ARTICLES

TORTIFYING EMPLOYMENT DISCRIMINATION

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Although Title VII is often described as a "statutory tort," that label has, until recently, been mostly metaphorical. In Staub v. Proctor Hospital, *however, the Supreme Court took an important step in incorporating concepts from tort law into the antidiscrimination statutes. Although* Staub *received some attention as a "cat's paw" (or subordinate bias) liability decision, it will have broader significance for two reasons.*

First, the Court explicitly adopted tort law's definition of "intent" for statutory discrimination cases, thus raising a threshold question of what it means to "intend to discriminate." This Article suggests that, rather than widening the notion of discriminatory intent, which Staub *at first blush seems to do, the opinion actually adds another layer to the plaintiff's burden: for liability, the decisionmaker must now both have the requisite wrongful motivation and either desire a resulting "adverse employment action" or believe that such an action is substantially certain to occur.*

Second, and potentially more important, Staub *for the first time imported the concept of proximate cause into the antidiscrimination context from its usual*

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home in negligence law. Such a transplant is especially remarkable because proximate cause was unnecessary for resolving the case before the Court. The only purpose of adding a proximate cause requirement is to limit liability short of the full reach of but-for causation, and limiting employer liability tracks what the Court has done in other areas of federal statutory law. In those areas, the Court has not only applied proximate cause to intentional conduct (a phenomenon largely foreign to tort law from which the Court is theoretically borrowing) but has also adopted a more rigorous view of what proximate cause requires. Rather than looking only to the foreseeability of the plaintiff or the harm, which is the majority approach in the negligence arena, the Court has articulated a policy-driven perspective that allows it to restrict liability in the name of applying traditional tort doctrine.

After exploring these issues, this Article argues that Staub*'s deployment of proximate cause in the discrimination area may have been intended to set the stage for a later effort to narrow the reach of Title VII and the other discrimination statutes by finding that "cognitive bias" does not proximately cause a resulting adverse employment action. While there is a spirited debate about whether Title VII bars adverse employment actions resulting from such bias,* Staub *may portend the Court's resolving that controversy by suggesting that only conscious bias can proximately cause an adverse employment action.*

INTRODUCTION

Although Title VII has often been described as creating a statutory tort,[1] the panoply of tort doctrines has been applied to this statutory scheme only sporadically, and then often in forms influenced by specific language of the law.[2] Perhaps most pointedly, that staple of tort law, "proximate cause," has

[1] The term is mostly metaphorical. Discrimination maps onto no obvious tort since the paradigmatic violation is a refusal to deal – refusing to enter into or continue a contractual relationship. Neither intentional interference with contract, RESTATEMENT (SECOND) OF TORTS §§ 766-766A (1965), nor intentional interference with prospective advantage, *id*. § 766B, is analogous because both require the tortfeasor to interfere with the contract or prospective advantage of the plaintiff with a third party. No tort arises when a party breaches a contract, much less when it refuses to enter into a contract to begin with. *Id*. § 766 cmt. b ("The rule stated in this Section does not apply to a mere refusal to deal. Deliberately and at his pleasure, one may ordinarily refuse to deal with another . . . .").

[2] Statutes are, almost by definition, passed to meet shortcomings in the common law. Accordingly, the question of the extent to which "background" common law principles, such as tort doctrine, should influence judicial interpretation of federal laws is both complicated and under-theorized. *See generally* Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. (forthcoming 2013) [hereinafter, Sperino, *Statutory Proximate Cause*] (questioning the Supreme Court's incorporation of common law doctrines as a legitimate exercise of statutory interpretation); Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. (forthcoming 2013) (arguing that merely "identifying a cause of action in a tort in a general sense does not provide any meaningful basis for courts to apply proximate cause").

not, until recently, made its appearance in the discrimination setting. *Staub v. Proctor Hospital*,[3] decided in 2011, was the first Supreme Court decision to apply the notion in the discrimination context, albeit not Title VII, and the implications of this innovation are far from clear.

Staub arrived at the Court from the Seventh Circuit as a "cat's paw" case and left it as a "proximate cause" decision. The cat's paw doctrine, as developed in the lower courts, imposed employer liability when the ultimate decisionmaker, although personally unbiased, was influenced to a greater or lesser degree by biased subordinates.[4] The Seventh Circuit had adopted the most demanding requirements for liability in such cases,[5] and *Staub* was generally viewed as plaintiff-friendly since it not only found liability without a showing that the actual decisionmaker had any intent to discriminate but also rejected the lower court's grudging view of what was necessary before the decisionmaker could be viewed as a cat's paw. Instead, the Court held that a reasonable jury could find both that lower-level supervisors had the intent to cause the adverse employment action at issue and that their biased action was the "proximate cause" of plaintiff's termination, even if by an unbiased final decisionmaker.

Staub is important in its own right since it is likely to affect the structure of employer decisionmaking. There is an increasing tension between forces tending towards decentralizing decisions in firms to reflect modern notions of work organization and forces pushing for more centralized control in order to limit liability.[6] While a number of scholars have stressed the flattening of hierarchies in firms and the movement toward collaborative organization of work,[7] increased liability concerns for discrimination and sexual harassment,

[3] 131 S. Ct. 1186 (2011).

[4] *See infra* note 10 and accompanying text.

[5] Staub v. Proctor Hosp., 560 F.3d 647 (7th Cir. 2009). The standard required that the non-decisionmaker exercise a "singular influence" over the decisionmaker such that the decision to terminate was the product of "blind reliance." *Staub*, 131 S. Ct. at 1190 (quoting *Staub*, 560 F.3d at 659).

[6] Some of these forces are reflected in the increasing recognition of "corporate compliance" as a driving force for the modern firm in a complicated legal and technical environment. *See* Kathleen M. Boozang & Simone Handler-Hutchinson, *"Monitoring" Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care*, 35 AM. J.L. & MED. 89, 123 (2009); Cynthia Estlund, *Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace*, 12 LEWIS & CLARK L. REV. 671, 681-83 (2008).

[7] *E.g.*, KATHERINE STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 104-05 (2003) ("[T]he fluid nature of the modern employment relationship, the flattened hierarchies, and the broadened job categories emphasizing knowledge and skills rather than specific job descriptions affect the nature of employment discrimination by removing the multi-stepped hierarchy and other intra-institutional markers by which to judge progress.").

even before *Staub*, cautioned against delegating too much formal discretion to lower levels. One compromise solution is to permit lower level managers to make decisions subject to some kind of grievance process.[8] And *Staub* might generate more pressure towards escalation of decisionmaking as firms attempt to sever the causal link between potentially biased recommenders and ultimate decisionmakers within the firm. Not surprisingly, then, the initial reaction to the case in the management-oriented law firm blogs was to stress both the need for greater training and the desirability of independent investigations once the possibility of discrimination at any level in the decision process was raised.[9]

But *Staub* may have importance far beyond the agency problem it addressed. For reasons that are as yet unclear, the Court created confusion as to what it means to "intend" to discriminate and simultaneously recognized what may be a means to avoid employer liability for such intent. How these competing vectors intersect is the subject of this Article.

I. CAT'S PAW (AKA SUBORDINATE BIAS) LIABILITY

Staub was the Supreme Court's long-awaited encounter with the cat's paw[10] question, one it had granted certiorari to resolve several years earlier but which

[8] Joshua C. Polster, Note, *Workplace Grievance Procedures: Signaling Fairness but Escalating Commitment*, 86 N.Y.U. L. REV. 638, 640-41 (2011) (reporting an increase in formal, multi-level grievance procedures in the nonunion setting to the point that half of all large employers are now estimated to have formal procedures).

[9] *E.g.*, *How Can Employers Deflect the Cat's Paw?*, HUNTON EMP. & LAB. PERSP. (Mar. 17, 2011), http://www.huntonlaborblog.com/2011/03/articles/employment-policies/how-can-employers-deflect-the-cats-paw/ ("*Staub* serves as a stark reminder to employers that employee allegations of illegal bias in their treatment by managers and supervisors should be independently investigated, regardless when [sic] and at what point in the discipline process the allegations are raised."); Jessica Glatzer Mason, *U.S. Supreme Court Approves "Cat's Paw" Theory of Liability in Employment Discrimination Cases*, WORK KNOWLEDGE BLOG (Mar. 16, 2011), http://www.workknowledgeblog.com/us-supreme-court-approves-cats-paw-theory-of-liability-in-employment-discrimination-cases-1/ ("Employers can avoid [liability] by training supervisors at all levels on the legal prohibitions against discrimination to ensure that reviews or disciplinary actions are not based on bias or animus, and by training human resources professionals to spot red flags when reviewing a termination recommendation, and conducing [sic] a truly independent investigation into the employee's performance rather than relying on a supervisor's recommendation."); *U.S. Supreme Court Broadens Employer Liability by Upholding "Cat's Paw" Theory in Employment Discrimination Case*, DUANE MORRIS (Mar. 2, 2011), http://www.duanemorris.com/alerts/Supreme_Court_Staub_Proctor_Hospital_cat_paw_employment_discrimination_3972.html ("[*Staub*] underscores the need for employers to conduct meaningful independent investigations, particularly where discriminatory bias may influence decisions regarding an employee. An employer may be able to avert liability for discrimination if it can establish that through the ultimate decision maker's independent investigation of the facts, the decision maker did not rely on or take action based upon the tainted information or tainted prior actions.").

[10] Judge Posner first used the term to describe situations where an innocent

had been settled before the Court could address it. That earlier case involved a Title VII claim of racial discrimination brought by the Equal Employment Opportunity Commission (EEOC),[11] and most cases with the cat's paw sobriquet arose under traditional antidiscrimination statutes, which were also the focus of the scholarship on the issue.[12] Less colorfully but more properly called subordinate bias liability, the issue was whether an employer could be liable for an adverse employment action when the decisionmaker was unbiased but had been influenced by others within the firm, typically lower-level supervisors.[13]

Staub was a claim by plaintiff that he was fired by his employer because of his service in the military reserves, which is unlawful under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[14] The Court's opinion, however, is certain to govern cases under more traditional antidiscrimination statutes.[15] USERRA prohibits discrimination in terms

decisionmaker is influenced by a biased subordinate. Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990). The Supreme Court describes the fable from which the term arises: "[A] monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing." *Staub*, 131 S. Ct. at 1190 n.1. Posner himself found the term wanting in a later opinion. Lust v. Sealy, Inc., 383 F.3d 580, 584 (7th Cir. 2004) ("The formula was (obviously) not intended to be taken literally . . . , and were it taken even semiliterally it would be inconsistent with the normal analysis of causal issues in tort litigation."); *see also* Cook v. IPC Int'l Corp., 673 F.3d 625, 628 (7th Cir. 2012) (taking responsibility for the "dreadful muddle" produced in part by "doctrine stated as metaphor, such as the 'cat's paw' theory of liability," which "can be a judicial attractive nuisance").

[11] EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476 (10th Cir. 2006), *cert. dismissed*, 549 U.S. 1105 (2007).

[12] *E.g.*, Stephen F. Befort & Alison L. Olig, *Within the Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. REV. 383, 383-85 (2008); Tim Davis, *Beyond the Cat's Paw: An Argument for Adopting a "Substantially Influences" Standard for Title VII and ADEA Liability*, 6 PIERCE L. REV. 247, 249 (2007); Ali Razzaghi, Case Note, Hill v. Lockheed Martin Logistics Management, Inc.*: "Substantially Influencing" the Fourth Circuit to Change Its Standard for Imputing Employer Liability for the Biases of a Non-Decisionmaker*, 73 U. CIN. L. REV. 1709, 1712 (2005); Keaton Wong, Comment, *Weighing Influence: Employment Discrimination and the Theory of Subordinate Bias Liability*, 57 AM. U. L. REV. 1729, 1735 (2008).

[13] *Staub* addressed subordinate bias liability only when the subordinate in question was a lower-level supervisor; it did not resolve the proper test when coworkers are involved. *Staub*, 131 S. Ct. at 1194 n.4; *see also infra* notes 111-13 and accompanying text.

[14] Pub. L. No. 103-353, 108 Stat. 3153 (codified at 38 U.S.C. §§ 4301-4335 (2006)).

