Tortifying Retaliation: Protected Activity at the Intersection of Fault, Duty, and Causation

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I. INTRODUCTION

In tort law's march into employment discrimination law, retaliation bears recent tracks. While the intersection of torts and the substantive law of status-based discrimination has attracted the most attention—sparked by the Supreme Court's grab for proximate cause in the closely watched "cat's paw" decision—retaliation is the site of tort law's most recent intrusion into Title VII. So far, as with other areas of employment discrimination law, the importation of tort-based concepts into retaliation law has served only to chip away at employer liability. This Article explores how tort principles have quietly taken root in retaliation law, with an eye toward pushing the tort analogy in a different direction to sharpen the focus on employer wrongdoing.

II. THE "TORT" OF RETALIATION: *NASSAR* AND TORT-BASED LIMITS ON CAUSATION

Nearly a quarter century has passed since the Supreme Court reached for tort principles in a pair of sexual harassment cases to determine employer

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liability rules under Title VII, drawing on inspiration from torts to impose vicarious liability, subject to an affirmative defense imposing a duty on the plaintiff to mitigate harm.[1] More recently in *Staub v. Proctor Hospital*,[2] the Court borrowed proximate cause from tort law to craft employer liability rules for adverse actions prompted by subordinate bias (also known as the cat's paw scenario) in an employment discrimination case.[3] By comparison, tort principles came late to retaliation law, at least overtly. The Supreme Court explicitly identified tort law as a source of authority for Title VII retaliation claims in its 2013 decision in *University of Texas Southwest Medical Center v. Nassar*.[4] *Nassar* presented the issue of whether a retaliation plaintiff could proceed on a "motivating-factor" model of causation, similar to Title VII plaintiffs challenging status-based discrimination, or whether they must prove the higher "but-for" standard of causation.[5]

The plaintiff in the case was a doctor, described as a person of Middle Eastern descent, who complained about allegedly discriminatory treatment by his supervisor.[6] Among the evidence suggesting bias, Dr. Nassar pointed to disparaging remarks about Middle Easterners by his supervisor.[7] Dr. Nassar attempted to restructure his employment at the hospital so that he would not have to report to this supervisor; in explaining to hospital administrators the reason for this request, he described his supervisor as biased.[8] According to Dr. Nassar, the administrators responded by defending the supervisor and punishing him for complaining.[9]

Dr. Nassar sued the hospital for national origin discrimination and retaliation.[10] The district court sent the claims to the jury, which found for the plaintiff on both claims.[11] The Fifth Circuit overturned the verdict on the discrimination claim for insufficient proof, but upheld the verdict on the retaliation claim under a mixed-motive framework.[12] The hospital challenged this ruling in the Supreme Court, arguing that Dr. Nassar should have been required to prove but-for causation—that the termination would not have

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[1] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998).

[2] Staub v. Proctor Hosp., 131 S. Ct. 1186 (2011).

[3] *Id.* at 1194 (interpreting the Uniformed Services Employment and Reemployment Rights Act).

[4] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

[5] *Id.* at 2524.

[6] *Id.* at 2523.

[7] *Id.*; Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 450 (5th Cir. 2012).

[8] *Nassar*, 674 F.3d at 451.

[9] *Nassar*, 133 S. Ct. at 2524.

[10] *Id.*

[11] *Id.* (reciting case history and noting jury award of over $400,000 for back pay and more than $3,000,000 in compensatory damages, which the district court reduced to $300,000).

[12] *Nassar*, 674 F.3d at 453–55.

occurred but for the hospital's retaliatory motive.[13] In a decision notable for its reliance on tort law, the Court sided with the hospital and overturned the retaliation verdict, adopting the stricter but-for approach to causation for Title VII retaliation claims.[14]

Unlike *Staub*, where the Court borrowed proximate cause from tort law to parse causation,[15] in *Nassar* the Court turned to tort law to set limits on causation-in-fact.[16] In both cases, the Court used tort principles to justify its selection of a standard that courts can use to rein in employer liability. In *Nassar*, the Court did so despite having taken a markedly different approach to causation-in-fact in an earlier Title VII precedent. In 1989, the Court ruled in *Price Waterhouse v. Hopkins*[17] that Title VII's "because of" language in section 703(a) permits plaintiffs to prevail by proving that discrimination was a "motivating part" (in the words of the plurality) or a "substantial factor" (in the terminology used by the concurring justices), unless the defendant proves by a preponderance of the evidence that it would have made the same decision without considering the discriminatory reason.[18] This ruling effectively shifted the burden of proof onto the defendant to disprove but-for causation once the plaintiff proves a discriminatory motivating (or substantial) factor.

Two years later, as part of a broader reform of employment discrimination law to correct a series of anti-plaintiff judicial rulings, Congress embraced this causation standard while making it more plaintiff-friendly in its consequences.[19] Instead of giving the defendant a defense to liability in the same decision, the Civil Rights Act of 1991 (the 1991 Act) codified the defense as a defense to remedies only. Under the 1991 Act, a defendant can avoid reinstatement and damages by proving that the plaintiff would have suffered the adverse action even absent the discriminatory motivation.[20] After the 1991 Act, Title VII liability is established by proof that the discriminatory reason was a "motivating factor."[21]

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[13] *Nassar*, 133 S. Ct. at 2534.

[14] *Id.* at 2533.

[15] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1194 (2011).

[16] *Nassar*, 133 S. Ct. at 2524–25. After *Staub*, lower courts have applied a similar proximate cause limit to retaliation cases presenting the cat's paw scenario, where a biased underling causes the adverse action taken by the ultimate decisionmaker. *See* Smith v. Bray, 681 F.3d 888, 897 (7th Cir. 2012); McKenna v. City of Phila., 649 F.3d 171, 176–77, 179 (3d Cir. 2011).

[17] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[18] *Id.* at 250 (plurality opinion); *id.* at 265 (O'Connor, J., concurring in judgment).

[19] Civil Rights Act of 1991, Pub. L. No. 102-166, § 703, 105 Stat. 1075 (codified as amended at 42 U.S.C. § 2000e-2(m) (2012)).

[20] Civil Rights Act of 1991 § 107(b) (codified as amended at 42 U.S.C. § 2000e-5(g)(2)(B) (2012)).

[21] *Price Waterhouse*, 490 U.S. at 249. The "motivating factor" language corresponds to the plurality's language in *Price Waterhouse*, rather than Justice O'Connor's subtly different, "substantial factor" standard. *Id.* at 265.

The difficulty the Court confronted in *Nassar* is one that has repeatedly dogged the 1991 Act; in its embrace of a more plaintiff-friendly standard, Congress only amended section 703 of Title VII, raising questions about the implications for other, related, statutory provisions.[22] Both section 703(a), the ban on status-based discrimination, and section 704(a), the retaliation provision, use the words "because of" to define the unlawful employment practice.[23] The 1991 Act codified the motivating-factor standard for status-based discrimination, but said nothing about retaliation specifically. The most aggressive reading of the 1991 amendment would interpret Congress's embrace of the motivating-factor model in the new section 703(m) as a gloss on other uses of "because of" elsewhere in the statute.[24] It was no surprise that the Court did not adopt such a robust reading of the 1991 Act,[25] but it was surprising how far the Court went in the opposite direction.[26] The *Nassar* majority not only refused to apply the 1991 Act's motivating-factor framework to section 704(a), it rejected the pre-existing framework that the 1991 Act codified (albeit, in a modified, more plaintiff-friendly way), abandoning the *Price Waterhouse* mixed-motive framework for section 704(a) claims altogether.[27] The Court read Congress's strengthening of the mixed-motive model from *Price Waterhouse* as a wholesale rejection of the mixed-motive model for section 704(a), leaving only the most defendant-friendly but-for standard to govern such claims.[28] The Court's main support for jettisoning the mixed-motive model came not from Title VII precedent, but from tort law.[29]

The Court began its interpretation of "because of" in section 704(a) by analogizing the Title VII retaliation claim to a tort. The Court explained, "[c]ausation in fact . . . is a standard requirement of any tort claim. This includes federal statutory claims of workplace discrimination."[30] The Court

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[22] *See* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 538–51 (2009) (discussing this problem in the 1991 Act).

[23] Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 703(a), 704(a), 78 Stat. 241, 251–57 (codified as amended at 42 U.S.C. §§ 2000e-2(a), 2000e-3(a)) (2012)).

[24] Widiss, *supra* note 22, at 550–51.

[25] *See* MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 486 (8th ed. 2013) (noting that most circuit courts applied the *Price Waterhouse* standard, and not the 1991 Act provision amending it, in retaliation claims).

[26] *See* Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (interpreting the 1991 Act's disparate impact provision's failure to amend the ADEA as leaving in place the Title VII *Wards Cove* decision to govern the parallel disparate impact provision in the ADEA (citing Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989))); *see also* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174–76 (2009) (interpreting the ADEA to require proof of but-for causation, but in rejecting the applicability of the *Price Waterhouse* mixed motive framework to the ADEA, noting that Title VII is a "different statute").

[27] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525–27, 2534 (2013).

[28] *Id.* at 2534.

[29] *Id.* at 2524–25.

[30] *Id.* (citations omitted).

then turned to the *Restatement (Third) of Torts*, which it read to require plaintiffs to prove but for causation in order to establish causation-in-fact.[31] This reading of tort principles contrasts sharply with that of Justice O'Connor in her concurring opinion in *Price Waterhouse*.[32] She too turned to tort law to interpret causation-in-fact under Title VII, but found it to support flipping the burden of proof onto the defendant to disprove but for causation once the plaintiff proves that the defendant's wrongdoing was a "substantial factor" causing harm.[33]

Not being a torts scholar, I will leave it to others to debate which version of causation-in-fact best corresponds to tort law.[34] Whichever standard tort law actually supports, the underlying reasons for the Court's more restrictive reading of torts surfaced later in the *Nassar* opinion. As it did in *Vance v. Ball State University*,[35] a Title VII case decided the same Term as *Nassar*, the Court prioritized ease of administration—a lightly veiled euphemism for enabling courts to more easily grant motions for judgment as a matter of law—and the weeding out of non-meritorious claims.[36] Sounding more like a common law court than a court engaging in statutory interpretation, the majority cited the "central importance to the fair and responsible allocation of resources [to] the judicial and litigation systems," and sounded a cautionary note about the uptick in Equal Employment Opportunity Commission (EEOC) charges alleging retaliation.[37]

Notably, for the first time, the Court in *Nassar* suggested a zero-sum relationship between retaliation and discrimination claims. The Court warned that adopting the more plaintiff-friendly causation standard would promote frivolous retaliation claims, at the cost of siphoning away resources from efforts to combat discrimination.[38] This newfound tension between retaliation and discrimination strikes a new tune for the Court, which, in recent years, has heralded the symbiotic relationship between the two claims and emphasized

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[31] *Id.* at 2525.

[32] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 261 (1989) (O'Connor, J., concurring).

[33] *Id.* at 263–64.

[34] Justice Ginsburg, however, makes a persuasive case in her dissent in *Nassar* that tort law does not support the majority's ruling. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2546–47 (2013) (Ginsburg, J., dissenting).

[35] Vance v. Ball State Univ., 133 S. Ct. 2434 (2013).

[36] *Nassar*, 133 S. Ct. at 2531–32; *Vance*, 133 S. Ct. at 2444.

[37] *Nassar*, 133 S. Ct. at 2531; *see also id.* at 2547 (Ginsburg, J., dissenting) ("Indeed, the Court appears driven by a zeal to reduce the number of retaliation claims filed against employers.").

[38] *Id.* at 2531–32 ("[L]essening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment.").

the need for broad protection from retaliation in order to fulfill the promise of anti-discrimination law.[39]

This change in tune also reflects changes in the composition of the Court and the resulting voting blocks. Justice Kennedy, the author of *Nassar*, had joined Justice Thomas's dissent in *Jackson v. Birmingham Board of Education*,[40] the case that launched a series of cases reading broadly-worded bans on discrimination to implicitly and by necessity encompass protection from retaliation.[41] Justice Kennedy also dissented in *Price Waterhouse*, so he has consistently favored but-for causation as the standard for Title VII.[42] With the substitution of Justice Alito for Justice O'Connor (who was in the majority in both *Jackson* and *Price Waterhouse*), the stage was set for the justices' alignment in *Nassar*.

