

# What Is Troubling About the Tortification of Employment Discrimination Law?

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### I. INTRODUCTION: THE COURT STIRS THE TEMPEST IN *STAUB*

“[W]hen Congress creates a federal tort it adopts the background of general tort law,” declared the Supreme Court in *Staub v. Proctor Hospital*.<sup>1</sup> The Court so labeled the Uniformed Services Employment and Reemployment Rights Act (USERRA), a federal employment discrimination law. The Court did more than merely label a federal employment discrimination statute a tort in *Staub*; it proceeded to import the tort concept of proximate cause as the test for “cat’s paw” or subordinate bias liability.<sup>2</sup> With the “federal tort” declaration and the importation of one of the most controversial and vexatious concepts in tort law into employment discrimination law, the Court provoked an onslaught of solicitous commentary and scholarship about the “tortification” of employment discrimination law<sup>3</sup>—including this Symposium. The proclamation in *Staub* was not the first time a Supreme Court opinion had suggested that employment discrimination law has a “tortiness” quality, nor was it the first time the Court had borrowed tort constructs or doctrines for use in employment discrimination law. Before *Staub*, however, there was little commentary<sup>4</sup> and even less consternation<sup>5</sup> over the relationship between tort law and civil rights and employment discrimination law. So, why all the fuss after *Staub*?

Several reasons occur to me why *Staub* touched off a tempest about the Court’s tort labeling of employment discrimination law and incorporation of a tort law principle into employment discrimination law. First, the proclamation in *Staub* was the most direct statement by a majority opinion of the Court that

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<sup>1</sup> *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191 (2011).

<sup>2</sup> The Court explained the cat’s paw issue as follows: “We consider the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision.” *Id.* at 1189.

<sup>3</sup> See, e.g., William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447 (2013) [hereinafter Corbett, *Unmasking*]; Sandra F. Sperino, *Discrimination Statutes, The Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1 [hereinafter Sperino, *Discrimination*]; Sandra F. Sperino, *The Tort Label*, 66 U. FLA. L. REV. 1051 (2014) [hereinafter Sperino, *Tort Label*]; Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012) [hereinafter Sullivan, *Tortifying*].

<sup>4</sup> See Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2180–81 (2007) (observing that the relationship between the areas of tort law and civil rights law was undertheorized and proposing more migration in the other direction—from civil rights law to tort law to develop the tort of intentional infliction of emotional distress).

<sup>5</sup> See *id.* at 2120 (positing that some migration between the two bodies of law is desirable).

a federal employment discrimination law is a statutory tort.<sup>6</sup> Second, the much-maligned tort concept of proximate cause<sup>7</sup> was adopted with little to no analysis of the appropriateness of the construct for the issue at hand,<sup>8</sup> when the adoption of the principle seemed wholly gratuitous and unnecessary to resolving the issue.<sup>9</sup> Third, both the proclamation and the incorporation in *Staub* harkened back to the Supreme Court's 2009 decision on the causation standard required by the Age Discrimination in Employment Act (ADEA)—*Gross v. FBL Financial Services*.<sup>10</sup> In *Gross*, the Court rejected a less rigorous standard of causation and declared but-for causation, purportedly drawn from tort law,<sup>11</sup> as the meaning of “because of” in the ADEA. *Gross* ensconced a rigorous standard of causation for age discrimination claims. Fourth, we all were left to wonder after *Staub* how tort law would next be deployed in employment discrimination law.

Some scholars thought that the labeling in *Staub* and the cavalier incorporation of proximate cause might signal a troublesome perspective on the part of the Court and a trend in which employment discrimination law is regarded as essentially indistinct from tort law. Commentators recognized that the tortification did not emerge full grown in *Staub*, but rather the seeds of tortification were to be found in earlier decisions. We looked backward to

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<sup>6</sup> Justice O'Connor, in her concurring opinion in *Price Waterhouse v. Hopkins*, referred to Title VII as creating a “statutory employment ‘tort.’” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring).

<sup>7</sup> Proximate cause has fallen into disfavor with many, probably most, torts scholars, and the term been replaced by limitations based on scope of risks in the Restatement (Third) of Torts. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM, ch. 6, special note on proximate cause (2010). For further discussion of the Restatement (Third) of Torts position on proximate cause, see *infra* note 210. Dean Mark Grady, in the course of offering a defense of proximate cause for its greater-than-appreciated predictability and cohesiveness, recognized that many believe that proximate cause is basically incoherent and that its cases either cannot be predicted or that they illustrate some fundamental disorder of the common law. See Mark F. Grady, *Proximate Cause Decoded*, 50 UCLA L. REV. 293, 294 (2002); see also Sperino, *Discrimination*, *supra* note 3, at 6 (quoting a leading torts treatise regarding the disagreement and confusion about proximate cause); Sullivan, *Tortifying*, *supra* note 3, at 1459 (“Complaints about the nebulousness of the concept are numerous and longstanding, and there have been determined efforts to eradicate it from legal discourse.”).

<sup>8</sup> The Court discussed agency principles applied in tort law and then announced that the inquiry whether the biased supervisor's animus caused the adverse employment action by the unbiased supervisor “incorporates the traditional tort-law concept of proximate cause.” *Staub v. Proctor Hosp.* 131 S. Ct. 1186, 1193 (2011).

<sup>9</sup> Sullivan, *Tortifying*, *supra* note 3, at 1457.

<sup>10</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009).

<sup>11</sup> Although the majority in *Gross* did not label the ADEA a federal tort, it cited the Prosser and Keeton torts treatise in support of its decision to equate the statutory language “because of” with “but for.” *Id.* at 176–77 (citing KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 265 (5th ed. 1984)).

*Gross, Price Waterhouse v. Hopkins*,<sup>12</sup> and one of us looked even as far back as *McDonnell Douglas Corp. v. Green*<sup>13</sup> to examine what influence and effect tort law has had on employment discrimination law over its fifty-year existence.<sup>14</sup> *Staub* thus aroused anxiety about escalating tortification and a felt need to examine the historical record of this phenomenon, even before the Court began expressly applying the tort label to the discrimination statutes.

The concerns prompted by *Staub* have not abated in the three years since the decision was rendered. Most of us think that we have been vindicated in our concerns by the Court's decision in *University of Texas Southwest Medical Center v. Nassar*,<sup>15</sup> in which the Court again talked torts as it extended its holding in *Gross* by interpreting "because of" in the antiretaliation provision in Title VII of the Civil Rights Act of 1964 to mean "but for" and signaled that but-for causation will be required for all statutes using "because of" language. The Court prefaced its adoption of but-for causation in *Nassar* with another declaration regarding the tortiness of employment discrimination law:

It is thus textbook tort law that an action "is not regarded as a cause of an event if the particular event would have occurred without it." This, then, is the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself.<sup>16</sup>

Thus, the trilogy of *Gross–Staub–Nassar* audaciously proclaims the escalating tortification of employment discrimination law.<sup>17</sup>

The importation of tort law into employment discrimination is not inherently a bad thing. Yet, scholarly commentary on the subject since *Staub* has ranged from cautious to suspicious to highly critical. From the outset, however, we probably should acknowledge that some good could come from tortification, and it is unlikely that the Court will abandon the notion that it can and should import tort law into the common law of employment discrimination.<sup>18</sup> A reasonable aspiration may be to persuade the Court and

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<sup>12</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>13</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>14</sup> See Corbett, *Unmasking*, *supra* note 3, *passim* (contending that the pretext analysis of *McDonnell Douglas* is a thinly-veiled version of *res ipsa loquitur*).

<sup>15</sup> See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013) (holding, based on *Gross*, that but-for causation is required to prove retaliation under Title VII).

<sup>16</sup> *Id.* at 2525 (citing KEETON ET AL., *supra* note 11, at 265).

<sup>17</sup> See, e.g., Sperino, *Tort Label*, *supra* note 3, at 1052 (describing the Supreme Court's use of tort law to interpret the employment discrimination statutes as becoming "more robust and automatic"); *id.* at 1066 ("Together *Staub*, *Gross*, and *Nassar* represent a shift in the way the Supreme Court uses tort law."). Professor Sperino organizes the periods of tortification into (1) the Pre-Tort Years, 1964–1988; (2) the Middle Years, 1989–2008; and (3) the Modern Cases, 2009 to Present. *Id.* at 1055–67.

<sup>18</sup> I use "common law of employment discrimination" to denominate the vast body of case law developing theories and principles not expressly provided for in the statutes.

courts to undertake a more thoughtful and discriminating approach to this process. Indeed, I do not argue that tort law should never be used to develop employment discrimination law. Numerous tort principles, with or without modification, may serve employment discrimination law very well. The Supreme Court, however, has employed a retrograde view of the tort law available and deployed it in ways that have resulted largely in a complex and almost chaotic common law of employment discrimination, which ill serves the grand objectives of the statutes.

What would best serve the law, after fifty years of discrimination law, is congressional intervention. Congress needs to examine a voluminous body of employment discrimination common law and amend the statutes in a comprehensive fashion. Such an undertaking could set the parameters for the use of tort law in discrimination law. Although I intend to make the case for a massive overhaul of the federal employment discrimination laws, I am not at all sanguine about the prospects for such. Over a period of fifty years, Congress has not necessarily neglected the statutes, but its primary approach to developing the law has been to leave it to the courts until it chooses to override particular Supreme Court decisions, sometimes overriding one at a time,<sup>19</sup> and sometimes dispatching with several at once.<sup>20</sup> There is nothing suggesting that Congress will undertake the kind of comprehensive reform that I think is warranted. Failing that, it is worthwhile to suggest some guidance for courts to use in deciding future incorporation and forbearance from incorporation of tort law.

Part II addresses what it means to label employment discrimination laws federal torts and what is troubling about the Court's application of the tort label and incorporation of tort law without adequate explanation and reasoning. First, I briefly chronicle the inception and development of the Court's application of the tort label to employment discrimination law. Second, I consider several different concerns with the tort analogy and the importation of common law and tort law principles. Finally in Part II, I

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<sup>19</sup> For example, with the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 and 42 U.S.C.), Congress abrogated *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

<sup>20</sup> The most significant example of such a law is the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.), which abrogated several Supreme Court decisions. Section 3(4), 105 Stat. 1071, expressly identifies as one of the Act's purposes "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Another example is the Americans with Disabilities Act Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, 122 Stat. 3533 (codified in scattered sections of 29 and 42 U.S.C.), which overturned several Supreme Court decisions restrictively interpreting the meaning of disability under the ADA. The issue of congressional overrides of the Court's statutory interpretation in employment discrimination law is usefully treated in Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 860 (2012). The problem addressed by Professor Widiss will be discussed *infra* Part III.A.

consider the negative effects that application of the tort label and the incorporation of tort principles have had on employment discrimination law. In Part III, I offer two solutions that could ameliorate the problems of past tortification and could usher in future incorporations of tort law that should enhance employment discrimination law. First, I make the case that the time has come for Congress to re-engage in employment discrimination law by amending and updating the statutes. The Court and courts are creating much employment discrimination doctrine without adequate guidance from Congress. Congress can and should “get back in the game” and, in the process, send a message about the role of tort law in employment discrimination law. Second, recognizing that Congress is unlikely to oblige, I offer some guidelines for courts in the incorporation of tort law into employment discrimination law, which actually are culled from various Supreme Court opinions that have handled the incorporation issue well or not so well. After proposing those guidelines, I demonstrate the proposed analysis by applying the guidelines to a couple of tort principles that could be candidates for importation into discrimination law.

## II. THE TORT LABEL AND THE INCORPORATION OF TORT CONCEPTS INTO EMPLOYMENT DISCRIMINATION LAW: MUCH ADO ABOUT NOTHING?

What is troublesome about *Staub* and the so-called tortification of employment discrimination law? Is it the mere fact that the Court applies the tort label to employment discrimination law? Or is it the specific tort concepts that the Court is importing? Or is it the way the Court goes about adopting it? For me the answer is “yes, all three.” The most troubling thing about the Court’s resort to tort law to develop employment discrimination law, however, is that it is occurring at a juncture in the history of employment discrimination law when the case law has created a complex and confusing labyrinth of principles and doctrines, and the statutes have not been adequately amended and updated by Congress. Against the backdrop of outdated statutes, it is not clear how much tort law or what tort law courts should import into employment discrimination law. Moreover, the outdated statutes encourage importation of tort law or other law to populate a body of law that is still, fifty years after its inception, loosely defined by lean statutes which provide little guidance on principles and doctrine.

### A. *The Tort Label*

Some have suggested that there is nothing inherently inappropriate about the Court or courts resorting to tort law to interpret and develop employment discrimination law. Professor Sullivan has argued that the negative reaction to

tort law gives too much weight to our rather artificial categorizations of law.<sup>21</sup> As Sullivan puts it, it's all law, and there are a limited number of concepts to address each legal inquiry.<sup>22</sup> Professor Sullivan finds the real issues of concern to be what tort law is adopted and whether that law is adequately adapted to serve the purposes of employment discrimination law.<sup>23</sup> While I agree with most of what he says, I do not find application of “the tort label” by the Court to be innocuous. I see it as potentially pernicious—more than just introducing the Court’s borrowing of a tort construct. First, labeling employment discrimination laws as federal torts indicates a particular perspective about the discrimination laws that troubles me. Second, the Supreme Court has begun to use the labeling as the key to importing tort doctrines or principles without conducting any analysis of whether the tort law is well-suited to employment discrimination law and whether any adaptations may be needed to make it function well. The Court calls the employment discrimination laws “torts,” saying that Congress knew the common law background against which it enacted the laws, and then chooses a tort principle with little to no analysis.

### 1. *Beginning and Evolution of the Tort Label*

Initially, it is worth asking what the Court means when it affixes the tort label to employment discrimination laws. What is it about the laws causes the Court to label them torts? The Court provided no explanation in *Gross*, *Staub*, or *Nassar*, but there is some history worth exploring.

Analogizing employment discrimination law to tort law is not self-evident. Early in the history of discrimination law not all courts<sup>24</sup> and commentators<sup>25</sup> agreed that the tort characterization was appropriate or correct. Indeed, the Supreme Court itself expressed some reticence about adopting common law principles (agency law) for employment discrimination issues in *Meritor Savings Bank, FSB v. Vinson*: “[S]uch common-law principles may not be

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<sup>21</sup> See Charles A. Sullivan, *Is There a Madness to the Method?: Torts and Other Influences on Employment Discrimination Law*, 75 OHIO ST. L.J. 1079, 1079–80 (2014) [hereinafter Sullivan, *Is There a Madness*].

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1080–81.

<sup>24</sup> See *Freeman v. Kelvinator, Inc.*, 469 F. Supp. 999, 1004 (E.D. Mich. 1979):

But simply because the law of tort might be a source to evaluate the loss caused by discrimination does not necessarily mean discrimination claims should be saddled with the whole of tort doctrine. The discrimination cause of action is unique. It is not derived from the English common law of personal freedom, but is rather an outgrowth of the fundamental principle that everyone should be treated equally without regard to race, color or, as we have come to realize more recently, sex.

<sup>25</sup> See, e.g., Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1242 (1988) (positing that because employment discrimination law is not

transferable in all their particulars to Title VII . . . .”<sup>26</sup> The Court in *Meritor* did, however, follow the urging of the Equal Employment Opportunity Commission to look to agency law for guidance in fashioning the employment discrimination standard.<sup>27</sup>

It was Justice O’Connor who became the architect of tortifying employment discrimination law, beginning with her concurring opinion in *Price Waterhouse v. Hopkins*.<sup>28</sup> In the course of sorting through torts standards of causation to choose one for the mixed-motives analysis in her concurrence,<sup>29</sup> Justice O’Connor referred to Title VII as creating a “statutory employment ‘tort.’”<sup>30</sup> However, a majority of the Court did not articulate that view.

A few years after *Price Waterhouse*, in *United States v. Burke*, the Court considered whether settlement of a backpay claim under Title VII was excludable from gross income under the Internal Revenue Code.<sup>31</sup> To come within the income exclusion, the legal basis for recovery had to be redress of a tort-like personal injury.<sup>32</sup> The Court majority held that the recovery was not tortlike and thus not excludable. The majority stated that “one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff . . . .”<sup>33</sup> Title VII, the Court noted, did not permit recovery for “other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages.”<sup>34</sup> The Court responded to the argument that the Civil Rights Act of 1991 changed the remedial provisions and thus made Title VII claims “inherently tort-like in nature,” by explaining that although “Congress’ decision to permit jury trials and compensatory and punitive damages under the amended Act signals a marked change in its conception of the injury redressable by Title VII,” that change could not be attributed to the statute

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common-law based, causal analysis perhaps should not play as critical a role as it does in negligence).