[15] *E.g.*, Smith v. Bray, 681 F.3d 888, 899 (7th Cir. 2012) (finding that *Staub* governs liability for retaliation for subordinate bias under, inter alia, Title VII); Marcus v. PQ Corp., 458 F. App'x 207, 212 (3d Cir. 2012) (finding that *Staub* allows for a cat's paw theory of liability in Age Discrimination in Employment Act (ADEA) cases); McKenna v. City of Philadelphia, 649 F.3d 171 (3d Cir. 2011) (Title VII); Simmons v. Sykes Enters., Inc., 647

identical to Title VII; that is, both declare it unlawful for the specified ground to be a "motivating factor" for the challenged employment action.[16] Thus, section 703(m) of Title VII provides that "[a]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice."[17] The parallel provision of USERRA states that "[a]n employer shall be considered to have engaged in actions prohibited [under the statute], if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action."[18]

Both statutes also have versions of the "same-decision" defense; Title VII's is the more complicated. It provides that, even if a plaintiff has proved a motivating factor for a particular adverse action, a court shall not award equitable relief or backpay if the employer "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor"; in such cases, the court may grant declaratory relief, some kinds of injunctive relief, and attorney's fees and costs, but "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment."[19] Like Title VII, USERRA imposes the burden of persuasion for this defense on the employer once the plaintiff establishes a motivating factor;[20] but, unlike Title VII, USERRA seems to contemplate that same-decision proof will allow the employer to avoid all liability.[21] In short, when a

F.3d 943, 949-50 (10th Cir. 2011) (stating that, although the ADEA has a but-for causation requirement, *Staub* governs whether subordinate bias can be found to have resulted in such causation). *See generally* Lisa M. Durham Taylor, *The Pro-Employee Bent of the Roberts Court*, 79 TENN. L. REV. (forthcoming 2012) (explaining that no federal court decision has yet refused to apply *Staub* to an antidiscrimination statute).

[16] *Staub*, 131 S. Ct at 1191 ("[USERRA] is very similar to Title VII, which prohibits employment discrimination 'because of . . . race, color, religion, sex, or national origin' and states that such discrimination is established when one of those factors 'was a motivating factor for any employment practice, even though other factors also motivated the practice.'").

[17] 42 U.S.C. § 2000e-2(m) (2006).

[18] 38 U.S.C. § 4311(c)(1) (2006).

[19] 42 U.S.C. § 2000e-5(g)(2)(B).

[20] *See* Velazquez-Garcia v. Horizon Lines of P.R., Inc., 473 F.3d 11, 17 (1st Cir. 2007) (holding that the burden of persuasion falls on the employer to prove that the challenged action would have been taken despite the protected status); Maxfield v. Cintas Corp. No. 2, 427 F.3d 544, 551 (8th Cir. 2005) (same); Coffman v. Chugach Support Servs., Inc., 411 F.3d 1231, 1238-39 (11th Cir. 2005) (same); Sheehan v. Dep't of the Navy, 240 F.3d 1009, 1014-15 (Fed. Cir. 2001) (same).

[21] USERRA tags a proviso onto the end of § 4311(c)(1): "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service." 38 U.S.C. § 4311(c)(1). Earlier decisions suggested such a reading, *see* Erickson v. U.S. States Postal

plaintiff establishes a motivating factor, she establishes the defendant's liability under Title VII but not necessarily under USERRA since the defendant still has a complete defense available.

This structure has its own conceptual complications even when the decisionmaker herself has the requisite bias. Since the statute envisions liability even when the adverse employment action would have been taken for legitimate reasons, describing liability as "but-for" causation is somewhat counterintuitive although consistent with standard tort analysis. Imagine a situation in which a decisionmaker is reading a resume, notes that the candidate is a woman, and stamps "rejected" on it. Had the decisionmaker read further, he would have discovered that the candidate lacked a necessary credential, say, a driver's license. One could say that bias against women caused the rejection even if it would have occurred anyway. Title VII would clearly impose liability on these facts, although the plaintiff would be unable to recover backpay or have a right to the job. Negligence law would treat this as "overdetermined" cause, which means that if two or more acts would independently bring about a certain result, each is viewed as a but-for cause of the harm,[22] which seems to be the correct view under Title VII's "motivating factor" specification.[23]

Serv., 571 F.3d 1364, 1368 (Fed. Cir. 2009) ("If the employee makes that prima facie showing, the employer can avoid liability by demonstrating, as an affirmative defense, that it would have taken the same action without regard to the employee's military service."); Gummo v. Village of Depew, 75 F.3d 98, 106 (2d Cir. 1996) (interpreting USERRA to create a defense to liability). *Staub* also seems to agree: "Thus, if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (by the terms of USERRA it is the employer's burden to establish that), then the employer will not be liable." *Staub*, 131 S. Ct. at 1193.

This "no liability" view of the "same action" defense was originally adopted for Title VII by *Price Waterhouse v. Hopkins*, 490 U.S. 228, 237 (1989) (holding that if an employer can prove it would have made the same decision regardless of gender, it will escape liability), only to be superseded by the 1991 Civil Rights Act, which rendered proof that the decision would have made the same decision anyway merely a defense to some remedies. *See* 1 CHARLES A. SULLIVAN & LAUREN M. WALTER, EMPLOYMENT DISCRIMINATION: LAW & PRACTICE § 2.03[D] (4th ed. 2009). Given that USERRA was enacted after the 1991 Civil Rights Act but lacks its distinction between liability and remedies, it seems likely that the "no liability" view is the correct interpretation.

[22] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 27 (2011) ("If multiple acts occur, each of which under § 26 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."). While the current Restatement reflects a different view than section 432(2) of the *Restatement (Second)*, which was operative when the 1991 Civil Rights Act was passed, it would, if anything, embrace more conduct as a but-for cause. RESTATEMENT (SECOND) OF TORTS § 432(2) cmt. b (1965).

[23] Section 703(m)'s "motivating factor"/same decision structure was derived from Justice Brennan's plurality decision in *Price Waterhouse*, 490 U.S. at 242. The 1991 Civil Rights Act codified this approach, *see* Desert Palace, Inc. v. Costa, 539 U.S. 90, 101-02 (2003)

However, "motivating factor" might alternatively reflect a causal concept entirely different from but-for causation. Dean Martin Katz points out that the term motivating factor was not previously found in the causal literature,[24] and concludes that, given the context in which section 703(m) was added to Title VII, it must mean "minimal causation," that is, a factor that has "some causal weight[,] . . . some tendency to influence the event in question but still not rise to the level of necessity or sufficiency."[25] Presumably, this means that, if applied over time, the factor would influence an appreciable number of decisions regardless of whether the decision at issue was affected. An appropriate metaphor might be the adding of weights to runners in a race. The added weight might not affect any given race but, over a large number of races, would result in handicapped competitors losing disproportionately.[26]

(holding that under Title VII "direct evidence of discrimination is not required in mixed-motive cases"), while modifying it to provide that proof of a motivating factor would establish liability regardless of whether the defendant could limit relief by proving that it would have taken the same action in any event. *See* 1 SULLIVAN & WALTER, *supra* note 21, § 2.03[D]. Justice Brennan explicitly adverted to overdetermined cause:

> To attribute this meaning to the words "because of" does not . . . divest them of causal significance. A simple example illustrates the point. Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, neither physical force was a "cause" of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply "in the air" unless we can identify at least one of them as a but-for cause of the object's movement. Events that are causally overdetermined, in other words, may not have any "cause" at all. This cannot be so.

Price Waterhouse, 490 U.S. at 241.

[24] Martin J. Katz, The *Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 492 (2006). Professor Gudel, writing before the enactment of the 1991 Civil Rights Act, concurred on this point with a vengeance: "[A] consistent and nonproblematic interpretation of 'motivating factor' cannot be given. This is because 'motivating factor' is a causal concept meant to reject the 'but for' causation model, but which provides no workable model of causation to replace it." Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 70 (1991).

[25] Katz, *supra* note 24, at 498-99. Although his analysis largely turned on the logical role motivating factors must play when rejecting determinative-factor causation, Dean Katz also looked to the legislative history of the Civil Rights Act of 1991, particularly House Report 40 Part I, which spoke of "a factor influencing the decision" and analogized the test to the concept of "contributing" to or "play[ing] a role" in a decision. *Id*. at 492 n.8. According to him, "Congress made clear that its intent was to proscribe 'consideration of' and 'reliance on' protected characteristics – formulations that evoke the concept of utilization of protected characteristics, which occurs when there is minimal causation." *Id*. at 506. He points out that, in fact, the term being described was "contributing factor," but that the later substitution of "motivating factor" was not intended to work any change. *Id*. at 505 n.60.

[26] In horse racing, "handicapping" is adding weight (imposts) to horses in order to equalize the competition in a given race. In our example, Congress intended that members

Whatever the meaning of motivating factor when the employer and the decisionmaker are the same individual, matters get more complicated in cat's paw situations. What is the correct approach when the bias of one individual might influence the actions of another individual in the organization (the decisionmaker) who is himself unbiased? This is the way *Staub* was framed.

Vincent Staub had won a jury verdict against his former employer, Proctor Hospital. As factually premised when the case reached the Court, the decision to discharge Staub was made by Linda Buck, who was not biased against military reservists. However, the jury accepted Staub's evidence that two lower-level supervisors – Janice Mulally, his immediate supervisor, and Michael Korenchuk, Mulally's supervisor – were hostile to Staub's obligations as a reservist. They apparently resented the adjustments that had to be made to accommodate his absences for weekend drills and yearly training.[27] The jury accepted Staub's claim that the two manufactured false allegations of his supposed job deficiencies, which resulted first in a Corrective Action letter and later in reports of supposed violations of it. These reports eventually reached Buck, Proctor's vice president of human resources.[28] It was Buck who ultimately decided to discharge Staub, and she later denied a grievance he filed claiming discrimination by the lower-level supervisors.[29] Despite Buck's lack of bias, the jury found that Proctor had violated USERRA.

As Justice Scalia framed the issue for the Court, "[t]he problem we confront arises when [the decisionmaking] official has no discriminatory animus but is influenced by previous company action that is the product of a like animus in someone else."[30] The majority's resolution is framed in a sentence, but one that requires more than a little parsing:

> We therefore hold that if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse

of protected classes be spared imposts resulting from the influence of prohibited considerations.

[27] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1189 (2011).

[28] In January 2004, Mulally issued a "Corrective Action" disciplinary warning for a purported violation of the company's rule requiring Staub to stay in his assigned area when not working with a patient. *Id*. Staub denied there was such a rule and, in any event, claimed he did not violate it. *Id*. Nevertheless, more supposed absences from his work area led Korenchuk to report to Buck that Staub left his desk without informing a supervisor, in violation of the Corrective Action letter. *Id*. "Buck relied on Korenchuk's accusation, however, and after reviewing Staub's personnel file, she decided to fire him. The termination notice stated that Staub had ignored the directive issued in the January 2004 Corrective Action." *Id*.

[29] *Id*. at 1189-90 ("Staub challenged his firing through Proctor's grievance process, claiming that Mulally had fabricated the allegation underlying the Corrective Action out of hostility toward his military obligations. Buck did not follow up with Mulally about this claim. After discussing the matter with another personnel officer, Buck adhered to her decision.").

[30] *Id*. at 1191.

> employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.[31]

This rule can be viewed as requiring four elements for a violation: first, discriminatory *motivation* by a supervisor; second, an action taken by the supervisor with the prohibited motivation that is *intended* by him to result in an "adverse employment action" for the plaintiff – that is, a sufficiently severe employment-related harm;[32] third, *the actual adverse employment action*; and, fourth, a *causal linkage* of the wrongfully motivated act with the adverse employment action.

On the first point, Mulally and Korenchuk had the requisite motive but did not themselves take a sufficiently adverse action against Staub. On the second point, a properly instructed jury could find that the two had the requisite intent that their reports would ultimately result in an adverse employment action. On the third point, Buck fired Staub, clearly an adverse employment action, although she herself lacked any wrongful motive. On the fourth and final point, since Mulally and Korenchuk's discriminatorily motivated actions caused Buck to terminate Staub, the necessary linkage existed. But *Staub*'s analysis, especially its invocation of proximate cause, is both convoluted and puzzling.

To begin with, Justice Scalia's opinion initially fails to clearly distinguish "intent" from "motive," thus repeating a common pattern in Supreme Court discrimination cases, which have used a variety of different words to describe the mental state necessary for a violation.[33] However, the distinction and its significance emerge from a careful reading of the opinion. Scalia begins with

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[31] *Id*. at 1194 (footnote omitted).

[32] In this passage, Scalia uses "adverse employment action" to indicate what harms would be actionable under USERRA. *Id*. While he also speaks of an "ultimate employment action," a term of art in some circuits under Title VII, *see* Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1126 (1998), it seems likely that Scalia was using that term merely to distinguish Buck's action from the earlier reports of the lower-level supervisors, *Staub*, 131 S. Ct. at 1194.