At bottom, the animating principle underlying the selection of tort principles in *Nassar* is the pull of employment at will and the protection of employer autonomy in managing the workplace.[43] This concern comes through even in the majority's description of the facts, which paints a different picture than the story told by the dissent and the lower courts in the case.[44]

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[39] *See* Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237, 239–40 (2009); Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 376–78 (2010); Michael J. Zimmer, *A Pro-Employee Supreme Court?: The Retaliation Decisions*, 60 S.C. L. REV. 917, 923–24 (2009).

[40] Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).

[41] *See id.* at 184 (Thomas, J., dissenting); *see also* CBOCS W., Inc. v. Humphries, 553 U.S. 442, 451–52 (2008) (interpreting 42 U.S.C. § 1981); Gomez-Perez v. Potter, 553 U.S. 474, 481–82 (2008) (interpreting the federal employee provision of the ADEA); *cf.* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1329 (2011) (interpreting FLSA retaliation provision to implicitly protect against retaliation for oral complaints, despite statutory language making it unlawful to retaliate against an employee who "filed" a complaint).

[42] Price Waterhouse v. Hopkins, 490 U.S. 228, 279 (1989) (Kennedy, J., dissenting).

[43] *See generally* MARION G. CRAIN ET AL., WORK LAW: CASES & MATERIALS 99 (2d ed. 2010) (stating that every state except Montana follows the employment at will common law rule); Joseph E. Slater, *The "American Rule" that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 56–57, 93–96 (2007) (summarizing the meaning and history of "the American rule" of at-will employment as the common law baseline from which statutes craft exceptions).

[44] *Compare Nassar*, 133 S. Ct. at 2523–24, 2532 (describing facts in a way that suggests the hospital was initially amenable to the plaintiff's requested restructuring but changed its position because of generally applicable rules requiring all affiliated staff doctors to be members of the faculty; and raising the specter of a conniving employee who brings a specious discrimination complaint in order to manufacture a retaliation claim), *with id.* at 2535–36 (Ginsburg, J., dissenting) (detailing the supervisor's different and more demanding treatment of the plaintiff, her comments reflecting bias, and the unfounded basis for her criticism of the plaintiff).

After reading the majority's statement of facts, one might forget that the jury ruled for the plaintiff on both the national origin and retaliation claims.[45]

The *Nassar* opinion reads more like a tort case than a statutory decision. After staging tort law as "the background against which Congress legislated," the majority concluded that Congress intended to incorporate tort law's "default rules" rather than break from them.[46] Whether this importation of tort law is a positive development or a lamentable one,[47] the Court's explicit description of the Title VII retaliation claim as a tort leaves little reason to believe that tort law's influence on retaliation law will end here. Indeed, tort analogies may have more staying power in retaliation cases than the rest of employment discrimination law. Status-based discrimination claims "map onto no obvious tort,"[48] but retaliation has a somewhat closer—although troubling—analogue in the tort of wrongful discharge in violation of public policy.[49] As the discussion below demonstrates, even before the *Nassar* decision, retaliation case law in the lower courts had already been deeply affected by principles sounding in torts.

III. PROTECTED ACTIVITY AND ITS INTERSECTION WITH TORT LAW

While the Supreme Court's explicit reliance on tort law to construe Title VII's retaliation provision has so far been limited to causation, the bigger influence of torts on retaliation cases in the lower courts, albeit surreptitiously, has been to narrow the scope of protected activity.[50] As I read the retaliation cases in the lower courts, tort concepts sounding in plaintiff fault, employer duty, and proximate cause have migrated into Title VII doctrine to limit protected activity—the threshold issue in a retaliation claim.

Two Title VII doctrines in particular limit the scope of protected activity in ways that map onto tort principles: the reasonable belief doctrine and the newly-minted manager rule. Like the Supreme Court in *Nassar*, lower courts have crafted these limits in response to concerns that the retaliation claim

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[45] *Id.* at 2536–37 & n.1 (Ginsburg, J., dissenting) (reciting this history and noting that the district court reduced the jury's compensatory damages award on the discrimination claim from over $3 million to $300,000 pursuant to the statutory cap).

[46] *Id.* at 2525.

[47] For arguments criticizing the importation of tort principles into employment discrimination statutes, see Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199, 1232–35 (2013) [hereinafter Sperino, *Statutory Proximate Cause*]; Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 2–3 [hereinafter Sperino, *Discrimination Statutes*]; Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1432–34 (2012).

[48] *See* Sullivan, *supra* note 47, at 1432 n.1 (noting that employment discrimination "maps onto no obvious tort" and may be more similar to "a refusal to deal"); *see also* Sperino, *Discrimination Statutes*, *supra* note 47, at 36–38 (discussing the difficulty of "map[ping] employment discrimination claims onto traditional tort[s]").

[49] *See* Slater, *supra* note 43, at 96–97 (describing the tort).

[50] *See infra* pp. 8–17.

would otherwise go too far in restricting employer autonomy and intrude too deeply into the default regime of at-will employment.[51]

Before exploring these doctrines, and by way of background, a cursory review of Title VII retaliation law is in order. An essential feature of retaliation law is the bifurcation of the claim depending on whether the plaintiff complained internally, to someone within the workplace, or externally, to a government enforcement agency (the EEOC or a state fair employment agency).[52] Title VII's retaliation provision has two separate clauses, the opposition clause, which governs internal complaints, and the participation clause, which governs external enforcement through the specified channels.[53] Both avenues are protected, but internal opposition garners less protection and is governed by distinctive doctrines circumscribing protected activity; conversely, participation in formal enforcement channels earns the highest level of protection.[54] Given the widespread adoption of internal anti-discrimination policies and grievance procedures by employers over the past few decades, employees rarely take their complaints to outside agencies, at least not before trying internal complaint channels first.[55] If an external charge is filed after an internal complaint, any retaliation occurring before the charge was filed falls under the opposition clause rather than the participation clause.[56] Because of the prominence of internal complaint channels in workplaces today, gaps in protection under the opposition clause are especially harmful to employees. Both doctrines addressed below, the reasonable belief

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[51] *See, e.g.*, Davis v. Town of Lake Park, 245 F.3d 1232, 1242, 1245 (11th Cir. 2001); Williams v. Serra Chevrolet Auto., LLC, 4 F. Supp. 3d 865, 877–78 (E.D. Mich. 2014); Foster v. Univ. of Md. E. Shore, No. TJS–10–1933, 2013 U.S. Dist. LEXIS 140207, at *4–5 (D. Md. Sept. 27, 2013).

[52] *See, e.g.*, EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000) (explaining that the participation clause applies only to Title VII's express enforcement "machinery," such as "proceedings and activities" connected with a formal EEOC charge, while internal complaints fall under the opposition clause).

[53] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 704(a), 78 Stat. 241, 247 (codified as amended at 42 U.S.C. § 2000e-3(a) (2012)) (making it an "unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice . . . .") (the opposition clause); *id.* (making it an unlawful employment practice to discriminate against an employee because he or she "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter") (the participation clause).

[54] *See* ZIMMER ET AL., *supra* note 25, at 457–58.

[55] *See* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 884–86, 930–31 (2008) (discussing the growth of internal complaint procedures and the pressure on employees to use them and not take their discrimination complaints directly to external enforcement channels).

[56] *See, e.g.*, Townsend v. Benjamin Enters., Inc., 679 F.3d 41, 49 (2d Cir. 2012); Abbott v. Crown Motor Co., 348 F.3d 537, 543 (6th Cir. 2003); Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1313 (6th Cir. 1989).

doctrine and the manager rule, fall under the opposition clause and restrict what counts as protected activity under that clause.

A. *The Reasonable Belief Doctrine: Unreasonable Plaintiffs in Tort and Retaliation*

One of the most constraining doctrines in Title VII retaliation law is the reasonable belief doctrine. While it had some traction in the lower courts earlier, this doctrine secured its foothold in the 2000 Supreme Court case of *Clark County School District v. Breeden*.[57] Without foreclosing the possibility that an even tougher standard might apply, the Court dismissed the plaintiff's retaliation claim under the opposition clause for lack of a reasonable belief that the conduct she opposed actually violated Title VII.[58] As the Court applied this rule, the complaining employee must have an objectively reasonable belief, both legally and factually, that the underlying conduct violated Title VII in order to be protected from retaliation for an internal complaint.[59] The doctrine tracks tort law in its use of plaintiff fault, measured by an objective reasonableness standard, to limit recovery.

As numerous critics have noted, the *Breeden* case is the paradigmatic case of bad facts making bad law.[60] The plaintiff, a woman, was offended by a verbal exchange during a meeting with a male supervisor and a male co-worker.[61] While the three were in a meeting reviewing applicant files, one of the men commented on a note in an applicant's personnel file that he once said to a woman, "I hear making love to you is like making love to the Grand Canyon."[62] He then turned to the other man in the meeting and said, "I don't know what that means."[63] This man replied, "[w]ell, I'll tell you later," and both men laughed.[64] The plaintiff, who heard the remark and the laughter, was offended.[65] She complained internally, following the employer's anti-

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[57] Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001).

[58] *Id.* at 271. The Court assumed, without deciding, that this was the governing standard, as opposed to requiring the plaintiff to prove that the underlying conduct was actually unlawful.

[59] *Id.* at 270.

[60] *See, e.g.*, Brake & Grossman, *supra* note 55, at 915–29; Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1471–72 (2007); Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 955 (2007); Moberly, *supra* note 39, at 389 n.71; Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1176 (2007).

[61] *Breeden*, 532 U.S. at 269–70.

[62] *Id.* at 269.

[63] *Id.*

[64] *Id.*

[65] *Id.*

discrimination policy and complaint procedure.[66] The Supreme Court affirmed the lower court's dismissal of her retaliation claim, ruling that the complaint was not protected activity because the plaintiff lacked an objectively reasonable belief that the comment and laughter met the severe or pervasive standard for an actionable hostile environment.[67]

The significance of *Breeden* for retaliation claims arising out of an internal complaint is twofold. First, the Court evaluated reasonableness based on the case law governing actionable harassment under Title VII.[68] Because one sexually offensive incident is not enough, as a matter of law, to create a hostile environment, the Court ruled, it was not reasonable for the plaintiff to believe otherwise.[69] The Court's failure to consider reasonableness from the employee's perspective departs from its approach in assessing the degree of adversity required for a retaliatory action, which asks whether it would likely deter a reasonable employee in the circumstances of the plaintiff from complaining.[70]

Second, the Court determined the reasonableness of the plaintiff's perception based entirely on the governing law, without considering the scope of the employer's sexual harassment policy. In fact, the employer's policy proscribed a wide range of conduct, broadly defining sexual harassment to encompass "uninvited sexual teasing, jokes, remarks and questions."[71] The Court did not mention that the plaintiff had followed this policy in reporting the incident, a fact that the Ninth Circuit had relied on in ruling that, while the incident did not violate Title VII, the plaintiff's belief that it did was reasonable.[72]

Since *Breeden*, the reasonable belief doctrine has taken off in the lower courts. Following the Supreme Court's lead, lower courts use judicial understandings of actionable discrimination to set a ceiling on the reasonableness of employee perceptions of discrimination.[73] Rather than using

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[66] *Id.* at 269–70.

[67] *Breeden*, 532 U.S. at 270–71.

[68] *Id.*

[69] *Id.*

[70] Burlington N. & Sante Fe Ry. Co. v. White, 548 U.S. 53, 69–71 (2006) (considering that the plaintiff was the only woman in her department, and using the example of a single mother with child care responsibilities to show how an employee's circumstances might affect a court's determination of whether the retaliatory acts would likely dissuade a reasonable employee from complaining).

[71] Breeden v. Clark Cnty. Sch. Dist., No. 99-15522, 85 Fair Empl. Prac. Cas. 726, 728 (9th Cir. 2000) (BNA) (citing the employer's policy).

