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Looking to Torts: Exploring the Risks of Workplace Discrimination

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Looking to Torts: Exploring the Risks of Workplace Discrimination

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I. INTRODUCTION

Thirty years of social science research has documented that implicit bias influences individual behaviors and group-based decisions. In reliance on this research, many scholars argue that Title VII's predominant focus on discriminatory intent fails to regulate decisions influenced by implicit bias in the workplace.[1]

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[1] Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 8 (2006); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2018–30 (1995); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95–99 (2003); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 969 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1071–78 (2006); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1027–52 (2006); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1276–91 (1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) [hereinafter Krieger, *Categories*]; David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993); *see also* Ian

This short reflection Article explores the possibility of regulating implicit bias in the workplace by cautiously turning to tort law.[2] Caution is warranted; we should avoid treating Title VII as the equivalent of a common law tort without appreciating their different purposes and objectives.[3] With that in mind, tort law is a logical and valuable legal field to draw from. Formally, "[t]he purpose of the law of torts is to adjust [for] losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another."[4] In reality, tort law does far more than compensate for injuries; it serves as a legal reflection of our cultural and societal values.[5] As I explain to students, tort law is one of our most basic organizing systems for defining harms, and it is important, especially for those interested in civil rights work, to appreciate it.[6] Further, the themes and values of tort law are inescapable in a discussion on regulating conduct outside the confines of an intentional discrimination framework.

In an early critique of the intent doctrine in equal protection law, Professor Kenneth Karst explains:

> Racism, 1970's-style, is a living system, just as Jim Crow was a system. The main difference between the two systems is that today's racism inflicts a greater proportion of its harms unthinkingly. One who is stumbled over often enough may, understandably, notice that those cumulative impacts bear a certain functional resemblance to kicks.[7]

Karst reminds us that both intentional and unintentional discrimination can co-exist and that the harms from both are not dissimilar and are detrimental to

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Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1489 (1996) (arguing that disparate impact liability may actually induce hiring discrimination against minorities); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1496–97 (2005) (introducing the concept of "racial mechanics").

[2] Implicit bias is one of many terms used to describe this cognitive phenomenon. Among those terms circulating in scholarship are "behavioral bias," "cognitive bias," "unreflective bias," "aversive racism," "institutionally-enabled racism," "non-deliberate discrimination," "unexamined discrimination," "unintended discrimination," a "mechanism of discrimination," "unconscious prejudice," and "stereotyping."

[3] *See* Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 3–4 [hereinafter Sperino, *Discrimination*] (identifying the problems of incorporating proximate cause into employment discrimination law).

[4] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 6 (W. Page Keeton ed., 5th ed. 1984) (quoting Cecil A. Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238 (1944)) (internal quotation marks omitted).

[5] *Id.* at 16 ("When the interest of the public is thrown into the scales and allowed to swing the balance for or against the plaintiff, the result is a form of 'social engineering.'").

[6] *See, e.g.*, Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 WASHBURN L. J. 249, 249 (1998).

[7] Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 51 (1977).

society. Karst's reference to stumbles and kicks is apropos. In the "real world," most tort injuries stem from elbows and stumbles, not fists and kicks.[8] Importantly, tort law recognizes causes of action for intended and unintended injuries in order to achieve important objectives. The tort system is a fundamental vehicle through which society defines legally cognizable harms in reliance on concepts of fault, individual and community interests, social values, morality, compensation, deterrence, fairness, and—especially important for this Article—risk-reduction.[9]

Title VII, however, is hyper-focused on discriminatory intent and a seek-and-find-the-"bad-actor" framework.[10] In light of the advances in our understanding of implicit bias, the objectives of Title VII—to end workplace discrimination, compensate those discriminated against, and deter future violations—may be more effectively achieved by rooting out conduct in the workplace that poses risks of discrimination.[11] As many scholars have contended, Title VII may better achieve its purpose by expanding its narrow definition of discrimination to explicitly include a negligence theory of recovery. After all, what constitutes discrimination has continually evolved and should continue to do so. Until 1964, when Title VII was enacted, an employer could explicitly refuse to hire individuals because of their race. In 1971, the Supreme Court interpreted Title VII to include disparate impact claims to address employment practices.[12] It was not until 1986 that the Supreme Court recognized sexual harassment claims as actionable.[13] This evolving recognition of discriminatory harms should continue to include the developments in our understanding of how discrimination operates, including through conduct driven by implicit bias.[14] This leads us to the looming

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[8] Jennifer B. Wriggins, *Domestic Violence in the First-Year Torts Curriculum*, 54 J. LEGAL EDUC. 511, 512 n.7 (2004) (discussing a 1992 Bureau of Justice Statistics report that revealed that 10,879 cases, or 2.9 percent of the tort cases, in the country's 75 largest counties were intentional tort cases).