[33] The Court has used "intent," "motive," "purpose," and "animus," but sometimes it equates "intent" and "motive." *E.g*., Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) ("In such 'disparate treatment' cases, . . . the plaintiff is required to prove that the defendant had a discriminatory intent or motive."); Pullman-Standard v. Swint, 456 U.S. 273, 289-90 (1982) ("Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive."). In other cases, it seems to equate "purpose" with "intent." *E.g*., Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 147 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."); Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971) ("The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test . . . ."); *see also infra* note 36 regarding "animus."

"the premise that when Congress creates a federal tort it adopts the background of general tort law,"[34] and "[i]ntentional torts such as this, 'as distinguished from negligent or reckless torts, . . . generally require that the actor intend "the *consequences*[] of an act," not simply "the act itself."'"[35] This meant that it was not enough that Mulally and Korenchuk made "an unfavorable entry on the plaintiff's personnel record . . . with discriminatory animus,"[36] even if that action ultimately caused his discharge.[37] The two also had to have so acted with the intent to cause Staub's dismissal.[38]

In other words, the state of mind of the two lower-level supervisors must be parsed in two separate ways – they must have the requisite animus or motivation, and they must have the requisite intent. Further, even assuming prohibited motivation, intent to harm is not enough; rather, the lower-level supervisors must have intended a harm of the sort cognizable under USERRA.

Although this intent requirement would seem to limit liability (and in fact the Seventh Circuit on remand ordered a new trial in large part because the jury had not been instructed as to this requirement[39]), the *Staub* majority defined "intent" in a way that potentially can be read to expand liability in discrimination law: "Under traditional tort law, 'intent' . . . denote[s] that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it."[40] In short, while

[34] *Staub*, 131 S. Ct. at 1191.

[35] *Id*. (quoting Kawaauhau v. Geiger, 523 U.S. 57, 61-62 (1998)).

[36] Justice Scalia used the term "animus" multiple times in *Staub*, and the word often appears in employment discrimination cases, most frequently connoting ill will or animosity. *See* BLACK'S LAW DICTIONARY 103 (9th ed. 2009); CONCISE OXFORD ENGLISH DICTIONARY 52 (11th ed. 2009).

[37] *Staub*, 131 S. Ct. at 1191.

[38] *See infra* pp. 1441-42.

[39] The Supreme Court remanded for consideration of whether the jury's instructions were adequate or whether a new trial should be held. *Staub*, 131 S. Ct. at 1194. On remand the Seventh Circuit held a new trial was required, in part because the jury had not been required to find that the two lower-level supervisors intended to cause plaintiff's discharge. Staub v. Proctor Hosp., 421 F. App'x 647, 648-49 (7th Cir. 2011).

[40] *Staub*, 131 S. Ct. at 1194 n.3 (internal quotation marks omitted). Justice Scalia's supporting citation was to section 8A of the *Restatement (Second) of Torts*, which treats intent not as why someone acts but rather as the foreseeable consequences of that act. RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (1965) ("'Intent,' as it is used throughout the Restatement of Torts, has reference to the consequences of an act rather than the act itself. When an actor fires a gun in the midst of the Mojave Desert, he intends to pull the trigger; but when the bullet hits a person who is present in the desert without the actor's knowledge, he does not intend that result."). As Comment b explains:

> All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow

Korenchuk and Mulally may have intended Staub's dismissal, USERRA is satisfied either if they desired that result or, absent such a desire, knew that dismissal was substantially certain to follow from their actions.[41]

That Korenchuk and Mulally acted from animus and either desired to harm the plaintiff or believed that harm was substantially certain to follow (as in fact it did) was necessary but not sufficient for employer liability:

> But discrimination was no part of Buck's reason for the dismissal; and while Korenchuk and Mulally acted with discriminatory animus, the act they committed – the mere making of the reports – was not a denial of "initial employment, reemployment, retention in employment, promotion, or any benefit of employment," as liability under USERRA requires. If dismissal was not the object of Mulally's and Korenchuk's reports, it may have been their result, or even their foreseeable consequence, but that is not enough to render Mulally or Korenchuk responsible.[42]

This passage looks to the language of USERRA to require what has been called an "adverse employment action" in Title VII cases – a sufficiently material harm to violate the statute.[43] There has been some dispute about whether individual supervisors can be personally liable under USERRA, [44]

> decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness. . . . As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence . . . .

Id. § 8A cmt. b.

[41] The way the Court frames this rule, the supervisors must actually foresee the consequences; it apparently is not enough if a reasonable person would have foreseen them.

[42] *Staub*, 131 S. Ct. at 1191; *see also* Crews v. City of Mt. Vernon, 567 F.3d 860 (7th Cir. 2009) (USERRA retaliation claim); Maher v. City of Chicago, 547 F.3d 817, 824 (7th Cir. 2008) (USERRA discrimination claim).

[43] Justice Scalia's restrictive reading of USERRA is consistent with the reluctance of the circuit courts to read Title VII's more broadly phrased prohibition of discrimination in "compensation, terms, conditions, and privileges of employment," 42 U.S.C. § 2000e-2(a) (2006), to include any employment-related harm. Rather, the lower courts have usually defined the term to require some material effect on the terms and conditions of employment; warnings and low performance evaluations have not sufficed. *See* Davis v. Town of Lake Park, 245 F.3d 1232, 1242-43 (11th Cir. 2001); Primes v. Reno, 190 F.3d 765, 767 (6th Cir. 1999). *See generally* 1 SULLIVAN & WALTER, *supra* note 21, § 2.02; White, *supra* note 32, at 1151-54 (critiquing restrictive views of what constitutes an adverse action as both counterintuitive and contrary to the generally broad notion of terms and conditions of employment); cases cited *supra* note 42.

[44] Some district court decisions at least hold open the possibility of individual liability when the individual in question has the authority to hire and fire, Brandsasse v. City of Suffolk, 72 F. Supp. 2d 608, 618 (E.D. Va. 1999), and perhaps even when he does not, Carter v. Siemens Bus. Servs., LLC, No. 10 C 1000, 2010 WL 3522949, at *8-9 (N.D. Ill. Sept. 2, 2010). *But see* Satterfield v. Borough of Schuylkill Haven, 12 F. Supp. 2d 423, 440-41 (E.D. Pa. 1998). Where state employment is concerned, however, the law is more complicated. Several circuits have held that USERRA suits cannot be brought against the

unlike Title VII.[45] But even if one assumes that a finding of personal liability remains possible after *Staub*, the Court at this point seems to exonerate any supervisor whose bias does not cause her to take an "adverse employment action," even if such an action ultimately ensues.

The statute thus requires a connection between the act taken with the requisite intent (the lower-level supervisors' reports) and a later employment decision significant enough to be actionable (the dismissal). The question thus reduced itself to when "the discriminatory motive of one of the employer's agents (Mulally or Korenchuk) can be aggregated with the act of another agent (Buck) to impose liability on Proctor."[46] While the "background" agency principles were not clear,[47] the Court found the answer in the language of the statute:

> [T]he governing text . . . requires that discrimination be "a motivating factor" in the adverse action. When a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a "factor" or a "causal factor" in the decision; but it seems to us a considerable stretch to call it "a motivating factor."[48]

Presumably, the point is that the prohibited consideration did not motivate the decisionmaker, which would seem to suggest that the employer is not liable since no human taking an adverse employment action against the plaintiff had the requisite intent.

While this would seem to doom Staub's claim,[49] the Court went on to reject Proctor's argument "that the employer is not liable unless the de facto decisionmaker (the technical decisionmaker or the agent who is the 'cat's paw') is motivated by discriminatory animus."[50] While the motivating factor

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state in federal court, Wood v. Fla. Atl. Univ. Bd. of Trs., 432 F. App'x 812, 815 (11th Cir. 2011), and one circuit has held against individual liability for state supervisors, Townsend v. Univ. of Alaska, 543 F.3d 478, 481 (9th Cir. 2008).

[45] *E.g.*, Fantini v. Salem State Coll., 557 F.3d 22, 30 (1st Cir. 2009) ("[W]e find that there is no individual employee liability under Title VII."). *See* 1 SULLIVAN & WALTER, *supra* note 21, § 1.06[D].

[46] *Staub*, 131 S. Ct. at 1191.

[47] While the *Restatement (Second) of Agency* maintained that "the malicious mental state of one agent cannot generally be combined with the harmful action of another agent to hold the principal liable for a tort that requires both," *Staub*, 131 S. Ct. at 1191 (citing RESTATEMENT (SECOND) OF AGENCY § 275 cmt. a, illus. 4 (1958)), the Court found the cases involving federal torts divided, *id.* at 1191-92.

[48] *Id.* at 1192.

[49] Recall that the mental state of Mulally or Korenchuk "cannot . . . be combined with the harmful action of [Buck] to hold the principal liable for a tort that requires both." *Id.* at 1191.

[50] *Id.* at 1192.

language bars "the aggregation of animus and adverse action," general tort law provides another route to liability[51]:

> Animus and responsibility for the adverse action can both be attributed to the earlier agent (here, Staub's supervisors) if the adverse action is the intended consequence of that agent's discriminatory conduct. So long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA.[52]

It is not so clear why this is a *separate* route to liability. In any event, the sentence casts into doubt the Court's apparent exoneration of Mulally or Korenchuk from individual liability because they did not take an adverse employment action.[53] They are responsible, maybe even liable, because their wrongly motivated action had the intended consequence of depriving the plaintiff of his job, an adverse employment action under any definition.

This takes us, at last, to proximate cause:

> [I]t is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm. Proximate cause requires only "some direct relation between the injury asserted and the injurious conduct alleged," and excludes only those "link[s] that are too remote, purely contingent, or indirect." We do not think that the ultimate decisionmaker's exercise of judgment automatically renders the link to the supervisor's bias "remote" or "purely contingent."[54]

While the Court recognized the decisionmaker may *also* be a proximate cause, "it is common for injuries to have multiple proximate causes."[55] Nor can the ultimate decisionmaker's judgment be deemed a superseding cause of the harm. A cause can be thought "superseding" only if it is a "cause of independent origin that was not foreseeable."[56] In other words, since the purpose of the two lower-level supervisors was to influence Buck, her action was not independent of their wrong.

This, then, explains the Court's holding, which would find a violation of USERRA "if a supervisor performs an act motivated by antimilitary animus

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[51] The Court assumed for purposes of its analysis that the various agents were acting within the scope of their employment, *id*. at 1194 n.4, which would not seem often to be a problem in cat's paw cases, but may have been intended to preclude liability when an adverse action was the result of bias by coworkers. The analogy would seem to be to employer liability for sexual harassment. *See generally* 2 SULLIVAN & WALTER, *supra* note 21, § 7.07[F].

[52] *Staub*, 131 S. Ct. at 1192.

[53] *See supra* p. 1441.

[54] *Staub*, 131 S. Ct. at 1192 (citation omitted).

[55] *Id*.

[56] *Id*.

that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action."[57]

The Court's approach avoided the risk that an employer could effectively immunize itself from Title VII liability by vesting ultimate power in a remote decisionmaker.[58] It necessarily cast doubt on those circuits that had found an "independent investigation" of a proposed adverse employment action to break any causal chain,[59] with the Court writing that even a "decisionmaker's independent investigation (and rejection) of the employee's allegations of discriminatory animus" would not *necessarily* do so.[60] One of the remaining

[57] *Id*. at 1194 (footnote omitted). The Court was not explicit as to whether the employer's liability is direct, similar to sexual harassment liability for the acts of co-workers or third parties, *see* 2 SULLIVAN & WALTER, *supra* note 21, § 7.07[F], or vicarious. While the latter would seem more likely, elsewhere, Justice Scalia spoke of employer fault: "Nor do we think the independent investigation somehow relieves the employer of 'fault.' The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision." *Staub*, 131 S. Ct. at 1193.

[58] *Id*. at 1193 ("Proctor's view would have the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action.").

[59] A number of circuits had endorsed some version of an "independent investigation" as a means to exonerate employers from liability. *E.g*., Poland v. Chertoff, 494 F.3d 1174, 1183 (9th Cir. 2007) ("[I]f an adverse employment action is the consequence of an entirely independent investigation by an employer, the animus of the retaliating employee is not imputed to the employer."); EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 488 (10th Cir. 2006) ("[B]ecause a plaintiff must demonstrate that the actions of the biased subordinate caused the employment action, an employer can avoid liability by conducting an independent investigation of the allegations against an employee. In that event, the employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated." (citation omitted)); Velez v. City of Chicago, 442 F.3d 1043, 1050 (7th Cir. 2006) (finding any issue as to whether bias tainted any report about plaintiffs' inadequate job performance was eliminated by the employer's independent investigation into their performance, which concluded that it was unsatisfactory); Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 725 (8th Cir. 1998) (holding that the "cat's paw" theory must fail when the decisionmaker made an independent determination whether the plaintiff should be terminated and thereby did not channel the desires of those with discriminatory motives).