<sup>26</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

<sup>27</sup> *Id.*

<sup>28</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O’Connor, J., concurring).

<sup>29</sup> Justice O’Connor’s analysis of tort causation standards will be discussed in detail *infra* Part III.B.1.

<sup>30</sup> *Price Waterhouse*, 490 U.S. at 264 (O’Connor, J., concurring). As Professor Bernstein chronicles, Justice O’Connor was the primary proponent of the thesis that employment discrimination law is statutory tort law. Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 510 (1997) (“[H]er colleagues on the Court have never effectively refuted Justice O’Connor’s cogent position that employment discrimination is a tort in all but name.”).

<sup>31</sup> *United States v. Burke*, 504 U.S. 229, 241–42 (1992) (ruling on taxability superseded by statute).

<sup>32</sup> *Id.* at 237.

<sup>33</sup> *Id.* at 235.

<sup>34</sup> *Id.* at 239.



before the amendment.<sup>35</sup> Dissenting, Justice O'Connor objected to the focus on the types of damages as the key to tortiness, and argued instead that it is the type of injury that is crucial. Relying on the Court's having characterized the Reconstruction era civil rights laws as torts, she argued that "[d]iscrimination in the workplace being no less injurious than discrimination elsewhere, the rights asserted by persons who sue under Title VII are just as tort-like as the rights asserted by plaintiffs in actions brought under §§ 1981 and 1983."<sup>36</sup> Thus, Justice O'Connor reasserted her view expressed in her *Price Waterhouse* concurrence that "Title VII offers a tort-like cause of action to those who suffer the injury of employment discrimination."<sup>37</sup>

The enactment of the Civil Rights Act of 1991 removed the rationale of the *Burke* majority for declining to classify Title VII as tortlike. The enactment of § 1981a<sup>38</sup> made capped compensatory and punitive damages and jury trials available for disparate treatment claims under Title VII and the Americans with Disabilities Act (ADA). A strong critic of the tortification of employment discrimination law, Cheryl Zemelman, expressed her assessment in 1993 that there had been "a two-decade evolution of Title VII from a public policy-enforcing statute, designed to promote employer responsibility, to a compensatory, tort-like statute, aimed at making victims whole . . . [such that] the privatization of Title VII has become so complete that once unthinkable characterizations of the statute now seem commonplace."<sup>39</sup> By the time of *Gross* and *Staub*, the O'Connor opinions in *Price Waterhouse* and *Burke* and the obviating of the *Burke* majority's rationale by the 1991 Act had laid a foundation for declaring the discrimination laws to be statutory torts.

## 2. Concerns About the Tort Label and Importation of Tort Law

### a. Is Employment Discrimination Law Tortlike?

If the employment discrimination statutes are not tortlike, then the Court is wrong, and labeling them as such may obscure important distinctions between tort law and employment discrimination law. Over time we would expect this to result in the distinctions being minimized and discrimination law becoming more tortlike, perhaps to the detriment of the public policy and civil rights objectives of discrimination law. In other words, tortification of employment discrimination law may be a self-fulfilling prophecy that enervates the civil rights laws.

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<sup>35</sup> *Id.* at 241 n.12.

<sup>36</sup> *Id.* at 252 (O'Connor, J., dissenting).

<sup>37</sup> *Burke*, 504 U.S. at 254.

<sup>38</sup> 42 U.S.C. § 1981a (2012).

<sup>39</sup> Cheryl Krause Zemelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 188, 196 (1993).

We may begin, then, by asking whether the employment discrimination statutes are tortlike rather than accepting the Court's recent proclamations as correct and viewing the laws as they have been shaped in the tort mold by the Court over the years. The answer is, based on the language of the statutes, "not necessarily." What does the Court mean by the tort analogy? Although the Supreme Court uses the tort characterization principally to refer to a type of injury (personal injuries) and a type of damages (compensatory damages), there is much more to tort law. Professor Sandra Sperino argues that the language and structure of the discrimination statutes does not mimic tort law.<sup>40</sup> She explains that the statutes do not use tort terms of art, such as but-for causation and proximate cause,<sup>41</sup> and the statutes do not set forth theories of discrimination couched in terms of a set of requisite elements.<sup>42</sup> For example, it is black letter law that battery requires proof of three or four elements (depending on whether consent is classified as a defense): (1) a voluntary act; (2) intent; (3) a harmful or offensive contact; and perhaps (4) lack of consent.<sup>43</sup> Negligence requires that the following elements be established: (1) duty; (2) breach; (3) cause in fact; (4) proximate or legal cause; and (5) compensable harm.<sup>44</sup> Courts and factfinders examine tort claims by fitting evidence into these constructs, determining whether there is sufficient, and then preponderant evidence of each element. Failure to establish any one of the requisite elements results in no liability.<sup>45</sup>

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<sup>40</sup> Sperino, *Tort Label*, *supra* note 3, at 1070.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* ("[T]ort law has developed a preference for a small set of central elements that define each cause of action.")

<sup>43</sup> See RESTATEMENT (SECOND) OF TORTS § 13 (1965); DAN B. DOBBS, *THE LAW OF TORTS* §§ 28–32 (2000).

<sup>44</sup> See RESTATEMENT (SECOND) OF TORTS § 328A (1965); DOBBS, *supra* note 43, § 114.

<sup>45</sup> Although this is textbook American tort law, such an all-or-nothing approach is not the only way to articulate and evaluate claims. For example, a flexible approach to tort law need not require that each element be established to a certain level of proof but instead may permit that the elements be considered in interaction. If one element is not established or is weak, liability may be established and recovery permitted if other elements are very strong. See, e.g., HELMUT KOZIOL, *BASIC QUESTIONS OF TORT LAW FROM A GERMANIC PERSPECTIVE* 14–16 (Fiona Salter Townshend trans., 2012); Ken Oliphant, *Uncertain Factual Causation in the Third Restatement: Some Comparative Notes*, 37 WM. MITCHELL L. REV. 1599, 1626 (2011) ("The reasoning is underpinned by the theory of a flexible system developed by the Austrian legal theorist, Walter Wilburg. In a flexible system, a weakness in a given claim corresponding to one element of liability can be offset by showing unusual strength relative to another element of liability." (footnote omitted)). One manifestation of such an approach is proportional liability and recovery based on probability of causation. A number of states in the U.S. recognize a version of this in lost chance of survival claims in medical malpractice wrongful death cases of uncertainty regarding causation. For further discussion of proportional liability and lost chance principles, see *infra* Part III.B.2.

The language of Title VII, the ADEA, and the ADA does not necessarily lead to the creation of required-element-based theories of discrimination. Essentially, the statutes prohibit employers from taking adverse employment actions because of race, color, sex, religion, national origin, age or disability. Such statutes could be interpreted as inviting open-ended and flexible examination of available evidence to determine whether discrimination has occurred. However, within the first decade of discrimination law, the Supreme Court began fashioning proof structures or frameworks that developed the law along the lines of the inflexible approach of tort law. In 1973, in *McDonnell Douglas Corp. v. Green*,<sup>46</sup> the Court announced its now ubiquitous three-part pretext proof structure, which has been criticized for narrowly cabining analysis of individual disparate treatment claims—forcing evidence into artificial categories<sup>47</sup> that do not obviously address whether a plaintiff was discriminated against because of a protected characteristic.<sup>48</sup> A plaintiff's failure to establish the elements of the stage one prima facie case or stage three pretext results in no liability. The required elements and the pigeonholing of evidence is a tort-like approach.<sup>49</sup> Other proof structures would be developed by the Court for discrimination claims, but the *McDonnell Douglas* pretext analysis is remarkable for its tort-like analysis and organization of evidence into categories based on a list of elements. This example of tortification cannot be pushed too far, as the pretext framework and other proof structures have not been applied by all courts with the same level of dispositive rigidity in employment discrimination cases as the requisite-elements approach in tort law.<sup>50</sup> Still, most courts do not diverge from the constraints of the *McDonnell*

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<sup>46</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>47</sup> See, e.g., Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2324 (1995) (“The claim that we have ‘special’ rules for intentional discrimination cases creates a false ‘sense of closure’—a false belief that the law has already taken extraordinary steps to assist Title VII plaintiffs.” (footnote omitted)); Stephen W. Smith, *Title VII’s National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 371–81 (1997) (exploring whether the *McDonnell Douglas* analysis is useful).

<sup>48</sup> See, e.g., Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 57 (1996) (referring to pretext as a proxy for employment discrimination); Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 HOUS. L. REV. 349, 392 (2007) (“[B]oth the federal *McDonnell Douglas* standard and the similar state court standards are a proxy for the following statement: These facts are material to determining whether there is evidence of discrimination.”).

<sup>49</sup> I have argued elsewhere that the *McDonnell Douglas* pretext analysis was perhaps the beginning of tortification of employment discrimination law because it essentially entailed the sub silentio incorporation of res ipsa loquitur into discrimination law. See Corbett, *Unmasking*, *supra* note 3, *passim*.

<sup>50</sup> Compare, e.g., *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) (“[E]stablishing the elements of the *McDonnell Douglas* framework is not, and never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment motion in an employment discrimination case. Accordingly, the plaintiff’s failure to

*Douglas* pretext framework, and even among those that do, almost all feel constrained to at least pay lip service to it. Thus, the courts' adherence to the proof structures makes employment discrimination more tortlike than the statutes require.

The Court's most significant importation of tort law into employment discrimination law has been the adoption of tort cause-in-fact standards. The adoption of tort law's most basic causation standard, but-for causation, has made discrimination law look like tort law. The Court based this importation on the statutory language "because of." As will be discussed further, this tortification was not required by the statutory language, notwithstanding the Court's declaration in *Gross* that "because of" means but-for causation.<sup>51</sup>

Some employment discrimination theories are tortier than others; most agree that sexual (and other) harassment is the discrimination theory that is most tortlike.<sup>52</sup> The type of injury (personal injury consisting of emotional distress and dignitary harm sometimes accompanied by physical harm)<sup>53</sup> and the damages awarded (after § 1981a was enacted as part of the Civil Rights Act of 1991)<sup>54</sup> cast sexual harassment as more tortlike than other employment

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produce a comparator does not necessarily doom the plaintiff's case."), *with, e.g.*, *Bell v. Crowne Mgmt., LLC*, 844 F. Supp. 2d 1222, 1232 (S.D. Ala. 2012) ("To the extent that *Smith* suggests the burden-shifting paradigm of *McDonnell Douglas* can be ignored in a case based on circumstantial evidence, freeing the plaintiff from any obligation to establish a prima facie case, it is in tension with a long line of Eleventh Circuit precedent.").

<sup>51</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176–77 (2009).

<sup>52</sup> *See, e.g.*, Chamallas, *supra* note 4, at 2127 (calling "workplace harassment [] the kind of employment discrimination that looks most like a tort"); *cf.* Bernstein, *supra* note 30, at 451 (arguing that the lens of respect "reconciles competing perspectives on fault, simultaneously recognizing the tort-like wrong of sexual harassment and the Title VII emphasis on workplace discrimination"); Mark M. Hager, *Harassment and Constitutional Tort: The Other Jurisprudence*, 16 HOFSTRA LAB. & EMP. L.J. 279, 317 (1999) ("[H]ostile environment harassment under Title VII dwells in a twilight zone between discrimination and tort.").

<sup>53</sup> *See* Chamallas, *supra* note 4, at 2119 (describing the injury as "a multifaceted injury—with both a personal and social dimension"). *But see* Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 833 (2005) (criticizing the Court's view of "sexual harassment as an individual, tort-like injury" because that view "obscures the relationship between sexual harassment and sex discrimination, both of which occur because of group-based bigotry").

<sup>54</sup> In many cases of sexual harassment, the original Title VII remedies were largely ineffectual for redressing plaintiffs' injuries because there was no adverse employment action resulting in a loss of pay, for which backpay could provide a remedy. The 1991 Act made compensatory and punitive damages available. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(b), 105 Stat. 1071, 1073 (codified as amended at 42 U.S.C. § 1981a (2012)). Section 2(1) states in part: "The Congress finds that . . . additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace . . ." *Id.* § 2(1); *see also* Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 747–51 (2008) (discussing the congressional response to the limited remedies available for redressing sexual harassment).

discrimination theories. Moreover, sexual harassment law is based on the requisite-elements approach of tort law. Hostile environment claims require proof of five elements, as enumerated by most courts, that must be established in order for a plaintiff to recover.<sup>55</sup> One might expect that in this most tort-like subset of employment discrimination law, and, in this context, the borrowing of tort would be least troublesome. I think that is correct.

Thus, the employment discrimination statutes do not manifestly create statutory torts. The Supreme Court, however, has imbued the common law of discrimination with tort characteristics, and Congress accentuated that with the 1991 Act's addition of compensatory and punitive damages.<sup>56</sup>

### *b. Reservations About Importation of Common Law Principles*

There is a common law of torts. There also is and always will be a common law of employment discrimination, created as the Court and courts interpret the statutes. The common law of employment discrimination, however, should be constrained by the statutes based on a respect for the roles of the judicial and legislative branches.<sup>57</sup> Courts should approach the migration of tort principles into employment discrimination law with caution and restraint rather than with the current promiscuity. A cautious approach is appropriate because tort law is primarily common law and employment discrimination law is principally statutory.<sup>58</sup> Although this seems a mere truism, it suggests reasons for a careful and analytical approach to importation of tort common law—an approach that includes consideration of adoption only

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<sup>55</sup>The elements are generally stated along the following lines: (1) that he or she belongs to a protected group; (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, or other conduct of a sexual nature; (3) that the harassment must have been based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable. *See, e.g.,* *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010); *Green v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642, 655 (5th Cir. 2002).

<sup>56</sup>I wish to be clear that I do not think that the addition of compensatory and punitive damages and jury trials in the 1991 Act was a bad thing. On the contrary, I think it was needed. However, it removed the only ground of distinction between tort and employment discrimination relied on by the Court in *United States v. Burke*, 504 U.S. 229, 241–42 (1992) (ruling on taxability superseded by statute).

<sup>57</sup>*See, e.g.,* Widiss, *supra* note 20, at 860 (discussing the proper roles of the courts and Congress in lawmaking); *cf.* Sullivan, *Is There a Madness*, *supra* note 21, at 1083 (explaining that resort to other bodies of law to interpret the employment discrimination statutes is permissible “only when Congress has not carefully enough defined the parameters of the inquiry”).

<sup>58</sup>Although there is a large body of common law of employment discrimination, the law was created by statutes, and the statutes must be read and interpreted to create the common law. *See, e.g.,* Sullivan, *Is There a Madness*, *supra* note 21, at 1083 (stating that courts' resort to tort law or any other law should be constrained by the statutes).

with appropriate modifications. First, there is a general concern that common law terms of art and principles are not always appropriate for various statutory tasks. Second, there is a specific concern that the common law of employment, which includes contract and tort law, is dominated by employment at will, a principle that is in tension with the employment discrimination statutes.

The common law has different baselines and norms than the employment discrimination laws.<sup>59</sup> Some baselines of the common law of employment are the following: (1) neutrality or freedom of contract, meaning government should leave private contracting parties to their personal preferences; (2) minimal interference, meaning the economy functions best with minimal government interference; and (3) protection of employers' property rights as owners against the competing claims of employees.<sup>60</sup> Professors Theodore Blumoff and Harold Lewis, Jr., in 1990 criticized the Supreme Court for adopting common law causation standards that are ill-suited for the statutory tasks. The Supreme Court's development of the law since 1990 has exacerbated the problem of common law baselines for development of statutory law, as will be discussed below regarding the causation debacle.<sup>61</sup>

Beyond general reservations about common law principles being adopted for statutory work, there is a specific concern about the common law of employment law. The "elephant in the room" of the common law is employment at will.<sup>62</sup> Employment at will is the basic governing principle<sup>63</sup> for employment termination in forty-nine of fifty states.<sup>64</sup> Employment at will provides that, absent contractual, statutory, or other restrictions, an employer can fire an employee for any reason (often stated as "good reason, bad reason, or no reason at all").<sup>65</sup> Employment at will is a longstanding, deeply

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<sup>59</sup> See Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 936–56 (1989) (identifying the first and third baselines); 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, 5 (1990) (identifying two of three baselines).

<sup>60</sup> See Blumoff & Lewis, Jr., *supra* note 59, at 66–70.

<sup>61</sup> See *infra* Part II.B.

<sup>62</sup> See Sperino, *Tort Label*, *supra* note 3, at 1068.

<sup>63</sup> It often is referred to as a default rule or a rebuttable presumption. See, e.g., Rachel Arnow-Richman, *Just Notice: Reforming Employment at Will*, 58 UCLA L. REV. 1, 4–5, 13 (2010); J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 349–50 (1995).