[9] In determining which interests are actionable, the tort law system balances a number of factors, including the plaintiff's claim of protection against an injury to an interest, the defendant's freedom of action to achieve her objectives, and the interests of the community and society. *See* KEETON ET AL., *supra* note 4, at 6.

[10] *See* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1290–93; Krieger, *Categories*, *supra* note 1, at 1164 ("[T]he way in which Title VII jurisprudence constructs discrimination, while sufficient to address the deliberate discrimination prevalent in an earlier age, is inadequate to address the subtle, often unconscious forms of bias that Title VII was also intended to remedy.").

[11] For a discussion on the objectives of anti-discrimination laws, see Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–21 (1975).

[12] Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 74 (2011) [hereinafter Sperino, *Rethinking*] (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

[13] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986).

[14] *See* Sperino, *Rethinking*, *supra* note 12, at 82 (explaining that "[i]n the first decades after Title VII's enactment, the courts were constantly considering how to shape the law to

question for purposes of this Article: Is it feasible to regulate implicit bias by rooting out the risks of discrimination? I do not have a definitive answer; however, the first step is to simply ask the question.[15]

Part II will offer a brief overview of Title VII's disparate treatment framework and then turn to a short discussion of the legal scholarship on implicit bias in the workplace and how the intent requirement falls short in capturing it. Part III will draw upon lessons from tort law to argue in favor of a role for Title VII to address implicit bias. First, this part will discuss tort law's focus on risk-reduction and offer a simple example to start a conversation about the risks of conduct that lead to workplace discrimination. Second, this part will briefly discuss the historical development of the torts of intentional and negligent infliction of emotional harm as an example of the benefits of recognizing these concurrent claims to remedy the same class of harm. Finally, this part will briefly discuss the benefits of tort law's view of negligent conduct as less morally blameworthy, a necessary value shift, in my view, to regulate implicit bias in the workplace. If everyone engages in implicit bias, treating it as less culpable may reduce defensiveness and minimize the characterization of defendants as racist or bad actors.

II. TITLE VII AND IMPLICIT BIAS

A. *Proving Intent to Discriminate*

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against applicants and employees on the basis of race, color, sex, religion and national origin.[16] Courts have developed two separate tracks for Title VII discrimination law: disparate impact and disparate treatment.[17] Disparate impact claims, viewed as a form of strict liability, require plaintiffs to prove that a specific employment practice has a disproportionate effect on a protected group, which can only be rebutted if the employer can prove that the practice is a job-related business necessity.[18] This Article will focus

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handle new understandings of how discrimination occurs" but this has declined since the late 1980s).

[15] For an interesting exploration of whether "unconsciously biased action fall[s] within the legal concept of actionable discrimination," see Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L. J. 67, 67, 83–100 (2010).

[16] Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012). The two other major employment discrimination statutes are the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634 (2012), and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12300 (2012).

[17] Sperino, *Discrimination*, *supra* note 3, at 12.

[18] *Id.* at 13. For the limitations of disparate impact, see Melissa Hart, *Disparate Impact Discrimination: The Limits of Litigation, the Possibilities for Internal Compliance*, 33 J.C. & U.L. 547, 548–51 (2007).

exclusively on the second track disparate treatment, which is the basis for the majority of employment discrimination claims.

Disparate treatment cases are classified as either a mixed-motive case or a single-motive case.[19] The mixed-motive cases are those that offer both a legitimate and a discriminatory reason for the employment decision in question.[20] If there is no mixed-motive then the case is viewed as a single motive case and is analyzed through the three-part *McDonnell Douglas* burden-shifting framework, which usually involves some variation of the following steps.[21]

First, the plaintiff must prove a prima facie case by showing that: (1) the plaintiff belongs to a protected class; (2) the plaintiff applied and was qualified for a job the employer was seeking to fill; (3) the employer rejected the plaintiff; and (4) the employer continued to seek applicants or the position was filled by someone else.[22] Once the prima facie case is met, a rebuttable presumption of discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the decision.[23] If the defendant meets its burden of production, the plaintiff must prove that the defendant's reason was a pretext for intentional discrimination.[24]

Although the text of Title VII simply prohibits discrimination against an individual "because of . . . race, color, religion, or sex,"[25] courts have interpreted it to require discriminatory intent. Thus, both direct evidence and circumstantial evidence regimes seek to determine whether the employer engaged in intentional discrimination.[26] Courts have yet to explicitly adopt a Title VII negligence theory.[27]

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[19] Sperino, *Discrimination*, *supra* note 3, at 12.

[20] *Id.* at 13. As Professor Sperino explains, "[s]ome circuits will allow a plaintiff to make a case of discrimination without resorting to *McDonnell Douglas*, if the plaintiff has 'either direct or circumstantial evidence that supports an inference of intentional discrimination.'" *Id.* at 15 n.88 (citing Coffman v. Indianapolis Fire Dep't, 578 F.3d 559, 563 (7th Cir. 2009)).

