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What Is Even More Troubling about the "Tortification" of Employment Discrimination

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RESPONSE

What Is Even More Troubling About the "Tortification" of Employment Discrimination Law

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I. INTRODUCTION

Earlier in my career, I viewed myself primarily as an employment law scholar. Over time, I have come to think of myself less as an employment law person and more of a Torts and Professional Responsibility person. There are lots of reasons for that, but one is that I simply became frustrated with discrimination law. In some ways, it seemed that the courts had unnecessarily complicated certain issues at the expense of a focus on the real issue in any case: whether the employer engaged in illegal discrimination. I decided I much preferred the order and substantive focus in tort law to the unnecessary complexity and relentless focus on procedure that permeates discrimination law. One area of employment discrimination law that I remain interested in, however, is workplace retaliation, perhaps because, at its core, it seems "tortier" in nature than the discrimination side of discrimination law.

As Professor William Corbett discusses in his article, *What Is Troubling About the "Tortification" of Employment Discrimination Law?,* the Supreme Court in recent years has increasingly tortified employment discrimination law.[1] With its decision in *University of Texas Southwestern Medical Center v. Nassar*[2] in 2013, the Court has now used tort principles to help shape the development of my beloved retaliation law under Title VII and other

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[1] *See* William R. Corbett, *What Is Troubling About the "Tortification" of Employment Discrimination Law?*, 75 OHIO ST. L.J. 1027, 1028 (2014).

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

discrimination statutes. In theory, as a Torts guy, all of this should make me happy. But Professor Corbett's article effectively illustrates why it doesn't.

Corbett doesn't talk a lot about *Nassar*, viewing the decision mostly as an extension of prior precedent.[3] But I think that *Nassar* actually illustrates many of Corbett's concerns about the Court's use of tort law, most notably the fact that the Court does not seem very good at it and that this has potential negative implications for future issues. What's more, I think the decision is the clearest indication yet that a majority of the Court is intent on importing tort principles into employment discrimination law whenever possible, regardless of the appropriateness of that action. That's why Corbett's suggested approach concerning how courts should go about the task of relying upon tort law to flesh out the contours of employment discrimination is potentially so useful.

II. *UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR*: A RETROGRADE APPROACH TO TORT LAW

I admire Professor Corbett's attempts to serve as an "archaeologist[] of causation standards,"[4] and I think he does an admirable job of tracking the evolution of the Court's reliance on tort law.[5] In fact, my only quibble with his article is that I think he underestimates the importance of the Court's 2013 decision in *University of Texas Southwestern Medical Center v. Nassar*. Perhaps more than any of the Court's prior decisions, *Nassar* reveals just how intent the Court is on incorporating its view of tort law into statutory discrimination law.

Nassar involved a seemingly straightforward issue of statutory construction: the meaning of the word "because" in Title VII's anti-retaliation provision. Title VII most famously prohibits an employer from discriminating against an individual "because" of the individual's race or other characteristic as identified in the statute.[6] Elsewhere, the statute explains that this section is violated when the employee's race or other characteristic was "a motivating factor" for the employer's action.[7] Race is a "motivating factor" where "the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision."[8] Thus, an employee is not required to show that the adverse employment action would not have occurred "but for" his race or other protected characteristic.[9]

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[3] *See* Corbett, *supra* note 1, at 1030.

[4] *Id.* at 1052.

[5] I also think he's right when he identifies Justice O'Connor as being the most thoughtful of the justices when it comes to her application of tort law to employment discrimination statutes. *See id.* at 1062.

[6] 42 U.S.C. § 2000e-2(a) (2012).

[7] 42 U.S.C. § 2000e-2(m).

[8] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2523 (2013).

[9] *Id.* at 2522–23.