<sup>64</sup> Forty-nine states are characterized as employment-at-will states. The Montana Wrongful Discharge from Employment Act of 1987 removed that state from the list, although weakly. MONT. CODE ANN. §§ 39-2-901 to -914 (2012).

<sup>65</sup> See, e.g., *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–20 (1884) ("All may dismiss their employe[e]s at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."), *overruled on other grounds* by *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915); see also Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1655 (1996) (stating that it is the "employer's presumptive right to fire employees at will—for good reason, for bad reason, or for no reason at all").

entrenched, and fundamental principle of employment law in the United States.<sup>66</sup> When employees are terminated, many believe their termination is wrongful or unjustified. They experience it as a personal injury, and many want to sue their former employer for “wrongful termination” or “wrongful discharge.” Yet, in a nation dominated by employment at will, few plaintiffs can assert viable claims for wrongful discharge. However, plaintiffs who can allege terminations because of race, sex, age, etc. under the employment discrimination laws often have viable claims. Thus, the most significant source of legal protection against unjust termination in the United States is the employment discrimination laws. Employment discrimination law necessarily impinged on employment at will from the beginning because Title VII expressly states that discharge is an adverse employment action for which discrimination is prohibited.<sup>67</sup> Over its life, employment discrimination law increasingly has come into tension with employment at will as the number of discriminatory discharge claims has increased.<sup>68</sup> In the early years after enactment of Title VII, most claims were based on refusal to hire, but over the years the majority of claims have become discharge claims. Thus, courts should hesitantly adopt common law to perform the statutory tasks of the employment discrimination laws.<sup>69</sup> The Court once expressed this view in *Meritor Savings Bank, FSB v. Vinson*: “[S]uch common-law principles may not be transferable in all their particulars to Title VII . . . .”<sup>70</sup> Before adopting common law, courts should carefully consider both the influence of employment at will on the common law and the need to develop employment discrimination law that adequately displaces employment at will.<sup>71</sup>

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<sup>66</sup> See, e.g., Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 66 (2000) (“To understand the American system, therefore, it is necessary to understand the doctrine of employment at will, its fundamental assumptions, and its ambivalence. More importantly, it is necessary to recognize where that fundamental assumption has shaped our labor law.”).

<sup>67</sup> “It shall be an unlawful employment practice for an employer [] to fail or refuse to hire or to discharge any individual . . . .” 42 U.S.C. § 2000e-2(a)(1) (2012).

<sup>68</sup> See, e.g., John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991) (noting that “[h]iring charges outnumbered termination charges by 50 percent in 1966, but by 1985, the ratio had reversed by more than 6 to 1”); see also *Statutes by Issue FY 2010 – FY 2013*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [http://www.eeoc.gov/eeoc/statistics/enforcement/statutes\\_by\\_issue.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm) (last visited Nov. 3, 2014), archived at <http://perma.cc/LC3-J7MV> (showing EEOC statistics of large percentage of charges filed from 2010 to 2013 based on discharges).

<sup>69</sup> See Blumoff & Lewis, Jr., *supra* note 59, at 70 (“At first blush, it seems almost inherently inconsistent to speak of the survival of common-law economic and political premises in light of a statutory scheme which, while stopping short of requiring just cause for discharge, is an undoubted encroachment on the doctrine of employment at will.”) (footnote omitted).

<sup>70</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

<sup>71</sup> Professor Sperino poses the analysis that courts should conduct as follows:

One may argue, however, that it is not the entirety of the common law that is dominated by employment at will; rather, it is the common law of contracts and employment law. However, in the realm of the common law, tort law interacts with employment at will, and courts generally have subordinated tort law principles to employment at will. Consider, for example, two tort theories urged by plaintiffs in termination cases: (1) wrongful discharge in violation of public policy; and (2) intentional infliction of emotional distress. Both tort theories routinely are subordinated to employment at will by courts that express concern about permitting tort law to dilute the venerable employment-at-will doctrine.

Wrongful discharge in violation of public policy could have developed as a significant restriction on abusive discharges.<sup>72</sup> Indeed, if it had developed as the abusive discharge tort proposed by Professor Lawrence Blades,<sup>73</sup> it would have been a formidable tort counterweight to employment at will. Instead it has developed as a feckless tort that is barely worth mentioning as a limitation on employment at will. While most states recognize a tort denominated as wrongful discharge in violation of public policy, it is notoriously hard for plaintiffs to recover under the tort theory.<sup>74</sup> Courts often explain their constrained development and application of the tort by declaring the need to preserve employment at will.<sup>75</sup>

Intentional infliction of emotional distress (IIED), or the tort of outrage, is a tort of general application that was not designed specifically for employment law or terminations, as was wrongful discharge in violation of public policy. As difficult as it has been for plaintiffs generally to recover for IIED, plaintiffs in employment cases, particularly those involving terminations, have found

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If Congress meant to alter the common law relationship in a significant way, did it also mean to fully retain common law meanings for core statutory words? If so, which words and concepts retained their common law meanings and how are these meanings changed by the limits Congress imposed on employers' ability to make decisions based on protected traits?

Sperino, *Tort Label*, *supra* note 3, at 1069.

<sup>72</sup> See Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 656 (2000) (describing wrongful discharge in violation of public policy ("WDVPP") as "[t]he most significant limitation on the employment-at-will doctrine [that] has arisen from tort law").

<sup>73</sup> See Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1423 (1967).

<sup>74</sup> See, e.g., Parker, *supra* note 63, at 392–402.

<sup>75</sup> See, e.g., Briggs v. Nova Servs., 213 P.3d 910, 914 (Wash. 2009) (en banc) (stating that "the tort of wrongful discharge in violation of public policy is a narrow exception to this employment at-will doctrine" and that "[t]he exception should be applied cautiously so as to not swallow the rule"); Bammert v. Don's Super Valu, Inc., 646 N.W.2d 365, 369 (Wis. 2002) (expressing reluctance to broaden the narrow tort theory of recovery because employment at will is a "stable fixture" of the common law of the state and is "central to the free market economy"); White v. Sears, Roebuck & Co., 837 N.E.2d 1275, 1279 (Ohio Ct. App. 2005) (recognizing a narrow exception to employment at will).



courts particularly reluctant to permit recovery.<sup>76</sup> As with wrongful discharge in violation of public policy, courts fear permitting a substantial tort incursion on employment at will.<sup>77</sup> Some courts adopting such a restrictive approach to IIED have cited a comment in the *Restatement (Second) of Torts*: “The actor is never liable . . . where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.”<sup>78</sup> Believing that employment at will is a sacrosanct principle of law, some courts fear that permitting recovery for one termination case under IIED will open the floodgates and jeopardize employment at will.<sup>79</sup>

Beyond the two tort theories of recovery that have proven ineffectual in the teeth of employment at will, various tort principles have succumbed. For example, in *Quebedeaux v. Dow Chemical Co.*,<sup>80</sup> the Supreme Court of Louisiana considered the case of an employee who was claiming damages for a battery by a co-employee. The plaintiff was fired for his involvement in the altercation, and he claimed damages for the battery he suffered. Although his physical harm was minimal, he claimed damages from the termination, including lost future wages and benefits. The court of appeals had permitted recovery under the tort principle of extended liability. For intentional torts, plaintiffs may recover all damages flowing from the tort, regardless of foreseeability.<sup>81</sup> The state supreme court recognized the tension between the extended liability principle of tort law and the employment-at-will doctrine and resolved it in favor of employment at will: “[V]ictim compensation, which is one of the primary policies supporting vicarious liability, must give way to

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<sup>76</sup> Interestingly, the first major criticism of the tortification of employment law was a criticism of the tort theory of IIED being used in the employment context. See Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against “Tortification” of Labor and Employment Law*, 74 B.U. L. REV. 387, 392 (1994).

<sup>77</sup> In 1994, Professor Duffy declared that “the overwhelming majority of jurisdictions either do not recognize the tort in the employment at will context, or place severe restrictions on liability in that context.” *Id.* at 391; see also Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J. 109, 157–58 (2003) (describing reluctance of courts to permit IIED to be used as a backdoor wrongful discharge claim); Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693, 1702 (1996) (“Despite the apparent openness of the tort, infliction claims by employees rarely succeed.”). Although there has been some expansion of application of IIED to terminations in some states since Duffy’s statement, there is still considerable reticence on the part of courts.

<sup>78</sup> RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1965).

<sup>79</sup> See, e.g., *Diamond Shamrock Ref. & Mktg. Co. v. Mendez*, 844 S.W.2d 198, 202 (Tex. 1992) (stating “there would be little left of the employment-at-will doctrine” if the court permitted recovery under IIED).

<sup>80</sup> *Quebedeaux v. Dow Chem. Co.*, 820 So. 2d 542 (La. 2002).

<sup>81</sup> *Quebedeaux v. Dow Chem. Co.*, 809 So. 2d 983, 989 (La. Ct. App. 2001), *rev’d*, 820 So. 2d 542 (La. 2002).

the employment-at-will doctrine, which furthers broader societal policies, such as maintaining a free and efficient flow of human resources.”<sup>82</sup>

In thinking about the importation of common law tort principles into employment discrimination, insight can be gained by considering migration of principles in the other direction—from employment discrimination law to tort law. Professor Martha Chamallas chronicled such a migration of law and encouraged further importation of the law of hostile environment sexual harassment to develop the tort law of IIED.<sup>83</sup> She described it as “an interpretive process by which courts selectively borrow from the statutory domain to give more concrete meaning to tort standards.”<sup>84</sup> She compared this migration process to the judicial practice of borrowing safety standards from statutes and using them to make more precise the standard of care in common law negligence claims. “The underlying idea is that it is beneficial that statutory norms find their way into tort law to insure that common law adjudication reinforces legislative priorities and responds to changing cultural sensibilities.”<sup>85</sup> The converse proposition is not equally strong. When borrowing from the common law to interpret and develop statutory law, courts should be careful that they do not misinterpret or frustrate legislative priorities, as has happened in employment discrimination law, specifically in the use of tort causation standards to interpret the statutory language “because of.”<sup>86</sup> Moreover, Professor Chamallas noted the most important and challenging part of the importation process: “Once a determination is made that courts in tort actions may appropriately borrow from civil rights, however, there remains the difficult question of precisely which concepts should be borrowed and how much overlap there should be between the two domains.”<sup>87</sup> Indeed, it is not the general principle of migration but the specific importation that merits careful analysis.

Using again Chamallas’s example of courts borrowing statutory safety standards for determining breach in negligence claims, courts do not do so without carefully analyzing whether the statutory standard is appropriate to the fact situation, whether it adds precision to the common law standard, whether it was intended to protect the type of plaintiff seeking recovery in the case, and whether it was intended to cover the type of harm for which the plaintiff seeks recovery.<sup>88</sup> Considering importation from employment discrimination law to tort law, two insights should inform migration of law in the other direction, the subject here: (1) the concern should be greater that legislative purpose and priorities not be frustrated by the importation; and (2) the analysis of which

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<sup>82</sup> *Quebedeaux*, 820 So. 2d at 546.

<sup>83</sup> Chamallas, *supra* note 4, *passim*.

<sup>84</sup> *Id.* at 2183.

<sup>85</sup> *Id.*

<sup>86</sup> *See infra* Part II.B.

<sup>87</sup> Chamallas, *supra* note 4, at 2183.

<sup>88</sup> *See Rains v. Bend of the River*, 124 S.W.3d 580, 590–91 (Tenn. Ct. App. 2003); RESTATEMENT (SECOND) OF TORTS § 288 (1965); DOBBS, *supra* note 43, §§ 134–38.

law appropriately may be imported should be at least as careful and discriminating as it is in the statutory-to-common-law migration.

In sum, courts should be careful when importing tort constructs and principles to interpret the employment discrimination statutes and to develop that body of law. Such an approach is necessary because of concerns with common law doing statutory tasks generally and with the common law of employment doing the work of employment discrimination statutes specifically.

### *c. Reservations About Importation of Tort Law Principles*

I think Congress—at least Congress in 1964—would have recoiled at Title VII being labeled a statutory tort. I hope that Congress in 2014 would object to the characterization. The label denigrates the different balance of objectives and policies in tort law and employment discrimination law.<sup>89</sup> Although both bodies of law share some objectives and policies, such as deterring harmful conduct and compensating injured parties, that does not mean that their priorities are the same.

Tort law is a big, diverse, complex, and constantly changing body of law that often is described as incoherent,<sup>90</sup> or lacking “a central theoretical unifying theory, aim, principle, or foundation.”<sup>91</sup> When it comes to theoretical underpinnings and principal objectives, tort law is multifaceted<sup>92</sup> and perhaps schizophrenic, described and animated by different schools of thought, theories, and objectives. The principal theories about tort law often are grouped into two schools of thought: the instrumentalist/social utility school, which emphasizes deterrence and compensation objectives, and the corrective justice school, which focuses on the moral importance of doing justice between or among the parties by requiring wrongdoers to correct the wrongful losses they occasion.<sup>93</sup> There are many ways to subdivide the theories and

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<sup>89</sup> I have made this argument elsewhere. See Corbett, *Unmasking*, *supra* note 3, at 461–62.

<sup>90</sup> See DOBBS, *supra* note 43, § 7.

<sup>91</sup> See, e.g., Michael D. Green, *Apportionment, Victim Reliance, and Fraud: A Comment*, 48 ARIZ. L. REV. 1027, 1043–44 (2006) (explaining that tort law reflects many influences over time—which is not well explained by a top-down intelligent design theory—and using Bruce Springsteen’s *Mama’s Soup Surprise* to illustrate the point); see also Sperino, *Tort Label*, *supra* note 3, at 1082 (“[T]ort law lacks a consistent unifying theory or even a manageable menu of theoretical considerations.”).

<sup>92</sup> See, e.g., John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 578 (2003) (“Tort law is a multifaceted enterprise, so it is no surprise to see that each theory brings something to the table . . .”).

<sup>93</sup> Green, *supra* note 91, at 1042 (crediting the late Professor Gary Schwartz with recognizing that torts includes strands of both corrective justice and deterrence); Jeffrey O’Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137, 138–39 (1999) (describing theories of deterrence, compensation, and

perhaps the objectives.<sup>94</sup> Interwoven with these theories and objectives is a balancing of concern with public versus private concerns. For example, tort law often aims to improve society, and it seeks to address private wrongs and private harms.<sup>95</sup> I am not undertaking here the ambitious enterprise of resolving the best theory of describing or prescribing tort law. Torts scholars have been engaged in that debate for some time. It is sufficient for my purposes to suggest that the priority of objectives in tort law and the balance of public versus private concern do not always align with employment discrimination law, nor should they.

Although tort law and employment discrimination law share the objectives of deterrence and compensation, the prioritizing or balancing of those objectives in tort law is uncertain and perhaps variable depending on the particular facts or pocket of tort law (for example, toxic torts compared with battery of an individual), whereas Congress and the Supreme Court have been clear that deterrence is the preeminent objective of the federal employment discrimination laws. The Supreme Court and other courts have declared this priority,<sup>96</sup> and Congress has indicated the same in both Title VII as originally enacted and the Civil Rights Act of 1991.<sup>97</sup> A focus on deterrence is to be

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corrective justice); Anthony J. Sebok, *Using Comparative Torts Materials to Teach First-Year Torts*, 57 J. LEGAL EDUC. 562, 573–74 (2007) (discussing corrective justice and deterrence theories); Sperino, *Tort Label*, *supra* note 3, at 1083.

<sup>94</sup> See Goldberg, *supra* note 92, at 514–16 (subdividing the theories).

<sup>95</sup> See, e.g., Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1509–10 (2009).

<sup>96</sup> The Court discussed the dual goals of deterrence/eradication of discrimination and compensation in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 413–25 (1975). The Court identified the “primary objective” of Title VII as “achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees.” *Id.* at 417 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1972) (internal quotation marks omitted)). The Court then went on to recognize that “[i]t is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.” *Id.* at 418. In her concurring opinion in *Price Waterhouse*, after Justice O’Connor applied the “statutory tort” label to Title VII, she noted the two primary functions of Title VII: the deterrence goal related to public policy and the compensation or make-whole goal. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O’Connor, J., concurring). The Third Circuit eloquently expressed the preeminence of the public policy:

[A]n act of employment discrimination is much more than an ordinary font of tort law. The anti-employment discrimination laws are suffused with a public aura for reasons that are well known . . . . A plaintiff in an employment-discrimination case accordingly acts not only to vindicate his or her personal interests in being made whole, but also as a ‘private attorney general’ to enforce the paramount public interest in eradicating invidious discrimination.

*Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1234 (3d Cir. 1994), *vacated*, 514 U.S. 1034 (1995).

<sup>97</sup> Before the 1991 amendments, Title VII provided for equitable relief, which included the possibility of a back pay award, but not compensatory and punitive damages.

expected of federal statutes that declare the strong public policy of eradicating invidious discrimination in employment. Although deterrence and compensation often are both served by a particular outcome, this is not always the case in torts,<sup>98</sup> and—as the remedies available under the employment discrimination statutes as amended by the 1991 Act indicate—it often is not the case under the discrimination laws.

Before the Civil Rights Act of 1991 was enacted, the principal remedy available for employment discrimination claims under the federal statutes (except the ADEA and Section 1981) was equitable relief, including backpay and affirmative injunctive relief such as reinstatement.<sup>99</sup> Although it is true that equitable relief, including backpay, can serve the twin goals of deterrence

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*See* 42 U.S.C. § 2000e-5(g)(1) (2012); *see also supra* notes 31–39 and accompanying text and *infra* notes 100–102 and accompanying text. The Civil Rights Act of 1991 added the possibility of compensatory and/or punitive damages in Title VII and ADA cases in which they previously were not available, but such damages were made available for only disparate treatment (intentional) discrimination claims, not disparate impact (unintentional) discrimination claims, and the damages were capped depending on the size of the employer. Pub. L. No. 102-166, § 102(a), 105 Stat. 1071, 1072–74 (codified as amended at 42 U.S.C. § 1981a (2012)).

<sup>98</sup> *See, e.g.,* Richard J. Bonnie & Bernard Guyer, *Injury as a Field of Public Health: Achievements and Controversies*, 30 J.L. MED. & ETHICS 267, 270 (2002) (“Operationally, however, they may converge (e.g., punishment of wrongdoers or imposition of liability can achieve preventive effects through deterrence) or diverge (e.g., the risk of tort liability faced by companies often reduces hazards, but sometimes creates disincentives to disclose safety information and may thereby retard safety innovation).”); *cf.* Mark A. Geistfeld, *The Coherence of Compensation-Deterrence Theory in Tort Law*, 61 DEPAUL L. REV. 383, 415 (2012) (“[T]he functions of compensation and deterrence do not obviously cohere into a viable theory of tort law.”).

<sup>99</sup> *See* 42 U.S.C. § 2000e-5(g)(1); *see also supra* notes 37–38 and accompanying text. Race discrimination claims, which could be asserted under 42 U.S.C. § 1981 in addition to Title VII, and age discrimination claims under the ADEA’s different remedial scheme, modeled on the Fair Labor Standards Act, were the exceptional claims for which damages were available. Regarding the assertion of race claims under § 1981, *see* *United States v. Burke*, 504 U.S. 229, 240 (1992) (“42 U.S.C. § 1981[] permits victims of race-based employment discrimination to obtain a jury trial at which both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages may be awarded.” (internal quotation marks omitted)). Regarding the ADEA remedial scheme and how it differs from that of Title VII because it was modeled on the FLSA, *see* 29 U.S.C. § 626(b) (2012) (“Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of [the FLSA].”); *see also* *Lorillard v. Pons*, 434 U.S. 575, 584–85 (1978) (“[T]he ADEA incorporates the FLSA provision that employers ‘shall be liable’ for amounts deemed unpaid minimum wages or overtime compensation, while under Title VII, the availability of backpay is a matter of equitable discretion[.] [R]ather than adopting the procedures of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedures even while adopting Title VII’s substantive prohibitions.” (citation omitted)).

and compensation, full compensation was not achieved in many cases.<sup>100</sup> The 1991 Act added compensatory and punitive damages, subject to caps, for claims of disparate treatment (intentional) discrimination, under Title VII and the Americans with Disabilities Act for which damages were not otherwise available.<sup>101</sup> However, such damages were not extended to claims of disparate impact.<sup>102</sup> Thus, compensation took on a more important place in employment discrimination than it previously had occupied, but only in cases of intentional discrimination.

The primacy of deterrence over compensation as reflected in the remedies available is even more clearly demonstrated by another part of the Civil Rights Act of 1991 that codified the mixed-motives proof structure in Title VII.<sup>103</sup> A plaintiff pursuing a Title VII claim under mixed motives can recover compensatory (and perhaps punitive) damages and backpay if the plaintiff proves that the protected characteristic was a motivating factor in the defendant employer's adverse employment action and the defendant fails to prove the same-decision defense (that it would have taken the same action for nondiscriminatory reasons). However, if the defendant proves the same-decision defense, which means the employer disproves but-for causation, then only nonmonetary relief (other than possible attorney's fees)—not even backpay or reinstatement—is available.<sup>104</sup> Because of the importance of deterrence, declaratory and some injunctive relief is available upon proof of less than but-for causation, but the plaintiff receives no monetary compensation. Congress in the statute sought to achieve the public policy of deterrence in cases involving a relatively weak showing of causation although it was not willing to compensate private plaintiffs in such cases. Thus, while elevating the compensatory objective of Title VII and the ADA, the Civil Rights Act of 1991 maintained the primacy of the deterrence objective. Although deterrence and compensation both may be served by outcomes under the employment discrimination statutes, Congress has fashioned the laws to further the deterrence objective even in cases in which it chooses not to advance fully the compensation objective.

While deterrence is the primary objective of employment discrimination law, it is arguable that compensation is at least an equally important objective of tort law.<sup>105</sup> As demonstrated above, these goals do not necessarily coincide

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<sup>100</sup> See, e.g., Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 427–28 (1999).

<sup>101</sup> See 42 U.S.C. § 1981a (2012).

<sup>102</sup> See *id.*

<sup>103</sup> See 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

<sup>104</sup> See *id.* § 2000e-5(g)(2)(B).

<sup>105</sup> See, e.g., Jack B. Weinstein, *The Restatement of Torts and the Courts*, 54 VAND. L. REV. 1439, 1439 (2001) (“Primarily through tort law the courts compensate those injured by others. Secondary aspects of our work such as deterrence or forcing tortfeasors to pay the full social costs of their activities are minor and collateral.”); *cf.* DOBBS, *supra* note 43,

in employment discrimination law. Closely associated with the priority of objectives in employment discrimination law is the primacy of the public policy function over the private function.<sup>106</sup> If the Court persists in characterizing employment discrimination law as a tort, it may blur the priority given to deterrence and public policy in employment discrimination law and the willingness to advance the deterrence objective for public policy reasons even when it is not appropriate to advance the compensation objective for private plaintiffs. This result already has manifested itself in the Court's decisions in *Gross* and *Nassar* to interpret the federal statutes as not permitting use of the mixed-motives framework (and its lower standard of causation) except where expressly provided by Congress. It is important for courts to understand and articulate the primacy of the deterrence objective and to recognize that, in employment discrimination law, sometimes deterrence should be advanced when compensation should not.

A second important distinction that should be maintained between employment discrimination law and tort law is that corrective justice, which contends as a major school of thought and objective and theory of tort law, has a more ambiguous role in employment discrimination. The corrective justice view of tort law is essentially that “wrongful losses ought to be corrected by wrongdoers.”<sup>107</sup> That is, one party has done wrong to another and caused harm, and morally the situation ought to be rectified. Arguably, employment discrimination law includes requirements and permissions that go beyond corrective justice.<sup>108</sup> Corrective justice would not be inclined to impose liability in several situations in which employment discrimination law does—probably including failure to make reasonable accommodation and disparate impact.<sup>109</sup> Regardless, corrective justice theorists in tort law generally insist

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§ 10 (“Compensation of injured persons is one of the generally accepted aims of tort law.”).

<sup>106</sup> See *supra* note 96 and accompanying text; *cf.* *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) (“[T]he plaintiff is the chosen instrument of Congress to vindicate ‘a policy that Congress considered of the highest priority.’”) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)).

<sup>107</sup> See, e.g., *Sebok*, *supra* note 93, at 574.

<sup>108</sup> See Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 407 (contending that distributive justice is more descriptive of employment discrimination law because it goes beyond remedying wrongs to achieving a vision of fairness and equality in jobs); Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 24–25 (describing antidiscrimination law as going beyond corrective justice “with a vengeance”). Examples often cited include the requirement of reasonable accommodations for disabilities and religion and the permissibility of voluntary affirmative action that meets certain criteria. See, e.g., Suk, *supra*, at 414–15; Zatz, *supra*, at 24–25.

<sup>109</sup> See Suk, *supra* note 108, at 426–27, 438 (“[C]ourts tend to reinforce a corrective justice understanding of the law, which in turn makes courts weak in enforcing disparate impact, reasonable accommodation, and hostile work environment problems.”).

upon a strong version of causation as a predicate to permitting recovery.<sup>110</sup> As will be discussed below, the courts' debate over causation in employment discrimination law has created the most chaotic and asymmetrical feature of this area of law.<sup>111</sup> Arguing as I do for a lower standard of causation in discrimination law, I think a principal tenet of corrective justice theory in tort law fits poorly with employment discrimination law, and I think Congress indicated this in the Civil Rights Act of 1991, although the Supreme Court in *Gross* and *Nassar* did not so interpret the law. Thus, another aspect of tort law that does not always fit well with employment discrimination law is the influence of corrective justice theory.

Employment discrimination is not the only area of the law which has been saddled with a tort analogy that does not necessarily, or always, correlate well. Writing about toxic torts and pollution, a commentator expressed concerns about the appropriateness of tort law to address the problems: "But if the problem, in fact, is not really a tort at all, those remedies will not only fail to further tort objectives but will also fail to achieve other vital objectives relevant to the actual problem."<sup>112</sup> As with employment discrimination, in toxic torts, causal indeterminacy presents problems for the victims.<sup>113</sup>

Ultimately, then, calling employment discrimination law a tort fails to acknowledge a different mix and balancing of objectives between the two areas of law. Failing to account for this difference is likely to result in a body of law that is less favorable to recovery than Congress intended.

If I am correct about the meaning of the tort label, why would the Court use it to suggest that employment discrimination law is primarily about compensating injury victims? Perhaps the Court thinks that the public policy of reducing, if not eradicating, discrimination has been largely achieved. On the other hand, the Court may think that the public policy is unattainable and the best that can be done is compensation of injured persons. It is hard to say what the Court thinks, but equating employment discrimination law and tort law suggests to me that the lofty purpose of discrimination law has been, or is being, enervated.

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<sup>110</sup> See, e.g., Erik S. Knutsen, *Ambiguous Cause-in-Fact and Structured Causation: A Multi-Jurisdictional Approach*, 38 TEX. INT'L L.J. 249, 285 (2003) ("[C]ausation for corrective justice theorists is perhaps the most vital component of the torts action"); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 439 (1990).

<sup>111</sup> See *infra* Part II.B.

<sup>112</sup> Palma J. Strand, Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 587 (1983).

<sup>113</sup> *Id.* at 584.



B. *What Harms Have the Tort Label and Unreasoned Importation of Tort Law Caused?*

So much for abstract concerns about the tortification of employment discrimination law based on differences between employment discrimination law on the one hand and common law and tort law on the other. Although the Court has only recently begun audaciously declaring that employment discrimination laws are torts in the *Gross–Staub–Nassar* trilogy, the process has been ongoing for many years. Has it caused any real harm to employment discrimination law? Yes, and the greatest harm has been done by the greatest borrowing from tort law—cause-in-fact analysis. The incorporation of tort cause-in-fact standards is a debacle that has rendered the common law of employment discrimination asymmetrical and chaotic.

Most chronicles of the adoption of tort causation standards begin with *Price Waterhouse* in 1989 and move forward to *Gross* in 2009.<sup>114</sup> *Nassar* is part of the progression, but it is merely an extension of *Gross*. Few recent commentaries dig down past *Price Waterhouse* for the tortification through adoption of cause-in-fact standards. Professor Sperino labels 1964–1988 the “Pre-Tort Years.”<sup>115</sup> It certainly is true that the Court did not talk much about tort law in employment discrimination before *Price Waterhouse*. The scholarly criticism of the Court’s use of tort causation standards is not new, however, and in his 1988 article Professor Belton critiqued the pre-*Price Waterhouse* cases in which the but-for causation standard was beginning to emerge.<sup>116</sup> Before the tort causation standards had been fully developed and given rise to the problems generated by *Desert Palace*, *Gross*, and *Nassar* discussed below, scholars were criticizing the importation of tort causation standards because they did not accurately describe the actual phenomenon of intentional discrimination.<sup>117</sup> Indeed, this is the point that Justice Breyer made in 2009 in his dissent in *Gross*:

It is one thing to require a typical tort plaintiff to show “but-for” causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of “but-for” causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a “but-for” relation when we consider,

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<sup>114</sup> See, e.g., Sperino, *Tort Label*, *supra* note 3, at 1055–67 (dividing the tortification of employment discrimination law into three periods); Widiss, *supra* note 20, at 881–900 (tracing the evolution of causation standards from *Price Waterhouse* through *Gross*).

<sup>115</sup> Sperino, *Tort Label*, *supra* note 3, at 1055.

<sup>116</sup> See Belton, *supra* note 25, at 1258–69.

<sup>117</sup> See, e.g., *id.* at 1242 (positing that “a strong argument can be made that causal analysis should not be as critical an element in employment discrimination law as it is in the law of negligence”); Paul J. Gudel, *Beyond Causation: The Interpretation of an Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 92 (1991) (explaining that “human actions cannot be explained within the terms of causal theories”).

not physical forces, but the mind-related characterizations that constitute motive.<sup>118</sup>

Although early on tort causation standards were explained to be a poor fit for analyzing and proving the statutorily prohibited acts, it took much more development of the law before the causation standards would leave the structure of employment discrimination law in shambles.

The Court *sub silentio* was laying the foundation of tortification in 1973 in *McDonnell Douglas Corp. v. Green*,<sup>119</sup> renowned for its announcement of the now-ubiquitous pretext analysis for individual disparate treatment claims.<sup>120</sup> For several reasons, I think it is important to trace the tortification and cause-in-fact importation back to *McDonnell Douglas*, although the Court did not mention tort law in the case. First, the pretext and mixed-motives proof frameworks, coupled as they are with particular causation standards and concepts of single- or mixed-motives, began with *McDonnell Douglas*. Although the Court did not suggest a causation standard that it associated with the pretext analysis in *McDonnell Douglas*,<sup>121</sup> it later would in *McDonald v. Santa Fe Trail Transportation Co.*<sup>122</sup> The Court linked the but-for causation standard to the pretext analysis and developed the related idea that the analysis was suited to cases in which a single motive, either discriminatory or legitimate, caused the adverse employment action. Those ideas about the pretext analysis later would prompt the Court to develop a second framework in *Price Waterhouse* with a different causation standard to apply to cases of multiple or mixed motives. Second, *McDonnell Douglas* in tort-like fashion created a series of elements that must be proven to establish a disparate treatment claim. Finally, as I have argued elsewhere, the pretext framework is a version of the tort doctrine of *res ipsa loquitur*,<sup>123</sup> although the Court never labeled it as such.<sup>124</sup> For those reasons, I begin the story of the importation of tort law and the adoption and development of tort causation standards with *McDonnell Douglas*.

Although we archeologists of causation standards in employment discrimination law may disagree on the origin that we select, most agree that the development of tort causation has arrived at a sorry state. As I said earlier, the problem is not just one of causation standards, but also the proof structures

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<sup>118</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 190 (2009) (Breyer, J., dissenting).

<sup>119</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>120</sup> The three stages with shifting burden of production are as follows: (1) plaintiff has burden of production on the prima facie case; (2) defendant has burden of production on a legitimate, nondiscriminatory reason; and (3) plaintiff has burden of production on pretext. *Id.* at 802–03.

<sup>121</sup> *See id.*

<sup>122</sup> *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976).

<sup>123</sup> *See Corbett, Unmasking*, *supra* note 3, at 478–506.