[21] *Id.* at 15–16.

[22] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[23] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000); Sperino, *Discrimination*, *supra* note 5, at 15–16.

[24] *Reeves*, 530 U.S. at 143; Sperino, *Discrimination*, *supra* note 3, at 15–16.

[25] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012).

[26] Sperino, *Discrimination*, *supra* note 3, at 12. Other intentional discrimination frameworks under disparate treatment are harassment and pattern and practice. *Id.* at 13.

[27] *Id.* at 13–14; Jalal v. Columbia Univ. 4 F. Supp. 2d 224, 241 (S.D.N.Y. 1998) ("Title VII . . . provides no remedy for negligent discrimination (if such a thing is possible): Only action taken with an *intent* to discriminate is prohibited.").

As the next section explains, the focus on intent may leave much workplace discrimination "because of race, color, religion, or sex" unregulated.[28]

B. *The Intent Requirement's Failure to Capture Implicit Bias*

Many people think of discrimination as a strict dichotomy: an individual or system acts intentionally, which means that race is consciously used in a decision, or unintentionally, which means that race is not a factor in the decision. This "either-or approach" is reflected in Title VII discrimination law as well.[29]

As implicit bias literature in social science and legal scholarship has proliferated, the either-or approach has increasingly come under scrutiny as failing to capture discrimination in the workplace.

In 1987, in *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, Charles Lawrence used social science research to expand on the inherent flaw in the discriminatory intent requirement in equal protection law.[30] Lawrence writes: "In short, requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works."[31] He then proposes two theoretical explanations for the unconscious nature of racially discriminatory beliefs and ideas—Freudian theory and cognitive psychology.[32]

In 1993, in *Negligent Discrimination*, David Oppenheimer compiles the results of an array of surveys as well as field and laboratory experiments—all demonstrating a commitment to non-discrimination in employment by whites, yet upon closer scrutiny, also revealing high levels of covert racism.[33] As a result of his compilation, Oppenheimer concludes that "a theory of discrimination liability that focuses on intentional wrongdoing will inevitably

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[28] This Article will not explicitly address causation. For exploration of causation generally, see Martin Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489 (2006).

[29] Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 743 (2005); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 748–49 (2001); Flagg, *supra* note 1, at 2014–15; Krieger, *Categories*, *supra* note 1, at 1162 nn.2–3. Conversely, a number of scholars argue that Title VII does cover unconscious bias. *See, e.g.*, Ann C. McGinley, *¡Viva la Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 420 (2000).

[30] Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324–25 (1987).

[31] *Id.* at 323.

[32] *Id.* at 331–56.

[33] Oppenheimer, *supra* note 1, at 903–15.

miss the mark; it will condemn only a small percentage of the wrongful conduct Title VII was enacted to eliminate."[34]

In 1995, in *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, Linda Krieger lays out four basic assumptions of existing employment discrimination law: that intergroup discrimination results from discriminatory motive or intent;[35] that unless discriminatory intent or motive is present, decision makers act objectively and judge rationally;[36] that discrimination is something that occurs "at the moment a decision is made;"[37] and that if an employee's race or gender is playing a role in decision making, the employer will be aware of it.[38] Krieger then turns to social cognition theory to extensively debunk these assumptions.[39] She explains that stereotyping is a normal process that stems from how people categorize and process information and that as a result, these stereotypes inevitably bias intergroup judgment and decision making.[40] She also demonstrates that cognitive biases influence decisionmakers well in advance of the moment of decision and beyond the decisionmakers' self-awareness.[41] She concludes that cognitive biases can be both unintentional and unconscious,[42] and that these subtle forms of bias represent today's most prevalent type of discrimination.[43]

In 2001, in *Second Generation Employment Discrimination: A Structural Approach*, Susan Sturm argues that discrimination is pervasive in structural and organizational practices.[44] She describes this as "second generation" employment discrimination—that is, a more subtle and complex form of discrimination.[45] Sturm offers a "framework that makes visible these emerging and converging patterns of response to second generation discrimination."[46]

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[34] *Id.* at 899.

[35] Krieger, *Categories*, *supra* note 1, at 1166. In 1997, Professors Mahzarin Banaji (Harvard), Tony Greenwald (University of Wisconsin) and Brian Nosek (University of Virginia) introduced the Implicit Association Test (IAT) that measures unconscious and implicit attitudes held by individuals. Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERS. & SOC. PSYCHOL. 1464, 1464 (1998). These tests have had a significant impact on the level and intensity of the legal and academic dialogue on implicit bias.

[36] Krieger, *Categories*, *supra* note 1, at 1167.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 1186–88.

[40] *Id.* at 1188.