[60] *Staub*, 131 S. Ct. at 1193; *see also* Chattman v. Toho Tenax Am., Inc., 686 F.3d 339, 353 (6th Cir. 2012) (overturning summary judgment for the employer because the court could not conclude that an investigation conducted by two other managers was "unrelated" to the actions of the biased "Human Resources manager, [who] actively inserted himself in the decisionmaking process. He both misinformed and selectively informed [the other managers] about the incident. A reasonable factfinder could find [the supervisor's] actions were a proximate cause of the adverse decisions."); Hicks v. Forest Pres. Dist. of Cook

serious questions in this area is when such an investigation will suffice. Arguably, a truly independent investigation would break the causal connection between bias and decision, but such a conclusion depends on the extent to which the decisionmaker's supposed "independent investigation" takes a biased report into account "without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified."[61]

Justice Alito, joined by Justice Thomas, concurred: "[I]n order for discrimination to be 'a motivating factor in [an] employer's action,' discrimination must be present 'within,' i.e., in the mind of, the person who makes the decision to take that action."[62] This might seem to preclude liability in the classic cat's paw case of innocent decisionmaker influenced by a biased subordinate. But the concurrence is more nuanced – to the extent that the formal decisionmaker defers to the biased subordinate, the employer may be said to have delegated decisionmaking authority to him.[63] So Alito would

Cnty., Ill., 677 F.3d 781, 790 (7th Cir. 2012) (upholding judgment for plaintiff when decisionmaker at hearing testified she relied on twenty-eight disciplinary action forms received either from a supervisor directly or with the supervisor's approval, which could have been found to amount to retaliatory animus against plaintiff).

[61] *Staub*, 131 S. Ct. at 1193. Even this formulation raises a conceptual problem, which the Court does not address. Suppose *A*'s supervisor, *B*, reports to *C* that *A* is repeatedly late and does so with a discriminatory motivation hoping that his report will result in *A* being fired. *C*, suspecting that *B* is acting from animus (or maybe just out of an abundance of caution), reviews *A*'s attendance records and determines that *A* was in fact repeatedly late. *C* fires *A*. This would seem to satisfy the Court as to *B*'s not being responsible: *B*'s report was the cause-in-fact but not the proximate cause of the discharge since *C*'s entirely independent investigation broke the (proximate) causal chain.

Or did it? What if *D*, a white employee, was as late as *A* but was not discharged? In other words, to avoid liability for *B*'s conduct does *C* not only have to determine that *A* acted as *B* reported but also that there are no better-treated employees around? A strong argument can be made that the answer is yes – *C* should determine not merely the facts (was *A* late?) but whether those facts warranted a discharge in terms of the company's actual practices (would *A*'s lateness have resulted in his discharge were he white?). Charles A. Sullivan, *From Cat's Paw to Proximate Cause: A Short Trip?*, WORKPLACE PROF BLOG (Mar. 17, 2011), http://lawprofessors.typepad.com/laborprof_blog/2011/03/i-seem-to-be-in-the-habit-lately-of-looking-for-the-dark-side-of-generally-good-news-hyperlink-to-prior-postthis-time-its.html.

[62] *Staub*, 131 S. Ct. at 1195 (Alito, J., concurring) (alteration in original). The concurrence went on: "The Court, however, strays from the statutory text by holding that it is enough for an employee to show that discrimination motivated *some other action* and that this latter action, in turn, caused the termination decision. That is simply not what the statute says." *Id*.

[63] *Id*. ("Where the officer with formal decisionmaking authority merely rubberstamps the recommendation of others, the employer, I would hold, has actually delegated the decisionmaking responsibility to those whose recommendation is rubberstamped. I would reach a similar conclusion where the officer with the formal decisionmaking authority is put on notice that adverse information about an employee may be based on antimilitary animus

permit liability in some subordinate bias cases, but a truly independent decision would exonerate the employer. Nor would it matter to Alito whether the investigation reaches the correct result – it is enough if it is reasonable.[64]

But the majority thought this approach departed from the statutory text and normal principles of agency: "[I]f the independent investigation relies on facts provided by the biased supervisor – as is necessary in any case of cat's-paw liability – then the employer . . . will have effectively delegated the factfinding portion of the investigation to the biased supervisor."[65] However, the difference between the majority and concurrence on this point may be less dramatic in practice than in formulation – if the decisionmaker reaches her conclusion uninfluenced by the biased subordinates, there will be no proximate cause, indeed no cause-in-fact.[66] Thus, we can anticipate the same issue to arise in future cases, regardless of the label.

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but does not undertake an independent investigation of the matter.").

[64] The employer should not be liable "where the officer with formal decisionmaking responsibility, having been alerted to the possibility that adverse information may be tainted, undertakes a reasonable investigation and finds insufficient evidence to dispute the accuracy of that information." *Id*. Justice Alito explicitly referenced the cases dealing with employer liability for harassment where the Court has devised an approach that is focused on employers' creating (and employees' invoking) internal systems to deal with complaints:

> [This interpretation] would also encourage employers to establish internal grievance procedures similar to those that have been adopted following our decisions in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*. Such procedures would often provide relief for employees without the need for litigation, and they would provide protection for employers who proceed in good faith.

Id. at 1196 (citations omitted); *see also* 2 SULLIVAN & WALTER, *supra* note 21, § 7.07[F][3][b] (discussing employer-created mechanisms to prevent and remedy sexual harassment in the workplace).

[65] *Staub*, 131 S. Ct. at 1193. Alito responded that the employer cannot

> be said to have "effectively delegated" decisionmaking authority any time a decisionmaker "relies on facts provided by [a] biased supervisor." A decisionmaker who credits information provided by another person – for example, a judge who credits the testimony of a witness in a bench trial – does not thereby delegate a portion of the decisionmaking authority to the person who provides the information.

Id. at 1195-96 (Alito, J., concurring) (alteration in original) (citation omitted).

[66] The difference between the two causal theories might arise in the context of one common situation, that of a biased supervisor reporting an employee for misconduct. The decisionmaker, without reliance on the report, ascertains that the facts are correct and discharges the plaintiff. From a cause-in-fact perspective, the report resulted in discharge, and might never have been made but for bias. From a proximate cause perspective, the employer is merely discharging a misbehaving employee and perhaps should not be liable. *Staub* itself elides this point. Staub argued that he did not, in fact, violate his Corrective Action warning, and that Buck should have determined that. Presumably, the jury agreed. But what if Staub *had* been absent – but his absences were reported only because of bias? Indeed, arguably the Corrective Action requirements were imposed for discriminatory reasons.

Staub left a number of unanswered questions. These questions include whether liability could follow from co-worker (as opposed to supervisor) animus;[67] and whether an employee might have a responsibility to file a grievance raising the discrimination claim (as plaintiff had done), presumably in order to bring the problem to the attention of the innocent decisionmaker.[68]

But perhaps the more important question for both subordinate bias liability and discrimination law more generally is what "proximate cause" means. Indeed, the Third Circuit confronted this issue within months of *Staub* in a Title VII retaliation case in which, at first blush at least, the employer had done as much as possible to insulate its decisionmakers from any bias. *McKenna v. City of Philadelphia*[69] involved a classic cat's paw situation with the twist that the plaintiff was a police officer and the decisionmaker was an official Police Board of Inquiry (PBI) conducting an internal hearing on charges proffered against him by his biased supervisor. The PBI found the plaintiff guilty of the charges.[70] Although there was a dispute about the adequacy of the PBI procedures, the Third Circuit upheld a jury verdict against the City without deciding that the procedures were deficient – the court seemed to think that liability could be found even when the decisionmaker conducted an adversarial proceeding to determine the truth or falsity of the charges motivated by discrimination.[71]

In reaching its result, the Third Circuit wrote that once the plaintiff established a "prima facie case" that his termination stemmed from animus, "it was the City's burden to come forward with evidence that it terminated [the plaintiff] for reasons unrelated to [the supervisor's] original biased action in preferring charges against him."[72] This passage is odd in several respects,[73]

[67] "We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision." *Staub*, 131 S. Ct. at 1194.

[68] "We also observe that Staub took advantage of Proctor's grievance process, and we express no view as to whether Proctor would have a . . . defense if he did not." *Id*. The Court then referred to the employer's affirmative defense to liability for sexual harassment. *See* 2 SULLIVAN & WALTER, *supra* note 21, § 7.07[F][3].

[69] 649 F.3d 171, 173-74 (3d Cir. 2011).

[70] *Id*. at 179 ("[T]he PBI affirmed those charges, and the Commissioner then terminated [plaintiff] Carnation."). It does not appear that the plaintiff defended the departmental charges on the basis that they were lodged in retaliation for his opposition to discrimination. McKenna v. City of Philadelphia, No. 98-5835, 2010 WL 2891591, at *26 (E.D. Pa. July 20, 2010) ("No evidence was presented at trial to suggest that the officers on the PBI had any retaliatory animus toward Carnation or even that they knew that Carnation had engaged in protected activity.").

[71] *McKenna*, 649 F.3d at 180; *see also* Adamczyk v. N.Y. State Dep't of Corr. Servs., No. 11–1406–cv, 2012 WL 1130637, at *2 (2d Cir. Apr. 5, 2012) (suggesting that *Staub* could be argued to support liability, even though the decision was reviewed by an arbitrator, if the arbitrator relied on discriminatorily motivated testimony).

[72] *McKenna*, 649 F.3d at 178.

but is most puzzling with regard to its view of causation. How could a Board whose role was to decide on charges preferred by a biased supervisor ever act "for reasons unrelated to" the preferred charges?

But even if that language were ill-chosen and the court meant to say only that the decision was otherwise independent,[74] the problem of proximate cause does not disappear. Indeed, the *McKenna* court seemed to equate cause-in-fact with proximate cause. The jury had been instructed before *Staub* was decided, so the question was whether those instructions were correct. The court held yes. The instruction below had been framed in terms of bias having "a determinative effect on the alleged materially adverse action."[75] According to the panel, these "instructions to the jury incorporated the concept of proximate cause."[76] While the instruction might have been correct, it was clearly framed in terms of cause-in-fact, not proximate cause. The court's decision, if not its language, may be justified on the ground that any error was harmless because "the jury could not have reached a different decision as a matter of law even if it had been instructed in accordance with *Staub*."[77] But that possibility itself brings into sharp focus the question of what, if anything, "proximate" cause adds to the analysis.

In other words, if proximate cause equals cause-in-fact, why did Justice Scalia go to such lengths to speak in terms of the former? Similarly, if, theoretically, proximate cause does not equal cause-in-fact, but no jury can fail to find proximate cause when there is cause-in-fact in a cat's paw case, why did Justice Scalia deploy the concept? While it is logically possible that the *McKenna* jury was required to find proximate cause on the facts before it while other cases might differ, *McKenna* presents perhaps the most extreme example

[73] This sentence seems wrong on one count and questionable on another. It is not enough to prove a "prima facie case" of bias by the immediate supervisor – a plaintiff must establish that bias in the face of whatever responses can be raised on behalf of that supervisor. Further, the burden of persuasion may have been impermissibly shifted. In tort law, proof of proximate cause is the plaintiff's burden, *e.g.*, Hazel & Thomas, P.C. v. Yavari, 465 S.E.2d 812, 815 (Va. 1996), and *Staub* looked to tort law for its analysis. *McKenna* neither justified its result nor even recognized any problem with its analysis.

[74] At one point the court seemed to believe that the PBI was not in fact independent, rejecting the argument that its adding a charge to those preferred showed that the panel was independent: the jury could find that "the added charge just as likely reflected that the PBI was not independent and that it adopted Colarulo's biased account of the events." *McKenna*, 649 F.3d at 179.

[75] *Id.* at 180.

[76] *Id.* Elsewhere in the opinion, the court had a more nuanced understanding of the concept: "Proximate cause requires only some direct relation between the injury asserted and the injurious conduct alleged, and excludes only those link[s] that are too remote, purely contingent, or indirect." It is "causation substantial enough and close enough to the harm to be recognized by law." *Id.* at 178 (alteration in original) (citations and internal quotation marks omitted).