<sup>124</sup> *See Sperino, Tort Label*, *supra* note 3, at 1056 (noting that the three-part *McDonnell Douglas* test “does not invoke specific tort principles and does not mimic any particular tort”).

associated with them and the idea that they apply to single- or multiple-motive cases. For example, in *Gross*, the Court declared that because the ADEA requires but-for causation, the mixed-motives proof structure does not apply to age discrimination claims. Most lower courts understood that holding also to signal that the *McDonnell Douglas* pretext analysis may be used for ADEA claims.<sup>125</sup> Thus, the development of tort causation standards in employment discrimination law is responsible for not just different standards of causation applicable to different statutes after *Gross* and even different causation standards applicable to different provisions within the same statute in *Nassar*. That alone would be a very significant problem.<sup>126</sup> However, the tort causation standards are a cause of an even more significant problem fraught with more uncertainty: After *Desert Palace, Inc. v. Costa*,<sup>127</sup> we have two standards of causation in Title VII and two proof structures—pretext and mixed motives—and we have no guidelines as to which applies to any given case. Although this may seem like a lot of blame to heap upon the causation law, it is all warranted. *Desert Palace* held that direct evidence is not required to support a motivating-factor jury instruction, thus erasing the only basis for deciding which disparate treatment cases under Title VII are evaluated under the pretext framework and which are evaluated under mixed motives.<sup>128</sup> This problem is attributable to the development of tort causation law in employment discrimination law as evidenced by this progression: (1) the Court's decision in *Price Waterhouse* creating the mixed-motives analysis with an uncertain standard of causation; followed by (2) Congress's partial override and partial codification of *Price Waterhouse* in the Civil Rights Act of 1991;<sup>129</sup> followed by (3) the Court's decision in *Desert Palace* interpreting the 1991 Act's amendment of Title VII as not requiring direct evidence to invoke the motivating-factor standard of causation and the mixed-motives analysis.

In sum, I think the most significant problems in employment discrimination law today are a result of the adoption and development of tort standards of causation. Curiously, the Court could have and should have

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<sup>125</sup> See, e.g., *Perry v. Batesville Casket Co.*, 551 F. App'x 987, 989–90 (11th Cir. 2014); *Tavernier v. Health Mgmt. Assocs., Inc.*, 498 F. App'x 349, 351 (4th Cir. 2012); *Blizzard v. Marion Technical Coll.*, 698 F.3d 275, 283 (6th Cir. 2012).

<sup>126</sup> See, e.g., *Widiss*, *supra* note 20, at 909–20 (explaining problems that arise with the extension of the *Gross* holding requiring but-for causation).

<sup>127</sup> *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101–02 (2003).

<sup>128</sup> There is a copious body of scholarship on the chaos created by *Desert Palace*. See, e.g., Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102–03 (2004); Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 861 (2004); Kaitlin Picco, *The Mixed-Motive Mess: Defining and Applying a Mixed-Motive Framework*, 26 A.B.A. J. LAB. & EMP. L. 461, 464–65 (2011); Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1650–51 (2011).

<sup>129</sup> See *Widiss*, *supra* note 20, at 885–86 (describing Congress's partial override and partial codification of *Price Waterhouse* in the Civil Rights Act of 1991).

stopped the tortification at *Desert Palace*. When the Court interpreted the Civil Rights Act of 1991, it found that Congress had adopted and codified the *Price Waterhouse* plurality's causation standard—motivating factor. Although tort law recognizes several different causation standards, motivating factor is not one of them. Thus, Congress in the 1991 Act, reacting to the *Price Waterhouse* (primarily Justice O'Connor's concurrence) foray into causation standards and tort law, codified a causation standard and a proof framework without tort analogues.<sup>130</sup> The Court could have understood this as Congress's message that employment discrimination law should not be so freely analogized to tort law and instead should be interpreted to provide more expansive protection and recovery. The Court did not hear such a message, and even if it had, *Gross* and *Nassar* suggest that it would have limited that message to section 703(m) of Title VII. However, in an alternate universe in which the Court interpreted the 1991 Act differently, *Gross* and *Nassar* may not have been decided as they were.<sup>131</sup>

Beyond the tort-causation-standard debacle, it does not seem that tort law has caused any other substantial harm in employment discrimination law. But will the *Staub* adoption of proximate cause create problems? It already has caused one problem which, somewhat ironically, is interwoven with the Court's adoption of cause-in-fact standards. The Court seemingly granted certiorari in *Staub* to resolve a split in the circuits on the question of cat's paw liability, which arises under all of the employment discrimination statutes. It seems unlikely that the Court intended to resolve the issue for only one or a couple of the discrimination statutes.<sup>132</sup> However, some courts have interpreted the *Staub* standard as applying to only statutes that have the "motivating-factor" standard of causation that USERRA has.<sup>133</sup>

Beyond the foregoing issue—possibly adding to the asymmetry in employment discrimination law on yet another issue—the proximate cause standard in *Staub* could be used to prevent expansions of employment discrimination theories. Professor Charles Sullivan speculates that proximate cause could be used by the Court to hold that discrimination based on cognitive bias is not actionable.<sup>134</sup> Cognitive bias is a theory of discrimination based on social research on biases that describes much discrimination as being

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<sup>130</sup> See Sperino, *Tort Label*, *supra* note 3, at 1071.

<sup>131</sup> See Widiss, *supra* note 20, at 900–08 (imagining development of the law if *Price Waterhouse* and *Gross* had been decided differently).

<sup>132</sup> See *Lee v. Waukegan Hosp. Corp.*, No. 10-C-2956, 2011 WL 6028778, at \*3 (N.D. Ill. Dec. 5, 2011) (“Even though *Staub*'s holding is not directly applicable here because it was not an FMLA case, its logic still is[, and] the *Staub* opinion clearly signaled that it was painting on a larger canvas . . .”).

<sup>133</sup> See Widiss, *supra* note 20, at 941 nn.426–33 (citing cases where the courts found that the *Staub* factor applies only to statutes that have a “motivating factor” standard).

<sup>134</sup> See Sullivan, *Tortifying*, *supra* note 3, at 1476–80.

based on the operation of biases of which the perpetrator is unaware.<sup>135</sup> After *Staub*, the Court's decision in *Wal-Mart Stores, Inc. v. Dukes*<sup>136</sup> expressed skepticism about the theory. Time will tell whether Sullivan's suspicion about the future use of proximate cause is correct.

In sum, it is clear that the incorporation of tort law into employment discrimination law is a cause (even if not a but-for cause) of the chaotic and asymmetrical state of the law today. Tortification need not be a bad thing for employment discrimination law, although to date it largely has been. So, how can good or better tortification be achieved?

### III. TOWARD A MORE CONSTRUCTIVE TORTIFICATION OF EMPLOYMENT DISCRIMINATION LAW

It cannot be surprising that employment discrimination scholars write and speak disapprovingly of the tortification of employment discrimination law, given the record to date. However, we must move beyond our aversion and recommend a better approach for two reasons. First, the Supreme Court, and lower courts taking their cue from the Court, is unlikely to suddenly denounce the tort label or analogy. As Professor Sullivan points out, there are only so many principles to draw on, and tort law is not an inapt place for courts to look to find principles, doctrines, and constructs with which to flesh out the lean statutory language of discrimination law.<sup>137</sup> Second, there are tort principles that the Supreme Court has not considered which may work very well in employment discrimination law and improve the body of law as a whole. There are even tort principles that might ameliorate the problems in causation. Thus, rather than futilely try to end the tortification of employment discrimination law, we would do well to try to reform it.

There are two approaches that could achieve the needed reform. The first is for Congress to undertake a comprehensive review of the discrimination laws and to amend them, not just in its usual manner of overriding one or a few Court decisions with which it disagrees. The second is for the Court and courts to undertake the incorporation of tort law differently, approaching it

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<sup>135</sup> See, e.g., *id.* at 1467–76. There is a large body of scholarship on cognitive bias discrimination. See, e.g., William T. Bielby, *Applying Social Research on Stereotyping and Cognitive Bias to Employment Discrimination Litigation: The Case of Allegations of Systematic Gender Bias at Wal-Mart Stores*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 395, 396–97 (Laura Beth Nielsen & Robert L. Nelson eds., 2005). Dr. Bielby was the expert in the *Wal-Mart v. Dukes* case who explained the theory of “social framework analysis.” Bielby, *supra*, at 395. For early work on cognitive bias, see generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

<sup>136</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 (2011).

<sup>137</sup> See Sullivan, *Is There a Madness*, *supra* note 21, at 1079–83.

with caution and due regard for differences between the common law of employment and statutory employment discrimination law and between tort law and employment discrimination law. In a perfect world, both of these approaches would be adopted. Although the legislative approach seems unlikely, adoption of the judicial approach would help.

*A. Better Statutes: Congress Should Comprehensively Review Employment Discrimination Law and Amend the Statutes*

Congress enacted Title VII in 1964,<sup>138</sup> the ADEA in 1967,<sup>139</sup> the ADA in 1990,<sup>140</sup> and the Genetic Information Nondiscrimination Act in 2008.<sup>141</sup> The effective date of Title VII was one year after its enactment—July 2, 1965.<sup>142</sup> So, in 2015, we have had fifty years of employment discrimination law. Along the way, Congress has amended the laws. The congressional approach has been primarily to override Supreme Court decisions with which Congress disagrees. The Lilly Ledbetter Fair Pay Act of 2009 is an example of a law that overrode one Supreme Court decision.<sup>143</sup> Congress also has enacted laws that

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<sup>138</sup> Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended in scattered sections of 42 U.S.C.).

<sup>139</sup> Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2012)).

<sup>140</sup> Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

<sup>141</sup> Genetic Information Nondiscrimination Act (GINA) of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified in scattered sections of 26, 29, and 42 U.S.C.).

<sup>142</sup> Title VII was enacted in 1964, but its effective date was July 2, 1965. Civil Rights Act § 716, 78 Stat. at 266 (stating that the effective date shall be one year after the date of enactment).

<sup>143</sup> Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 and 42 U.S.C.). In enacting this Act, Congress overrode *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). *Id.* In *Ledbetter*, the Court gave a grudging and strict interpretation of when a timely charge of discrimination alleging discriminatory pay practices must be filed with the Equal Employment Opportunity Commission. *See Ledbetter*, 550 U.S. at 628–43. The Court held that the discrete act of a discriminatory pay practice triggers the running of the 180 (or 300) day charge-filing period; a charge must be filed within 180 days of each discrete discriminatory act. *Id.* at 628. The Ledbetter Fair Pay Act overturned the decision by establishing three different events that constitute an unlawful employment practice and commence the running of the charge-filing period, thus more carefully tailoring the limitations period to the various acts of discrimination in compensation. § 4, 123 Stat. at 6. The three events are as follows: (1) when a discriminatory compensation decision or practice is adopted; (2) when an individual becomes subject to a discriminatory compensation decision or practice; or (3) when an individual is affected by such a decision or practice, including each time the individual is paid resulting from the decision or practice. *Id.* § 4(3). The Ledbetter Act amended Title VII and several other federal employment discrimination laws, as follows: Title VII, 42 U.S.C. § 2000e-5(e)(3)(A) (2012); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(d)(3) (2012); Americans with Disabilities Act of 1990, 42 U.S.C.

overrode several decisions in one stroke and added some features that were not overrides, such as in the Civil Rights Act of 1991<sup>144</sup> and the Americans with Disabilities Act Amendments Act of 2008.<sup>145</sup> Half a century into the development of employment discrimination law, Congress should re-engage with the law by legislating in a different way. Rather than override one or many decisions, Congress should undertake an encyclopedic review of employment discrimination law followed by a comprehensive statutory overhaul.<sup>146</sup> Parliament enacted such a reform of the employment discrimination law of the United Kingdom in the Equality Act 2010,<sup>147</sup> and that type of reform is now needed in U.S. law. Among other matters, such reform could correct past tortification errors and set the parameters for future incorporation of tort law.

Employment discrimination law at fifty years is tumultuous and asymmetrical, with different standards of causation governing different types of intentional discrimination claims, different proof frameworks applying to different intentional discrimination claims, and uncertainty about which causation standard and which proof framework apply to any given claim under Title VII. It is so confused that most courts have difficulty deciding whether to evaluate a motion for summary judgment on a Title VII claim under the *McDonnell Douglas* pretext framework or the statutory mixed-motives framework. Furthermore, if a plaintiff brought an intersectional or hybrid claim of discrimination based on the combination of age and sex (discrimination against an older woman),<sup>148</sup> would a court apply the but-for

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§ 12117(a) (incorporating 42 U.S.C. § 2000e-5); Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794 (2012).

<sup>144</sup> Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

<sup>145</sup> Pub. L. No. 110-325, 122 Stat. 3553, 3553 (2008) (codified in scattered sections of 42 U.S.C.).

<sup>146</sup> I urged such an approach in earlier work. See generally William R. Corbett, *Calling on Congress: Take a Page from Parliament's Playbook and Fix Employment Discrimination Law*, 66 VAND. L. REV. EN BANC 135, 135–37, 144 (2013); William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81, 99–115 (2009).

<sup>147</sup> Equality Act, 2010, c. 15, § 149 (Eng.), available at [http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga\\_20100015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf). The European Union effected a similar consolidation in the 2006 Gender Recast Directive, which repealed prior sex discrimination directives and consolidated them in one directive. See Mark Bell, *Gender Identity and Sexual Orientation: Alternative Pathways in EU Equality Law*, 60 AM. J. COMP. L. 127, 130 (2012); Xavier B. Lutchmie Persad, *An Expanding Human Rights Corpus: Sexual Minority Rights as International Human Rights*, 20 CARDOZO J.L. & GENDER 337, 355 (2014).

<sup>148</sup> Courts have not agreed about whether such intersectional claims crossing statutes are actionable. See generally Jourdan Day, Note, *Closing the Loophole—Why Intersectional Claims Are Needed to Address Discrimination Against Older Women*, 75 OHIO ST. L.J. 447, 461–65 (2014).

standard of causation required for ADEA claims after *Gross* or the motivating-factor standard statutorily permitted under Title VII?<sup>149</sup>

Employment discrimination arrived at this chaotic state because of the way Congress and the Supreme Court have conducted their dialogue about the employment discrimination laws.<sup>150</sup> For example, Professor Deborah Widiss uses the Court's decision in *Gross* to explain what she calls the "hydra" problem, whereby Congress cuts off one head of the Court's interpretation of the Civil Rights Act of 1991, only to see more such heads grow out in *Gross* and its progeny (including *Nassar*, which had not been decided at the time of Widiss's article).<sup>151</sup> Through the Civil Rights Act of 1991, Congress seemed to have solved the Court's indecision in *Price Waterhouse* over the appropriate standard of causation by codifying "motivating factor,"—a non-torts standard—only to have the basic tort standard of but-for causation grow out again in *Gross* and *Nassar*. Indeed, the but-for heads seem likely to proliferate for any statute using "because of" or similar language.<sup>152</sup> It is the congressional approach of overrides, in the Civil Rights Act of 1991, and the Court's responses to it in *Gross* and *Nassar* that produced this state of affairs. Continuing to pursue this dysfunctional dialogue, override bills were introduced in Congress as the Protecting Older Workers Against Discrimination Act (POWADA), first after *Gross*,<sup>153</sup> and then again after *Nassar*<sup>154</sup>—but they were not enacted. Justice Ginsburg in her dissent urged Congress to override *Nassar*.<sup>155</sup>

The back-and-forth of Court decisions followed by congressional overrides followed by Court decisions interpreting (I think misinterpreting) the overrides has brought employment discrimination law to its current state. It is no easy task for Congress to override Court decisions and ensure that the Court will move in a different direction consistent with the override.<sup>156</sup> For example, the POWADA bills introduced in 2009 included a blanket provision stating that they applied to any federal employment discrimination or retaliation law.<sup>157</sup> The 2013 bills instead specifically amended the ADEA, Title VII, the ADA, and the Rehabilitation Act of 1973.<sup>158</sup> The 2009 bill approach risks being over-inclusive,<sup>159</sup> and the 2013 bill approach risks being

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<sup>149</sup> See Widiss, *supra* note 20, at 917 (recognizing this issue).

<sup>150</sup> *Id.* at 881 (explaining "the ongoing conversation between the courts and Congress regarding the standard of causation in employment discrimination law").

<sup>151</sup> See *id.* at 877–81.

<sup>152</sup> See *id.* at 909–20.

<sup>153</sup> See S. 1756, 111th Cong. (2009); H.R. 3721, 111th Cong. (2009).

<sup>154</sup> See S. 1391, 113th Cong. (2013); H.R. 2852, 113th Cong. (2013).

<sup>155</sup> *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2547 (2013) (Ginsburg, J., dissenting).

<sup>156</sup> See Widiss, *supra* note 20, at 920–26.

<sup>157</sup> See S. 1756 § 3; H.R. 3721 § 3.

<sup>158</sup> See S. 1391 § 3; H.R. 2852 § 3.

<sup>159</sup> See Widiss, *supra* note 20, at 925 (explaining that there are disadvantages to Congress taking a blanket approach).



under-inclusive.<sup>160</sup> Given the track record of congressional overrides, this approach simply is not a functional dialogue between the Court and Congress that develops coherent and accessible body of employment discrimination law that Congress must have intended.