[41] Krieger, *Categories*, *supra* note 1, at 1188. .

[42] *Id.*

[43] *Id.* at 1164 ("[S]omething about the way the law was defining and seeking to remedy disparate treatment discrimination was fundamentally flawed.").

[44] Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

[45] *Id.* at 460–61.

[46] *Id.* at 462.

According to Sturm, a successful structural approach must combine the efforts of employers, employees, lawyers, courts, and mediating organizations to construct a regime that encourages employers to engage in effective problem solving around discrimination.[47]

In addition to social science developments regarding implicit bias in individual behavior, organizations, and structural systems,. legal scholars have also begun to document studies about such bias displayed in group conduct as well. In 2002, Michelle Adams's article, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, explains the social identity theory suggesting that unconscious (and conscious) biases do not operate solely through individual action but are also influenced by group identity.[48] Adams explains, "social science scholarship has recognized that discriminatory behaviors are not just the result of personal, individual cognitive-process distortions, but are a problem of collective action."[49] Through this process, self-identified members of groups engage in behaviors that lead to in-group favoritism as well as out-group derision.[50] In my own scholarship, in *The Group Dangers of Race-Based Conspiracies*, I argue that social identification on the basis of race can lead to group dynamics of racial loyalty, racial persuasion, and racial conformity.[51] The group dynamics occur even in the absence of intent. As Ann McGinley has explained, "as defined by the courts, 'discriminatory intent' represents an outdated view of human behavior, a view contradicted by overwhelming scientific evidence."[52]

For every skeptic of the intent requirement's ability to capture the full range of discrimination, however, there is a believer that it is the appropriate solution to discrimination in the workplace.[53] In 1999, Amy Wax in *Discrimination As Accident*, counters the argument that implicit bias leads to

[47] *Id.* at 463–65.

[48] Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1093 (2002).

[49] *Id.*

[50] *Id.* at 1102–03.

[51] *See generally* Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55 (2006).

[52] McGinley, *supra* note 29, at 418; *see also* Chamallas, *supra* note 29, at 749.

[53] *See* David Copus, *A Lawyer's View: Avoiding Junk Science*, *in* EMPLOYMENT DISCRIMINATION LITIGATION: BEHAVIORAL, QUANTITATIVE, AND LEGAL PERSPECTIVES 450, 453 (Frank J. Landy ed., 2005); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1028 (2006); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1132–33 (1999) [hereinafter Wax, *Discrimination*]; Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 985 (2008) [hereinafter Wax, *Discriminating*] ("[W]hat really matters, and what ought to matter to law, is whether people are treated worse because of their race—or other protected characteristics, such as sex—in the real world."); Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCHOL. 553, 553 (2005).

discriminatory decisions in the work place.[54] According to Wax, because society does not understand implicit bias or whether this bias actually impacts real world decisions, the cost of trying to remedy implicit bias outweighs the potential positive impact of liability.[55] She argues, "[s]uch biases, if they operate at all, may . . . affect the workplace 'bottom line' only erratically and infrequently.[56]

There is an ongoing and intense debate surrounding implicit bias. Within this debate there are efforts to define harms, to balance the interests of employers and employees, to elucidate concepts of fault, and to define the scope of anti-discrimination law. This Article does not offer additional social science data to the debate; instead, in light of the literature that exists, it suggests that it may be helpful to contemplate a framework that seeks to reduce the "risks" of discrimination in the workplace.

III. LESSONS FROM TORT LAW

Tort law is viewed as embodying three theories of recovery—strict liability, intent, and negligence. Negligence is the predominant theory and its focus "is a matter of risk—that is to say, of recognizable danger of injury."[57] Importantly, what is viewed a "recognizable" danger is not determined based on an individual actor's state of mind but is based on the collective judgment of the community or society about what conduct is or is not reasonable under the circumstances. "In most instances, [negligence] is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his act."[58] The actor faces negligence liability for causing injury to another based on a collective judgment that—from an external viewpoint that society imposes on the individual—such conduct poses unacceptable risks.

As previously discussed, there is a significant gap between Title VII's quest for the intentional discriminator and what we now know about implicit bias in the workplace. Negligence—or in keeping with our advisory to be cautious, at least negligence concepts—may serve as a bridge for this divide.

A. *Some Preliminary Thoughts on Regulating the Risks of Discrimination*

To the extent that there have been arguments in favor of a Title VII negligence framework, scholars have focused on negligence in the structural or organizational processes in which the employer allows implicit bias (or

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[54] Wax, *Discrimination*, *supra* note 53, at 1134.
[55] *Id.* at 1132–34.
[56] *Id.*
[57] KEETON ET AL., *supra* note 4, at 169.
[58] *Id.*

intentional discrimination for that matter) to go unchecked. In other words, the focus is primarily on the employer's failure to take reasonable steps to reduce the risk of discrimination in its organizational structure or management training.[59] I applaud these efforts. However, in this section, I will focus solely on the risks of discrimination in the context of a single decisionmaker and do so by way of example.