Another section of Title VII, Section 704(a), prohibits an employer from retaliating against an employee "because" the employee has opposed unlawful discrimination or participated in a proceeding under Title VII.[10] However, unlike Title VII's anti-discrimination section, Section 704(a) does not include the "motivating factor" language. Thus, the question in *Nassar* was what causation standard applies in a Section 704(a) retaliation case.[11]

The question was made more complex by virtue of the tortured legislative and judicial history surrounding Title VII and other anti-discrimination statutes. While Title VII requires only that a discrimination plaintiff establish that race was a motivating factor in the employer's decision,[12] the Age Discrimination in Employment Act (ADEA)[13] does not include the "motivating factor" language. In *Gross v. FBL Financial Services*, the Court concluded that the stricter but-for causation standard applies in age discrimination actions.[14] The majority opinion in *Gross* makes only one reference to tort law and its use of the but-for standard.[15] Instead, the decision is based largely on dictionary definitions and prior decisions.[16]

Based on its decision in *Gross*, it might have been possible for the Court to resolve *Nassar* purely on the grounds of precedent and text. And, to some extent, the majority opinion does rely on these grounds.[17] But it is tort law that gets the train rolling in *Nassar*. Rather than begin his argument with a resort to precedent and text, Justice Kennedy chose to begin with an examination of how tort law supported his conclusion that Section 704(a) employs a but-for causation standard.[18] In the second sentence, Kennedy explains, "The requisite relation between prohibited conduct and compensable injury is governed by the principles of causation, a subject most often arising in elaborating the law of torts."[19] Kennedy made clear early in the opinion that he viewed the statutory interpretation issue through the lens of common law. Referencing existing principles of construction, Kennedy observed that "Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will

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[10] 42 U.S.C. § 2000e-3(a).

[11] *Nassar*, 133 S. Ct. at 2523.

[12] Actually, that's not entirely right. As Professor Corbett notes, there are actually two different causation standards and two proof structures, "pretext and mixed motives—and we have no guidelines as to which applies to any given case." Corbett, *supra* note 1, at 1053. But, for the sake of this Response, I'll keep it simple.

[13] 29 U.S.C. § 623 (2012).

[14] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009).

[15] *Id.* at 176–77.

[16] *Id.* at 177.

[17] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525–28 (2013).

[18] *Id.* at 2524–25.

[19] *Id.* at 2522.

apply except 'when a statutory purpose to the contrary is evident.'"[20] It was only after establishing what Kennedy believed to be the background of common-law principles that he felt the need to focus more explicitly on text and precedent.

The problem—in the words of Professor Corbett—is that the majority adopts a "retrograde view" of the relevant tort law.[21] The issue in *Nassar* was whether Section 704(a) employs the simple but-for causation standard applied in straightforward tort cases, or whether it employs a standard more like that commonly applied in more complex cases involving what the *Restatement (Third) of Torts* refers to as "multiple sufficient causes."[22] According to Section 27 of the *Restatement*, "If multiple acts occur, each of which . . . alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm."[23] This standard is essentially a reformulation and clarification of the "substantial factor" test that is used when there are multiple causes contributing to a result.[24]

The leading case on the substantial factor approach is *Anderson v. Minneapolis St. Paul & Sault Ste. Marie Railway Co.*[25] There, the defendant's negligence resulted in a fire, which joined with another fire of unknown origin.[26] The resulting fire then destroyed the plaintiff's property.[27] Application of the traditional but-for causation test might have allowed the defendant to avoid liability: but for the defendant's negligence, the harm still would have occurred due to the presence of the other fire. But the Supreme Court of Minnesota was unwilling to permit a wrongdoer to avoid liability based on the fortuitous circumstance that there were multiple sufficient causes of the plaintiff's injury. Instead, the court held that in such cases, the plaintiff could recover when the defendant's negligence was a substantial or material factor in bringing about the harm.[28]

Anderson is just one example of a situation in which courts have been willing to depart from the but-for standard in the face of difficult causation issues. Perhaps the most famous other example is *Summers v. Tice*,[29] the case all Torts students remember as involving the two hunters who both were negligent in firing their guns. The problem for the plaintiff was that while both

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[20] Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (citations omitted) (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)).

[21] Corbett, *supra* note 1, at 1031.

[22] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 (2010).

[23] *Id.*

[24] *Id.* § 27 cmt. b.

[25] Anderson v. Minneapolis St. Paul & Sault Ste. Marie Ry. Co., 179 N.W. 45 (Minn. 1920).

[26] *Id.* at 46.

[27] *Id.*

[28] *Id.* at 48.