[77] *Id.* at 180.

of an employer's decision-making process being structured to minimize the possibility of individual error or bias tainting any decision.[78]

One explanation for *Staub*'s invocation of proximate cause is that the majority was not really concerned with exonerating an employer in the cat's paw situation where cause-in-fact and proximate cause are both satisfied by the same proof; rather, it had other ends in mind. To appreciate this, it is important to understand that *Staub* may have implications for antidiscrimination law that go beyond the cat's paw scenario. These potential implications have two vectors, cutting in quite different directions. The less obvious has been touched on briefly – *Staub*'s treatment of "intent" under the antidiscrimination laws, which has the potential to expand the reach of the disparate treatment theory. The second, countervailing possibility is that transplanting "proximate cause" to the discrimination context may allow courts to reject liability in instances where discrimination was a cause-in-fact of adverse employment actions.

II. *STAUB*'S RECASTING OF INTENT

There is no principle more basic to Title VII and other antidiscrimination laws than that the disparate treatment theory requires "intent to discriminate." The term "intentional discrimination" appears multiple times in Supreme Court opinions[79] and has been used literally thousands of times in the lower courts.[80]

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[78] Other circuit court cases applying *Staub* to date tend to avoid these issues, finding no intent to cause an adverse action by the individual with the discriminatory intent and/or no showing of influence on the actual decisionmaker. *See generally* Hysten v. Burlington N. Santa Fe Ry. Co., 415 F. App'x 897 (10th Cir. 2011).

[79] *E.g.*, Ricci v. DeStefano, 129 S. Ct. 2658, 2710 n.21 (2009) (Ginsburg, J., dissenting) ("In any event, it is not apparent why these alleged political maneuvers suggest an intent to discriminate against petitioners."); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645-46 (1989) ("Under this basis for liability, which is known as the 'disparate-impact' theory and which is involved in this case, a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a 'disparate-treatment' case."); Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 988 (1988) ("[W]e have consistently used conventional disparate treatment theory, in which proof of intent to discriminate is required, to review hiring and promotion decisions that were based on the exercise of personal judgment or the application of inherently subjective criteria.").

"Intentional discrimination" is used most often to distinguish disparate treatment from disparate impact, but it is also often used to describe the mental state necessary for a violation. *Compare* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) ("Title VII, for example, can be violated in many ways – by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company."), *with* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (finding disbelief of an employer's nondiscriminatory explanation is "one form of circumstantial evidence that is probative of intentional discrimination").

Despite the frequency of "intent," however, the Court has also often spoken of "motive."[81] For example, its original description of disparate treatment was framed in terms of instances where "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."[82] Nevertheless, the same opinion later spoke of "intent to discriminate" as though it were synonymous with motive.[83] Further, decisions often speak of "discriminatory purpose."[84] Finally, as in *Staub*,[85] the Court has also labeled the prohibited state of mind for a violation as "animus,"[86] although that term is surely not correct to the extent that it might suggest the necessity for a hostile motivation.[87] In short, despite some scholarly efforts to clarify the terms,[88] the

[80] A search conducted in May 2012 on the Lexis Federal and State Cases Combined Database using the terms "intentional discrimination" and "Title VII" yielded over 3000 hits from the last decade alone. On the LexisNexis splash page, click on "Federal & State Cases, Combined"; then, under the "Restrict by Date" option, select "Previous 10 Years" from the drop down; then click search.

[81] *See infra* note 89.

[82] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[83] *Id*. at 346 n.28 ("[T]he decisions can be viewed as resting upon the proposition that a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption.")

[84] *See infra* notes 90-92.

[85] *See supra* note 36.

[86] *E.g*., Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 637 (2007) ("Ledbetter has not adduced evidence that Goodyear initially adopted its performance-based pay system in order to discriminate on the basis of sex or that it later applied this system to her within the charging period with any discriminatory animus . . . ."); Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006) ("Although it is true the disputed word ["boy," as applied to an African American man,] will not always be evidence of racial animus, it 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."); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000) ("Applying this standard here, it is apparent that respondent was not entitled to judgment as a matter of law. In this case, in addition to establishing a prima facie case of discrimination and creating a jury issue as to the falsity of the employer's explanation, petitioner introduced additional evidence that Chesnut was motivated by age-based animus and was principally responsible for petitioner's firing.").

[87] The Supreme Court has held that classifications that distinguish on a prohibited basis are illegal even absent any hostility to the class in question. It is sufficient that the employer intended to draw a distinction on a prohibited ground. *E.g*., UAW v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991) (striking down a fetal protection policy limited to women); L.A. Dep**'**t of Water & Power v. Manhart, 435 U.S. 702, 723 (1978) (striking down the use of sex-segregated actuarial tables as used in an employer**'**s pension plan).

[88] *See, e.g*., Mark S. Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C. L. REV. 943, 978-79 (1984) ("[I]n the tort

authority prior to *Staub* often used a number of terms as though they were interchangeable.[89]

The confusion is not limited to the statutory setting. In the constitutional context, the Court has been clear that the mere fact that a decision adversely affects a particular race or sex is not enough for a violation – no matter how predictable or even certain it is that the adverse effect will follow. Thus, in *Personnel Administrator of Massachusetts v. Feeney*,[90] the Court explicitly held that a governmental action will not be deemed to have been "intended" to discriminate for equal protection purposes even if the "natural and probable" consequences of a decision are certain to be adverse to one sex.[91] In language directed to the Equal Protection Clause, but which many think reflected the Court's view under the antidiscrimination statutes, the Court wrote that

area . . . the term generally is defined without regard to the actor's motive or underlying purpose, [and] is used merely to distinguish conduct that is deliberate and volitional from conduct that is accidental. . . . [Moreover,] tort law has objectified the requisite state of mind for its intentional wrongs, permitting it to be inferred from the circumstances of the act and thus avoiding the subjective question of actual state of mind."); Mark C. Weber, *Beyond* Price Waterhouse v. Hopkins*: A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495, 498 (1990) ("In [many] cases, the term 'motive' is used interchangeably with 'intent.' Of course, the two terms are not identical in many legal applications. Ordinarily, intentions are immediate objectives, such as the intent to steal, whereas motives are more basic or underlying objectives, such as the motive to be wealthy."); D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733, 740 (1987) ("The confusion that has occurred between intent and motive is a result of what Professor Fiss has identified as putting a 'psychological gloss' on the concept of motivation, that is, improperly thinking that these causal concepts refer to the employer's state of mind.").

[89] *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) ("In such 'disparate treatment' cases . . . the plaintiff is required to prove that the defendant had a discriminatory intent or motive."); Pullman-Standard v. Swint, 456 U.S. 273, 289-90 (1982) ("Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive."). An exception occurs with "mixed motives" cases, where the Court does not speak of "mixed intent." *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003) (deciding issue of "whether a plaintiff must present direct evidence of discrimination in order to obtain a *mixed-motive* instruction" (emphasis added)); McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 359-60 (1995) (explaining that "mixed motives" analysis does not apply when the employer has no prior knowledge of employee wrongdoing); Hazen Paper Co. v. Biggins, 507 U.S. 604, 613 (1993) ("[I]nferring age motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present.").

[90] 442 U.S. 256 (1979).

[91] *Feeney* involved a state's preference for veterans in government employment. Given the federal laws then restricting women's military service, there was no doubt that such a preference would benefit men as opposed to women.

> "[d]iscriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.[92]

This language has been repeatedly reaffirmed in constitutional cases and clearly reaches beyond the state legislation at issue in *Feeney* to executive decisionmaking. For example, in a landmark decision, *Ashcroft v. Iqbal*, the Court found that a complaint alleging discrimination in law enforcement on the basis of religion and national origin was not well pled.[93] Although defendants Attorney General Ashcroft and FBI Director Robert Mueller must have known that Arabs and Muslims would be far more likely than members of other religions and nationalities to be swept up in post-9/11 crack-downs, "[u]nder extant precedent purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.' It instead involves a decisionmaker's undertaking a course of action 'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group.'"[94]

In light of this Article's analysis, it seems likely that this whole conceptual structure would have been better phrased in terms of motive, not intent. In contradistinction to tort law as framed by Justice Scalia in *Staub* (and presumably applicable to the antidiscrimination statutes), the constitutional question is whether "the actor desires to cause [the] consequences of his act"; it is *not* enough that "he believes that the consequences are substantially certain to result from it."[95]

At first glance, then, *Staub* would seem to expand the reach of the discrimination statutes, not something the current Court seems likely to do. But *Staub*'s expansion of intent beyond desire to substantially certain consequences is coupled with its requirement of impermissible motive. In other words, while "intent to discriminate" was previously thought to satisfy the statutes, Justice Scalia would seem to have disaggregated the two and require both motive and intent, as he defined the term, to cause an adverse employment action. It is not clear as a practical matter whether things have gotten worse for plaintiffs under this two-part structure. In the employment context, adverse employment actions may often be "substantially certain" to occur from actions of supervisors, although far less likely to follow from the actions of co-workers. Nevertheless, it is unlikely things have gotten better.

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[92] *Feeney*, 442 U.S. at 269.

[93] Ashcroft v. Iqbal, 556 U.S. 662, 676-77 (2009); *see also* Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) (citing *Feeney*, 442 U.S. at 279, in discussing the constitutional implications of a public employer taking race into account in order to address practices with a disparate impact). *See generally* Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613 (2011).

[94] *Iqbal*, 556 U.S. at 676-77 (second alteration in original).

[95] Staub v. Proctor Hospital, 131 S. Ct. 1186, 1194 n.3 (2011).

In any event, *Staub* seems to mean that the *Feeney* line of authority developed for intent-based constitutional claims cannot be automatically transposed to the antidiscrimination statutes. While courts[96] and commentators[97] generally believed that *Feeney* governed intent under Title VII, that remains true only so long as "intent" means "motive."[98] And if *Staub* is generalized to other antidiscrimination laws, the plaintiff will have to prove both motive and intent to cause an adverse employment action. Of course, as *Feeney* recognized, the foreseeability of particular results might be a basis to infer the underlying motive.[99]

[96] *See, e.g.*, EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1273 (11th Cir. 2000) (citing *Feeney* as defining intent for Title VII); AFSCME v. Washington, 770 F.2d 1401, 1405 (9th Cir. 1985).

[97] *See, e.g.*, MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES & MATERIALS ON EMPLOYMENT DISCRIMINATION 156 (2008); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1299 (1998) ("[I]n a disparate treatment case commenced under [Title VII], a plaintiff must prove purposeful discrimination along the lines *Feeney* describes."); Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1751-52 (1986) (reading *Feeney* to govern a Title VII comparable worth case); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 503 (2001) ("Although *Feeney* was a constitutional, not statutory, decision, the judicial approach to intentional discrimination in Fourteenth Amendment claims and its approach to intentional discrimination under . . . Title VII has been consistent.").

[98] Indeed, the distinction between the desired and the foreseeable maps onto the conceptual cleavage between disparate treatment and disparate impact under Title VII since the racial or gender results of adopting practices with a disparate impact are typically foreseeable. *See Ricci*, 129 S. Ct. at 2669 (recounting the city's consideration of the disparate impact of a civil service test in which one witness reported that adverse impact was generally predictable for employment tests); Amy L. Wax *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 623 (2011) (describing the "validity-diversity tradeoff" for industrial and organizational psychology resulting from "the most effective job selection criteria consistently generat[ing] the smallest number of minority hires"). If foreseeability were sufficient to establish disparate treatment, most impact cases would become treatment cases, effectively eliminating the employer's business necessity/job relation defense. *See generally* 1 SULLIVAN & WALTER, *supra* note 21, § 4.03[D] (discussing the circumstances under which the business necessity/job relation defense operates as an affirmative defense).

[99] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 n.25 (1979) ("This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. . . . [But] when, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate[,] . . . the inference simply fails to ripen into proof."); *see also* EEOC v. Dial Corp., 469 F.3d 735, 738-39 (8th Cir. 2006) (holding employer liable under Title VII for both disparate impact and disparate treatment, with the foreseeability of adverse impact being one basis for inferring intent to discriminate); United States v. City of New York, No. 07-CV-2067, 2011 WL 4639832, at *9-10 (E.D.N.Y. Oct. 5, 2011) (finding continued use of tests with a disparate impact to be one basis from which to infer intent to discriminate).

In short, *Staub* is best read as requiring both motive and intent, i.e., motive to treat an employee differently because of his military service (or race) and intent that that difference in treatment result in an adverse employment action. This principle seems likely to be generalizable to the other antidiscrimination statutes. Suppose a supervisor provides a negative performance evaluation because of the subordinate's race in order "to take him down a peg." No immediate discharge followed nor was contemplated by the supervisor, but several years later, a downturn causes the employer to lay off a number of workers, and it chooses those with the lowest evaluations. Race animosity caused the discharge in a but-for sense, but, while motive was present, intent may well not have been – the result may have neither been desired by the supervisor nor believed by him to be substantially certain to occur when the evaluation was conducted. While it has long been true that an employer who is not motivated by a prohibited consideration does not violate the statute, *Staub* creates the possibility that an employer who is so motivated will still not be liable for a resulting adverse employment action.[100] However, regardless of whether *Staub* is expansive or contractive on the meaning of intent under the antidiscrimination laws, the Court simultaneously restricted the reach of the statutes by importing "proximate cause" into antidiscrimination law.