In a typical negligence case, the "danger" in question is typically of a physical injury. The fact-finder must observe the injury at issue, make an assessment of the conduct that led to the injury, and then decide whether a reasonable person could foresee that the conduct posed risks of the same type or class of injury that occurred.[60] The inquiry is not whether the actor intended or desired for the injury or its consequences to occur. The fact-finder must determine if there is a "risk of such consequences, sufficiently great to lead a reasonable person in his position to anticipate them, and guard against them."[61] Because the focus in negligence is whether the actor's conduct poses unreasonable risks of injury, negligence is thus understood as an external, objective standard—it is a norm by which community members are expected to conduct their affairs.[62]

So, how would such a negligence approach operate in workplace discrimination? In the face of a hiring, firing, or failure to promote "because of race, color, religion or sex," the inquiry would not focus on intent to discriminate but would focus on whether the decisionmaker's conduct posed an unreasonable risk that race was a factor in the decision. This determination may have a two-part inquiry. First, did the decisionmaker's conduct create or foster a risk that race was a factor in his or her decision. Second, was the risk of race as a factor in the decision enough to be an "unreasonable" risk? An example is instructive.

In *Ash v. Tyson Foods*, two African-American employees, Anthony Ash and John Hithon, sued Tyson Foods for race discrimination after they were passed over for promotion, and the two available slots were filled with white males in Tyson Food's Gadsen, Alabama, plant.[63] Upon the plaintiffs' successful jury verdict for both compensatory and punitive damages, the federal district court granted, in part, Tyson Food's motion for judgment as a matter of law.[64] The court held that the evidence was insufficient to show pretext (or intentional discrimination) under the burden-shifting framework of *McDonnell Douglas*.[65] The plaintiffs met the prima facie case, but the

[59] Oppenheimer, *supra* note 1, at 900 (explaining the existence of negligence in Title VII, including disparate impact and sexual harassment law).

[60] RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965) ("The actor is required to do what this ideal individual would do in his place.").

[61] KEETON ET AL., *supra* note 4, at 169.

[62] *Id.*; RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965).

[63] Ash v. Tyson Foods, Inc., 546 U.S. 454, 455 (2006).

[64] *Id.*

[65] *Id.*

defendant Tyson Foods offered legitimate, non-discriminatory reasons for the failure to promote Ash and Hithon. The ultimate issue in the case came down to whether comments by the supervisor were a pretext for intentional discrimination.

The Eleventh Circuit Court of Appeals affirmed the district court in part and reversed in part. The court reversed as to Hithon, finding that he proved intentional discrimination based on evidence that he was interviewed after the decisionmaker had already hired one of the white recipients of the job, making the legitimate reasons raised by employer to be pretextual.[66] As for Ash, the court upheld his dismissal because the evidence did not establish intentional discrimination, including the decisionmaker's use of the term "boy" to refer to Ash and other African-American employees.[67] The court held that "[w]hile the use of [the term] 'boy' when modified by a racial classification like 'black' or 'white' is evidence of discriminatory intent, . . . the use of 'boy' alone is not evidence of discrimination."[68]

The United States Supreme Court, in a per curiam opinion, reversed the Eleventh Circuit and explained that context matters. "[I]t does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage."[69] Upon remand, despite the Supreme Court's guidance, the Eleventh Circuit reinstated its position that the record did not support an inference of intentional discrimination.[70] It found that the comments were "conversational" and "non-racial in context," and no reasonable jury could find unlawful (i.e., intentional) discrimination.[71]

The *Ash* facts and outcome are typical of the proof of discriminatory intent in circumstantial evidence cases as courts try to interpret the meaning of biased comments or "stray remarks."[72] How would this case by analyzed from a negligence approach? The central focus would be whether the decisionmaker's conduct posed an unreasonable risk of race being a factor in Ash's failure to obtain the promotion.[73]

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[66] Ash v. Tyson Foods, Inc., 129 F. App'x 529, 534 (11th Cir. 2005). The reasons were that Hithon lacked a college degree, he was a supervisor at a financially troubled plant, and he lacked experience outside of the plant. *Id.*

[67] *Id.* at 533.

[68] *Id.* Hithon had additional evidence to support his claim.

[69] Ash, 546 U.S. at 456 (2006). The court also disagreed with the Eleventh Circuit's position on Hithon's arguments that he had superior qualifications than those hired, which was that it would not second guess the employer's decision unless the facts "jump off the page." *Id.*

[70] Ash v. Tyson Foods, Inc., 190 F. App'x 924, 927 (11th Cir. 2006).

[71] *Id.* at 926.

[72] For a history of the stray remarks doctrine see Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 149 (2012).