[72] *Id.*

[73] *See, e.g.*, Session v. Montgomery Cnty. Sch. Bd., 462 F. App'x 323, 326 (4th Cir. 2012) (finding that two comments perceived by plaintiff to be subjectively insulting were "inadequate as a matter of law" to sustain plaintiff's retaliation claim); Wilson v. Farley, 203 F. App'x 239, 247–48 (11th Cir. 2006) (concluding that plaintiff's complaint about a single remark by a co-worker was not objectively reasonable); Butts v. Ameripath, Inc., 794 F. Supp. 2d 1277, 1292–94 (S.D. Fla. 2011) (suggesting, in dicta, that a one-time

the perspective of a reasonable employee or a reasonable layperson, courts use their own perspective, informed by case law, to gauge the reasonableness of the legal and factual support for the employee's belief in discrimination.[74] As one court put it: "A plaintiff may not stand on his ignorance of the substantive law to argue that his belief was reasonable."[75]

Lower courts have copied *Breeden*'s disregard of employer anti-discrimination policies in judging the employee's reasonableness. In a recent article, I examined numerous cases in which courts have persisted in measuring reasonableness by narrow legal interpretations, even when the plaintiff's perspective matches the scope of the employer's anti-discrimination policy.[76] This creates a troubling dilemma for employees because employer anti-discrimination policies often encompass a broader range of conduct than what is prohibited by Title VII.[77] Employer anti-harassment policies, for example, extend far beyond actionable harassment, often using the term harassment interchangeably with incivility and disrespect.[78] Far from cautioning employees about reporting harassing behavior before it becomes severe or pervasive, they encourage and even direct employees to immediately report conduct falling within the policy. One model harassment policy posted on a major website for legal resources instructs, "If an employee feels that he or she has been harassed on the basis of his or her sex, race, national origin, ethic [sic] background, or any other legally protected characteristic they should immediately report the matter to his or her supervisor."[79] Such broad policies shape employees' understanding of, and response to, workplace harassment.[80]

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exposure to numerous racially insensitive e-mails "most likely" did not support an objectively reasonable belief in a hostile work environment); Mitchell v. Barnard Constr. Co., No. 08-81087-CIV, 107 Fair Empl. Prac. Cas. 661, 664 (S.D. Fla. Sept. 22, 2009) (BNA) (rejecting plaintiff's retaliation claim because co-worker's single racist remark did not support an objectively reasonable belief in a hostile work environment).

[74] *See* cases cited *supra* note 73.

[75] Mitchell v. Barnard Constr. Co., No. 08-81087-CIV, 107 Fair Empl. Prac. Cas. 661, 664 (S.D. Fla. Sept. 22, 2009) (BNA).

[76] *See* Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 140–43 (2014) [hereinafter Brake, *EEO World*].

[77] *Id.* at 143–44, 147–49.

[78] *See* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2093–2103 (2003).

[79] *Sample Anti-Discrimination and Harassment Policies*, FINDLAW, http://smallbusiness.findlaw.com/employment-law-and-human-resources/sample-anti-discrimination-and-harassment-policies.html (last visited Sept. 13, 2014), *archived at* http://perma.cc/JK38-2LRC; *see also* Blackmon v. Eaton Corp., No. 11-cv-02850-JPM-tmp, 2013 U.S. Dist. LEXIS 125999, at *3 (W.D. Tenn. June 6, 2013) (reciting employer anti-discrimination and harassment policy listing among potential forms of harassment, "language or comments that are offensive including hostile, mocking or lewd comments or jokes or intimidation that alters an individual's work efficiency") (internal quotation marks omitted).

[80] *See* FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 200–204 (2009).

Employer policies, and their effects on employee perceptions, are not limited to harassment. They commonly address other forms of discrimination too, and define it more broadly than legal authorities. Blending commitments to diversity with promises of non-discrimination, such policies blur the line between non-discrimination and affirmative action.[81] In the same breath that they prohibit discrimination, they proclaim support for diversity and increasing the representation of persons from historically underrepresented groups.[82] They also frequently cover classes of persons beyond the categories protected by Title VII, for example, including sexual orientation and gender identity in promises of fairness and inclusion.[83] Such policies play a bigger role than the external law in shaping employee perceptions of discrimination.[84] No wonder, then, that employee perceptions of discrimination often extend beyond actual unlawful discrimination.

The clash between employee understandings of discrimination and the law's narrower, more circumscribed definition has created a doctrinal crisis in courts' application of the reasonable belief doctrine. In a case starkly illustrating this conflict in the realm of racial harassment, *Jordan v. Alternative Resources Corp.*,[85] the plaintiff, an African-American man, had complained of a racially offensive statement made by a white co-worker.[86] In the company break room, while watching televised coverage of a police capture of two African-American suspects in several highly publicized sniper shootings in the Washington, D.C. area, a white male employee blurted out, "They should put those two black monkeys in a cage with a bunch of black apes and let the apes f—k them."[87] The plaintiff was offended, and in talking with other co-workers, learned that this same colleague had a history of making racially offensive comments at work.[88] The plaintiff complained about the co-worker's offensive remark, was terminated, and sued for retaliation.[89]

The district court granted the employer's motion to dismiss the complaint for failure to state a claim, ruling that the plaintiff did not engage in protected activity because one racist comment does not create an actionable hostile environment, even combined with knowledge that the same co-worker had

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[81] *Id.* at 14, 42, 72.

[82] *Id.* at 142–44, 148–49.

[83] *Id.* at 144, 201; *see also* Brad Sears & Christy Mallory, *Economic Motives for Adopting LGBT-Related Workplace Policies*, WILLIAMS INST., Oct. 2011, at 1, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf (reporting that 87% of Fortune 500 companies have policies prohibiting discrimination on the basis of sexual orientation, and 41% have policies including gender identity).

[84] *See* DOBBIN, *supra* note 80, at 7–10.

[85] Jordan v. Alt. Res. Corp., 458 F.3d 332 (4th Cir. 2006).

[86] *Id.* at 339–40.

[87] *Id.* at 336.

[88] *Id.* at 337.

[89] *Id.* at 336.

made similar comments previously.[90] The Fourth Circuit affirmed in an opinion that did not mention the fact that the plaintiff had followed the company's anti-harassment policy directing employees to report conduct they perceived as discriminatory.[91] Even the dissenting judge mentioned this fact more in passing than as a full-blown argument for enlarging the perspective used to determine the reasonableness of the plaintiff's belief in discrimination.[92] The district court had mentioned the policy only in the course of ruling on the plaintiff's state law claim for breach of contract, which the plaintiff also lost, on the grounds that the policy disclaimed creating any enforceable rights that would limit the employer's discretion to fire an employee at will.[93]

A decade and a half after *Breeden*, there is a sizeable and growing number of lower court decisions applying the reasonable belief doctrine to deny protected activity despite employer policies encouraging the plaintiff's complaint. Courts consistently find an absence of protected activity when the plaintiff reports conduct that could potentially—if it continued—add up to a hostile environment.[94] The fact patterns giving rise to the employee complaints in these cases include hostile epithets by co-workers and demeaning sexual or racial comments by managers. In one particularly vivid, if otherwise unexceptional account, a district court in Alabama boldly proclaimed, the manager's "act of slapping [the plaintiff] on the buttocks in an effort to make her comply with his demand [to pick up spilled equipment from the floor] is certainly not condoned by this court, however, it was not an act which reasonably could be perceived as sexual harassment under Eleventh Circuit law."[95] This statement was followed by a string citation of cases with parentheticals describing sexually explicit facts that courts had ruled fell short of an actionable hostile environment, and no mention of whether the employer had a policy prohibiting such conduct.[96]

A variation on this line of cases deems complaints of harassment unreasonable because the alleged harassment did not involve a protected class under Title VII. For example, this problem arises when the court views the employee's internal complaint as involving harassment based on sexual

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[90] Jordan v. Alt. Res. Corp., No. DKC 2004-1091, 2005 U.S. Dist. LEXIS 5279, at *11–15 (D. Md. Mar. 30, 2005).

[91] *Jordan*, 458 F.3d at 339–40.

[92] *Id.* at 350 (King, J., dissenting).

[93] *Jordan*, 2005 U.S. Dist. LEXIS 5279, at *17–20. The plaintiff also brought and lost a state law tort claim for wrongful discharge in violation of public policy for failure to sufficiently identify a clear public policy that the employer's conduct violated. *Id.* at *15–16.

[94] *See* Brake, *EEO World*, *supra* note 76, at 140–43 (collecting cases); Brake & Grossman, *supra* note 55, at 923–28 (same); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 87–88 & n.242 (2005) (same).

[95] Hill v. Guyoungtech USA, Inc., No. 07-0750-KD-M, 2008 U.S. Dist. LEXIS 69388, at *30 (S.D. Ala. Aug. 26, 2008).

[96] *Id.* at *21–27.

orientation, but not sex, and therefore falling outside the reach of Title VII. Even if the employer's policy covers sexual orientation discrimination and harassment, a plaintiff can lose the retaliation claim for unreasonably believing that anti-gay harassment violates Title VII.[97] Many employer policies make no such artificial distinctions, however.[98]

The reasonable belief cases are not limited to employee complaints about harassment. Other kinds of complaints about discrimination are also ensnared in this doctrine. One common case involves complaints about the employer's failure to follow its affirmative action policy, such as by not bringing in a diverse group of candidates for a position, or not being sufficiently attentive to an institutional lack of diversity. In these cases, courts insist that the plaintiff lacked an objectively reasonable belief that the employer's failure to engage in affirmative action or to promote diversity violated Title VII, without regard to the existence of employer policies blurring promises of diversity, affirmative action, and non-discrimination.[99] Some of these cases arise in university settings, which have some of the broadest policies on diversity and affirmative action.[100]

In all of these cases, the fact that the plaintiff followed an internal policy does not affect courts' judgments about the reasonableness of the plaintiff's complaint. Because courts do not find employer anti-discrimination policies relevant to the reasonable belief doctrine, they rarely discuss them in detail, making it virtually impossible to tell how the policies corresponded to plaintiffs' perceptions of discrimination.

While the courts do not specifically say that they are borrowing from tort law in these cases, the question this doctrine asks—whether the employee was reasonable in perceiving unlawful discrimination—has an obvious analogue in tort law's reasonable person standard.[101] Tort law uses reasonableness not just

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[97] *See, e.g.*, Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1062–63, 1066 (7th Cir. 2003); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 708 (7th Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 262–63 (1st Cir. 1999); Ogle v. Wal-Mart Stores E., LP, No. 2:09-CV-317-PPS, 2011 U.S. Dist. LEXIS 116212, at *15 (N.D. Ind. Sept. 23, 2011).

[98] *See* Sears & Mallory, *supra* note 83, at 1.

[99] *See, e.g.*, Phillips v. Pepsi-Cola Gen. Bottlers, Inc., No. 90-5603, 1991 U.S. App. LEXIS 3856, at *2–5 (6th Cir. Mar. 5, 1991); Miller-Calabrese v. Cont'l Grain Co., No. 96 C 6626, 1997 U.S. Dist. LEXIS 9944, at *7–8 (N.D. Ill. July 8, 1997); Holden v. Owens-Illinois, Inc., 793 F.2d 745, 748–49 (6th Cir. 1986). *See also* DOBBIN, *supra* note 80, at 14 (discussing how employers came to merge nondiscrimination and affirmative action in their EEO policies).

[100] *See, e.g.*, Johnson v. Univ. of Cincinnati, 215 F.3d 561, 566–68 (6th Cir. 2000); Manoharan v. Colum. Univ. Coll. of Physicians & Surgeons, 842 F.2d 590, 592–94 (2d Cir. 1988); Montgomery v. DePaul Univ., No. 10 C 78, 2012 U.S. Dist. LEXIS 128206, at *25–30 (N.D. Ill. Sept. 7, 2012).

[101] Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1352 (2010) ("The 'objective' reasonable person standard . . . is a staple of tort law . . . .").

to measure the reasonableness of the defendant's conduct (once a duty is established), but also the reasonableness of the plaintiff's conduct.[102] The reasonable belief doctrine operates as a de facto rule of contributory negligence.