[29] Summers v. Tice, 199 P.2d 1, 2 (Cal. 1948).

hunters were negligent, only one of them caused his injuries and he was unable to prove who the responsible party was.[30] Again, strict application of traditional causation rules would have meant that the plaintiff's injuries would have gone uncompensated. Instead, the Supreme Court of California modified the causation element of a negligence claim in such cases to prevent injustice. In such cases, the burden shifts to each defendant to establish that he was not the actual cause of the plaintiff's injuries.[31]

Based on Justice Kennedy's stated desire to give effect to Congress's expectation that well-established common-law principles would be incorporated within a statute, one logical question that emerges is whether the substantial factor/multiple-sufficient-cause approach was well-established and constituted the background against which Congress was legislating when it enacted Title VII. A quick glance at virtually any Torts casebook might help to answer that question. While all get across the idea that the but-for standard is the norm, each devotes significant attention to some of the more complex causation-in-fact issues courts sometimes confront. For example, nearly all contain material on the *Summers v. Tice* problem. Relatedly, most include at least some mention of pharmaceutical cases, in which a plaintiff may face the almost insurmountable problem of trying to identify which manufacturer out of many produced the drug that actually caused her injuries.[32] Many of the casebooks contain material devoted to the "loss of chance" problem in medical malpractice cases, in which a doctor's negligence was statistically unlikely to have caused the ultimate harm suffered by a patient, but, nonetheless, may have deprived the patient of a chance of a better outcome.[33] Some include material designed to illustrate more general proof problems that plaintiffs face when confronted with a situation in which there are multiple possible explanations for the plaintiff's injuries, only one of which was the fault of the defendant.[34]

Importantly, virtually every casebook contains a section devoted to the multiple-sufficient-cause problem identified in the *Restatement*. Nearly all include—either as a primary case or in the notes—the venerable *Anderson* case involving the two fires set by separate parties, in which the court applied a

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[30] *Id.* at 2.

[31] *Id.* at 4.

[32] *See, e.g.*, Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1072 (N.Y. 1989).

[33] *See, e.g.*, Matsuyama v. Birnbaum, 890 N.E.2d 819, 823 (Mass. 2008); Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1353–55 (1981).

[34] For example, the book I use includes *Stubbs v. City of Rochester*, 124 N.E. 137 (N.Y. 1919), an old case from New York in which the plaintiff contracted typhoid fever. One possible explanation for the plaintiff's injury was that he drank water, supplied by the defendant, that was contaminated by sewage. *Id.* at 138. There were also a host of other possible explanations for the contraction of typhoid fever, none of which were the fault of the defendant. *Id.*; *see also* MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES 334 (9th ed. 2011).

substantial factor test.[35] The casebooks may differ in terms of how much attention they devote to this issue, but the but-for causation standard is invariably covered in less detail than the substantial factor/multiple-sufficient-cause standard.

Yet, as portrayed by the majority decision in *Nassar*, there is really only one meaningful causation standard in tort law: the but-for standard. Justice Kennedy notes that "[i]n the usual course," the causation-in-fact standard in tort law requires a plaintiff to establish that the harm would not have occurred but for the defendant's conduct.[36] He then cites numerous sections from the various Restatements of Torts to this effect. Justice Kennedy's string cite does include one reference to the exception for cases involving multiple sufficient causes, but Kennedy includes a quote from the *Restatement (Third) of Torts* in a parenthetical to the effect that "cases invoking the concept are rare."[37] (Nothing to see here, Justice Kennedy assures us.) He then includes a sentence summarizing for the reader the idea that the but-for standard is "textbook tort law."[38] He then wraps up with a third and final sentence concluding that "[t]his, then, is the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself."[39] And so in the space of one paragraph, consisting of three sentences, Justice Kennedy dispenses with virtually everything that makes the issue of causation-in-fact such a rich and intellectually challenging area of the law and reduces causation-in-fact to but-for causation.[40] The fact that but-for causation is merely the default rule from which courts depart in the face of more complicated causation issues is of little consequence.

To Justice Kennedy, there are several indications that a common-law rule served as part of "the background against which Congress legislated."[41] One is inclusion of the rule within the *Restatement*.[42] Indeed, Justice Kennedy cites to

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[35] *E.g.*, DAN B. DOBBS ET AL., TORTS AND COMPENSATION 215 (7th ed. 2013); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 292 (12th ed. 2010).

