 2000e-2(k)(1)(A) (2012) (requiring a motivating factor analysis for Title VII claims).

these elements is unmoored from the traditional tort categories of intentional torts, negligence, or strict liability. The Court's Franken-tort pieces together approximations of elements from both intentional torts and negligence but without the full support of the surrounding doctrines.

As discussed throughout this Article, each of these tort elements significantly changes when imported into the discrimination context. This is because the Court either subtly redefined the concepts or failed to recognize how the discrimination claim itself forces changes in the underlying doctrine.[118] The Court marries but-for cause and proximate cause standards from negligence law into a claim that the Court deems to require some type of intent. As discussed throughout this Article, underneath this fairly simple set of elements are complex questions about intent, causation, and employer liability for actions that occur within the workplace.

The Court provided little guidance as to how these pieces fit together with one another or how they connect to the rest of the statutory language. Further, the Court made no attempt to connect these tort principles with its own court-created proof structures for discrimination cases. For example, there was no discussion about how these elements integrate with the *McDonnell Douglas* burden-shifting test, which has been one of the primary ways of evaluating individual disparate treatment claims for more than forty years.[119] Further, the Court did not explain how the new tort-based discrimination concepts intersect with the court-created harassment doctrine.[120]

Each of these tort elements, as well as the final proof structure that emerges from them, is also unmoored from the history, precedent, and policies that undergird discrimination law. Once the individual pieces are put together, it is unclear whether the emerging structure will actually determine whether an employer treated an employee differently because of a protected trait.

Highlighting just two of the issues that are arising in the wake of tortification shows how these concerns manifest themselves in practice. In *McDonnell Douglas*, the U.S. Supreme Court introduced a three-part burden-shifting proof structure to evaluate individual disparate treatment claims based on circumstantial evidence.[121] Courts

118. The following analysis focuses on how the Court appears to characterize the elements of a disparate treatment claim. The implications of tortification for disparate impact claims is beyond the scope of this Article.

119. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

120. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

121. *McDonnell Douglas*, 411 U.S. at 802.

have applied this test in the ADEA context;[122] however, it is unclear how this long-used test is compatible with the but-for cause test.

Although uncommon, under *McDonnell Douglas*, the plaintiff can prevail if the defendant fails to articulate a legitimate, nondiscriminatory reason for its actions after the plaintiff establishes the prima facie case. The plaintiff can also force the defendant to articulate a legitimate, nondiscriminatory reason for its actions by establishing a prima facie case. However, if the ADEA requires the plaintiff to establish but-for cause, it is unclear whether the plaintiff should prevail if she establishes the prima facie case and the defendant fails to meet its burden under the second prong of the test. Under this scenario, the plaintiff has not established that age was the but-for cause of the employment action.

If the plaintiff is required to establish causation, it also is unclear why the defendant should be forced to articulate a legitimate, nondiscriminatory reason for its action. This is not compatible with the way a tort inquiry into causation would proceed in a case in which the plaintiff is required to prove causation. In these cases, the defendant has no obligation to articulate its reason for acting.

The question of how but-for cause intersects with *McDonnell Douglas* is percolating in the lower courts.[123] Much judicial and litigant time and energy will be devoted to trying to reconcile this question. But, it is not at all clear how reconciling but-for cause and *McDonnell Douglas* is necessary or even helpful to understanding whether an employment outcome was impermissibly tainted by a protected trait.

Or, take a cat's paw case involving actions by coworkers.[124] Under the new employment discrimination tort standard, some notion of intent is tied to but-for cause and proximate cause. But, this rough outline of the tort concepts leaves many questions unanswered. If a coworker submits false information to a supervisor because of bias and the supervisor then terminates the employee based on the false information provided by the coworker, should the employer be liable for discrimination? The answer to this question heavily depends on the required connection between causation, intent, the actor, and notions of employer liability. This is especially true in the coworker cat's paw scenario in which the coworker may have the ability to heavily influence the employment outcome but does not possess the formal power to take an adverse action. The current elements of the discrim-

122. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141–43 (2000).

123. *See, e.g.*, Kalra v. HSBC Bank U.S.A., N.A., 360 F. App'x 214, 216 (2d Cir. 2010).