What I propose is that Congress change course and do something different, radical, and grand. Congress should act like Parliament. It should reform U.S. employment discrimination law by having a commission with expertise provide a comprehensive overview of the state of discrimination law after fifty years and recommend revised employment discrimination law. The United Kingdom found itself with a three-decade-old body of law, featuring nine antidiscrimination laws described as “outdated, fragmented, inconsistent, inadequate, inaccessible, and at times incomprehensible.”<sup>161</sup> A research team, supported by an advisory board and panel of experts, undertook a year-long study that culminated in 2000 with a detailed report recommending a single equality act.<sup>162</sup> That report was followed by a publication entitled *Discrimination Law Review* that reached the same recommendation in 2007.<sup>163</sup> Those efforts came to fruition in 2010, with one comprehensive law replacing the others. The review-and-recommendations stage of this process is crucial because Congress does not have sufficient knowledge of the problems in the current state of the law.<sup>164</sup> For example, the 2009 POWADA bills expressly stated that the *McDonnell Douglas* pretext framework is to be available to plaintiffs, and the 2013 bills appear to achieve the same result by referring not to *McDonnell Douglas*, but to “any available method of proof or analytical framework.”<sup>165</sup> The decision to preserve the pretext proof structure suggests that Congress may not be aware of or fully appreciate the problems with proof structures in current employment discrimination law. Given the confusion created by *Desert Palace* and a large body of criticism of the pretext analysis, Congress should at least consider whether preservation of the pretext proof structure and a two-structure regime is the proper course of action. I am confident that a body could be assembled and a review produced at the behest of either Congress or the President.<sup>166</sup>

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<sup>160</sup> For example, the Court in *Nassar* and *Gross* interpreted the 1991 Act as not applying to the ADEA and the antiretaliation provision of Title VII. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2521 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174–75 (2009).

<sup>161</sup> Bob Hepple, *The New Single Equality Act in Britain*, EQUAL RIGHTS REV., Aug. 2010, at 11, 13, available at <http://www.equalrightstrust.org/ertdocumentbank/bob%20hepple.pdf>.

<sup>162</sup> See BOB HEPPLÉ ET AL., EQUALITY: A NEW FRAMEWORK—REPORT OF THE INDEPENDENT REVIEW OF THE ENFORCEMENT OF UK ANTI-DISCRIMINATION LEGISLATION I (2000).

<sup>163</sup> Hepple, *supra* note 161, at 14.

<sup>164</sup> See Widiss, *supra* note 20, at 872, 876.

<sup>165</sup> H.R. 2852, 113th Cong. § 2(b)(3)(C) (2013).

<sup>166</sup> Both Congress and the President have some experience in ordering studies of labor and employment laws. Congress ordered the Secretary of Labor to study and report on the

As strongly as I believe comprehensive review and revision of the employment discrimination statutes is the best course of action for both repairing the damage from the importation of tort cause-in-fact standards and charting a course for future migration of tort law, I am not optimistic that it will happen. First, employment laws, and particularly employment discrimination laws, are controversial laws—legislators risk votes when they deal with them.<sup>167</sup> Second, in the current political climate, Congress is not adept at moving major bills, and particularly controversial ones.<sup>168</sup> Finally, both employers and employees and civil rights advocates and opponents likely would be reluctant to urge Congress to undertake comprehensive review and reform. Both sides have won some victories along the way, and reform risks surrendering those wins.<sup>169</sup>

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issue of age discrimination before enacting the ADEA. *See generally* U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965). A different approach is for the President to appoint a commission. In early 1993, the Clinton Administration appointed the Commission on the Future of Worker-Management Relations, better known as the Dunlop Commission for Chair John T. Dunlop, a former Secretary of Labor. *See, e.g.*, Barbara Presley Noble, *At Work; Labor-Management Rorschach Test*, N.Y. TIMES (June 5, 1994), <http://query.nytimes.com/gst/fullpage.html?res=9501EED61E3BF936A35755C0A962958260&sec=&spon=&pagewanted=all>, archived at <http://perma.cc/NNT2-P2H6>. The Commission's charge was to evaluate what changes should be made in the laws governing collective bargaining "to enhance productivity, employee participation, labor-management cooperation, and resolution of workplace problems by the parties themselves." Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW. 117, 120 (1996). When the Commission delivered its recommendations in December 1994, the proposals were dead on arrival, coming one month after the Republicans swept into power under the "Contract with America." *See id.* at 121.

<sup>167</sup> *See* Michael Bologna, *Hill Watchers Foresee Little Activity on the Labor and Employment Law Front*, DAILY LAB. REP. (BNA) No. 152, at C-1 (Aug. 9, 2001) (quoting Deron Zeppelin, director of government affairs for the Society for Human Resource Management, as saying, "Most members of Congress, believe it or not, do not like to vote on [employment] issues, period."). Consider, for example, the tumultuous history of the Civil Rights Act of 1991, Congress's most ambitious revision of the employment discrimination laws. *See* Pub. L. No. 102-166, 105 Stat. 1071 (1991); Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459, 1469 (1994). The 1991 Act was enacted after President Bush's veto of the similar Civil Rights Act of 1990, which President Bush had labeled as a "quota bill." *See* President George H.W. Bush, Message to the Senate Returning Without Approval of the Civil Rights Act of 1990 2 PUB. PAPERS 1437 (Oct. 22, 1990), available at [http://bushlibrary.tamu.edu/research/public\\_papers.php?id=2345&year=1990&month=1](http://bushlibrary.tamu.edu/research/public_papers.php?id=2345&year=1990&month=1).

<sup>168</sup> Consider, for example, the inability to enact an immigration reform bill. *See, e.g.*, Chris Opfer, *Democrats Want Obama to Issue Orders if No House Action on Immigration by July 4*, DAILY LAB. REP. (BNA), No. 104, at A-6 (May 30, 2014).

<sup>169</sup> Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 558 (2008) ("Any serious effort to reform employment discrimination laws would necessarily implicate some of the most sensitive and divisive issues of our times.").

However, I remain hopeful that Congress might be up to the task. Although gridlock seems to characterize Congress now, enactment of the ADA Amendments Act and the Genetic Information Nondiscrimination Act in 2008 demonstrates that passage of significant employment discrimination laws is possible. Moreover, though “both sides” may fear bad law as a result of such a reform effort, the 2008 laws suggest that good reform is possible. Furthermore, it seems to me that if the sides disagree strongly about an issue, the likely result is no legislation on that issue rather than very bad law for either side.<sup>170</sup> There are risks associated with a major reform of the type I propose, but the alternative is leaving development of the law to the Court and courts, and that has not produced propitious results in recent years.

*B. Better Case Law: Courts Should Abandon the Facile Incorporation of Tort Law and the Lack of Reasoned Adaptation and Engage in Careful Analysis and Adaptation When Needed*

Regardless of our views about the significance of the Supreme Court’s use of the tort label and resort to tort law to interpret the employment discrimination statutes, scholars agree that the Court and courts should engage in a careful analysis to determine which specific tort concepts and principles to import.<sup>171</sup> Moreover, some tort principles may be appropriate but only if adjustments are made so that the law serves the purposes of employment discrimination law.<sup>172</sup> The careful analysis and adjustment is not happening, and the lack of analysis is tied to the use of the tort label. The Court majority’s approach in *Gross*, *Staub*, and *Nassar* has been to use the tort label to justify the importation of tort law without careful analysis or consideration of adaptation of the tort law being incorporated. It is important that the Supreme Court and lower courts undertake careful and “discriminating” analysis because tort law is going to continue to be applied to employment discrimination law, and there is some tort law that should, if adjusted appropriately, improve the common law of employment discrimination. Indeed, I can envision an employment discrimination law that is greatly improved by the addition of tort principles, although some such incorporations may be beyond the courts’ interpretive authority and may require congressional amendment of the statutes.

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<sup>170</sup> It is possible, however, that a very muddled amendment or reform may occur, such as the redefinition/nonredefinition of “business necessity” in the Civil Rights Act of 1991, in which Congress did not define the term in the law. See Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 901 (1993).

<sup>171</sup> See, e.g., Sullivan, *Is There a Madness*, *supra* note 21, at 1080 (“The real problem for interpreting the anti-discrimination statutes is not that the Court is looking to tort law; rather, the problems are the Court’s choice of what tort law to look to and its failure to adapt tort doctrine to the goals of the anti-discrimination laws.”).

<sup>172</sup> *Id.* at 1098–1102.

### 1. *Examples of the Supreme Court's Analysis When Borrowing Tort Law: Gleaning Guidelines*

Parts of the Court occasionally have performed a passable analysis of the tort law being considered, but it tends not to be in majority opinions. Justice O'Connor performed what I consider an admirable analysis in her *Price Waterhouse* concurrence from which I draw most of the guidelines that follow. This section considers some of the Court's approaches, good and bad, and gleans from them some guidelines for how a court can conduct a good analysis regarding importation of tort law.

Elsewhere I have argued that the Court adopted tort law in *McDonnell Douglas*, a version of the *res ipsa* analysis.<sup>173</sup> The Court did not mention *res ipsa* and did not suggest that it was adopting tort law. Maybe it did not think of it as such. Here I will move on to examples in which the Court or some part of it acknowledges the invocation of tort law. However, I will note that I think it facilitates good analysis and adjustments to identify the practice of borrowing from tort law.

As discussed earlier,<sup>174</sup> Justice O'Connor is the acknowledged pioneer of characterizing employment discrimination law as statutory tort law.<sup>175</sup> She also performed the analysis better than anyone else has. In *Price Waterhouse* the plurality did untort-like things in developing the mixed-motives framework for Title VII: rejecting tort's most basic standard of cause in fact, but-for causation, as the test for the statutory language "because of"; adopting from constitutional law a mixed-motives proof structure; and adopting "motivating factor" as the causation standard for the mixed-motives analysis.<sup>176</sup> Justice O'Connor in her concurrence labeled Title VII a "statutory employment tort"<sup>177</sup> and insisted, agreeing with the *Price Waterhouse* dissent and the future majority in *Gross*, that the statutory language "because of" means "but-for" causation.<sup>178</sup> However, she did not limit her tortification to labeling Title VII a tort and then using the label as a license to import tort law. Instead, she found that the statutory language, although requiring but-for causation, did not prevent dividing the causation analysis into two parts with a shifting burden of persuasion.<sup>179</sup> She resorted to tort law and explained that courts in some torts cases involving multiple causation shift the burden of persuasion on causation from the plaintiff to the defendant because requiring the plaintiff to prove but-

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<sup>173</sup> See Corbett, *Unmasking*, *supra* note 3, at 478–506.

<sup>174</sup> See *supra* notes 29–30 and accompanying text.

<sup>175</sup> See *supra* note 96 and accompanying text.

<sup>176</sup> See Sperino, *Discrimination*, *supra* note 3, at 17 ("The Supreme Court plurality opinion did not purport to draw its test from traditional common-law causation principles, and it specifically indicated that to equate the causal standard in Title VII as requiring 'but-for' cause is to misunderstand it.>").

<sup>177</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring).

<sup>178</sup> *Id.* at 262–63.

<sup>179</sup> *Id.* at 263.

for causation would harm the deterrence function of tort law.<sup>180</sup> She considered the two objectives shared by tort law and employment discrimination law: deterrence and compensation (making whole injured persons).<sup>181</sup> She settled on “substantial factor,” a tort standard of causation, as the appropriate standard to trigger the deterrence objective, noting that a lower standard would not justify a departure from the usual rule that the plaintiff bears the burden of persuasion.<sup>182</sup> When that level of causation is proven, the employer has the burden of persuasion to prove that it would have made the same decision. O’Connor found an analogue for that structure already extant in employment discrimination law in the remedial phase of class action systemic disparate treatment cases.<sup>183</sup> She explained why the mixed-motives two-part analysis drawn from constitutional analysis was appropriate for analyzing disparate treatment discrimination claims,<sup>184</sup> why the new proof structure was needed to supplement *McDonnell Douglas*,<sup>185</sup> and why the new structure would not conflict with other congressional policies embodied in Title VII.<sup>186</sup> She further justified the shifting burden of the framework by saying that a rule that kept the burden on plaintiff to prove but-for causation in all cases would disserve the deterrent purpose of Title VII.<sup>187</sup>

Professor Sperino characterizes Justice O’Connor’s concurrence as not having the “rigid formality” of later cases because she separated the questions of the causation standard and placement of the burden of persuasion.<sup>188</sup> I agree with that assessment, but I wish to go beyond that and say that the architect of tortification of employment discrimination law knew how to do it the right way and demonstrated how to conduct an analysis justifying the incorporation of a tort principle with appropriate modification. From her concurring opinion, I glean several guidelines for analysis. First, ask whether the statutory language permits resorting to tort law and to the particular tort law under consideration for incorporation.<sup>189</sup> The dissent reasoned that the statutory language required but-for causation, and although Justice O’Connor agreed, she found room within that requirement to craft a more innovative approach

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<sup>180</sup> *Id.* at 263–64 (citing *Summers v. Tice*, 199 P.2d 1 (Cal. 1984)).

<sup>181</sup> *See id.* at 264–66.

<sup>182</sup> *Id.* at 265–66.

<sup>183</sup> *Price Waterhouse*, 490 U.S. at 266.

<sup>184</sup> *Id.* at 267–70 (stating that she “cannot believe that Congress intended Title VII to accord *more* deference to a private employer” that the evidence substantially proves discriminated on a prohibited basis).

<sup>185</sup> *Id.* at 272.

<sup>186</sup> *Id.* at 274.

<sup>187</sup> *Id.* at 278.

<sup>188</sup> Sperino, *Tort Label*, *supra* note 3, at 1058–59. Professor Sullivan also finds the approaches of the various opinions to be unobjectionable. *See* Sullivan, *Is There a Madness*, *supra* note 21, at 1096–97.

<sup>189</sup> *See* Sullivan, *Is There a Madness*, *supra* note 21, at 1083 (“[R]esort to tort . . . or anything else[], is permissible (in theory at least) only when Congress has not carefully enough defined the parameters of the inquiry.”).

that better accomplished the objectives of the law as applied to the facts. Second, recognize in the analysis the shared objectives of tort law and employment discrimination law, but emphasize the preeminence of the deterrence objective in discrimination and ensure that the tort principle selected serves that objective. Third, explain why the current state of employment discrimination law is inadequate to address the question before the court and why resort is being had to tort law. Fourth, examine different standards in tort law. Herein lies one of the most egregious missteps of the Court in recent cases: the Court seizes upon a tort principle without adequately exploring the range of standards, tests, etc. available. Justice O'Connor looked to a subset of tort law, multiple causation cases, to find the tort standard she imported. What the Court has done in recent opinions is take a quick glance at the most basic level of tort law—really, a caricature of a complex and nuanced body of law.<sup>190</sup> Substantial factor was a secondary tort standard of causation drawn from multiple causation cases, and a shifting burden of persuasion—which ultimately requires the defendant to disprove but-for causation—was drawn from the innovative torts case *Summers v. Tice* and constitutional law. Thus, O'Connor probed thoroughly in tort causation law and found a standard used not in the most basic torts cases, but a standard used in tort law to address precisely the issue she had encountered in employment discrimination law—uncertainty about causation. The foregoing description of what Justice O'Connor did in surveying and probing tort law suggests a fifth guideline: a court incorporating tort law should consider modifications that may be necessary for the principle, standard, or doctrine to function well and adequately serve the purposes of employment discrimination law. Thus, Justice O'Connor did not blithely apply the tort label and adopt the most basic principle of tort law she could find without adaptation. She chose tort law addressing the specific problem and adjusted it, with a shifting burden of persuasion, to satisfy both her understanding of the statutory language (ultimately requiring but-for causation) and to better achieve the deterrence function of Title VII (by permitting recovery in some cases of uncertainty regarding causation). Although Congress subsequently disagreed with the substantial factor standard of causation in the Civil Rights Act of 1991 and the effect of the same-decision defense, that does not detract from the quality of Justice O'Connor's analysis. Indeed, I think the better argument is that Justice O'Connor did the most that she thought the statutory language permitted in terms of causation standards with both the plaintiff's prima facie case and the effect of the employer's proving, under the same-decision defense, no but-for causation. Lowering the prima facie case standard of causation to "motivating factor" and imposing liability even if the employer proved no but-for causation required congressional amendment of the statute. Moreover, *Price Waterhouse* and the Civil Rights Act of 1991 constitutes a healthy and productive dialogue

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<sup>190</sup> See Sperino, *Tort Label*, *supra* note 3, at 1058.

between the Court and Congress about the state of employment discrimination law.