If we adjust the tort lens a little, the reasonable belief doctrine might also be compared to a no-duty rule or, to a lesser extent, proximate cause. Much like a no-duty rule, the reasonable belief doctrine cuts off the employer's duty not to retaliate in the class of cases where plaintiffs complain about discrimination that a supposedly reasonable person would know is not actionable. No-duty rules have been a focal point of contention in tort law increasingly in recent years, as a battleground for policy clashes over the proper scope of liability.[103]

Alternatively, the reasonable belief doctrine might be compared to proximate cause. Like proximate cause, it limits the type of harm the defendant is expected to foresee and take care to avoid causing.[104] The analogy to proximate cause is more of a stretch, however, because proximate cause typically cuts off liability for the defendant's negligence when it results in a harm that differs from the harm normally to be expected; in a retaliation case, the adverse action (the firing, for example) is precisely the kind of harm anticipated.[105] Still, proximate cause is notoriously malleable,[106] and changing the level of generality used to describe the harm might sharpen the doctrine's resemblance to proximate cause. If the harm is described more particularly, as firing an employee for acting on a mistaken belief about discrimination, the reasonable belief doctrine begins to look more like proximate cause, because it too places the harm outside the class of harms for which the defendant is liable.

The "play" between the doctrines here, no-duty rules and proximate cause, is a manifestation of the slippery line separating them. In the final analysis, the potential for analogizing the reasonable belief doctrine to more than one tort doctrine speaks to the malleability of tort doctrine, rather than undermining the force of the comparison between the reasonable belief doctrine and contributory negligence. In my view, the reasonable belief doctrine's focus on employee reasonableness makes contributory negligence the most on-point analogue.

And yet, while retaliation's reasonable belief doctrine generally tracks the role that plaintiff fault plays in tort law, in two important respects, it is more

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[102] DAN B. DOBBS, THE LAW OF TORTS § 117, at 277 (2000) (discussing the objective reasonable person standard in tort law and stating, "[t]he standard applies equally when the issue is the plaintiff's contributory negligence").

[103] *See* W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 703–13 (2008).

[104] DOBBS, *supra* note 102, § 180, at 443–45.

[105] I am indebted to Martha Chamallas for this insight.

[106] *See* Jessie Allen, *The Persistence of Proximate Cause: How Legal Doctrine Thrives on Skepticism*, 90 DENV. U. L. REV. 77, 82 (2012).

draconian than its counterpart in torts. First, Title VII's reasonable belief doctrine places a total bar on recovery. It functions similar to the harshest of the variations on plaintiff unreasonableness in tort law, the contributory negligence rule.[107] While contributory negligence was once the majority rule, over time, reform has paved the way for a more calibrated approach to plaintiff fault.[108] The majority rule now assesses comparative negligence and then reduces the plaintiff's recovery to reflect the percentage of the parties' respective fault.[109] Jurisdictions vary in how they apply comparative negligence—some forbid any recovery if the plaintiff is more than fifty percent at fault, while others assess damages even if the plaintiff's share of fault is higher.[110] The reasonable belief doctrine invites no such comparison of the employee's fault in misperceiving discrimination and the employer's fault in promoting such an understanding through the promulgation of broad non-discrimination policies.[111] Title VII doctrine thus has a more anti-plaintiff bent than tort law's approach to plaintiff fault.

Second, retaliation parts ways with torts on the issue of perspective—from whose perspective to judge the plaintiff's reasonableness. This departure is not quite so stark, however. Both tort law and Title VII retaliation law ignore one significant dimension of the plaintiff's perspective: neither considers the way the plaintiff's perspective is shaped by social group identity.[112] Tort law does not use a "reasonable woman" perspective, for example, in asking if a female plaintiff acted negligently.[113] Likewise, Title VII's reasonable belief doctrine does not consider how a plaintiff's race or gender shaped the perception of discrimination, even though research shows that subjective perceptions of discrimination vary greatly by race and gender.[114]

Despite this similarity, however, the reasonable belief doctrine goes farther than tort law in disregarding the role of the plaintiff's perspective in assessing reasonableness. Tort law's approach to plaintiff fault allows external circumstances to bear on the reasonableness of the plaintiff's conduct.[115] The reasonable belief cases, however, deny even this degree of subjectivity in the assessment of plaintiff reasonableness. Courts do not consider the employee's access to legal knowledge or the circumstances in the workplace under which the employee formed the belief, such as the effect of an employer policy

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[107] *See* DOBBS, *supra* note 102, § 199, at 494.

[108] *Id.* § 201, at 503–04.

[109] *Id.*

[110] *Id.* § 201, at 505–06.

[111] *See supra* pp. 1394–96.

[112] *See* Chamallas, *supra* note 101, at 1358–61, 1368.

[113] *See id.* at 1360–61.

[114] *See, e.g.*, Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1276–80 (2012); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1105–06 (2008).

[115] Chamallas, *supra* note 101, at 1356–59 (contrasting external circumstances with internal circumstances—such as age, frailty, etc.—which are not taken into consideration).

addressing discrimination. Instead, judges measure reasonableness from their own legally informed perspective on whether the conduct violates Title VII.

In addition to the doctrine of contributory negligence, plaintiff fault comes up in a more particularized way in the closest tort analogue to retaliation, the tort of wrongful discharge in violation of public policy. As discussed in more detail below, this is a notoriously stringent and difficult-to-win tort, and a terrible blueprint for the statutory retaliation claim. Even here, however, the role of plaintiff fault in this tort may not be quite as draconian as it is in the Title VII reasonable belief cases. In a wrongful discharge tort, the employee's mistaken understanding, when it forms the basis for opposing perceived illegality by the employer, may pose a bar to the plaintiff's recovery.[116] However, some courts will permit recovery if the employee acted on a good faith belief.[117] Even for those courts that require proof of actual illegality as the predicate for the employee's protest, proof that the employer took actions contributing to the employee's mistaken belief might be relevant to whether the tort claim may proceed.[118] In the Title VII reasonable belief cases, in contrast, employer policies encouraging a broader view of discrimination do not affect how courts judge reasonableness, which is governed solely by the external law.

So while the Title VII reasonable belief cases surreptitiously borrow from tort law's reasonableness standard for measuring plaintiff fault, courts have applied reasonableness in a way that is more hostile to plaintiffs in retaliation cases. Tort concepts serve a similar function of narrowing the field of employer liability in another Title VII retaliation doctrine, discussed below.

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[116] CRAIN ET AL., *supra* note 43, at 198 (discussing the role of the plaintiff's mistaken belief in a wrongful discharge tort claim).

[117] *See, e.g.*, Hayes v. Eateries, Inc., 905 P.2d 778, 786–87 (Okla. 1995) (noting precedents protecting "good faith reporting of infractions by the employer"); Palmer v. Brown, 752 P.2d 685, 687–90 (Kan. 1988) (protecting employee's good faith reporting of employer's unlawful misconduct); Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 571 (Minn. 1987) (same); Johnston v. Del Mar Distrib. Co., 776 S.W.2d 768, 772 (Tex. App. 1989) (recognizing wrongful discharge tort claim where employee had a good faith belief that her employer required her to do an act that would violate the criminal law); McQuary v. Bel Air Convalescent Home, Inc., 684 P.2d 21, 23–24 (Or. Ct. App.1984) (holding that "employee is protected from discharge for good faith reporting of what the employee believes to be patient mistreatment to an appropriate authority"); *see also* Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1970–71 (1996) (stating that tort law on wrongful discharge is "not always more sympathetic to a whistleblower who is correct than to one who merely acts in good faith," and discussing cases protecting an employee who acts on a mistaken, but good faith, belief).

[118] *See* Dicomes v. State, 782 P.2d 1002, 1007 (Wash. 1989) (stating that, in deciding a tort claim for wrongful discharge in violation of public policy based on whistleblowing, "courts generally examine the degree of alleged employer wrongdoing, together with the reasonableness of the manner in which the employee reported, or attempted to remedy, the alleged misconduct").

B. *The Manager Rule, Employer Duty, and Proximate Cause*

A separate limit on protected activity under Title VII also has parallels with tort principles. In a development that has accelerated in recent years, lower courts have refused to find protected activity if the plaintiff performed her assigned responsibilities to report, investigate, or otherwise address discrimination in the workplace.[119] The result is to effectively cut off the employer's duty not to retaliate against employees whose job responsibilities include oversight and enforcement of internal anti-discrimination policies. Some courts call this the manager rule, while others describe the doctrine as requiring employees with anti-discrimination compliance responsibilities to step outside their roles.[120] This doctrine has roots in other areas of employment law, both statutory and constitutional, and has increasingly worked its way into Title VII.[121]

A recent case from the Eleventh Circuit Court of Appeals, *Brush v. Sears Holdings Corp.*, illustrates the doctrine.[122] Janet Brush's duties included investigating allegations of sexual harassment in the workplace.[123] In the course of one such investigation, Brush discovered that a female employee's allegations of sexual harassment were more serious than first appeared, involving several instances of rape by a supervisor.[124] Brush took the position that the alleged rapes should be reported to the police, but her superiors disagreed.[125] Brush was fired, she claimed because of her insistence that Sears report the rapes to the police.[126] The Eleventh Circuit ruled that even if true, Brush did not engage in protected activity under Title VII.[127] In sweeping reasoning, the court articulated its agreement with the manager rule, describing it as follows: "[T]he manager rule holds that a management employee that, in the course of her normal job performance, disagrees with or opposes the actions of an employer does not engage in protected activity."[128] In order for her normal job performance to become "protected activity," the court continued, she "must cross the line from . . . performing her

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[119] *See* Deborah L. Brake, *Retaliation in the EEO Office*, 50 TULSA L. REV. (forthcoming 2014) (on file with author).

[120] *Id.*

[121] *See* McKenzie v. Renberg's Inc., 94 F.3d 1478, 1481 (10th Cir. 1996) (personnel director did not engage in protected activity under the FLSA when she acted within her official role to correct wage and hour disparities); *see also* Garcetti v. Ceballos, 547 U.S. 410, 424 (2006) (public employee did not engage in protected speech under the First Amendment when she publicly complained about employer's misconduct because she acted within her official duties).

[122] Brush v. Sears Holdings Corp., 466 Fed. App'x 781 (11th Cir. 2012).

[123] *Id.* at 783.

[124] *Id.* at 784.

[125] *Id.*

[126] *Id.*

[127] *Id.* at 783.

[128] *Brush*, 466 Fed. App'x at 787 (internal quotation marks omitted).

job . . . to . . . lodging a personal complaint."[129] Absent a personal complaint, and "where . . . a third party is neither directly interested in the underlying discrimination nor acting beyond the scope of her employment in opposing an employer's action, no Title VII claim will lie."[130] The court's reasoning uses the plaintiff's scope of employment to cut short the defendant's duty not to retaliate.[131]

Brush is representative of a trend in the lower courts to deny protected activity where the plaintiff acted within the scope of her job's duties to address internal discrimination complaints. While the particular result in *Brush* might be defended as the court's way of handling a reasonable difference of opinion between Brush and Sears over how, within the obligations of Title VII, to best respond to rape allegations, the court's reasoning was not so limited.[132] Other courts have applied the manager rule to fact patterns where the dispute goes beyond a reasonable difference in opinion over the best way to deal with a complaint about discrimination. In one such case, *Vidal v. Ramallo Bros. Printing, Inc.*,[133] the plaintiff was a human resources director who received several complaints from employees alleging that they had been sexually harassed by the company president and vice-president, who were brothers.[134] When the plaintiff informed the brothers of his plans to investigate the allegations, they ordered him not to do so, assuring him that they would handle it themselves.[135] The plaintiff disagreed with this course of conduct and was fired.[136] The court dismissed the retaliation claim for lack of protected activity.[137] As human resources director, the court explained, the plaintiff's actions fell within his job responsibilities and were taken for the benefit of the company.[138] Like the court in *Brush*, this court distinguished between a human resources employee who filed a complaint on his own behalf, which would be protected, and this plaintiff's actions to address the complaints of others, which were not protected.[139]

The logic of the manager rule is not limited to officially designated equal employment opportunity (EEO) compliance personnel. Taken to its logical extreme, the rule could extend to any employee whose supervisory responsibilities include bringing forward and addressing the complaints of subordinates. For example, in *Cyrus v. Hyundai Motor Manufacturing*

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129 *Id.* (quoting McKenzie v. Renberg's Inc., 94 F.3d 1478, 1486 (10th Cir. 1996)).
130 *Id.* at 788 n.8.
131 *Id.* at 787–88.
132 *Id.* at 784–87.
133 Vidal v. Ramallo Bros. Printing, Inc., 380 F. Supp. 2d 60 (D.P.R. 2005).
134 *Id.* at 61.
135 *Id.*
136 *Id.*
137 *Id.* at 62
138 *Id.*
139 *Vidal*, 380 F.2d at 62.