124. *See, e.g.*, Reynolds v. Fed. Express Corp., No. 09-2692-STA-cgc, 2012 WL 1107834, at *19 (W.D. Tenn. Mar. 31, 2012).

ination tort are not connected together in a way that is helpful to answering the question of cat's paw liability for coworker conduct.

It is also easy to imagine an almost unending stream of questions that will arise from tortification. Does the eggshell skull rule apply to discrimination? If tort concepts of harm are used, should touching that would constitute a battery automatically establish harassment? How do tort concepts intersect with accommodation obligations that do not have common law tort analogs? How do the torts of intentional and negligent infliction of emotional distress intersect with discrimination law? Should the courts abandon the current court-created agency analysis in favor of an agency analysis that more closely adheres to tort standards? Importantly, it is not clear that answering any of these questions in the context of tort law helps us better understand when an employer should be liable for treating workers differently because of a protected trait.

Tort law was not necessary to resolve the underlying questions in *Gross*, *Staub*, and *Nassar*, but the choice of tort law inserts unneeded complexity and confusion into a discrimination jurisprudence that is already confusing and complex.

B. The Restatement of Torts

The tortification of discrimination law poses many questions to tort law as a whole. This Section focuses on the challenges tortification poses for the *Restatement of Torts*. The *Restatement of Torts* is a project with many facets. It reflects the doctrinal history of tort law. At the same time, it is a reform project. It recognizes emerging areas of tort law and clarifies legal concepts. In another sense, the *Restatement* defines what activity is within the realm of tort law and what conduct does not fit within that category.

For the most part, the *Restatement of Torts* is a project that extensively focuses on the common law of torts. To date, it has not purported to provide a history of statutory torts, and it has not added major sections covering statutory torts that differ in fundamental respects from tort common law. When courts transform the *Restatement of Torts* into the "Restatement of Torts and Civil Rights," this raises questions about the scope of the *Restatement* project.

While the U.S. Supreme Court is starting to define federal discrimination law as a statutory tort, the American Law Institute (ALI) should consider whether it deserves that label. There are many reasons that federal discrimination law does not fit comfortably within the tort category. When creating statutes, legislatures are not bound by historical categories of law, such as those found in the first year law

school curriculum. Legislatures are free to create statutes that draw from many different substantive areas and are also free to create new causes of action that have little connection with existing common law.

Federal discrimination law addressed a large societal problem that the common law did not address. In doing so, the legislature did not choose an existing tort and modify it for the discrimination context. Instead, Congress created a new statutory regime that drew from many different areas of law, including state law discrimination statutes, labor law, and contract law.[125] Congress did not explicitly rely on any particular traditional tort in the federal discrimination statutes. These statutes are not based on any particular intentional tort, negligence law, or strict liability. Congress did not organize federal discrimination law with traditional tort elements and did not heavily rely on traditional tort language.[126]

The federal discrimination statutes have many provisions with little or no relationship to tort law. The statutes recognize disparate impact claims that do not have a tort analog.[127] The statutes also impose accommodation duties that include affirmative obligations to alter environment and policies.[128] For example, an employer is required to accommodate certain religious beliefs and practices.[129] Under the ADA, employers are also required to accommodate employees with disabilities.[130] Until 1991, Title VII did not contain tort-like remedies, and, even now, the remedies regime does not entirely mimic tort remedies.[131]

The U.S. Supreme Court's reliance on the *Restatement of Torts* poses a challenge to the ALI. Should it comment at all about the Court's use of the *Restatement* in this way? Should it enter the discussion about whether discrimination is a tort? If a cause of action did not organically develop from traditional torts, what criteria does it have to meet to fit within the umbrella of tort law? Does the ALI have the necessary expertise in discrimination law to determine whether discrimination is tort?

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125. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 418–19 (1975); *see also* Hishon v. King & Spalding, 467 U.S. 69, 74 (1984) (using contract language to describe Title VII).

126. *See, e.g.*, 42 U.S.C. § 2000e-2(a) (2012).

127. *See, e.g.*, *id.* § 2000e-2(k)(1)(A)(i).

128. *See, e.g.*, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79–81, 83 n.14 (1977) (discussing the employer's obligation under Title VII, in certain circumstances, to make some effort to accommodate an employee's religious beliefs).

129. *Id.*

130. 42 U.S.C. § 12112(b)(5) (defining discrimination under the ADA as a failure to provide reasonable accommodations).