The majority opinion in *Gross v. FBL Financial Services, Inc.* provides an example of a poor approach to tortification,<sup>191</sup> and Justice Breyer's dissent is an example of a well-reasoned of the rejection of importing a tort principle into discrimination law. *Gross* has been criticized on many grounds by many commentators,<sup>192</sup> but I limit the criticism here to the discussion and lack of discussion of adopting a torts standard. The Court majority brushed aside the question on which it granted certiorari—whether a mixed-motives analysis under the ADEA requires direct evidence (essentially whether the holding of *Desert Palace* extends to the ADEA)—and decided instead whether the mixed-motives framework is even applicable to the ADEA. The majority did not apply the tort label expressly (i.e., did not call the ADEA a tort), but it did cite a torts treatise, among other sources, in support of its interpretation of the statutory language “because of” as meaning but-for causation.<sup>193</sup> There is no analysis of the propriety of adopting the tort standard of causation. Perhaps this is not surprising because the majority repudiates most of what was said in the *Price Waterhouse* plurality opinion and O'Connor's concurring opinion, saying that if the Court were considering the issue for the first time it might not adopt the approach<sup>194</sup>—apparently referring to the approach largely codified by Congress in the Civil Rights Act of 1991. Justice Breyer, dissenting in *Gross*, urged the Court to consider the difference in applying but-for causation in torts cases and employment discrimination cases before glibly adopting but-for causation because it is used in tort law.<sup>195</sup> He demonstrated the importance of such analysis, pointing out that but-for causation may function well enough when applied to the physical forces in torts cases, but it is likely to be more difficult when applied to determine the causal role of mental states in employment discrimination.<sup>196</sup> This was by no means a novel critique of why but-for causation is a bad fit for employment discrimination law,<sup>197</sup> but it illustrates an important guideline for deciding whether to import tort law—consider differences in what is being regulated by the different bodies of law.<sup>198</sup> Those differences may mean that the principle should not be

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<sup>191</sup> See *Gross v. Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009).

<sup>192</sup> See, e.g., Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857, 858 (2010); Widiss, *supra* note 20, at 880 (“*Gross* has quickly caused widespread upheaval and confusion . . .”).

<sup>193</sup> *Gross*, 557 U.S. at 176–77 (citing KEETON ET AL., *supra* note 11, at 265).

<sup>194</sup> See *id.* at 179.

<sup>195</sup> See *id.* at 191 (Breyer, J., dissenting).

<sup>196</sup> See *id.* at 190–91.

<sup>197</sup> See, e.g., Gudel, *supra* note 117, at 88–89.

<sup>198</sup> Although Justice Breyer did not discuss it, an additional difference in causation in tort law and employment discrimination law is that the focus on but-for causation in tort law is under a negligence theory, whereas the disparate treatment theory of discrimination to which it is being applied in employment discrimination is based on intent. The question in negligence is who or what caused the harm. In employment discrimination disparate

incorporated or that it should be only after modification, as Justice O'Connor had advocated in her *Price Waterhouse* concurrence.

Although the Court used the tort label in *University of Texas Southwestern Medical Center v. Nassar*,<sup>199</sup> the case simply extended the holding of *Gross* to the “because of” language in the antiretaliation provision of Title VII. The Court did express concern that interpreting the antiretaliation provision as having a lower standard of causation would permit many frivolous claims to survive summary judgment.<sup>200</sup> Such reasoning demonstrates the Court’s fixation on the common law of employment that emphasizes employer prerogative and control, as manifested in the employment-at-will doctrine. *Nassar* is also notable for Justice Ginsburg in dissent calling for Congress to override the decision. As discussed above, I think Congress should forego single-decision overrides and overhaul the statutes.

Finally, the Court majority in *Staub v. Proctor Hospital*<sup>201</sup> did a poor job of explaining why it was importing proximate cause. The Court began by applying the label: “[W]hen Congress creates a federal tort it adopts the background of general tort law.”<sup>202</sup> The Court was announcing a standard to resolve a circuit split on the cat’s paw issue—under what circumstances liability is to be imposed on an employer as a result of a subordinate’s discriminatory intent being attributed to a supervisor who is the actual decisionmaker regarding the adverse job action. The Court briefly discussed agency law before announcing that “[p]roximate cause requires only ‘some direct relation between the injury asserted and the injurious conduct alleged,’ and excludes only those ‘link[s] that are too remote, purely contingent, or indirect.’”<sup>203</sup> The Court also explained how the proximate cause subsidiary principles of superseding cause and intervening cause relate to the analysis.<sup>204</sup> Interspersed are discussions of intent, including an odd footnote explaining the

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treatment claims, we know who caused the harm, and the question is why. A better tort analogue may be found in the intentional tort pocket. Although the foregoing describes the state of disparate treatment law in the U.S., discrimination theory need not be focused on the employer’s state of mind. In the European Union, direct discrimination cases, which are the analogues of disparate treatment, do not focus on hostile intent. See Bob Hepple, *The European Legacy of Brown v. Board of Education*, 2006 U. ILL. L. REV. 605, 614 (“Unlike American federal law, liability for direct discrimination (less favorable treatment on racial grounds) under British and EU law does not depend on establishing a discriminatory intent or purpose on the part of the alleged wrongdoer. It is sufficient to show that but for the claimant’s race, he or she would not have been differently treated. The absence of a hostile intent or the presence of a benign motive for the differential treatment is irrelevant.” (footnotes omitted)).

<sup>199</sup> *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2524–25 (2013).

<sup>200</sup> *Id.* at 2531–32.

<sup>201</sup> *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011).

<sup>202</sup> *Id.* at 1191.

<sup>203</sup> *Id.* at 1192 (quoting *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9 (2010)).

<sup>204</sup> *Id.*



intentional tort doctrine of transferred intent, which goes on to say it does not apply to the facts of the case.<sup>205</sup>

The *Staub* Court did provide some analysis to support its adoption of proximate cause, but it is poor analysis. First, the Court wrote about intentional torts and causation, never even acknowledging that this blending would be unusual under tort law.<sup>206</sup> When the Court stated that if the dismissal was not the object of the subordinates' reports, it may have been the result,<sup>207</sup> it seemed to be moving in the direction of the two-pronged definition of intent in tort law: purpose or knowledge to a substantial certainty.<sup>208</sup> Then, it quickly ventured into negligence concepts of foreseeability and proximate cause. Although I do not mean to suggest that such a modification of tort concepts could not be appropriate for discrimination laws, good analysis should explain the reason for such a modification. Another troubling feature of the tortification in *Staub* is that the Court was adopting one of the most amorphous and troubling concepts in tort law as the standard for what seems a rather straightforward employment discrimination issue, and proximate cause was a standard that had received almost no support or mention in the lower courts before *Staub*.<sup>209</sup> Proximate cause has been deemed so unhelpful in tort law that the *Restatement (Third) of Torts* recommends abandoning it.<sup>210</sup> Overall, my criticism of the *Staub* analysis is that its use of proximate cause seems like a sloppy description of tort law that does little to support importation of a concept that has a troublesome track record in its home body of law.

In sum, the Supreme Court or justices, concurring or dissenting, have demonstrated both good and bad analysis for incorporating tort law into employment discrimination law. The following guidelines can be gleaned from the opinions, although this certainly is not an exhaustive list. First, consider the statutory language and determine whether it permits importation of tort law and what parameters it establishes. Second, recognize the differences in the objectives of employment discrimination law and tort law as well as their similarities; the employment discrimination laws are expressions of strong public policy and deterrence of discrimination is the paramount objective. This

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<sup>205</sup> *Id.* at 1192 n.2 (citing RESTATEMENT (SECOND) OF TORTS §§ 435, 435B cmt. a (1965)).

<sup>206</sup> See, e.g., Sperino, *Tort Label*, *supra* note 3, at 1079 (“[T]he causal inquiry is not of key importance in intentional tort cases . . .”).

<sup>207</sup> *Staub*, 131 S. Ct. at 1191.

<sup>208</sup> See *Garratt v. Dailey*, 279 P.2d 1091, 1093 (Wash. 1955); RESTATEMENT (SECOND) OF TORTS § 8A (1965).

<sup>209</sup> *But see, e.g., Young v. Dillon Cos.*, 468 F.3d 1243, 1253 (10th Cir. 2006) (“[A] plaintiff must show that the allegedly biased investigator’s discriminatory reports, recommendation, or other actions were the proximate cause of the adverse employment action.”).

<sup>210</sup> The Restatement (Third) of Torts replaces “proximate cause” with “scope of liability,” explaining that proximate cause is a poor term to describe the idea embodied in the term. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM, ch. 6, special note on proximate cause (2010).

prioritizing of deterrence and public policy over individual compensation may lead a court to be less stringent in what it requires of employment discrimination plaintiffs than tort plaintiffs or to be more rigorous in the requirements it imposes on employment discrimination defendants trying to avoid liability. Third, address why the current statutory and common law of employment discrimination law is not adequate to address the issue. Fourth, survey in detail tort law relevant to the issue, look for treatment of analogous issues in tort law (as Justice O'Connor did in her *Price Waterhouse* concurrence and the *Gross* majority did not), consider any alternatives offered by tort law, and explain why the one chosen is an appropriate choice. Under this guideline, it is appropriate to consider the performance (track record) of the principle in tort law. For example, is it among the most controversial and amorphous principles in tort law, like proximate cause? Is it old tort law that is being replaced with newer principles? Fifth, consider what differences, such as mental states compared with physical acts, might render implementation of the tort principle more problematic in discrimination law. Sixth, if a tort principle or doctrine seems serviceable, consider what modifications may be needed to make it work well in discrimination law. No doubt there are other guidelines that could be harvested from court opinions or other sources, but I think the foregoing considerations would lead to better analyses and decisions regarding adoption of tort principles in discrimination law. I do not suggest that courts should be bound to a mechanical recitation and application of these guidelines. Given the debacle of causation in employment discrimination law, I almost would favor a rebuttable presumption that tort law should not be imported. However, unless and until Congress provides more detail in the statutes, the common law of employment discrimination is likely to grow and need to grow, and tort law is not a bad reservoir of common law. Moreover, as I explain below, there is tort law that could perhaps ameliorate the causation mess in employment discrimination law.

## *2. Experimenting with the Guidelines: Considering Possible Incorporations of Tort Law*

My principal project has been to suggest ways that Congress and the courts can determine under what circumstances and how to import tort law into employment discrimination law. I do not intend to evaluate all tort principles that could be imported. However, considering a couple of tort principles may be instructive. First, the concept of assumption of the risk has received some attention and consideration in sexual harassment law. I think that tort concept is a poor candidate for incorporation, and I shall demonstrate that using the proposed guidelines. The concept of proportional liability, which the tort law of the United States recognizes in some versions, such as enterprise liability and lost chance of survival, seems to me to be a promising candidate to improve upon the morass that is employment discrimination

causation law, although I have some doubt that the statutory language should be interpreted as permitting adoption of proportional liability.

Assumption of the risk is a tort doctrine providing an affirmative defense, barring a plaintiff's recovery when the plaintiff voluntarily and knowingly encounters a risk.<sup>211</sup> The idea has surfaced in sexual harassment law in the context of workplaces that are sexy, rugged, or—at least in one case—creative. The idea was raised regarding the Hooters restaurant chain being sued by several former waitresses for sexual harassment, alleging that the employer established an environment in which customers felt free to engage in sexual conduct and talk directed at the waitresses.<sup>212</sup> Although I am unaware of a court that has expressly adopted the defense in such a fact situation, a California appellate court accepted a version of assumption of the risk in *Lyle v. Warner Brothers Television Productions*.<sup>213</sup> In that case, a writer's assistant for the television show *Friends* sued for sexual harassment, alleging that she was required to sit in writers' meetings preparing material for the shows, and the meetings were permeated with salacious talk and vulgar jokes while discussing ideas for story lines, jokes, and dialog for the show.<sup>214</sup> The defendants argued, and prevailed at the appellate court level, that creative necessity required license to talk about such matters.<sup>215</sup> The opinion later was superseded.<sup>216</sup> There is also an idea that a certain level of rough and sexual talk, and perhaps conduct, must be accepted when one takes a job with a "rugged environment."<sup>217</sup> For example, in a recent opinion, the Fifth Circuit decided that a construction worker who was subjected to egregious sexual conduct and language by his supervisor could establish same-sex sexual harassment via the gender stereotyping theory in *EEOC v. Boh Brothers Construction Co., LLC*.<sup>218</sup> The dissent embraced the idea that some vulgar conduct is to be expected in some workplaces. The dissent satirized the majority opinion, by drafting an "Etiquette for Ironworkers" memorandum, and suggested it as a way for employers to avoid liability in light of the majority opinion.<sup>219</sup>

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<sup>211</sup> See RESTATEMENT (SECOND) OF TORTS § 496A (1965); DOBBS, *supra* note 43, § 211.

<sup>212</sup> See generally Kelly Ann Cahill, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1108–09 (1995).

<sup>213</sup> *Lyle v. Warner Bros. Television Prods.*, 12 Cal. Rptr. 3d 511, 512 (Cal. Ct. App. 2004).

<sup>214</sup> See *id.* at 513.

<sup>215</sup> See *id.* at 512.

<sup>216</sup> See *Lyle v. Warner Bros. Television Prods.*, 94 P.3d 476, 476 (Cal. 2004).

<sup>217</sup> See *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 194, 201 (4th Cir. 2000) (rejecting the idea that such a workplace culture is acceptable due to the "rugged environment").

<sup>218</sup> *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. 2013).

<sup>219</sup> *Id.* at 475 (Jones, J., dissenting).

There obviously has not been an outpouring of support to adopt assumption of the risk or its variants in sexual harassment law, but it is a tort doctrine that could be imported to the most tortlike of all discrimination claims. How would the type of analysis that I have suggested evaluate the incorporation of assumption of the risk? First, the statutory language does not seem to prohibit or constrain adoption of the tort doctrine because harassment theory is not expressly provided for in the statutes but is largely created and developed by case law, which is a good reason for Congress to overhaul and update the laws. Second, consideration of the prominence of the deterrence objective in discrimination law would support not adopting a version of assumption of risk even in the face of the argument that the compensation objective is not as strong because the person took a job knowing what she was facing. Employers will not be deterred from tolerating sexual harassment in some types of jobs if they can rely on an assumption-of-the-risk defense. Indeed, employers might use the concept to insulate themselves from liability by warning employees at the time of hire that there are risks of harassment inherent in the job. Thus, the preeminent discrimination objective of deterrence would be undermined rather than supported by adoption of the tort concept. Third, current sexual harassment law has sufficient capacity to address the issue. One of the elements of a hostile environment claim is unwelcomeness.<sup>220</sup> Although many courts do not like this element and describe welcome harassment as an oxymoron,<sup>221</sup> the element provides a way of analyzing employees' conduct in the job without importing assumption of the risk. Moreover, the courts' misgivings about unwelcomeness militate against bringing in a related tort concept. Fourth, considering the performance of assumption of the risk in tort law, it seems to be an antiquated defense, with some states abolishing it because it can be subsumed within comparative fault, which may reduce, without barring recovery.<sup>222</sup> As will be discussed further below, the trend in tort law in the United States and much of the world has been away from all-or-nothing approaches. I do not think an analysis would need to proceed any further to reject assumption of the risk as a candidate for importation into discrimination law.

The other tort principle or doctrine that I wish to evaluate is proportional liability. Thus, we move from consideration of the old and fading tort doctrine of assumption of the risk to consideration of a modern cutting-edge tort doctrine. We do not use the term proportional liability generally in the United

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<sup>220</sup> See 29 C.F.R. § 1604.11(a) (2014) (defining hostile workplace as including "unwelcome sexual advances"); see also *supra* note 55 (discussing courts' statements of the required elements of a sexual harassment hostile environment claim).

<sup>221</sup> *E.g.*, Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1008 (7th Cir. 1994).

<sup>222</sup> See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. § 2 cmt. c (2000); see, e.g., Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1125 (La. 1988).

States,<sup>223</sup> but we are familiar with and accept some subsets—comparative fault, lost chance of survival, and market share liability.<sup>224</sup> More generally, proportional liability is apportionment of liability for a harm among a plaintiff and defendants based on either comparative fault or comparative causal risk.<sup>225</sup> It is endorsed by the European Group on Tort Law in the *Principles of European Tort Law*.<sup>226</sup> Common to both the comparative causation and comparative fault subsets is the idea that recovery in tort need not be all or nothing. Comparative fault obviously is well accepted in the United States with all but about five U.S. jurisdictions having moved from contributory negligence to some version of comparative fault.<sup>227</sup> We have far less acceptance of and experience with comparative causation. In cases of uncertainty about causation, proportional liability “impos[es] liability on an otherwise liable defendant based on the probability that the defendant’s tortious conduct was a cause of plaintiff’s harm.”<sup>228</sup> The American Law Institute’s *Restatement (Third) of Torts* does not adopt a general theory of proportional liability.<sup>229</sup>

Because I wish to analyze the suitability of proportional causation<sup>230</sup> for employment discrimination law, I am putting to one side the subset of comparative fault, although I think it is worth considering whether

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<sup>223</sup> See Michael D. Green, *Causal Uncertainty and Proportional Liability in the US*, in PROPORTIONAL LIABILITY: ANALYTICAL AND COMPARATIVE PERSPECTIVES 343, 343 (European Ctr. of Tort & Ins. Law ed., 2013) (stating that proportional liability is not defined in U.S. tort law).