III. PROXIMATE CAUSE IN DISCRIMINATION CASES

Prior to *Staub*, proximate cause had been conspicuously absent from discrimination jurisprudence, raising the question of why the Court invoked it at this juncture. The Supreme Court had not only avoided proximate cause in discrimination cases prior to *Staub*,[101] but arguably in *Price Waterhouse v.*

But see Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372-73 (2001) ("Although disparate impact may be relevant evidence of racial discrimination, such evidence alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny." (citation omitted)).

[100] How likely it is that such a scenario could occur is a matter of conjecture, but, for example, it could be argued that as applied to the harassment context, this thrust might add an inquiry into the harasser's state of mind in addition to determining whether the employer has created "an environment that a reasonable person would find hostile or abusive," and one that the victim "subjectively perceive[s] . . . to be abusive." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).

[101] While the term was occasionally used in passing in addressing other issues, *e.g.*, Comm'r v. Schleier, 515 U.S. 323, 330 (1995) (using the term in connection with whether settlement of a discrimination suit is excludable from income for purposes of federal taxation), the closest the Supreme Court came to suggesting that proximate cause had a role to play in cases brought under the antidiscrimination laws was a lone dissent by Justice Thomas in *Olmstead v. L.C.* ex rel. *Zimring*, 527 U.S. 581 (1999), a case decided under Title II of the ADA. Plaintiffs there challenged the failure of a state agency to place disabled individuals in the community, and the majority held that, in appropriate circumstances, a failure to do so would violate the statute. Justice Thomas in dissent argued that the state's action could not be viewed as discriminating against the plaintiffs "by reason of" their

Hopkins,[102] had also implicitly rejected such a limitation in Title VII cases by its focus on cause-in-fact (although admittedly the authority of *Price Waterhouse* has since been substantially eroded).[103] Further, while some Supreme Court decisions limiting the reach of the antidiscrimination statutes could have been framed in proximate cause terms, the Court each time chose another avenue.[104] Nor was the landscape different in the lower courts. They rarely invoked the term in discrimination cases. And when they did, they either addressed cat's paw situations,[105] framed but-for causation as proximate cause,[106] or dealt with a variety of miscellaneous questions.[107]

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disabilities, as 42 U.S.C. § 12132 requires. That term is properly interpreted as "requiring proximate causation," and the plaintiff could not show that their disabilities constituted the proximate cause for their exclusion when the real reason was limited resources. *Olmstead*, 527 U.S. at 626 (Thomas, J., dissenting).

[102] 490 U.S. 228 (1989). While the dissenters in *Price Waterhouse* required the plaintiff to prove but-for causation, and therefore could plausibly claim to not have reached any conclusion as to whether proximate cause was also required, the other three Justices apparently found but-for causation enough. The plurality, authored by Justice Brennan, and the separate concurrences of Justices O'Connor and White upheld the judgment for plaintiff and therefore may have, implicitly at least, considered that but-for causation sufficed. O'Connor in particular used proximate cause twice in describing more general tort principles and could have been expected to introduce that concept had she thought it relevant to Title VII. *Id*. at 263-64 (O'Connor, J., concurring). *See generally* 1 SULLIVAN & WALTER, *supra* note 21, § 2.03[C].

[103] *Price Waterhouse*'s liability structure was codified as altered by "motivating factor" analysis for Title VII by the Civil Rights Act of 1991. *See generally* 1 SULLIVAN & WALTER, *supra* note 21, § 2.03[D]. Any utility *Price Waterhouse* might have retained, therefore, would operate with respect to other statutes, such as the ADEA. However, in *Gross v. FBL Financial Services*, the Court rejected such an application and in the process cast doubt on any continued role for *Price Waterhouse*:

> [W]e reject petitioner's contention that our interpretation of the ADEA is controlled by *Price Waterhouse*, which initially established that the burden of persuasion shifted in alleged mixed-motives Title VII claims. In any event, it is far from clear that the Court would have the same approach were it to consider the question today in the first instance.

Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2351-52 (2009) (footnote omitted). *Gross* seems likely to control most of antidiscrimination law. *See generally* Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, Inc., *and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69 (2010); Martin J. Katz, Gross *Disunity*, 114 PENN STATE L. REV. 857 (2010); Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 281 (2010); Charles A. Sullivan, Response, *The Curious Incident of* Gross *and the Significance of Congress's Failure to Bark*, 90 TEX. L. REV. SEE ALSO 157 (2012); Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859 (2012).

[104] *See infra* notes 126-127 and accompanying text.

[105] Cat's paw situations, whether or not that term is used, include: *Talbert v. Judiciary of New Jersey*, 420 F. App'x 140, 141 (3d Cir. 2011) (holding that governor's independent

Of course, the absence of proximate cause analysis in prior decisions might be explained simply by the fact that there was no need to invoke such a concept. Under this view, it is significant that most of the few circuit court decisions referencing proximate cause were in the cat's paw scenario since that was the only context in which it made a difference. The problem with this possibility is that proximate cause was also unnecessary to the result in *Staub* and, indeed, to the Court's analysis.

Precisely what proximate cause is remains to be examined and will, of course, heavily influence the significance of the doctrine for antidiscrimination law. But it is at least clear that proximate cause, if it is to have any bite, is more demanding of plaintiffs than mere cause-in-fact. Cause-in-fact is necessary in normal tort law,[108] but the interposition of proximate cause means that it is not always sufficient. In *Staub*, the lower-level supervisors had the requisite discriminatory motives, that is, the intent to cause the plaintiff to be fired because of his military service. Their actions caused the ultimate decisionmaker to discharge the plaintiff, thus satisfying the cause-in-fact criterion. It is hard to see how this scenario raises any questions of proximity. Indeed, the Court's expansive definition of intent largely seems to subsume any separate inquiry since the "substantially certain" consequence of an act, much less a desired consequence, seems necessarily proximate to the act itself.[109] In short, once the Court was willing to find that a lower-level

decision not to reappoint plaintiff to the judiciary barred any suit based on discrimination by colleagues and the judiciary itself), *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107, 126 (2d Cir. 2004) (finding independent investigation did not preclude discrimination litigation), and *Springer v. Seaman*, 821 F.2d 871, 882 (1st Cir. 1987) (taking independent employment guidelines into account, though not holding them dispositive, in deciding whether litigation should go forth).

[106] Decisions using the term when but-for causation is clearly meant include *Bogle v. McClure*, 332 F.3d 1347, 1357 (11th Cir. 2003), and *Bibbs v. Block*, 778 F.2d 1318, 1328 (8th Cir. 1985).

[107] *See* Siefken v. Vill. of Arlington Heights, 65 F.3d 664 (7th Cir. 1995) (recognizing that plaintiff's disability may have been the cause-in-fact of his misconduct but it was not the proximate cause of his discharge that was predicated on that misconduct).

[108] This statement, however true generally of tort law, may be questionable as applied to Title VII due to the motivating factor provision. Even if the employer can prove that it would have made the same decision in any event, it remains liable. Put differently, while proof of no cause-in-fact will limit remedies against an employer, it does not avoid liability.

[109] One recurring proximate cause question is whether an intervening act negates liability of the original tortfeasor. The general answer is that it does if the intervening act is unforeseeable and does not if the intervening act is foreseeable. By definition, the biased supervisors must have foreseen the resulting conduct if they "intended" it in the first place within the meaning of *Staub*.

This approach to intervening acts has changed over time since earlier decisions tended to view an intervening criminal act as barring liability, no matter how foreseeable. *E.g.*, DAN B. DOBBS, THE LAW OF TORTS 470-74 (2000) ("In an earlier era, courts tended to hold that intervening criminal acts were unforeseeable as a matter of law."); Martha Chamallas,

supervisor's intent could result in employer liability, it could easily have relied on cause-in-fact rather than proximate cause.

Why then did the Court invoke proximate cause? Although lower courts not infrequently seem to confuse cause-in-fact and proximate cause, Justice Scalia does not deploy legal concepts lightly, especially in an opinion seemingly structured around transplanting tort law to the discrimination context.[110] It is possible, of course, that the Court was merely setting the stage for subordinate-bias cases it explicitly did not address: discharge caused by a biased coworker[111] or instances in which the plaintiff did not take advantage of the employer's grievance procedure.[112] However, other doctrines are available should the Court want to limit liability in those contexts. As for coworkers, Title VII would not permit respondeat superior liability for their actions, which means that employers are responsible for harassment of coworkers only when they are negligent in dealing with the harassment.[113] As for requiring resort to grievance procedures, the Supreme Court created an elaborate "prevent and correct" apparatus for sexual harassment[114] in order to incentivize employers to deal with such problems internally, and it would seem easily transferrable to the cat's paw scenario.[115] In short, employer liability could be avoided in both situations by invoking extant doctrine that does not necessitate any notion of proximity.

Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases, 14 LEWIS & CLARK L. REV. 1351, 1374 (2010) ("In the past, the general rule was that intervening criminal conduct severed the causal chain, resulting in no proximate cause as a matter of law. Contemporary courts are far less likely to rely on proximate cause and to rule that the sexual assault or other criminal act severs the causal chain. Instead, the fight is now over duty with no clear direction in the case law.").

[110] Further, Justice Scalia has been concerned with proximate cause as an element of statutory liability at least since his concurrence in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 290 (1992) (Scalia, J., concurring in the judgment).

[111] While co-workers could fabricate a fellow employee's supposed misconduct for discriminatory reasons, perhaps a more likely and difficult scenario is "ratting out" the victim for real shortcomings that would otherwise not have come to the employer's attention. *See* Hysten v. Burlington N. Santa Fe Ry. Co., 415 F. App'x. 897, 912 (10th Cir. 2011) (rejecting proximate cause stemming from the actions of co-workers in part because they "had absolutely no supervisory authority or influence with respect to Mr. Hysten, including authority or influence relating to employee discipline").

[112] *See supra* note 8 and accompanying text.

[113] *See* 2 SULLIVAN & WALTER, *supra* note 21, § 7.07[F][4]. Further, Justice Scalia cautioned that employer liability required the discriminating agent to act within the scope of his employment, which would rarely be true of co-workers. *See supra* note 51.

[114] *See* 2 SULLIVAN & WALTER, *supra* note 21, § 7.07[F][3].

[115] Burlington Indus. v. Ellerth, 524 U.S. 742, 764-65 (1998) (recognizing an affirmative defense to supervisory harassment that does not result in a tangible employment action "[i]n order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees").

A remaining possibility is that "proximate cause" as a limitation on employer liability was recognized in *Staub* for another reason entirely – perhaps to deal with the increasing prominence given to what goes by many names but will in this Article be generally called "cognitive bias." The possibility is simply that the Court is readying the ground to hold that unconscious discrimination is not actionable because it does not proximately cause the resultant harm. This argument is less than intuitively obvious, and in fact depends on an approach to proximate cause that is distinctly in the minority. But a court looking for a protean tool to deal with a troublesome issue might do worse than using proximate cause, and there is some reason to suspect the Supreme Court is doing precisely that. The next section develops the concept of proximate cause in more detail in order to assess this possibility.

IV. PROXIMATE CAUSE

Justice Scalia's importation of proximate cause into Title VII jurisprudence was remarkable for a variety of reasons. First, proximate cause has always been a notoriously amorphous concept even in those areas in which it applies. While it has been reformulated over time, how these efforts to reframe the idea might bear on *Staub*'s endorsement of "proximate cause" is by no means apparent. Second, the concept has been primarily utilized for negligence, and a disparate-treatment Title VII violation is more akin to an intentional tort. Third, and relatedly, tort law has generally utilized proximate cause for physical injuries, not for economic torts, and Title VII suits are much more like the latter. These points suggest that the lower courts will spend years trying to decode what the Court had in mind.

With respect to the meaning of proximate cause in its most usual setting, i.e., in negligence cases for physical injury, the generations of law students who have encountered the term, most memorably in *Palsgraf v. Long Island Railroad*,[116] are typically left confused rather than enlightened. Complaints about the nebulousness of the concept are numerous and longstanding, and there have been determined efforts to eradicate it from legal discourse. Some of these are more than a little amusing. Thus, the *Restatement (Third) of Torts* critiqued and attempted to eliminate the term, but it also hedged its bets by including the term only in a special note to the relevant Chapter and "fervently hop[ing] that the Restatement Fourth of Torts will not find this parenthetical necessary."[117] In other words, Justice Scalia seems to have resurrected proximate cause while one respected authority seeks to inter it.