131. *See, e.g.*, *id.* § 1981a(b)(3).

If the ALI does deem discrimination a tort, additional issues emerge. To include discrimination law in the *Restatement* would require the ALI to undertake a mapping exercise of historical proportions. It would need to shoehorn existing discrimination claims into the current *Restatement* organization or create completely new sections to describe these claims.

The structure of employment discrimination law does not mimic the organization of tort law. Discrimination law does not contain a section called "intentional torts" or a section called "negligence." Through statutory interpretation, the courts have created different interpretive frames for viewing discrimination claims.

Even a cursory description of discrimination law's organizational structure shows how different it is than the current organization of the *Restatement*. The U.S. Supreme Court has described different frameworks for analyzing discrimination cases, which the courts divide into two broad categories: (1) disparate treatment and (2) disparate impact.[132] Disparate treatment cases are further subdivided into individual disparate treatment, harassment, and pattern-or-practice cases.[133] Integrating these different claims and their frameworks into a tort analysis would be a difficult, if not impossible, task.

It is also unclear how the *Restatement* should contend with other aspects of the statutory regime. When the EEOC issues regulations or guidance interpreting discrimination law, should this affect the tort analysis? If Congress amends the discrimination statutes, how does this affect the tort analysis?

Even the use of the *Restatement of Torts* as a dictionary for tort terms raises interesting questions. The move to tortify discrimination law represents a restatement of discrimination law. At the same time, it also represents a restatement of tort law. The Court's interpretation of tort law in the discrimination context has the potential to affect tort cases. This is especially true because the relevant U.S. Supreme Court cases do not explicitly discuss the ways in which the Court altered tort law in the discrimination context.

Just as the tortification of discrimination law raises many questions for discrimination jurisprudence, it also raises questions for tort law.

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132. *See* Zatz, *supra* note 90, at 1368 ("Few propositions are less controversial or more embedded in the structure of Title VII analysis than that the statute recognizes only 'disparate treatment' and 'disparate impact theories of employment discrimination.'" (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993))).

133. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 348–49 (1977) (discussing Congress's proscription of discriminatory policies or practices); Zatz, *supra* note 90, at 1414 (discussing the subdivision into individual disparate treatment and harassment cases).

Will common law courts start to adopt narrow versions of factual cause in tort cases? Will common law courts create more causes of action that combine elements of intentional torts and negligence? Will courts start to apply notions of proximate cause more robustly in the intentional tort context? Will courts start to develop a corporate intent doctrine?

Given the enormous questions about whether discrimination is a tort[134] and how it relates to common law torts, the better course is for the ALI to disclaim discrimination as a concern for the *Restatement* project.[135] The *Restatement* has not, as a historical matter, undertaken to describe federal discrimination law or to imagine its future. To do so would require a wholesale reimagining of the *Restatement of Torts*.[136]

VII. Conclusion

The U.S. Supreme Court has firmly ensconced discrimination law within a tort frame and invoked the *Restatement* as its new dictionary for discrimination terms. This shift raises important questions for both discrimination and tort law. One likely result of this tortification is that courts will become increasingly concerned with the minutia of how tort law intersects with discrimination concepts, especially regarding how tort law affects existing frameworks for establishing discrimination. Although this exercise is likely to take up much court time, the more important question is whether this effort will help society understand how discrimination happens in the workplace, how to best prevent it, and how to remedy it when it does occur.

134. The answer to this question largely depends on how one chooses to define tort law. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151, 160–67 (1973); Mark Geistfeld, *Implementing Enterprise Liability: A Comment on Henderson and Twerski*, 67 N.Y.U. L. Rev. 1157, 1159 (1992); and John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88, Tex. L. Rev. 917, 919 (2010), for different views on how to conceptualize tort law.

135. 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 1 (Am. Law Inst. 2010) (explaining that tort law does not strictly apply in the insurance context). I am not advocating that scholars, judges, and practitioners remove themselves from this issue. The tortification of discrimination law raises important issues for both tort and discrimination law that demand further intense consideration.

136. *But see* 2 Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 46 illus. 5 (Am. Law Inst. 2012) (describing how infliction of emotional distress might intersect with a hypothetical based on a pregnant worker and an employment decision).