[73] It is beyond the scope of this Article to explore the different tests to assess unreasonableness.

Should the supervisor have known that his conduct created or fostered a risk of race being a factor in the employment decision? As with a negligence analysis in torts, the facts would dictate whether there was a risk and whether the degree of risk was low or high. The fact-finder must assess circumstances of the case and determine whether a risk of race being a factor was present. If so, the fact-finder must ask whether the risk was high enough to create an unreasonable risk of race being a factor in the decision.[74]

In the *Ash* case, the "boy" comments, taken in context, including "inflection, tone of voice, local custom, and historical usage,"[75] would go to the assessment of the degree of the risk of discrimination (race being a factor in the decision), not whether it proved intent to discriminate. The parties could offer evidence and arguments in support of their respective positions—the plaintiff would offer evidence to prove that the risk was high, while the defendant would offer evidence to show that the risk was low or non-existent. For example, as to the use of the term "boy," a fact-finder may find that if the comment occurred two years prior, the risk may be lower; if it occurred every week, the risk could be viewed as significantly higher.

Also, the biased comment or stray remark would not be viewed in isolation but in context with other factors in analyzing the risks of discrimination (i.e., race being a factor in the decision)—the qualifications of the plaintiff and the selected candidate, the evidence of lying by the defendant, the timing of events, shifting job requirements, whether the decisionmaker was the person who hired the plaintiff (same-actor inference), and other important facts that might be relevant.[76]

Importantly, both parties could use what we know about implicit bias to educate the jury.[77] For example, if the supervisor in Ash had objected to the plaintiff's interpersonal skills as a reason to deny him the promotion, the plaintiff could offer social science literature to show that subjective judgments

[74] I avoid using the term "reasonable" because it seems incompatible with the term discrimination. However, it could be that the fact-finder finds that race was not sufficiently present to create an unreasonable risk.

[75] Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006). The court also disagreed with the Eleventh Circuit's position on Hithon's arguments that he had superior qualifications than those hired, which was that it would not second guess the employer's decision unless the facts "jump off the page." *Id.*

[76] It is interesting that the Eleventh Circuit found intentional discrimination against Hithon without an analysis of the boy reference. It may be that the facts were so egregious, it was impossible to avoid a conclusion of intentional discrimination. It may also be that it is easier for a court to analyze a discrimination claim when biased comments or stray remarks are not present.

[77] Over time, we might see the development of a "state of the art" test for employers on implicit bias literature.

in this area are "vulnerable to stereotypic biases," thereby increasing the risk that race was a factor in the decision.[78]

Professor Wax argues that a negligence standard would be extremely difficult to execute because of causation issues, cost, and the limitations of human knowledge on unconscious bias.[79] She warns that "[e]ven on those occasions when bias distorts judgment, it may do so only a little, with no measurable deprivation of concrete benefits or rewards. Unconscious bias thus may not be 'determinative' of a harmful outcome in every case in which it can be said to play a part."[80]

The concern that we do not know enough about implicit bias to explore a negligence theory does warrant caution. However, it is also important to understand that in assessing the risk of harm in negligence law in general, the focus is on the actors' conduct, not state of mind. Sometimes, the actor is aware that his conduct poses certain risks. Even when the actor is using his best judgment about the risks, the actor is unaware of the risks, or the actor is not even subjectively capable of appreciating the risks of harm his conduct poses, negligence law still applies.[81] As explained earlier, the actor faces negligence liability for causing injury to another based on a collective judgment—from an external viewpoint that society imposes on the individual—that such conduct poses unacceptable risks.

There will be some cases in which there are no facts to demonstrate that there were risks of discrimination present. In those cases, the plaintiff may lose in a negligence claim. Yet, there will be some cases that do offer such evidence. The main point is that it might be valuable to allow a jury, instead of judges, to decide whether and when conduct poses unacceptable risks of race being a factor in an employment decision.

Even in the current intentional framework as it exists, courts implicitly recognize that certain facts or circumstances make "race as a factor" in the decisionmaking process more or less likely, even though the ultimate focus is on discriminatory intent. For example, proof of the *McDonnell Douglas* framework itself "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, *are more likely than not* based on the consideration of impermissible factors."[82] Similarly, under the same-actor inference or when the defendant decisionmaker is the same person who

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[78] Hart, *supra* note 29, at 748 (citing Susan Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 AM. PSYCHOL. 1049, 1056 (1991)).

[79] Wax, *Discrimination*, *supra* note 53, at 1153.

[80] *Id.* at 1174.

[81] KEETON ET AL., *supra* note 4, at 169.