Alabama, LLC,[140] the court applied this doctrine to bar a retaliation claim by a manager who reported the discrimination complaints of persons he supervised and then was fired.[141] The court denied the existence of protected activity, explaining that it was part of his job to alert the company to potentially unlawful conduct; because he did not step outside of his assigned role, he did not engage in opposition adversarial to the company.[142]

The manager rule creates a dilemma for the employees it covers, especially when viewed in light of the broader framework of Title VII retaliation law. A separate retaliation doctrine denies protected activity under the opposition clause when the plaintiff opposes discrimination in an unreasonable manner, such as by being disruptive or insubordinate. Under this doctrine, an employee who, in the course of opposing discrimination, steps too far outside her assigned role risks being fired for insubordination and disloyalty. In a line of cases that began before the manager rule emerged, courts rejected retaliation claims brought by employees with EEO responsibilities for going beyond their assigned roles in the course of performing their job duties.[143] For example, in a case decided by the D.C. Circuit in 1980, the court denied a retaliation claim brought by federal employees serving as EEO counselors who were fired for being "too militant" by participating in a protest demonstration against unequal employment opportunities in the department.[144] The court faulted the plaintiffs for going beyond the EEO counseling functions of the job.[145] Courts continue to enforce this line, requiring the form of the opposition to be reasonable.[146] There is scant space between stepping outside an employee's assigned role and steering clear of insubordination and disloyalty so as to make the form of the opposition unreasonable.

In applying the manager rule, courts use the employer's assignment of anti-discrimination compliance responsibilities to deny protection from retaliation to the employees performing those responsibilities, even when the employee acts in a manner that would otherwise register as opposition to discrimination. What purpose does this doctrine serve? One possibility is that it functions as a quick-look judgment about causation-in-fact, based on an assumption that an employer would not delegate anti-discrimination responsibilities and then fire an employee for performing them. If this is the assumption beneath the doctrine, however, it is misplaced. It ignores the

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[140] Cyrus v. Hyundai Motor Mfg. Ala., LLC, No. 2:07cv144-ID, 2008 U.S. Dist. LEXIS 33826 (M.D. Ala. Apr. 24, 2008).

[141] *Id.* at *38–39.

[142] *Id.* at *35–39.

[143] *See, e.g.*, Jones v. Flagship Int'l, 793 F.2d 714, 728–29 (5th Cir. 1986); Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 230, 234 (1st Cir. 1976).

[144] Pendleton v. Rumsfeld, 628 F.2d 102, 108–09 (D.C. Cir. 1980).

[145] *Id.*

[146] *See, e.g.*, Burns v. Blackhawk Mgmt. Corp., 494 F. Supp. 2d 427, 433–36 (S.D. Miss. 2007); Velez v. Janssen Ortho LLC, 389 F. Supp. 2d 253, 260–62 (D.P.R. 2005).

benefits employers reap by having anti-discrimination policies and personnel to implement them—benefits discussed in Part IV below.[147] The adoption of anti-discrimination policies and the assignment of employees to administer them may reflect an employer's strategic self-interest rather than a principled commitment to workplace equality.

Rather than a proxy for causation-in-fact, the manager rule is better understood as a curtailment of the employer's duty not to retaliate. The manager rule functions like a no-duty rule in torts, cutting off the defendant's liability notwithstanding the defendant's action causing injury. No-duty rules have become a favored vehicle for grappling with the kinds of controversial policy judgments that proximate cause is known for tackling.[148] Martha Chamallas's study of third-party assault torts is instructive.[149] She traces the shift from proximate cause to no-duty rules in third-party sexual assault cases brought by victims against an institutional defendant that might have done more to prevent attacks on its premises.[150] Instead of adjudicating such assaults to be not foreseeable, courts ruling against plaintiffs now more typically limit the defendant's duty to protect against criminal sexual assaults by a third party. While the determination of whether a tort defendant breached a duty is usually made by the jury, the determination of whether the defendant had a duty in the first place is a question of law determined by the court.[151]

Similar to a no-duty rule, the manager rule requires courts to make surreptitious policy judgments in order to decide, as a matter of law, the scope of the employer's duty not to retaliate. By negating the element of protected activity, the rule voids any duty on the part of the employer not to retaliate against the plaintiff; in contrast, the question of whether the defendant acted for a retaliatory reason is a question of fact.[152] By keeping the case away from the jury, both the manager rule and no-duty rules in tort protect defendants from liability.

Like the reasonable belief doctrine, the manager rule might be productively compared to more than one tort doctrine. It too bears a similarity to proximate cause—a resemblance that is unsurprising given the porosity of the line separating proximate cause from no-duty rules. Proximate cause insists that it is not enough that the defendant's wrongful conduct caused harm to someone; it must have been wrongful toward the plaintiff or the class of persons to whom the plaintiff belongs.[153] This principle is now submerged in the *Restatement (Third) of Torts*' phrase, "scope of liability," which limits the

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[147] *See infra* Part IV.

[148] Chamallas, *supra* note 101, at 1371–72. On the slipperiness of the categories of proximate cause and no-duty rules, see DOBBS, *supra* note 102, at 584–85.

[149] *See* Chamallas, *supra* note 101, at 1371–72.

[150] *Id.* at 1374.

[151] *Id.* at 1380.

[152] *See* B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 458–59 (2008) (summarizing how the element of causation is established in retaliation cases).

[153] *See* Sullivan, *supra* note 47, at 1460.

defendant's liability to those harms resulting from the same risks that made the defendant's conduct tortious in the first place.[154]

To return to *Brush*, the court in that case emphasized that the plaintiff herself was not the victim of the alleged discrimination.[155] In the terminology of proximate cause, Brush was a bystander who was harmed by the employer's hostility to the employee who made the rape accusation; that hostility landed on Brush when she insisted on a stronger response to the accusation than the employer was prepared to take. Using language with echoes of proximate cause, the *Brush* court expressed skepticism about the "transitive property" of Title VII claims in terms of providing any remedy to Brush, emphasizing that she was not among those "directly impacted" by the underlying discrimination.[156] By invoking the manager rule to block Title VII from protecting persons not directly targeted by the discrimination, the court's opinion carries the ring of proximate cause.

As scholars have long observed, proximate cause functions as a tool to cut off liability in service of other policy objectives.[157] In this respect, it is functionally similar to no-duty rules.[158]

Whether compared to proximate cause or no-duty rules, the manager rule bears considerable resemblance to tort principles. But like the reasonable belief doctrine, there is both congruity and distortion in its tracking of tort principles. The selective draw from torts has made Title VII's manager rule more draconian than a carefully considered use of tort law for guidance would support. A critical look at the particularities of this tort analogy would expose the difficulties created by the manager rule and might prompt a rethinking of its suitability for Title VII retaliation cases.

One way that the manager rule departs from tort law is in its use of agency principles. Typically in tort law, scope of employment is used to impute an employee's wrongful action to the employer for purposes of establishing employer liability.[159] The manager rule, in contrast, uses scope of employment principles to cut off the employer's duty not to retaliate when the plaintiff acts within the scope of employment. Tort law uses scope of employment principles to impute employer liability, while the manager rule uses it to cut off employer liability. In torts, the focus is on the wrongdoer's scope of

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[154] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (2010).

[155] Brush v. Sears Holdings Corp., 466 Fed. App'x 781, 787 (11th Cir. 2012).

[156] *Id.*

[157] *See* Sullivan, *supra* note 47, at 1467; *see also* Sperino, *Statutory Proximate Cause*, *supra* note 47, at 1202–05.

[158] *Cf.* Chamallas, *supra* note 101, at 1374 (explaining that in third-party assault cases courts have vacillated over time between no-duty rules and proximate cause as the vehicle for cutting off the defendant's liability).

[159] *See* Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 136 (2013) (discussing scope of employment and vicarious liability rules in tort law).

employment in order to determine who acts on behalf of the defendant, while the manager rule uses the plaintiff's scope of employment to block employer liability. In this respect, the manager rule is more of a distortion than an embrace of tort's scope of employment principles.

One possible parallel in tort law to the manager rule's use of scope of employment is in the tort of wrongful discharge. However, this similarity may be due as much to the circularity of Title VII's influence on tort law as to the independent development of tort principles in this ill-defined tort. In the wrongful discharge tort, too, an employee may end up outside the law's protection if the employee acted within her job duties to oppose the employer's misconduct. For example, in one case where the plaintiff was a safety compliance officer in an industrial workplace, the plaintiff alleged that he was fired for his efforts to correct the employer's environmental record and for bringing compliance issues to the attention of a government enforcement agency.[160] In a resulting claim for the tort of wrongful discharge in violation of public policy, the court ruled against the plaintiff on the ground that he acted within the scope of his job responsibilities, which included oversight of safety and compliance with environmental and safety regulations. This is a case, however, in which Title VII doctrine appeared to shape the court's use of tort principles. The court implicitly analogized the tort of wrongful discharge to a Title VII claim for retaliation, citing Title VII cases applying the manager rule to support the line it drew in the wrongful discharge action, and cutting off liability based on the plaintiff's scope of employment.[161]

To the extent that Title VII's manager rule is taking its cue from tort law's wrongful discharge case law on the plaintiff's scope of employment, it is a very poor body of law from which to draw support for this doctrine. Despite the occasional case tracking the manager rule, the wrongful discharge case law contains more cases cutting in the opposite direction, denying recovery to employees who act outside their job expertise to report or oppose employer misconduct. Courts have denied recovery in wrongful discharge cases where the employee protested illegality by the employer, but lacked the job expertise to credibly evaluate the legality of the employer's actions.[162] It seems that wrongful discharge plaintiffs can lose their cases whichever side of this line

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[160] Hill v. Belk Store Servs., Inc., No. 3:06-cv-398, 2007 U.S. Dist. LEXIS 79239, at *1–3 (W.D.N.C. Oct. 12, 2007).

[161] *Id.* at *3–4 (citing Title VII precedents).

[162] *See, e.g.*, Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1344–45 (3d Cir. 1990) (denying wrongful discharge tort, and requiring the employee reporting employer misconduct to have responsibility for the subject matter of the complaint); Sheets v. Teddy's Frosted Foods, Inc. 427 A.2d 385, 388–89 (Conn. 1980) (permitting plaintiff to bring a wrongful discharge claim, and emphasizing that he did have expertise and responsibility for the subject matter of his complaints); Geary v. U.S. Steel Corp., 319 A.2d 174, 178–79 (Pa. 1974) (denying wrongful discharge tort claim where plaintiff, a sales representative, lacked the expertise and corporate responsibility to complain about perceived safety problems).

they straddle. Title VII retaliation law should not be replicating this incoherence, although, as discussed above, that is precisely what is happening. The Title VII case law simultaneously requires managerial employees to step outside their roles in order to engage in protected activity, and yet punishes them for doing so if they act insubordinately or disloyally. Rather than squaring with generally applicable tort principles, the manager rule appears to be tracking the incoherence and damned-if-you-do, damned-if-you-don't tension in the wrongful discharge tort.