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

[37] *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. b (2010)).

[38] *Id.*

[39] *Id.*

[40] In a subsequent criminal law case in 2014, Justice Scalia again downplayed any alternate approaches to causation and repeated the notion that but-for causation "is one of the traditional background principles 'against which Congress legislate[s].'" Burrage v. U.S., 134 S. Ct. 881, 889 (2014) (quoting *Nassar*, 133 S. Ct. at 2525). Scalia continued to insist that decisions departing from the but-for test "when multiple sufficient causes independently, but concurrently, produce a result" are "rare." *Id.* at 890.

[41] *Nassar*, 133 S. Ct. at 2525.

[42] The "imprimatur" of the *Restatement* carries great weight with courts and often "substitutes for independent thought." Matthew W. Finkin, *Shoring Up the Citadel (At-Will Employment)*, 24 HOFSTRA LAB. & EMP. L.J. 1, 28 (2006).

the Restatements eight times in one string cite.[43] Yet, Justice Kennedy manages to largely ignore the fact that the Restatements have also always included the substantial factor test. *Anderson*, the leading case on the substantial factor test, was decided in 1920. The substantial factor test itself was enshrined in the first *Restatement of Torts* in 1934,[44] thirty years before Title VII's enactment.

A second relevant consideration to Justice Kennedy is how often a rule has actually been applied by the courts. Here, Kennedy has an ace up his sleeve. Yes, Section 27 of the *Restatement (Third) of Torts* lists an exception to the general but-for causation standard, Kennedy's string cite tells us, but the authors of the *Restatement* themselves note that cases invoking that exception are rare.[45] Therefore, according to Justice Kennedy, the default rule Congress meant to incorporate in Title VII is but-for causation. Yet, the authors of the *Restatement* present a somewhat more complicated view of the extent to which the substantial factor/multiple-sufficient-cause rule has actually been applied in practice. A comment notes that "courts have *long imposed* liability when a tortfeasor's conduct, while not necessary for the outcome, would have been a factual cause if the other competing cause had not been operating."[46] Indeed, there were numerous cases decided well prior to the passage of Title VII in which courts applied the substantial factor outlined in the *Restatement*.[47] A Reporters' Note accompanying Section 27 notes that "[t]here is near-universal recognition of the inappropriateness of the but-for standard for factual causation when multiple sufficient causes exist" and then cites numerous cases to this effect.[48] Thus, the comments accompanying Section 27 suggest that the substantial factor rule is hardly the anomaly in Tort law that Justice Kennedy's opinion indicates and that decisions invoking the concept are less rare than they might seem.

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[43] *Nassar*, 133 S. Ct. at 2525.

[44] RESTATEMENT OF TORTS § 432(2) (1934).

[45] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. b (2010). The Reporters' Note offers one possible explanation as to the supposed dearth of decisions involving this concept: "One reason for the paucity of multiple-sufficient-cause cases may be that this phenomenon's presence frequently is not recognized." *Id.* § 27 cmt. b, Reporters' Note.

[46] *Id.* § 27 cmt. a (emphasis added).

[47] For example, in *Rey v. Colonial Nav. Co.*, 116 F.2d 580, 581 (2d Cir. 1941), the plaintiff contracted tuberculosis. His resistance to tuberculosis had been lowered, either as a result of having syphilis (which was not the fault of the defendant) or as a result of damp sleeping quarters (which was the fault of the defendant). *Id.* at 582–83. The Second Circuit cited Section 432 in support of the idea that where there were concurring causes of an injury and there was sufficient evident that the defendant's negligence was a substantial factor in bringing about the injury, liability was proper. *Id.* at 583. *Maxfield v. Maxfield*, 151 A.2d 226, 228 (N.H. 1959), involved a plaintiff who slipped and fell on some butternuts on a path while rushing to save her car, which was engulfed in flames. The defendant was not at fault for the presence of the butternuts, but was at fault for the fire. *Id.* at 229–30. Citing Section 432, the New Hampshire Supreme Court concluded that liability could attach. *Id.* at 230.

[48] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. a, Reporter's Note (2010).