But without carrying the zombie metaphor too far, perhaps the *Staub* Court was merely deciding the meaning of the statute against the backdrop of common law negligence principles existing when the statute was enacted, not with later efforts to clarify it. The Court has looked to common law analogs in

[116] 162 N.E. 99 (N.Y. 1928).

[117] RESTATEMENT (THIRD) OF TORTS ch. 6, special note on proximate cause (2010).

a number of discrimination contexts, drawing upon both torts principles[118] and agency law.[119] Perhaps, then, what Justice Scalia has in mind is the notion of proximate cause as it existed in 1964. However, to the extent the Restatement captures the case law, there has been very little change over the three successive torts Restatements, which have been more or less consistent in message if not terminology.

Briefly, a unified "foreseeable harm/foreseeable plaintiffs" theme runs from the original *Restatement* (promulgated in 1934), through the *Restatement (Second)* (1965), and the *Restatement (Third)* (2010). While the various formulations have different terminology, and none uses "proximate cause" in its blackletter,[120] the core notion is that it is not enough for liability that the conduct is negligent with regard to someone; it must also be negligent with regard to the harm (or class of harms) or the plaintiff (or the class of people to whom the plaintiff belongs). The original *Restatement* explained: "If the actor's misconduct is negligent and not intentional, the actor cannot be liable to another harmed thereby, no matter how directly, unless his conduct was negligent toward the other as involving an unreasonable risk of harm to him, or to a class of which he is a member."[121] The *Restatement (Second)* took the

[118] *E.g.*, Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 538 (1999) (citing RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) for standards for the award of punitive damages).

[119] *E.g.*, Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 448 (2003) (relying on RESTATEMENT (SECOND) OF AGENCY § 2(2) (1957) for the definition of the master-servant relationship in an ADA case); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 319 (1992) (reading the term "employee" "to incorporate traditional agency law criteria for identifying master-servant relationships" in an ERISA case); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 793 (1998) (applying RESTATEMENT (SECOND) OF AGENCY § 219(1) to determine employer liability for the torts of its agents).

[120] The first two Restatements spoke of "legal cause," a concept that embraced both cause in fact and some version of proximate cause. RESTATEMENT OF TORTS § 430 (1934); RESTATEMENT (SECOND) OF TORTS § 430; *id.* § 430 cmt. b (essentially repeating the language of the original Restatement). The *Restatement (Third)* abandons that term in favor of "scope of liability." *See* RESTATEMENT (THIRD) OF TORTS ch. 6, special note on proximate cause ("Neither the first Restatement of Torts nor the portion of the Second Restatement of Torts published in 1965 contains the phrase. Instead, . . . prior Restatements employed the umbrella term 'legal cause' to include both factual cause and proximate cause.").

[121] RESTATEMENT OF TORTS § 430 cmt. b. However, this stress on foreseeability was complicated by language also requiring that the conduct be a "substantial factor" in the harm. Thus, the original Restatement dealt with proximate cause in Chapter 16 in the Negligence volume entitled "The Causal Relation Necessary to the Existence of Liability for Another's Harm." This required that negligent conduct be "a legal cause of harm to another," which in turn required the negligent conduct to be "a substantial factor in bringing about the harm." *Id.* § 431. Although "substantial factor" might have meant only cause-in-fact, the original Restatement makes plain that something more was required. *Compare id.* § 432 cmt. a ("If, without the actor's negligent conduct, the other would have sustained the harm, . . . the actor's conduct . . . is not a substantial factor in bringing it about."), *with id.* §

same approach, relying heavily on the formulation of the earlier one.[122] Most recently, the *Restatement (Third)*'s *Liability for Physical and Emotional Harm* expressed the same concept in terms of "scope of the risk": section 29 provides that "[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."[123] Under this view, an act may be negligent towards *A* because the harm to *A* is sufficiently foreseeable, but it does not follow that harm caused in fact to *B* by that act is itself sufficiently foreseeable to be actionable by *B*.[124]

This is all coherent – if often difficult of application – but it scarcely sheds any light on what Justice Scalia meant by proximate cause in *Staub*. The act in question, trumped-up claims of plaintiff's deficiencies, could scarcely have harmed anyone other than the plaintiff, at least in the first instance. *Staub* did envision a lower-level subordinate giving a bad evaluation without anticipating it would result in an adverse employment action, but the Court's analysis treated this as a question of lack of the requisite intent, not proximate cause: there can be no liability if no human being had the requisite intent to cause an adverse employment action.[125]

In short, the most obvious plaintiffs are those whom the tortfeasor intends to harm – the employees in question. While others, such as spouses or creditors,

433 (listing considerations in determining "substantial factor," including whether "it appears highly extraordinary that [the negligence] should have brought about the harm"). Nevertheless, the "substantiality" requirement seemed to add little to the foreseeable risks/foreseeable plaintiffs thrust of the original restatement. *See* Peter Zablotsky, *Mixing Oil and Water: Reconciling the Substantial Factor and Result-Within-the-Risk Approaches to Proximate Cause*, 56 CLEV. ST. L. REV. 1003, 1028 (2008) (finding little difference over time between "substantial factor, with its focus on significance as qualified by foreseeable manner, or the means of result-within-the-risk, with its focus on narrow concepts of foreseeable person, type and manner within-the-risk").

[122] RESTATEMENT (SECOND) OF TORTS § 430; *id*. § 430 cmt. b (essentially repeating the language of the original Restatement).

[123] *See* Sheehan v. City of New York, 354 N.E.2d 823, 835 (N.Y. 1976) (concluding that a bus driver was negligent in not pulling over to the curb to discharge passengers but that this negligence did not increase the risk of passengers being struck by a vehicle from behind).

[124] At least some model jury instructions incorporate this notion. *See* GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS – CIVIL § 60.202 ("A defendant may be held liable for an injury when that person commits a negligent act that puts other forces in motion or operation resulting in the injury when such other forces are the natural and probable result of the act that the defendant committed and that reasonably should have been foreseen by the defendant. When the injuries could not reasonably have been foreseen as the natural, reasonable, and probable result of the original negligent act, then there can be no recovery. If the chain reaction that resulted from the defendant's alleged negligence, if any, meets the above tests, then the plaintiff may recover.").

[125] Staub v. Proctor Hospital, 131 S. Ct. 1186, 1192 (2011) ("So long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable . . . .").

may be harmed derivatively, proximate cause is not needed to bar a Title VII suit by them since a decision handed down the same term as *Staub*, and also authored by Justice Scalia, limited standing for "persons aggrieved" by a Title VII violation.[126] Only those within the "zone of interests" the statute was designed to protect have standing, which presumably, would not include creditors.[127]

Of course, Justice Scalia's reference to the common law background against which the antidiscrimination statutes were enacted is not necessarily reflected in the Restatements, which, at least in part, aim to reconcile competing decisions, or, if that is not possible, choose the better one.[128] In fact, there are two competing polar views of proximate cause in the negligence context, which date back at least to the opposing opinions of Judges Cardozo and Andrews in *Palsgraf*. Although he did not use the term, Cardozo framed the proximate cause issue in terms of foreseeability.[129] While some harm to someone has to be foreseeable in order for an act to be negligent in the first place,[130] an act that is negligent because it risks harm to a given kind of plaintiff is not necessarily negligent as to all persons whose harm is caused in fact by the act. That is, Cardozo would limit liability for harm caused in fact to

[126] Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 870 (2011). At one point the Court described as "absurd" the possibility that "a shareholder would be able to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence." *Id*. at 869.

[127] Co-workers occupy a kind of intermediate position. They may themselves have been harmed by being deprived of what have been called the benefits of interracial association if another employee is fired for being black. It is not clear how such workers would fare under *Thompson*. Charles A. Sullivan, *Standing to Bring Antidiscrimination Claims*, WORKPLACE PROF BLOG (Feb. 21, 2011), http://lawprofessors.typepad.com/laborprof_blog/2011/02/like-many-of-us-i-was-pleased-with-the-outcome-in-thompson-v-north-american-stainless-lp-holding-that-title-viis-anti.html. *See generally* 2 SULLIVAN & WALTER, *supra* note 21, § 12.10[C] (4th ed. Supp. 2012).

[128] *See generally* Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 206 (2007) ("The critique from one side is that the Restatements are too activist, stating the law as the Institute believes it should be, rather than the law as it is. The critique from the other side is that the Institute is too conservative – frozen in time in the late 1800s or early 1900s – and fails to incorporate the best contemporary practices in the study of law.").

[129] *See generally* David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277, 1278, n.10 (2009). Cardozo's opinion repeatedly speaks in terms of foreseeability relating to whether there is a duty to a particular individual. *E.g*., Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928) ("The diversity of interests emphasizes the futility of the effort to build the plaintiff's right upon the basis of a wrong to someone else. The gain is one of emphasis, for a like result would follow if the interests were the same. Even then, the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.").

[130] DOBBS, *supra* note 109, § 182, at 448 ("If the defendant is negligent, that necessarily means he should have foreseen some harm, of some kind, to some person or property.").

situations where the injured plaintiff (or class of plaintiffs) and the injury (or type of injury) was at least generally foreseeable. In *Palsgraf* itself, it was foreseeable that the conductor's negligence would injure the person attempting to board the train (or perhaps those near him), but not a different person at the other end of the platform injured by a freak concatenation of events. This is, of course, essentially the position taken by the three Restatements.

In contrast, Judge Andrews' dissent in *Palsgraf* argued for limiting liability short of the harms caused in fact by the breach of duty, but he would have drawn the line in terms of policy considerations rather than pure foreseeability: "What we mean by 'proximate' is that, because of inconvenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."[131] Foreseeability is only a factor in this analysis.[132] A New Jersey court more recently framed the doctrine this way:

> Utilization of [the] term [proximate cause] to draw judicial lines beyond which liability will not be extended is fundamentally . . . an instrument of fairness and policy, although the conclusion is frequently expressed in the confusing language of causation, "foreseeability" and "natural and probable consequences." Many years ago a case in this State hit it on the head when it was said that the determination of proximate cause by a court is to be based "upon mixed considerations of logic, common sense, justice, policy and precedent."[133]

Of course, this approach to proximate cause has its own problem. Although foreseeability is itself rarely determinative because of the wide spectrum along which consequences are more or less foreseeable, the introduction of "mixed considerations of logic, common sense, justice, policy and precedent" is certain to make outcomes even less predictable. However, to the extent that a court wants flexibility in deciding where to impose liability, the lack of predictability may be a virtue. If Justice Scalia intended to adopt some variation of Judge Andrews' dissent in *Palsgraf*, it would open the door to limiting liability for intentional discrimination even when there was cause-in-fact, much less a motivating factor.

And, in fact, the Supreme Court has so deployed the term in cases arising under the Constitution and other federal statutes. For example, *Martinez v. California*[134] refused to hold the state parole board liable for a killing by a paroled criminal five months after his release:

> Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to his victim or to

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[131] *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

[132] DOBBS, *supra* note 109, § 183, at 451 ("Judge Andrews and the dissenters thought that . . . as a matter of substantive law, foreseeability should not be determinative.").

[133] Zaza v. Marquess & Nell, Inc., 675 A.2d 620, 635 (N.J. 1996) (quoting Powers v. Standard Oil Co., 119 A. 273, 274 (N.J. Sup. Ct.), *aff'd*, 121 A. 926 (N.J. 1923)).

[134] 444 U.S. 277 (1980).

> have proximately caused her death, we hold that . . . appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment.[135]

The death was "too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law."[136] Although the Court framed the question as one of the reach of constitutional protections, it could have reached the result by using a kind of constitutional proximate cause.[137]

But perhaps this is the wrong lens through which to examine the question. The *Palsgraf* analysis and the Restatement provisions we have discussed apply to personal injury caused by an act of negligence.[138] In contrast, the discrimination laws deal with intentional acts, and causation standards for liability have historically been more encompassing for intentional torts than for mere negligence. Thus, the *Restatement (Third*) emphasizes that its "scope of liability" analysis applies only to liability for physical harm, and its rules "may not be appropriate in other contexts."[139]

The failure of either the three Restatements or the cases to provide much guidance on proximate cause when intentional torts are concerned probably stems from the fact that, even aside from the so-called prima facie tort,[140]

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[135] *Id*. at 285 (citing, inter alia, *Palsgraf*).