The wrongful discharge tort shares other, equally ill-suited principles with the Title VII case law applying the manager rule. The wrongful discharge tort sets a notoriously high bar for the venality of employer misconduct that the plaintiff opposed. It is a common refrain for courts in wrongful discharge cases, in the course of ruling against the plaintiff, to point out that the employer did not force the discharged employee to do anything that would violate the criminal law.[163] The court in *Brush* echoed this refrain, taking pains to point out that the employer did not violate the criminal law in refusing to report the rapes to the police, nor force the plaintiff to commit a crime when it instructed her not to report the rapes.[164] While setting the threshold for employer misconduct at the level of criminal law is draconian even for the wrongful discharge claim, it is especially unsuitable for Title VII, which protects the civil rights of employees to a non-discriminatory workplace. Allowing the strict limits of the wrongful discharge claim into the retaliation claim gives insufficient room for employees to act in the role Congress envisioned as "private attorney general" to enforce Title VII.[165]

The tort of wrongful discharge is also a poor model for Title VII retaliation claims in its distinction between public and private wrongdoing, and its protection of employee actions opposing the former but not the latter. To succeed in a wrongful discharge tort claim, courts insist that the employee acted to vindicate a public interest and not merely a private interest.[166] This is a notoriously porous line.[167] For example, courts have dismissed wrongful

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[163] *See, e.g.*, Wagner v. City of Globe, 722 P.2d 250, 256 (Ariz. 1986) (distinguishing employee actions to report employer wrongdoing from employee resistance to performing a criminal act, and suggesting greater protection of the latter); *Sheets*, 427 A.2d at 388 (recognizing wrongful discharge tort claim, and noting that "[t]he plaintiff's position as quality control director and operations manager might have exposed him to the possibility of criminal prosecution under" federal law); City of Midland v. O'Bryant, 18 S.W.3d 209, 215–16 (Tex. 2000) (limiting wrongful discharge claims to cases where employer required the employee to violate the criminal law); Fox v. MCI Commc'ns Corp., 931 P.2d 857, 862 (Utah 1997) (denying recovery and emphasizing that the employer had not required the plaintiff to commit a criminal act).

[164] Brush v. Sears Holdings Corp., 466 Fed. App'x 781, 788 (11th Cir. 2012).

[165] *See* N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63 (1980).

[166] Schwab, *supra* note 117, at 1944–45.

[167] *See id.* at 1944 (describing this public-private distinction as "treacherous at best"); *see also* Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878–79 (Ill. 1981) (stating that "a matter must strike at the heart of a citizen's social rights, duties, and responsibilities

discharge claims in which the plaintiff reported another employee's illegal theft, explaining that the plaintiff did not exercise a legal right or interest of his own, but intervened in a mere private matter between the employer and the co-worker.[168] Other cases classify an employee's whistleblowing to prevent the employer from violating the law and incurring a penalty as involving only a private matter, for the benefit of the employer.[169] These rulings purport to distinguish workplace-related wrongdoing that affects the public interest from that affecting only the private interest of the employer or employees.

As problematic as this distinction has proven to be in wrongful discharge cases, it is all the more so in cases applying the manager rule. The manager rule cases also deny protection to plaintiffs for addressing the rights of other employees, instead of pressing their own complaints. In *Brush*, for example, the court suggested the possibility of a different result if the plaintiff had acted to protect her own rights to non-discrimination instead of those of a fellow employee.[170] Presumably, the court recognized that an employee who asserts her own rights fulfills the private attorney general role of enforcing Title VII, in service of the public interest. However, such a divide between the employee's own rights and the rights of fellow workers is incoherent as applied to Title VII retaliation claims. Protecting the Title VII rights of other

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before the tort will be allowed," but acknowledging that "there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal"). Not only is the public-private line porous, it invites the kind of public-private dichotomy that feminist scholars have shown to marginalize those harms especially affecting women. *See, e.g.*, Green v. Bryant, 887 F. Supp. 798, 801 (E.D. Pa. 1995) (refusing to recognize wrongful discharge claim for employer's firing of an employee who was beaten and raped by her ex-husband, because employer's desire not to deal with this situation did not implicate a sufficiently public interest); MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER AND TORT LAW 76–87 (2010).

[168] *See* Hayes v. Eateries, Inc., 905 P.2d 778, 785–88 (Okla. 1995) (finding that employee's reporting of criminal activity—embezzlement by a co-worker—did not implicate a sufficiently "public" policy to give rise to a wrongful discharge tort claim); Foley v. Interactive Data Corp., 765 P.2d 373, 380 (Cal. 1988) (holding employee fired for reporting that supervisor was under investigation for embezzlement did not have a wrongful discharge tort claim because the employee's action served "only the private interest of the employer").

[169] *See, e.g.*, Adler v. Am. Standard Corp., 830 F.2d 1303, 1307 (4th Cir. 1987) (finding that employee's reporting of employer's illegality did not sufficiently implicate public policy so as to give rise to a wrongful discharge claim, and stating that wrongful discharge claims should be limited to "situations involving the actual refusal to engage in illegal activity, or the intention to fulfill a statutorily prescribed duty"); *Foley*, 765 P.2d at 380 (distinguishing protection of an employer's private interest in avoiding penalties from the public interest).

[170] Brush v. Sears Holdings Corp., 466 Fed. App'x 781, 783, 786 (11th Cir. 2012); *cf. Hayes*, 905 P.2d at 786–88 (emphasizing that employee who reported co-worker's embezzlement was "not exercising any legal right or interest of his own," and distinguishing cases where employees are fired for seeking to vindicate their own legal rights).

employees is just as much in the public interest as the promotion of one's own Title VII rights.[171] Recognizing this, retaliation law generally protects persons advocating for the non-discrimination rights of others.[172] It also protects persons targeted by the employer because of their relationship to the complainant, at least if the relationship is a sufficiently close one.[173] There is no principled reason why managers should have any less protection for protecting the rights of other employees, even if such activity falls within their job descriptions, than if they asserted their own rights. To the extent the manager rule is replicating this dichotomy from the wrongful discharge tort, the transplant is a gross mismatch.

The underlying policy served by both the manager rule and the tight limits on the tort of wrongful discharge is essentially the same policy that underlies tort law's no-duty rules and proximate cause: cutting off liability to protect the defendant's freedom of action. In the employment setting, this preserves the baseline of employment at will. The tort of wrongful discharge is an especially effective vehicle for promoting this objective. The tort is known for its stringency toward plaintiffs.[174] Expressing a widely shared sentiment, the Supreme Court of Connecticut summed up a common judicial reaction to this tort: "We are mindful that courts should not lightly intervene to impair the exercise of managerial discretion or to foment unwarranted litigation."[175] Toward that end, the tort is ill-defined and difficult for plaintiffs to win.[176] This stringency reflects the tort's common law underpinnings as a narrow, judicially-crafted intrusion into employment at will, triggering separation of powers concerns that leave courts vulnerable to criticism for crafting judicial remedies for violations of public policy that legislatures have not created.[177]

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[171] *See* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1665–66 (1996) (contending that retaliation protections for enforcing statutory rights serve the public just as much as, and for the same reasons as, the underlying substantive rights protected in the statute).

[172] *See* Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 273 (2009) (holding that Title VII opposition clause protects employee for testifying in support of complainant in employer's internal investigation of a sexual harassment complaint); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005) (deciding that Title IX protects a school basketball coach who opposed discrimination against student-athletes on his team).

[173] *See* Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 867, 870 (2011) (finding that employer's retaliatory firing of the fiancé of the complainant violates Title VII).

[174] *See* Slater, *supra* note 43, at 98 ("Many of the states recognizing the public policy exception [to at-will employment] have defined public policy very narrowly, such that only a 'handful of employees' can use the tort of wrongful discharge."); *see also Hayes*, 905 P.2d at 785 (noting that the claim is "to be tightly circumscribed in light of the vague meaning of the term public policy").

[175] Sheets v. Teddy's Frosted Foods, Inc. 427 A.2d 385, 387–88 (Conn. 1980).

[176] *See* Estlund, *supra* note 171, at 1669–70.

[177] *See, e.g.*, Hill v. Belk Stores Servs., Inc., 3:06-cv-398, 2007 U.S. Dist. LEXIS 79239 at *5 (W.D.N.C. Oct. 12, 2007) ("Courts in North Carolina are institutionally averse to creating claims based on public policy."); Gantt v. Sentry Ins., 824 P.2d 680, 687 (Cal.

Focusing on the underlying objectives served by Title VII's analogy to torts might help sort out which particular analogies to tort law are appropriate for retaliation law and which are not. The wrongful discharge tort is an exceptionally poor model for the Title VII retaliation claim. The statutory claim does not raise the separation of powers ghost that haunts the tort of wrongful discharge. As a statutory incursion into employment at will, Title VII retaliation law should be guided foremost by the objectives of the statute. Instead, the manager rule re-inscribes employer autonomy over the workplace for a significant class of employees.

And yet, there is a degree of legitimacy in the policy concerns driving the manager rule. Courts' embrace of the manager rule reflects a legitimate concern that, without it, employers would lose the ability to supervise job performance for some segment of the workforce. The fundamental problem driving the manager rule is that, when part of the employee's job is to oversee compliance with anti-discrimination law, the search for a retaliatory motive cannot separate the illegitimate motive of retaliation from the legitimate motive of job performance.[178] For employees charged with enforcing anti-discrimination laws and policies in the workplace, punishing the employee for how she performs this responsibility is both retaliatory and related to job performance. Without the manager rule, when securing compliance with non-discrimination laws and policies falls within employees' job duties, the retaliation claim would deeply intrude into employer oversight of this group of employees. On the other hand, the manager rule tilts the scales all the way in the opposite direction, causing a complete withdrawal of retaliation protection from the employees assigned such job responsibilities, effectively removing them from Title VII's antiretaliation exception to employment at will. Instead of a nuanced calibration of the conflicting employee and employer interests in such conflicts, the manager rule selectively follows and distorts tort-like principles to bolster the employment at will default regime.

Both the reasonable belief doctrine and the manager rule serve the same core objective: reinvigorating the common law baseline of employment at will

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1992) ("[C]ourts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, lest they mistake their own predilections for public policy which deserves recognition at law.") (internal quotation marks omitted); Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 89–90 (N.Y. 1983) (refusing to recognize tort for wrongful discharge in violation of public policy, stating such rights "are best and more appropriately explored and resolved by the legislative branch of our government").

[178] *See, e.g.*, Correa v. Mana Prods., Inc., 550 F. Supp. 2d 319, 330 (E.D.N.Y. 2008) (explaining that, without such a rule, employees with EEO responsibilities would be untouchable, a result that would intrude too deeply into the employer's ability to oversee job performance); *cf.* Whatley v. Metro. Atl. Rapid Transit Auth., 632 F.2d 1325, 1326 (5th Cir. 1980) (holding that Title VII does not prevent an employer from firing an employee whose job it is to handle discrimination complaints when the employee does this contrary to the employer's instructions).

and limiting the extent of Title VII's statutory incursion into that baseline.[179] So far, tort's footprints in Title VII retaliation law have led in only one direction, walking back the protection the law extends to employees. The next section calls for greater attention to a side of tort law that has been missing so far in tort's influence on Title VII retaliation law: the nature and degree of the defendant's wrongfulness.

IV. TAKING TORTS SERIOUSLY

Despite the one-way influence of tort law to date in cutting back Title VII liability for retaliation, there is room for making tort's role in this area more of a two-way street. Rather than putting all efforts into resisting the intrusion of torts into Title VII retaliation law—a losing proposition after *Nassar*—Title VII scholars should undertake a reconstructive approach.

At a minimum, a forthright acknowledgement of tort law's impact on Title VII retaliation doctrine should call attention to the ways Title VII case law has selectively imported tort principles to curtail employer liability, distorting those principles in the process. As discussed above, both the reasonable belief doctrine and the manager rule, in tracking tort principles go farther in protecting employer autonomy than tort principles dictate. The reasonable belief doctrine stretches tort principles of plaintiff fault to reach a more draconian result than analogous tort doctrines would require. The manager rule lines up with malleable tort rules (no-duty and proximate cause) that mask judicial policy preferences; and to the extent it follows more particularized tort doctrine, it aligns with an especially stingy tort—the wrongful discharge claim—to a degree unsuitable for Title VII's statutory claim. Bringing tort concepts out of the shadows and into the light should prompt a reconsideration of the Title VII doctrines that have significantly narrowed the scope of protected activity under the opposition clause. It also illuminates the extent to which the Title VII retaliation case law has reinvigorated the employment at will common law background rules, notwithstanding the purported statutory incursion into that regime.