Finally, any question as to whether the rule outlined in Section 27 formed part of the background against which Congress legislated might be resolved by considering the extent to which the rule had effectively become "textbook tort law." Here, Justice Kennedy quotes *Prosser & Keeton*—the most famous hornbook on the subject of tort law—in support of his conclusion that the but-for causation test is the only causation test of any moment.[49] However, Kennedy's opinion omits *Prosser & Keeton*'s fairly lengthy discussion of the substantial factor rule, a rule which the authors note "has found general acceptance."[50] Kennedy also fails to cite the other leading hornbook on tort law, which states matter-of-factly that "[w]hen each of two or more causes is sufficient standing alone to cause the plaintiff's harm, courts usually drop the but-for test."[51] Finally, there is the fact, previously mentioned, that pretty much every modern Torts casebook devotes significant attention to the multiple-sufficient-cause problem.[52] Of course, these modern casebooks were not part of the background against which Congress acted in passing Title VII. Fortunately, my school's library has a bunch of the books that were in print around that time, and, as it turns out, they tend to deal with the causation question in a similar manner. The casebooks devote significant time to more complex causation issues. So, for example, *Summers v. Tice* appears,[53] as does *Anderson* and its substantial factor test in the case of multiple sufficient causes.[54]

When considered alongside other recent decisions in which the Court has tortified employment discrimination law, *Nassar* suggests that a majority of the Court is intent on incorporating tort law into statutory employment discrimination law. What's more, *Nassar* suggests that a majority of the Court isn't really interested in expending the energy necessary to do it well. As Professor Corbett notes, both tort law and discrimination law share a core principle of seeking to deter undesirable conduct.[55] Retaliation provisions, in particular, exist in large measure as a means of furthering the deterrent goals of discrimination law. As such, *Nassar* seems like the kind of situation in which tort law and common-law decision-making might actually be useful. In the case of multiple causes in tort actions, the Second Circuit Court of Appeals has noted that wrongful conduct "will be more effectively deterred by imposing liability than by giving the wrongdoer a windfall in cases where an all-sufficient

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[49] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525 (2013) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 265 (5th ed. 1984)).

[50] KEETON, *supra* note 49, § 41 at 267.

[51] DAN B. DOBBS, THE LAW OF TORTS § 189 (2d ed. 2011).

[52] *See supra* notes 32–35 and accompanying text.

[53] CHARLES O. GREGORY & HARRY KALVEN, JR., CASES AND MATERIALS ON TORTS 11 (1959).

[54] FRANCIS H. BOHLEN & FOWLER V. HARPER, CASES ON THE LAW OF TORTS 200 (4th ed. 1941); WILLIAM L. PROSSER & JOHN W. WADE, TORTS: CASES AND MATERIALS 277 (5th ed. 1952).

[55] *See* Corbett, *supra* note 1, at 1045.

innocent cause happens to concur with his wrong in producing the harm."[56] Yet, there is no hint in *Nassar* about how the but-for standard furthers the deterrent goal of Title VII, nor is there any meaningful effort to analyze tort law in any serious manner.

III. *NASSAR* AND THE CONTINUING TORTIFICATION OF EMPLOYMENT DISCRIMINATION LAW

If, as I believe, *Nassar* really does signal that a majority of the Court is not just inclined but in fact anxious to use tort law to fill in the gaps of statutory discrimination law, Professor Corbett's article couldn't come at a better time. Corbett's assessment of the problems caused by the Court's approach is spot on. The Court's application of its "retrograde view" of tort law has "resulted largely in a complex and almost chaotic common law of employment discrimination, which ill serves the grand objectives of the statutes."[57] The big concerns are what the Court will do in the future and whether it will find a principled way of applying tort law.