[82] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (emphasis added); *see* 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, 448 (describing *McDonnell Douglas* framework as a "thinly veiled version of the tort doctrine of res ipsa loquitur.").

hired the plaintiff, the court creates a strong inference or presumption that the decisionmaker did not engage in intentional discrimination when firing the individual. These doctrines could continue to be in play but serve to answer a different question: Does proof of the prima facie case from *McDonnell Douglas* or of the same-actor inference make it more or less likely that race was a factor in the decisionmaking process?

These are simply initial thoughts, I do not have any definitive answers as to the feasibility of such an approach; however, I do believe that it is worth asking the question.

B. *Both Intended and Unintended Discrimination as Remedies*

A second lesson from tort law that may be instructive in Title VII employment discrimination law is the feasibility and importance of recognizing both intentional and negligent theories of recovery as concurrent claims for the same class of injury. A clear example of this approach is in the area of emotional harm recovery. The torts of intentional and negligent infliction of emotional distress did not develop in a vacuum; they were recognized because of a high priority placed on compensating individuals for an injury that courts viewed as real but for which a remedy was hard to come by under existing doctrine. As a result of the importance of addressing emotional harm, the courts allowed recovery and at the same time addressed the concerns about these torts by imposing limitations on each.

The point in reciting a brief history of these two torts is not to suggest incorporation of tort law elements into employment discrimination law but to draw out an important lesson from the development and coexistence of both intent and negligence claims as we explore whether Title VII should expand its reach to unintentional discrimination.

Until the 1930s and 1940s, pure emotional harm was not actionable.[83] As one jurist put it, "[m]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone."[84] In 1934, this view was reflected in the *Restatement (First) of Torts*, which simply stated that conduct "intended or likely to cause only mental or emotional distress is not tortious."[85] At the time, emotional harm recovery was available only as "parasitic" to other independent torts, such as assault, battery, false imprisonment, trespass, and seduction.[86]

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[83] Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 126 (1990).

[84] Lynch v. Knight, 9 H.L. Cas. 577, 598 (1861); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 816–17 (1990).

[85] RESTATEMENT OF TORTS § 46 cmt. c (1934); Geoffrey Christopher Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 GA. L. REV. 107, 131 (2010).

[86] Catherine E. Smith, *Intentional Infliction of Emotional Distress: An Old Arrow Targets the New Head of the Hate Hydra*, 80 DENV. U. L. REV. 1, 32 (2002).

In 1948, a supplement to the first *Restatement* recognized intentional infliction of emotional distress as a separate tort. In 1965, the *Restatement (Second) of Torts* reflected what are now the current elements of the intentional infliction of emotional distress, requiring proof that the defendant: (1) acted in an extreme and outrageous manner; (2) intentionally or recklessly caused emotional harm; and (3) that the plaintiff's resulting emotional harm was severe.[87] According to many scholars, the recognition of the tort was in response to advances in scientific evidence and a keen interest in expansion by legal academics.[88]

Despite increased recognition of the intentional infliction of emotional harm, the negligence counterpart to that tort was slower to gain traction. A plaintiff who suffered a physical impact from negligent conduct could recover for pain and suffering and other forms of emotional harm but there was no recovery for emotional harm alone.[89] Over time, states eliminated the physical impact requirement and required a physical injury or physical manifestation. In order to recover for emotional injury, the plaintiff had to exhibit some physical symptoms of her distress, such as vomiting, neuroses, psychoses, depression, heart attack, miscarriage, and nightmares.[90] Eventually, states not only recognized "direct" claims of emotional harm, but also allowed "bystander" or "indirect" claims, in which a plaintiff suffers emotional harm from observing the serious injury or death of a family member.[91]

Today, both intentional and negligent infliction of emotional distress are recognized in the *Restatement (Third) of Torts* and the majority of states.[92] Both of these torts faced resistance from skeptical jurists and academics who questioned (and continue to question) the legitimacy of emotional harm, the feasibility of regulating it, and its potential to lead to unlimited expansion of liability.[93]

When defining harms to individuals and society, the law should avoid placing the difficulty of proof over fairness and equality. As William Prosser and Robert Keeton explain:

> It is sometimes said that compensation for losses is the primary function of tort law and the primary factor influencing its development. It is perhaps more accurate to describe the primary function as one of determining when

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[87] RESTATEMENT (SECOND) OF TORTS § 46 (1977).

[88] Rapp, *supra* note 85, at 132–33.

[89] *Id.* at 138.

[90] Chamallas & Kerber, *supra* note 84, at 820; Rapp, *supra* note 85, at 138.

[91] Chamallas & Kerber, *supra* note 84, at 821; Rapp, *supra* note 85, at 138–40.

[92] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 45–46 (2012).