<sup>224</sup> See *id.* at 343–44; Oliphant, *supra* note 45, at 1605–06.

<sup>225</sup> See, e.g., Israel Gilead et al., *General Report: Causal Uncertainty and Proportional Liability: Analytical and Comparative Report*, in PROPORTIONAL LIABILITY: ANALYTICAL AND COMPARATIVE PERSPECTIVES, *supra* note 223, at 1.

<sup>226</sup> EUROPEAN GRP. ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW: TEXT & COMMENTARY arts. 3:105, 3:106 (2005)). This acceptance does acknowledge, however, that the case for proportional liability is strongest when the probability distribution based on specific facts is limited, and the case weakens as the range of probabilities widens. *Id.* art. 3:106, ¶ 15; cf. Michael D. Green, *Introduction: The Third Restatement of Torts in a Crystal Ball*, 37 WM. MITCHELL L. REV. 993, 995 (2011).

<sup>227</sup> See Eli K. Best & John J. Donohue III, *Jury Nullification in Modified Comparative Fault Negligence Regimes*, 79 U. CHI. L. REV. 945, 948–50 (2012).

<sup>228</sup> See Green, *supra* note 226, at 994.

<sup>229</sup> See *id.*; Oliphant, *supra* note 45, at 1605–06 (“[N]either the theory, nor the published work that supports it, is paid much attention in the Third Restatement; nowhere are the pros and cons of proportional-liability squarely addressed. Instead, the Third Restatement . . . focuses on only one species of proportional-liability approach—the award of damages for loss-of-chance.” (footnotes omitted)).

<sup>230</sup> I sometimes will use the term “proportional causation” to distinguish the concept from comparative fault. I realize that the term is objectionable under a theory of proportional liability that views the standard of causation as remaining the same and the compensable harm as changing. I find the case more persuasive for a theory of proportional liability that recognizes a change in the standard of causation. See *infra* note 231 and accompanying text.

comparative fault should be adopted in discrimination law or parts of discrimination law.<sup>231</sup> In the United States, most jurisdictions now recognize a subset of proportional causation in the lost-chance-of-survival theory in medical malpractice cases, principally but not exclusively wrongful death. Tracing its origin to Professor Joseph King's article,<sup>232</sup> a majority of U.S. jurisdictions recognize some version of the theory.<sup>233</sup> It has been suggested that lost chance could be used in employment discrimination law,<sup>234</sup> and one federal appellate court has—while not holding it applicable—commented favorably on it in *Doll v. Brown*.<sup>235</sup>

How would proportional liability or lost chance fare under the analysis that I have recommended for evaluating incorporation of tort law into employment discrimination law? Whereas assumption of the risk was, in my view, easily resolved as unacceptable, the answer for proportional liability is far from clear. First, does the statutory language permit such incorporation? Based on the Court's limitation in *Gross* and *Nassar* of the "because of" language to mean but-for causation, it seems that the analysis might end here with the conclusion that the language does not permit the interpretation, except for the discrimination (not antiretaliation) provisions of Title VII. With "motivating factor" in Title VII, there is no obvious statutory obstacle to incorporation of proportional liability (proportional causation) for Title VII. However, there is an argument regarding lost chance in tort law that might circumvent the but-for problem in the other statutes. The *Restatement (Third)*

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<sup>231</sup> Professor Katz discusses tort law's comparative fault allocation scheme as a way of ameliorating all-or-nothing windfalls to either plaintiffs or defendants, but he recognizes that there is no precedent for a comparative fault regime in employment discrimination law. See Katz, *supra* note 192, at 887–88. I think that comparative fault is not as well-suited to employment discrimination law as proportional causation/lost chance because often the nondiscriminatory reasons are not fault based, such as when an employer takes an adverse employment action due in part to economic reasons. Still, a comparative fault regime that permits assignment of a percentage to the discriminatory reason could achieve the same result as lost chance. A proportional liability system that permits assignment of a percentage chance that discrimination caused an action would improve upon the all-or-nothing problem of current standards. Although one may argue that the current statutory mixed-motives analysis is not all or nothing because the same-decision defense does not avoid liability, it does preclude almost all monetary relief for the plaintiff. Moreover, after *Nassar*, mixed motives is likely limited to Title VII discrimination claims.

<sup>232</sup> Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1363–70 (1981).

<sup>233</sup> See Green, *supra* note 223, at 362. The first reported judicial decision to adopt the approach was *Herskovits v. Group Health Coop.*, 664 P.2d 474, 479 (Wash. 1983) (en banc).

<sup>234</sup> See Paul M. Secunda, *A Public Interest Model for Applying Lost Chance Theory to Probabilistic Injuries in Employment Discrimination Cases*, 2005 WIS. L. REV. 747, 784–91 (advancing a "public interest approach for remedying probabilistic injuries in employment discrimination litigation").

<sup>235</sup> *Doll v. Brown*, 75 F.3d 1200, 1207 (7th Cir. 1996).

of Torts and most state courts take the position that lost chance recovery entails not a change in the standard of causation, but a change in the compensable harm.<sup>236</sup> That is, the plaintiff must prove that a chance of survival would not have been lost but for the defendant's breach. For example, the Supreme Court of Louisiana rejected the argument that lost chance of survival is a relaxation of the usual tort causation and quantum of proof standards in *Smith v. State*.<sup>237</sup> The court said:

[A]llowing such recovery is a recognition of the loss of a chance of survival as a distinct compensable injury caused by the defendant's negligence, to be distinguished from the loss of life in wrongful death cases, and there is no variance from the usual burden in proving that distinct loss.<sup>238</sup>

While the merit and persuasiveness of this characterization of lost chance—a different compensable harm, not a different standard of causation—are debatable, it is a view of lost chance that may render it acceptable even under the but-for interpretation of *Gross* and *Nassar*. Such a creative rationale for working within the statutory language is reminiscent of Justice O'Connor's approach to but-for causation in *Price Waterhouse*. It also seems to me that a move toward proportional liability is consistent with Congress's codification of a mixed-motives analysis in Title VII in the Civil Rights Act of 1991. Motivating factor is a standard of causation below but for, and the same-decision defense does not avoid liability, but mitigates the award. My conclusion on the first guideline of whether the statutory language permits adoption of proportional liability (proportional causation) is mixed: probably for Title VII and probably not for the other statutes and antiretaliation provisions under current Supreme Court interpretations unless lost chance is defined as a change in the compensable harm rather than the standard of causation. The uncertainty about the limits of the statutory language causes me to return to my point that the best way to accomplish development of employment discrimination law through incorporation of tort law is for Congress to re-engage and amend the statutes.

Second, is incorporation of proportional liability consistent with deterrence being the preeminent objective of discrimination law? It has been argued by one of the proponents of lost chance in U.S. tort law that it improves the deterrent effect of tort law,<sup>239</sup> but that argument is contested.<sup>240</sup> At a minimum, it seems likely that proportional liability—being perceived as a

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<sup>236</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. f (2010) (“[T]here are times when courts recognize new, unusual, or reconceptualized harms, which change the causal inquiry.”).

<sup>237</sup> *Smith v. State Dep't of Health & Hosps.*, 676 So. 2d 543, 549 (La. 1996).

<sup>238</sup> *Id.* at 547.

<sup>239</sup> See John Makdisi, *Proportional Liability: A Comprehensive Rule to Apportion Tort Damages Based on Probability*, 67 N.C. L. REV. 1063, 1068–69 (1989).

<sup>240</sup> See Green, *supra* note 223, at 344–45.

lower standard of causation, like motivating factor—would increase the number of plaintiffs recovering, although the awards under the scheme would be adjusted.<sup>241</sup> If employers knew that there was a greater chance of a plaintiff recovering some award, would that deter discrimination? A corollary under current law is whether employers are less concerned with losing cases under the but-for standard after *Gross* and *Nassar*. Although I cannot empirically support the answer, it seems to me that proportional liability might improve deterrence because, at a minimum, attorneys advise their employer clients on changes in the law and what those changes mean. Presumably, Congress had the deterrence objective in mind when it chose “motivating factor,” a lenient (plaintiff-friendly) causation standard, in the Civil Rights Act of 1991.

Third, is proportional liability needed because the current state of employment discrimination law is inadequate to address the issue? Perhaps the best start to answering this question is that causation is, as explained above, one of the biggest messes in employment discrimination law. As my answer immediately above to the first guideline suggests, adoption of lost chance may not clean up the asymmetry created by *Gross* and *Nassar*. However, I think that proportional liability, if it could be implemented in employment discrimination, has the potential to displace all other causation standards. The Supreme Court of Texas, in rejecting lost chance in the most generally accepted tort context of medical malpractice, explained that it could not see any reasoned basis for limiting the spread of lost chance to other torts cases beyond medical malpractice: “[I]t is doubtful that there is any principled way we could prevent its application to similar actions involving other professions.”<sup>242</sup> I conclude that proportional liability has the potential to ameliorate some of the confusion and other problems created by the Court’s development of the causation law in employment discrimination law.

Fourth, in evaluating proportional liability or lost chance in tort law, the analogue seems at least as good as the other cause-in-fact standards adopted in discrimination law, although not perfect. The purpose of this lower standard of causation in tort law is to address cases of uncertainty about causation. One of the principal criticisms of but-for causation applied to employment discrimination is the greater difficulty (than in tort law) posed by determining whether an adverse job action would have been taken in the absence of a discriminatory motive, as Justice Breyer argued in his *Gross* dissent.<sup>243</sup> The *Summers v. Tice* case cited by Justice O’Connor in her *Price Waterhouse* concurrence, which she used to support her shifting of the burden to the defendant to prove no but-for causation, is a case of uncertainty regarding

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<sup>241</sup> Under the Court’s rationale in *Nassar*, the Court majority likely would find that a proportional liability regime would exacerbate the potential for frivolous claims. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2531–32 (2013).

<sup>242</sup> *Kramer v. Lewisville Mem’l Hosp.*, 858 S.W.2d 397, 406 (Tex. 1993).

<sup>243</sup> See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 190 (2009) (Breyer, J., dissenting); *supra* text accompanying note 118.



causation,<sup>244</sup> and Congress codified that aspect of the mixed-motives framework in Title VII. One may argue, as the dissent did in *Price Waterhouse*, that the but-for causation standard is preserved at stage two of mixed motives (the same-decision defense); however, that is not true in the statutory version which provides for limitation of remedies rather than avoidance of liability. Regarding a survey that considers the full range of tort law, causation standards have been borrowed from tort law, and this could be seen as the next step. Tort law throughout the world<sup>245</sup> is characterized by a movement away from the all-or-nothing approach to recovery.<sup>246</sup> This movement is manifested in the United States broadly in the movement to comparative fault and more narrowly in the spread of lost chance of survival.

United States tort law, however, has not broadly accepted the concept, theory, or doctrine of proportional causation, as indicated in the *Restatement (Third) of Torts*.<sup>247</sup> Although there is an analogous situation of uncertainty about causation in tort law and employment discrimination law, the general adoption of proportional liability/lost chance in employment discrimination would take it beyond U.S. tort law. Given the greater difficulty of proving causation in employment discrimination, moving beyond tort law on the causation issue may be justified. Another possibility is for the incorporation of lost chance in employment discrimination to mimic U.S. tort law—to apply lost chance to only a particular subset of uncertainty-regarding-causation cases. Similarly, and based on the O'Connor concurrence in *Price Waterhouse*, the motivating-factor causation standard (and mixed-motives analysis) was limited to cases involving direct evidence. However, that line of demarcation always was problematic, and it was eradicated by *Desert Palace v. Costa*. Thus, a limited subset of uncertain causation cases in employment discrimination cases does not occur to me. In sum, the consideration of the tort law analogue and consideration of the track record of proportional liability in tort law yields a mixed verdict on which way that guideline gravitates. The close analogy between the issue in the two bodies of law and the general trend or movement of tort law causes me to think it favors an adoption of some version of proportional liability.

Fifth, in considering the differences that may make the principle more difficult to apply in employment discrimination law than in tort law, it is worth noting that the argument for proportional liability in tort law may be stronger based on a difference in the wrong addressed by the two bodies of law. As Justice Breyer argued in his *Gross* dissent: it is conceptually harder to apply but-for causation to mental states and acts than physical acts and physical harm. On the other hand, and perhaps weakening the argument for extension

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<sup>244</sup> See, e.g., Green, *supra* note 223, at 356.

<sup>245</sup> See, e.g., EUROPEAN GRP. ON TORT LAW, *supra* note 226, arts. 3:105, 3:106.

<sup>246</sup> See, e.g., Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 875 (1996).

<sup>247</sup> See Green, *supra* note 223, at 343–44; Oliphant, *supra* note 45, at 1607.

of proportional liability to discrimination law, in tort law when proportional liability is employed in a negligence analysis, a wrongful act—a breach of the standard of care—already has been established and the question is limited to whether the wrong caused a harm. In contrast, in employment discrimination law the question of wrongfulness is not separate from causation: an adverse employment action is not wrongful unless caused by a discriminatory motive. In this way the “because of” statutory language defining the unlawful employment practice does state a distinction that makes a difference, perhaps supporting a requirement of stronger causal connection in employment discrimination law.

Regarding the sixth factor, I do not have many suggestions for modification because I have not fully worked through a theory of proportional liability for employment discrimination law. I will suggest, however, that given the requirement of causation for a wrongful act in employment discrimination law and Justice O’Connor’s having worked through these issues and problems of importing tort causation standards to address uncertainty regarding causation in employment discrimination, the proportional liability principle might be woven into the statutory mixed-motives analysis.<sup>248</sup> The first stage of motivating factor might be preserved whereby the plaintiff makes out a prima facie case of wrongfulness, and then the burden shifts to the employer to disprove causation. Rather than permitting the employer to prove it would have made the same decision for nondiscriminatory reasons (negating but-for causation) and thereby limiting the remedies (no money to the plaintiff), the employer could disprove causation to whatever extent it could, subject to the factfinder’s determination, and the recovery would be proportional to the level of causation proven. Given the damage caps in section 1981a,<sup>249</sup> proportional recovery could result in small awards of compensatory damages. This contrasts with tort law in which such damage limitations generally do not exist. This adaptation of incorporating proportional liability into the mixed-motives framework would, of course, require statutory amendment.

As the foregoing examples demonstrate, application of these suggested guidelines for considering incorporation of tort law into employment discrimination law does not necessarily yield an obvious answer. For assumption of the risk, I think the answer is clear, but for proportional liability/lost chance it is not. Yet, I think the guidelines yield the type of careful and discerning analysis that is needed to make good decisions. Such analysis could result in consideration of the full range of relevant tort law and importation of tort law, perhaps adjusted, that actually both fleshes out and improves employment discrimination law.

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<sup>248</sup> See William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 723–24 (2010).

<sup>249</sup> See 42 U.S.C. § 1981a (2012).

## IV. CONCLUSION

The reaction in the scholarship to the tortification of employment discrimination law has not been positive, and “tortification” and “tort label” generally have not been words of praise directed at the Court. The more fully developed body of tort law has, however, been a source of law for employment discrimination for many years, and it will continue to be. Scholars generally agree that the migration of tort law to employment discrimination does not necessarily worsen the latter. However, the story of the incorporation of tort causation standards has not been felicitous, and the recent tales in *Gross* and *Nassar* have been particularly bad, exposing the dysfunctional dialogue between Congress and the Supreme Court about the development and direction of discrimination law. I have not attempted to catalogue all tort law that should and should not be imported to discrimination law. Instead, I have argued that, at the half-century mark in the life of discrimination law, Congress needs to re-engage in the process in a significant way, overhauling and updating the laws, much as Parliament did in the Equality Act 2010. Regardless of whether that happens (and I am doubtful that it will), I have offered some guidelines for tort migration analysis that the Court and courts can use to achieve a better quality of analysis, similar to that conducted by Justice O’Connor in her *Price Waterhouse* concurrence. On the hundredth anniversary of employment discrimination law, perhaps scholars will look back and laud the development and enhancement of employment discrimination law through the incorporation of tort law.