In addition to taking a more critical look at how courts have used tort-like principles to limit Title VII liability, tort law might be mined for its potential to place employer fault at the forefront of the analysis in a retaliation claim. In *Nassar*, the Court repeatedly characterized the retaliation claim as a remedy for "wrongful" action by the employer.[180] The wrongfulness of the defendant's conduct, as a matter of social policy, is at the foundation of tort law; it is what fundamentally distinguishes torts from civil actions to enforce contract or

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[179] *Cf.* Slater, *supra* note 43, at 97 (arguing that the common law baseline of employment at will has encroached into its statutory exceptions, such as Title VII, because courts have interpreted these statutory rights very narrowly).

[180] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2522, 2525 (2013). In the first two paragraphs alone, the Court used the word "wrong," and words derived from it, five times. *Id.* at 2522.

property rights.[181] Even the wrongful discharge claim, with its strict limits on what is actionable, makes employer wrongfulness the focal point, as the very name of the tort suggests. Courts describe the tort of wrongful discharge as remedying an employer action that is "ex delicto"—from a wrong.[182]

So far, Title VII doctrine limiting the scope of protected activity has invoked tort-inspired limits on plaintiff recovery without a corresponding emphasis on employer fault. But tort law's fault-based focus could also strengthen Title VII protection by more fully developing courts' understanding of employer wrongfulness in the retaliation claim. Both the reasonable belief doctrine and the manager rule, as applied by the lower courts, have let employers reap the benefits of having anti-discrimination policies while punishing the employees who use and administer them. Tort law might help construct theories of wrongfulness to address this unfairness and ameliorate the harshness of these doctrines.

A starting point for probing employer wrongfulness is through the lens of intentional torts. In a retaliation claim, the adverse action is no accident.[183] If the adverse action occurs because of a retaliatory intent, it is both wrongful and intentional. Professor Sandra Sperino's argument that the closest tort analogue to employment discrimination is intentional torts rather than negligence applies equally to retaliation.[184]

The analogy between retaliation and intentional torts is complex and more nuanced, however.[185] Intentional torts typically involve deliberate (that is, not accidental) actions done with intent to harm or knowledge of a substantial likelihood of causing harm.[186] In an employment discrimination claim such as retaliation, the adverse employment action—the firing for example—is intentional, but its wrongfulness depends on the reason, or motive, for why it

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[181] *See* STUART M. SPEISER ET AL., 1 THE AMERICAN LAW OF TORTS § 1:1, at 5–6 (2003).

[182] *See* Tameny v. Atl. Richfield Co., 610 P.2d 1330, 1335 (Cal. 1980) (stating that "an employee's action for wrongful discharge is ex delicto and subjects an employer to tort liability").

[183] *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173–74 (2005) ("Retaliation is, by definition, an intentional act."); *see also* Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011) (analogizing the USERRA claim to an intentional tort, as opposed to negligence, because it requires "that the actor intend the consequences of an act, not simply the act itself") (internal quotation marks omitted).

[184] Sperino, *Discrimination Statutes*, *supra* note 47, at 37–38; *see also* Sullivan, *supra* note 47, at 1459 ("[A] disparate-treatment Title VII violation is more akin to an intentional tort.").

[185] Perhaps it is the difficulty of settling on a tort analogy for retaliation that prompted the Court to cite from a grab bag of tort principles, lumping in both negligence and intentional torts. *Nassar*, 133 S. Ct. at 2525 (citing Restatement provisions on negligence and intentional torts).

[186] *See* Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1063 (2006) (discussing the definition of intent in the Restatement (Third) of Torts).

was done. It is not the deliberate causing of harm that makes the adverse employment action unlawful under Title VII. Even non-retaliatory firings intentionally cause harm to the person fired. It is the intentionality of the action combined with the wrongful reason for the action that makes it unlawful.

This difference should not necessarily defeat the analogy to intentional torts, however. With intentional torts, too, the reason for the intentional act that causes harm may be relevant to the wrongfulness of the action, even if its relevance is not always made explicit. For example, if the reason for hitting someone is justified, such as intervening in an attack on a child, the defendant's intent to throw a punch is not enough to make it actionable.[187] It is the lack of justification for the punch, combined with the intent to harm, that gives rise to the tort, as it is the retaliatory motive for the firing that makes the retaliatory firing actionable. In retaliation claims and intentional torts, the intentionality of the defendant's action, combined with the illegitimate motive (or lack of justification), gives rise to the claim.

The analogy to intentional torts alone, however, will not fend off tort-based incursions into protected activity under Title VII. Grounding the wrongfulness of the adverse action in the employer's retaliatory motive circles right back to where the reasonable belief doctrine and the manager rule entered, wrestling with the proper scope of protected activity. Whether the employer acted with a retaliatory motive turns on the scope of protected activity under the statute. Only if the employer acted with a motive to punish employee conduct that qualifies as protected activity does the motive qualify as retaliatory. A motive to punish an employee for complaining about something that is not protected by the statute, for example, would not be retaliatory under Title VII.

Where the analogy to intentional torts might help is in defining the proper scope of protected activity. Courts should calibrate the boundary of protected activity to fit the nature and degree of the employer's wrongfulness. For the retaliation claim to fulfill its purpose—keeping open the channels for enforcing statutory rights, including internal opposition to discrimination—the category of protected activity must be expansive enough to capture the core wrong of retaliation. In cases where the employee follows or administers an employer's non-discrimination policy to report or address discrimination covered by that policy, thereby triggering employer retaliation, there are two

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[187] *See* 8 SPEISER ET AL., *supra* note 181, § 26:10, at 289 (on the defense of others as a defense to battery). Justification also matters in the tort of wrongful discharge. *See* Ellis v. City of Seattle, 13 P.3d 1065, 1070 (Wash. 2000) (listing among the elements of a claim for wrongful discharge in violation against public policy that "[t]he defendant must not be able to offer an overriding justification for the dismissal"); *see also* Simons, *supra* note 186, at 1084 & n.84 (discussing the "prima facie" tort of intentionally causing harm, and quoting the Restatement (Second) definition that the conduct "is generally culpable and not justifiable under the circumstances").

dimensions of employer wrongfulness that the definition of protected activity should take into account.

First, there is the wrongfulness toward the individual employee who is encouraged to use or administer the employer's policy on non-discrimination and then punished for doing so. When the retaliation claim is brought under the opposition clause and the opposition is expressed through the employer's internal complaint procedures, there is a distinct dimension of wrongfulness to the employer's retaliation. Not only does the retaliation interfere with the work lives of individual employees and the enforcement of statutory rights, it enables the employer to have its cake and eat it too: the employer benefits from having an anti-discrimination policy—benefits discussed in greater detail below[188]—even though the policy is effectively nullified by the retaliation. It is tantamount to fraudulent misrepresentation and unjust enrichment (a principle rooted in corrective justice) for the employer to benefit from having anti-discrimination policies, while retaliating against the employees who use and administer them.[189] In this respect, the retaliation claim under the opposition clause has an additional dimension of wrongfulness compared to a Title VII participation clause claim, where the employee is punished for using the statute's official enforcement mechanisms. When the employer's policy encouraged the employee's opposition, the wrongfulness of the retaliation is heightened by the employer's self-serving decision to capture the benefits of having anti-discrimination policies while punishing their use. The focus of intentional torts on defendant wrongfulness might productively call attention to this dimension of employer wrongfulness, which the case law on protected activity so far has failed to consider.

A second type of wrong addressed by the retaliation claim is the public harm to law enforcement stemming from the employer's interference with the enforcement of statutory rights. The scope of protected activity should be broad enough to reflect the role played by internal anti-discrimination policies in the enforcement of statutory rights. By now, employer anti-discrimination policies have been so thoroughly integrated into Title VII's statutory framework—a point discussed in more depth below[190]—that sabotaging their use thwarts statutory rights just as much as an employer's interference with external enforcement channels.

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[188] *See infra* pp. 1407–11.

[189] *See* DOBBS, *supra* note 102, §§ 469–470, at 1343–46 (discussing fraudulent misrepresentation). Although unjust enrichment defies easy categorization in the traditional common law categories of tort, property and contracts, it shares an animating theory of corrective justice with tort law. *See* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802–11 (1997) (discussing the corrective justice underpinnings of tort law); Lionel Smith, *Restitution: The Heart of Corrective Justice*, 79 TEX. L. REV. 2115, 2115 (2001) (arguing that unjust enrichment is based on a theory of corrective justice);.

[190] *See infra* pp. 1420–21.

The analogy to intentional torts might also be marshaled to resist the particular ways lower courts have used the reasonable belief doctrine and manager rule to circumscribe protected activity under Title VII. If retaliation is an intentional tort, proximate cause-type limits on protected activity are out of place. Proximate cause does not play the same role in intentional torts as in negligence-based wrongs.[191] In an intentional tort, the defendant is more likely to be liable for the full extent of the harm, without regard to foreseeability.[192] The defendant's culpability—the seriousness of the harm and the degree of the deviation from "appropriate care"—can reduce the role proximate cause plays in limiting liability.[193] To the extent that both the reasonable belief doctrine and the manager rule are tracking proximate cause-inspired limits on liability, aligning retaliation with intentional torts might help check these doctrines.

The analogy to intentional torts could also be used to question overly stringent applications of plaintiff fault as a limit on protected activity. As discussed above, the reasonable belief doctrine mimics tort-inspired limits on plaintiff fault, akin to a de facto contributory negligence rule. However, contributory negligence does not negate liability for an intentional tort. A defendant's wrongfulness in intentionally causing harm is not ameliorated by the injured person's failure to take reasonable care to avoid the harm.[194] Analogizing retaliation to an intentional tort might help rein in the reasonable belief rule, at least insofar as the employee's belief about discrimination conforms to the employer's anti-discrimination policy.

Even if the analogy to intentional torts falters and negligence emerges as the guiding tort framework for the Title VII retaliation claim, fault-based concepts should be developed to resist the tort-inspired limits on protected activity that have taken hold in the case law. Under a negligence framework, both the duty not to retaliate (in relation to managerial employees) and the role of contributory negligence (in the form of the reasonable belief doctrine) should be calibrated to take into account the full scope of the employer's wrongfulness.[195] In retaliation claims brought under the opposition clause, the wrongfulness of the adverse action is heightened by the employer's decision to

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[191] *See* Sperino, *Discrimination Statutes*, *supra* note 47, at 10; Sperino, *Statutory Proximate Cause*, *supra* note 47, at 1206–07; Sullivan, *supra* note 47, at 1459.

[192] Sperino, *Statutory Proximate Cause*, *supra* note 47, at 1206.

[193] *Id.* (quoting the RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 33 (2010)).

[194] *See* DOBBS, *supra* note 102, § 200, at 498; Chamallas, *supra* note 101, at 1381; *see also* DOBBS, *supra* note 102, § 206, at 517–21 (discussing the modern, more nuanced approach to comparative negligence in intentional torts).

[195] DOBBS, *supra* note 102, § 229, at 582–83 (discussing the factors taken into account in determining the defendant's duty); *id.* § 202, at 506–07 (discussing comparative fault); *see also* 1 SPEISER ET AL., *supra* note 181, § 1:4, at 14–16 (discussing fault in tort law as responsive to changes in social conditions); Schwartz, *supra* note 189, at 1815–19 (1997) (arguing that corrective justice—with its focus on relational fairness and not just economic-based deterrence rationales—underlies negligence-based torts).

benefit from the adoption of internal anti-discrimination policies and the assignment of responsibility to employees for implementing them.

Taking this one step further, the employer's adoption of an anti-discrimination policy should be viewed as an affirmative undertaking by the defendant, with reliance by the plaintiff, giving rise to a duty on the defendant to take reasonable care.[196] Tort law places a duty of reasonable care on a person who need not, in the first instance, take measures to avoid harm, but voluntarily assumes a duty to do so.[197] Likewise, while an employer need not promise anti-discrimination protection beyond what is required by Title VII, having done so, it should have a duty of care not to punish persons who use the employer's policies to report discrimination. Similarly, having created anti-discrimination policies and charged certain employees to oversee and administer them, the employer should be viewed as assuming a duty not to retaliate against them for doing so. The employer's punishment of employees for following or administering internal anti-discrimination policies that the employer affirmatively adopted should be viewed as a breach of that duty.