[93] Rapp, *supra* note 85, at 126–30 (listing five policy concerns for the expansion of emotional harm recovery).

compensation is to be required. Courts leave a loss where it is unless they find good reason to shift it.[94]

The tort system's response to concerns about emotional harm recovery was not that it was the "natural result of social existence, and that those who suffer it should grin and bear it."[95] The response was to develop a legal framework that attempted to compensate for a legitimate injury while at the same time responding to concerns by proceeding cautiously.[96]

As the court in one of the seminal cases on the recognition of pure emotional harm recovery stated, "the fear of an expansion of litigation should not deter courts from granting relief in meritorious cases; the proper remedy is an expansion of the judicial machinery, not a decrease in the availability of justice."[97] Instead, advanced scientific developments that gave the courts a greater understanding of emotional injuries afforded shifts in the elements required to prove each tort. For example, the physical impact requirement was replaced by the physical injury or physical manifestation rule to address the fear of fake claims and the flood of litigation. As the science on psychological harm has advanced, the physical manifestation rule has been liberalized as well.[98] The emotional harm torts continue to evolve as our understanding of emotional suffering improves and a social commitment to reducing emotional injury deepens.

As for Title VII, the eradication of workplace discrimination on the basis of protected categories is an explicit federal mandate. The statute has two basic purposes: "to deter conduct which has been identified as contrary to public policy and harmful to society as a whole" and "to make persons whole for injuries suffered on account of unlawful employment discrimination."[99] There are certainly good reasons to shift the loss from victims of implicit bias discrimination to the discriminatory actors and employers. Like the development of both intentional and negligent claims for emotional distress, the courts can begin the process of developing a negligence theory with appropriate limitations to address expansion concerns and over time shift the test as our understanding of implicit bias and workplace discrimination evolves.

Further, importing implicit bias into the employment discrimination regime will incentivize employers to study and develop expertise and arguments on practices that reduce implicit bias in the workplace.

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[94] KEETON ET AL., *supra* note 4, at 20 (footnote omitted).

[95] Rapp, *supra* note 85, at 127.

[96] Love, *supra* note 83, at 126–27 (explaining Prosser's redraft of Section 46 was "to keep the courts from running wild on this thing" and to "spell out some boundaries, qualifications and limitations" to the tort).

[97] Falzone v. Busch, 214 A.2d 12, 16 (N.J. 1965).

[98] Rapp, *supra* note 85, at 126.

[99] Price Waterhouse v. Hopkins, 490 U.S. 228, 264–65 (1989) (O'Connor J., concurring in judgment) (citation omitted).

C. *The Importance of Shifting Moral Blame*

Third, importantly, the torts of intentional and negligent infliction of emotional distress are not mutually exclusive. They are both actionable and serve to comprehensively regulate emotional harm. Both torts seek to protect mental tranquility and peace of mind, and they serve different roles in doing so. In most jurisdictions, the two torts are not viewed as mutually exclusive of one another. We do not have to pick just one. This more comprehensive approach of recognizing both intentional and negligence claims is instructive for regulation of discriminatory harms.

The intentional torts require an inquiry into the subjective state of mind of the defendant to determine whether he desired the consequences, or had substantial certainty that the consequences might occur.[100] Because of the fault underlying these torts, intentional tortfeasors are often viewed as morally culpable. This moral theme is reflected in the availability of more extensive liability under proximate cause, fewer affirmative defenses, nominal damages, and punitive damages.

While the intentional torts are viewed as morally blameworthy, negligence law is not viewed in the same way. Instead, the failure to conform one's behavior to the reasonable person is not as loaded with moral judgment or derision. All of us engage in unreasonable conduct. Our system of negligence law makes the conduct actionable when it lines up with particular elements of duty, breach, causation, and damages. It is significant that, generally, negligence offers a less morally blameworthy cause of action to address unintended conduct. The reduction of blameworthiness attributed to individuals and institutions may go a long way towards addressing discriminatory harms in the workplace. If Title VII explicitly regulates implicit bias by adopting a negligence framework, it is imperative that it endorse a similar shift in how society views discrimination. The law can maintain the moral judgment of intentional actors who consciously use race or other protected categories to deny equal opportunity. For those who do not harbor such conscious biases and are simply being human by engaging in implicit bias, the objective should be one of compensation for the resulting injury and deterrence, free from heavy moral judgment.

IV. CONCLUSION

Tort law plays a powerful role in defining cognizable harms and allocating responsibility based on concepts of fault, individual and community interests, social values, morality, compensation, deterrence, and notions of fairness. So, the idea that it may serve as a source of guidance in employment discrimination law, and in particular, in one of the most intractable debates

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[100] Some intentional torts include the additional definition of reckless whether the defendant was aware of a high degree of risk and disregarded it.

within employment discrimination jurisprudence—the requirement of discriminatory intent—is not "unreasonable."[101] To shift from an intentional discrimination mindset to one focused on risks of discrimination will not be easy. Hopefully, this brief inquiry has offered some food for thought.

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[101] KEETON ET AL., *supra* note 4, at 3 ("New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before.").