The Court's current, superficial approach to incorporating tort law might potentially lead to other undesirable outcomes. Corbett identifies one tort theory that might find its way into employment discrimination law: assumption of risk.[58] Agency principles are another possibility. The Court has already imported agency principles into its sexual harassment jurisprudence in *Burlington Industries, Inc. v. Ellerth*[59] and *Faragher v. City of Boca Raton*.[60] The Court's efforts in this regard were met with a fair amount of criticism, including the complaint that the Court had misread an obscure provision of the *Restatement (Second) of Agency* in formulating a new standard for employer liability in sexual harassment cases.[61] Indeed, Professor Paula Dalley has referred to the Court's application of this agency rule—which was not even retained in the *Restatement (Third) of Agency*—as "bad applications of imperfectly understood legal rules."[62] There are other situations in which the Court might be tempted to borrow from agency law—or, better stated, its own version of agency law—in order to supplement existing statutory discrimination

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[56] Basko v. Sterling Drug, Inc., 416 F.2d 417, 429 (2d Cir. 1969) (quoting HARPER & JAMES, THE LAW OF TORTS § 20.2, at 1123 (1956)). This echoes a similar idea expressed by Judge Learned Hand years earlier: "the single tortfeasor cannot be allowed to escape through the meshes of a logical net. He is a wrongdoer; let him unravel the casuistries resulting from his wrong." Navigazione Libera T.S.A. v. Newtown Creek Towing Co., 98 F.2d 694, 697 (2d Cir. 1938).

[57] Corbett, *supra* note 1, at 1031.

[58] *See id.* at 1070–71.

[59] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

[60] Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[61] Paula J. Dalley, *All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment*, 104 W. VA. L. REV. 517, 519 (2002).

[62] *Id.*

law. Perhaps the most notable situation in which agency principles might prove relevant is in the case of employer liability for coworker retaliation, an area where a circuit split exists and courts have already imported common-law agency principles with mixed results.[63]

The Court's treatment of tort law in *Nassar* is also likely to stunt the development of employment discrimination law in unfortunate ways. Corbett offers the possibility that the tort concept of proportional liability might (and he emphasizes *might*) be suitable for use in discrimination cases.[64] But the Court's rudimentary approach to tort law in *Nassar* might serve as a clue to lower courts and deter them from even considering the adoption of more nuanced legal principles like proportional liability. Moreover, the Court's insistence in *Nassar* that the tort principle in question must have been part of "the background against which Congress legislated"[65] might prevent any meaningful consideration of the loss-of-chance theory that Corbett identifies as a possible candidate for inclusion. Aside from the fact that loss of chance is a fairly exotic doctrine for a Court that views causation in fact solely in terms of but-for causation, loss of chance was certainly not "textbook hornbook law" at the time Title VII was enacted.

IV. CONCLUSION

All of which is somewhat depressing for someone who loves torts and still at least has feelings for employment discrimination law. The Court's insistence in *Nassar* that the relevant common-law principle must have served as part of the background of the law when Congress enacted Title VII may prevent lower courts from considering potentially relevant theories. More generally, *Nassar*'s retrograde view of tort law has already negatively impacted the development of discrimination law and actually makes it more likely that such decaying all-or-nothing tort theories as assumption of risk and contributory fault will somehow find their way into discrimination law.

What should be done? Professor Corbett is exactly right that Congress needs to assume some responsibility and fix the unnecessarily complex statutory discrimination regime that currently exists. And, unfortunately, Corbett is also probably exactly right that this isn't likely to happen to anytime soon.

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[63] *See* Alex B. Long & Sandra F. Sperino, *Diminishing Retaliation Liability*, 88 N.Y.U. L. REV. ONLINE 7, 7–8 (2013). Several courts utilize a negligence standard, in which an employer is liable if the employer had actual or constructive knowledge about the coworker harassment but failed to take adequate remedial action. *E.g.*, Moore v. City of Philadelphia, 461 F.3d 331, 349 (3d Cir. 2006). In contrast, the Fifth Circuit, applying its view of agency principles, requires that a plaintiff satisfy the extremely difficult threshold that the coworker harassment was *in furtherance* of the employer's business. *See* Hernandez v. Yellow Transp., Inc., 670 F.3d 644, 649, 657 (5th Cir. 2012).

[64] *See* Corbett, *supra* note 1, at 1071–76.

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

This makes developing a more robust approach to analyzing the applicability of common-law principles to statutory discrimination law the next-best option. As Professor Corbett demonstrates in his discussion of Justice O'Connor's approach to the issue, there is certainly precedent for such an approach. Perhaps it is not too late for the courts to adopt the kind of rigorous analytical approach to the question of when common-law principles should be adopted that Corbett suggests.