The above arguments for using intentional tort and negligence concepts to direct attention to employer fault and strengthen retaliation protections rest on the assertion that employers benefit from having anti-discrimination policies and procedures in place. The following section briefly sketches those benefits and considers their implications for Title VII retaliation law more broadly.

IV. THE INTEGRATION OF EMPLOYER NON-DISCRIMINATION POLICIES INTO TITLE VII'S LEGAL FRAMEWORK AND THE IMPLICATIONS FOR A FAULT-BASED APPROACH TO RETALIATION

Whether intentional torts or negligence ultimately sticks as the guiding analogy for the retaliation claim, the wrongfulness of retaliating against an employee for using internal complaint channels cannot be fully appreciated without understanding the outsized role these policies play in Title VII law and the benefits employers gain from adopting them. Over the past two decades, employment discrimination law has increasingly incentivized—both formally and informally—the adoption of internal anti-discrimination policies and complaint procedures. The most well known of these stem from the employer liability rules for supervisor sexual harassment, which the Supreme Court announced in a pair of cases decided in 1998.[198] That framework imposes vicarious liability on employers for sexual harassment by a supervisor, subject to an affirmative defense. The affirmative defense makes the existence of internal policies and procedures for addressing sexual harassment a virtual

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[196] *See* DOBBS, *supra* note 102, § 319, at 860–64.

[197] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 42 (2010).

[198] Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

necessity in order to avoid liability in such cases.[199] This same liability framework, and resulting incentives for adopting internal policies, applies to other forms of unlawful harassment too, including harassment based on race, religion, or national origin. Employer liability rules for harassment by non-supervisors (co-workers or customers), while not governed by the affirmative defense per se, also incentivize internal policies and grievance procedures. The fault-based "knew or should have known" standard courts apply to non-supervisory workplace harassment is more easily established if the employer lacked a viable policy for reporting harassment.[200]

The employer liability rules for harassment are only the beginning of the legal incentives for employers to adopt internal policies and procedures addressing discrimination. In all discrimination cases, employers benefit from having anti-discrimination policies. Even if the plaintiff proves discrimination in court, having such a policy can inoculate the employer against a punitive damages award.[201] Apart from damages, socio-legal scholars have found that anti-discrimination policies significantly influence whether legal actors view employers as compliant with the law. In practice, the EEOC is less likely to find "cause" to believe that discrimination occurred if the employer had an anti-discrimination policy.[202] Such policies convey the impression of a well-meaning employer, one with a visible commitment to non-discrimination rather than one that acts with a discriminatory intent.[203] Judges, too, look more favorably on employers with anti-discrimination policies and tend to equate having such policies with legal compliance.[204]

If the Court's musings in *Staub* are any indication, the value of anti-discrimination policies to employers may further appreciate. In discussing the role of proximate cause in a cat's paw scenario, the Court left open the possibility that a truly independent internal investigation might exonerate the defendant from liability for a subordinate's discriminatory action. The Court suggested that it might break the chain of proximate cause if the plaintiff failed to use an available internal channel to complain about the allegedly

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[199] *See* ZIMMER ET AL., *supra* note 25, at 391 (summarizing case law and stating, "[a]lthough the Supreme Court has stated that an employer need not necessarily have promulgated an antiharassment policy to satisfy its duty of reasonable care, it is unusual for an employer to prevail absent such a policy").

[200] *See* Vance v. Ball State Univ., 133 S. Ct. 2434, 2463–64 (2013) (Ginsburg, J., dissenting); *see also id.* at 2453 (majority opinion) ("Assuming that a harasser is not a supervisor, a plaintiff could still prevail by showing that his or her employer was negligent in failing to prevent harassment from taking place.").

[201] Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544–46 (1999).

[202] C. Elizabeth Hirsh & Sabino Kornrich, *The Context of Discrimination: Workplace Conditions, Institutional Environments, and Sex and Race Discrimination Charges*, 113 AM. J. SOC. 1394, 1424–25 (2008).

[203] *See* C. Elizabeth Hirsh, *Settling for Less? Organizational Determinants of Discrimination-Charge Outcomes*, 42 L. & SOC'Y REV. 239, 250–51 (2008).

[204] *See* Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 906, 929–30 (2011).

discriminatory action.[205] If this dictum comes to fruition, internal anti-discrimination policies will have the added benefit of limiting employer liability for adverse actions induced by a subordinate employee acting upon a discriminatory motivation.

Given the role internal anti-discrimination policies play in Title VII's legal landscape, the bifurcation of internal and external complaint channels—with their different levels of protection—should be revisited.[206] Short of such a stark change in retaliation doctrine, however, the determination of protected activity under the opposition clause should at least take into account the employer's role in enticing and even requiring employees to use employer channels for addressing discrimination.

The wrongfulness of an employer profiting from the adoption of an anti-discrimination policy and complaint procedure, and then turning around and retaliating against employees for participating in them, was not lost on the Supreme Court when it addressed a distinct issue of retaliation law in *Crawford v. Metropolitan Government of Nashville & Davidson County*.[207] In that case, the employer allegedly retaliated against an employee for participating as a corroborating witness in an internal investigation of a sexual harassment complaint brought by a co-worker.[208] The lower court had ruled that the plaintiff's participation as a witness in an internal investigation pursuant to the employer's anti-harassment policy did not qualify as opposition to discrimination, and therefore was not protected activity under Title VII.[209] The Supreme Court reversed and emphatically rejected the employer's argument that permitting retaliation claims by witnesses in internal investigations would deter employers from undertaking such voluntary compliance efforts.[210] The Court's rejoinder emphasized how deeply Title VII liability rules have incentivized internal anti-discrimination policies and grievance procedures, and how commonplace such policies are in the workplace.[211] Calling the rule proposed by the employer "freakish," the Court

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[205] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1194 n.4 (2011) ("We also observe that Staub took advantage of Proctor's grievance process, and we express no view as to whether Proctor would have an affirmative defense if he did not."); *see also* Sullivan, *supra* note 47, at 1434 & n.9 (suggesting that *Staub* will likely increase the role of employers' anti-discrimination policies and complaint procedures).

[206] Orly Lobel, Remarks in New Ways of Governing the Workplace: Proceedings of the 2007 Meeting of the Association of American Law Schools Section on Labor Relations and Employment Law (transcript in 11 EMP. RTS. & EMP. POL'Y J. 111, 113–19) (arguing against the current default in workplace law of providing greater protection for employee exercises of external voice than internal voice).

[207] Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 279 (2009).

[208] *Id.* at 273–74.

[209] Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 211 Fed. App'x 373, 376–77 (6th Cir. 2006).

[210] *Crawford*, 555 U.S. at 278.

[211] *Id.* at 278–79.

exhibited sensitivity to the unfairness of a legal framework that would reward employers for adopting anti-discrimination policies but allow them to retaliate against the employees who participate in them.[212] While the Court's holding in *Crawford* is a narrow one, ruling that witness participation in internal grievance procedures may qualify as protected "opposition" to discrimination, the Court's opinion lays the building blocks for a broader view of employer wrongfulness in the retaliation claim. The tension the Court noted in *Crawford* is palpable in the case law discussed above, in which lower courts have enabled employers to punish employees for following internal anti-discrimination policies to report discrimination, and for administering these policies and complaint procedures, by crafting tort-inspired limits on what counts as protected activity.

Another recent Supreme Court retaliation case offers further hope for developing conceptions of employer wrongfulness broad enough to resist the tort-inspired limits on Title VII retaliation claims discussed above, particularly the manager rule. In *Thompson v. North American Stainless, LP*,[213] the Court construed the class of persons to whom the employer owes a duty not to retaliate to include persons other than the complainant.[214] In that case the Court ruled that retaliating against the complainant's fiancé was actionable under Title VII, and that the fiancé himself, as a "person aggrieved," could sue for the retaliation.[215] The Court was not tempted to construct a proximate cause-type roadblock limiting the employer's liability to only those retaliatory actions taken against a complainant.[216] The wrongfulness of the employer's conduct supported the Court's broad, purpose-driven approach to statutory interpretation in that case. The *Thompson* holding does not sweep so far as to call into question the manager rule cases; the Court limited its reasoning to persons in a "close relationship" with the complainant.[217] However, to the extent the wrongfulness of the employer's actions drove the Court's result, the reasoning suggests that the Court may be receptive to arguments about employer wrongfulness in targeting EEO personnel, who are not themselves complainants, but who are subjected to discrimination for investigating and addressing other employees' discrimination complaints pursuant to employer policies.

Both *Crawford* and *Thompson* show the Supreme Court to be alert to the potential for employer wrongdoing and on guard against interpretations of Title VII that would invite it. In addition, *Nassar* forthrightly invokes an analogy to torts as a fitting lens for construing the retaliation claim, repeatedly describing the claim as one for remedying employer wrongdoing. Together, these cases open the door to the potential for using tort principles as an

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[212] *Id.* at 278.
[213] Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863 (2011).
[214] *Id.* at 867–68.
[215] *Id.* at 870.
[216] *Id.* at 868–69.
[217] *Id.*

interpretive guide to nudge Title VII closer to capturing wrongful retaliation. Title VII's wholesale embrace of employer non-discrimination policies is a big part of what makes employer retaliation so wrongful under the opposition clause. Shifting the tort lens to hone in on employer fault is a productive way to push back against the one-way use of tort principles that has so far taken hold in the lower courts to limit employer liability.

V. CONCLUSION

After the Court's packaging of retaliation as a tort in *Nassar*, any agenda to keep tort law out of Title VII retaliation law has already been lost. Even if the explicit importation of tort principles in this area could be halted, it would not prevent the surreptitious influence of tort-inspired limits on retaliation claims. Without naming tort law as the foundation for the reasonable belief doctrine and the manager rule, lower court decisions applying these doctrines bear the footprints of torts.[218] In these cases, the pull of at-will employment and the presumption—reflected in *Nassar*—that employers generally act for legitimate reasons has been driving courts' turn to torts.[219] Tort law may be here to stay, but there is room to resist its selective and one-way use to cut short employer liability. A more faithful use of tort principles would reinvigorate the concept of employer wrongfulness as the touchstone for the retaliation claim—a focus that has been lost in the lower court's piecemeal approach to tort-inspired principles.

This Article has argued that a big part of what makes the employer's conduct wrongful in retaliation cases bought under the opposition clause is that employers are benefitting from having anti-discrimination policies while punishing employees for using and implementing them. Like a tort, this wrongfulness exists apart from any contractual obligation not to retaliate for the use or implementation of these processes. Indeed, well-crafted anti-discrimination policies avoid creating such contractual rights for employees

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[218] *Cf.* 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, 454–56 (2013) (arguing that, although courts have not explicitly invoked the tort doctrine of res ipsa loquitur in Title VII cases, that is effectively what they have done in adopting the pretext proof method).

[219] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2531–32 (2013). The Court's concern, that a more lenient standard for proving causation-in-fact would result in excessive liability and invite frivolous claims, might have been exacerbated by retaliation law's allowance of proximity in time to infer proof of causation. To borrow an analogy from Bill Corbett, proximity is the res ipsa loquitur of retaliation: the closeness in time between the protected activity and the adverse actions speaks for itself, creating an inference of retaliatory intent. Corbett, *supra* note 218, at 486–91 (arguing that the *McDonnell Douglas* proof structure is a de facto res ipsa loquitur rule). Judicial anxiety about inferring causation from proximity may be driving courts to set limits on protected activity in order to keep the retaliation claim in check.

that would give rise to a breach of contract action.[220] Whether or not the employer made a legally binding promise not to retaliate, the core wrong stems from the violation of the social policy codified in Title VII. In addition to impeding the enforcement of statutory rights, there is the added wrong of employers inducing employees to address discrimination internally, within a legal framework that rewards employers for having anti-discrimination policies, while punishing employees for following or executing those very policies. Tort principles should be redirected to capture this core of wrongfulness at the heart of the retaliation claim.

[220] *See* Slater, *supra* note 43, at 98 (noting that the creation of contract rights by such policies can be avoided by the inclusion of appropriate disclaimers).