[136] *Id*. at 285 ("Although a § 1983 claim has been described as 'a species of tort liability,' it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute." (citation omitted)).

[137] Given the protean nature of proximate cause, Professor Steve Willborn asked, in commenting on an earlier draft, why the Court did not utilize proximate cause in *Martinez* and suggests that it may have wanted even more discretion in limiting constitutional liability than proximate cause might comfortably provide.

[138] Indeed, Cardozo's opinion in *Palsgraf* at several points distinguishes between negligence and intentional harm. *E.g*., Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928) ("The plaintiff as she stood upon the platform of the station might claim to be protected against intentional invasion of her bodily security."). Indeed, he explicitly referred to the doctrine of transferred intent, which would hold an actor liable for injury to one person if the actor desired to harm another. *Id*. at 101 (distinguishing negligence cases from "certain cases of what is known as transferred intent [in which liability is imposed for] an act willfully dangerous to A resulting by misadventure in injury to B").

[139] RESTATEMENT (THIRD) OF TORTS § 29 cmt. c (2010). It goes on to note that "[g]enerally, no – or limited – duty rules [as opposed to proximate cause] have been employed to limit liability for other harms, such as economic loss, for which tort law has historically provided less protection." *Id*. The comment explains: "Economic loss, especially, given the interdependent economy and the variety of financial relationships, can spread quite broadly, far more so than physical harm from a single tortious act." *Id*.

[140] The underlying notion of the prima facie tort is that causing harm for the sake of causing harm, as opposed to causing harm in the pursuit of another interest, should be actionable. The *Restatement (Second)* captures this in section 870: "One who intentionally causes harm to another is subject to liability to that other for the injury, if his conduct is generally culpable and not justifiable under the circumstances." RESTATEMENT (SECOND) OF TORTS § 870 (1979). In this context, "intentionally" means that "the actor intends to

notions of causation are often wrapped up in the definition of the tort itself. For example, intentional interference with contract is often phrased in terms of the party to the contract whose breach has been induced.[141] Since the injured party is framed as the plaintiff, this formulation of the tort would not permit someone else – say a creditor of the injured party—to sue. It is not surprising, therefore, that a few cases state that proximate cause is unnecessary for intentional torts, or at least that a more relaxed notion of proximate cause is appropriate.[142] Nor do the Restatements explicitly address the core question. They do reject a foreseeability limitation for those intentional torts where the tortfeasor acts for the purpose of causing harm[143] but do not consider the rule for torts that are intentional only in the sense that the natural and probable consequence of the defendant's act is to cause the harm.

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produce the harm that ensued; it is not enough that he intends to perform the act." *Id*. § 870 cmt. b.

[141] *Id*. § 766.

[142] *E.g*., Shades Ridge Holding Co. v. Cobbs, Allen & Hall Mortg. Co., 390 So. 2d 601, 608-12 (Ala. 1980) (reversing a trial court's application of negligence principles of proximate cause to a case of fraud); Tate v. Canonica, 5 Cal. Rptr. 28, 33 (Cal. Ct. App. 1960) ("[M]any of the limitations upon liability that are subsumed under the doctrine of 'proximate cause,' as usually expounded in negligence cases, do not apply to intentional torts."); Van Bibber v. Norris, 404 N.E.2d 1365, 1380-81 (Ind. Ct. App. 1980) ("[T]he particular concept of 'proximate cause' does not apply to the intentional tort of conversion."). *But see* Martin v. Heinold Commodities, 643 N.E.2d 734, 749 (Ill. 1994) (rejecting "remote causation" for a misrepresentation case, at least where "plaintiffs willingly assumed known market risks"). *See generally* David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1773 n.30 (1997) ("The rule of legal (proximate) cause (scope of responsibility) for intentional torts sweeps very broadly, almost to the full reach of factual causation.").

[143] RESTATEMENT (THIRD) OF TORTS § 33(a) ("An actor who intentionally causes harm is subject to liability for that harm even if it was unlikely to occur.") The section goes on to state that, due to the enhanced moral culpability of such conduct, "[a]n actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently." *Id*. § 33(b). However, even such a person "is not subject to liability for harm the risk of which was not increased by the actor's tortious conduct." *Id*. § 33(c). Section 435A of the *Restatement (Second)* also provides that "[a] person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it is expectable, except where the harm results from an outside force the risk of which is not increased by the defendant's act." RESTATEMENT (SECOND) OF TORTS § 435A (1965). The effect of this rule

> is to impose liability for a particular consequence even though had the defendant been merely negligent in the commission of the tort or liable for other reasons, he would not have been responsible for the particular result. In such a case, the tortfeasor is liable for the consequence although it was unexpectable and although he did not believe that it was at all likely that such a result would happen.

Id. §435A cmt. a.

The *Restatement (Third)* does recognize that "[c]ourts have relied on proximate cause to place limits on the scope of liability for statutory claims where the statute contains general protections against a broad array of (especially economic) harms to a potentially large group of injured persons."[144] It looks to two cases for this principle: *Holmes v. Securities Investor Protection Corp.*,[145] which rejected a RICO claim because the injury to the claimant was too "remote,"[146] and *Associated General Contractors v. California State Council of Carpenters*,[147] which, on proximate-cause grounds, denied a union antitrust recovery for losses suffered as a result of harm to firms that employed its members.[148] But in both these cases, at issue was *A*'s seeking to recover for the consequences of injury suffered in the first instance by *B*.

Other Supreme Court decisions, however, utilize proximate cause as a limiting principle even when *A*'s harm was not derivative of the harm of the immediate victim.[149] Further, some of these decisions clearly reject a Cardozian foreseeability test for proximity[150] in favor of the more diffuse public policy considerations of Judge Andrews.

For example, in his dissent in *Archer v. Warner*,[151] Justice Thomas admitted that the Court "has been less than clear with respect to the requirements for establishing proximate cause."[152] He cited *Holmes* for the candid admission that the Court sometimes applied the term "to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts."[153] *Holmes*, in turn, was explicit about its intellectual debt to the Andrews opinion in *Palsgraf*.[154]

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[144] RESTATEMENT (THIRD) OF TORTS § 29 cmt. c.

[145] 503 U.S. 258 (1992).

[146] *Id.* at 271.

[147] 459 U.S. 519 (1983).

[148] *Id.* at 519-20.

[149] For example, *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346 (2005), overturned a lower court holding that a misrepresentation caused an inflated stock price at the time of purchase as "inconsistent with the law's requirement that a plaintiff prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss."

[150] *See* Hemi Grp., LLC v. City of New York, 130 S. Ct. 983, 991 (2010) (rejecting the dissent's foreseeability test for RICO's proximate cause requirement in favor of requiring "a sufficiently 'direct relationship' between the fraud and the harm").

[151] 538 U.S. 314 (2003).

[152] *Id.* at 326 (Thomas, J., dissenting).

[153] *Id.* (quoting Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992)).

[154] *Holmes* also quoted W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984), for the proposition that, "[a]t bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" *Holmes*, 503 U.S. at 268.

These decisions reflect the Court's desire to invoke proximate cause to inject liability-limiting factors into the analysis.[155] But they seem to do so as a means of validating what are essentially policy decisions under the guise of straightforward applications of traditional tort principles.[156] We have seen, however, that not only do such cases wrench proximate cause from its negligence moorings, but also they choose Judge Andrews' strain of proximate cause, which is distinctly in the minority among the common-law courts.

Not only does that cast doubt on the supposed purpose of incorporating tort law into statutory analysis in the first place, but it leads us back to the question of why Justice Scalia undertook this exercise in *Staub*. In other words, why did the Court transplant an amorphous negligence concept into discrimination law when there was simply no need to do so? Homer nodded is surely one possibility. But if Homer were awake, then the Court may believe that proximate cause can play a role in limiting employer liability in other settings. The next Part explores one such possibility.

V. COGNITIVE BIAS

Arguably the most difficult conceptual problem for employment discrimination today is cognitive bias. Although the origins of the concept can be traced much further back,[157] Linda Hamilton Krieger inspired a major wave

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[155] Other Supreme Court opinions, typically in the more common negligence/physical injury setting, require proximate cause but are more permissive as to what satisfies the concept. For example, *CSX Transportation, Inc. v. McBride* concluded that the Federal Employer Liability Act

> does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2634 (2011). But even that decision quoted Judge Andrews' language regarding "convenience, of public policy, of a rough sense of justice." *Id.* at 2637.

[156] *See generally* Jill E. Fisch, *Cause For Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 840-41 (2009) ("Although the common law employs a variety of approaches in intentional tort cases, it often authorizes recovery in fraud cases for harms that would be excluded under the federal courts' current loss causation requirement. As a result . . . common law fraud does not offer strong support for the causation jurisprudence that courts have developed under Rule 10b-5. In particular, the common law cases do not require that the plaintiff's loss be a foreseeable materialization of the risk concealed by the defendant's misrepresentation. Moreover, missing from the analysis are the policy considerations that typically accompany an analysis of proximate cause in tort law and that have led to the elimination of proximate cause in the Third Restatement."); Sperino, *Statutory Proximate Cause*, *supra* note 2 (arguing that courts can assign multiple meanings to proximate cause is and urging more sophisticated inquiries into whether particular statutes incorporate proximate cause concepts).

[157] *E.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with*

of legal scholarship with her article, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*.[158] Her work attempted to explain discriminatory conduct by building on social science research into biases of which the holder was unaware. In the wake of Krieger's work, there has been both an explosion of empirical exploration of the issue and an increasing convergence of social science and legal research. Nevertheless, there remains a contentious debate about the existence and significance of the kinds of bias she explored.

Of course, Krieger was not the first to notice what she called cognitive bias. Although there were numerous cases in which the discrimination was either facial[159] or clearly conscious, the notion of stereotypes has long played a role both in the political arena and in the courts deciding Title VII cases. While many stereotypes are conscious race- or sex-based generalizations,[160] there was also recognition that employers might sometimes act on the basis of unconscious biases. For example, Nadine Taub's article, *Keeping Women in Their Place: Stereotyping* Per Se *as a Form of Employment Discrimination*,[161] compiled a range of social psychology studies going back to 1968 which found, inter alia, that a scholarly article was rated more highly if attributed to a male than to a female.[162] She attributed this finding to "stereotyping," and she

Unconscious Racism, 39 STAN. L. REV. 317, 322 (1987).

[158] 47 STAN. L. REV. 1161, 1164-65 (1995).

[159] *E.g.*, Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations, 413 U.S. 376, 391 (1973) (rejecting First Amendment challenge to restrictions on sex-based employment advertising).

[160] This was true in the early years of Title VII. *E.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (restricting employment of women with pre-school aged children); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(1)(ii) (2012) (precluding a bona fide occupational qualification defense when employer relied on "stereotyped characterizations of the sexes"); *see also* Castaneda v. Partida, 430 U.S. 482, 504 (1977) (Marshall, J., concurring) ("[I]n reviewing claims of intentional discrimination, this Court has a solemn responsibility to avoid basing its decisions on broad generalizations concerning minority groups. If history has taught us anything, it is the danger of relying on such stereotypes."); Reitman v. Mulkey, 387 U.S. 369, 382-83 (1967) (Douglas, J., concurring) ("The persistent stereotypes of certain minority groups as poor credit risks also block the flow of credit, although these stereotypes have often been proved unjustified." (quoting U.S. COMM'N ON CIVIL RIGHTS, HOUSING 3 (1961))). And it remains true today. *E.g.*, AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1975 n.4 (2009) (Ginsburg, J, dissenting) ("[S]ex discrimination, Congress recognized, is rooted, primarily, in stereotypes about 'women when they are mothers or mothers-to-be . . . .'" (quoting Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736-37 (2003))). For example, in *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 68, 73, 86-87 (2001), while the majority and dissent disagreed over the definition of stereotype, both treated the category as conscious classification.

[161] 21 B.C. L. REV. 345 (1980).

[162] *Id.* at 353 & n.38.

recognized that the bias reflected in this phenomenon could be unconscious.[163] A few courts also seemed to recognize that possibility.[164]

Nevertheless, it was not until Krieger's article that cognitive bias began to dominate debates about the reach of the antidiscrimination laws, a question that is typically framed in terms of the meaning of "intent" in disparate treatment cases. "First generation" lawsuits usually involved straightforward examples where the decisionmaker was fully aware of why he acted. Such an individual may be aware of his aversion to, perhaps even hatred of, members of another race, but, alternatively, he may value women, but only in "their place." When he acts on these conscious preferences to deny someone a job, he has violated the statute.[165]

In contrast to that classic bigot is the "rational discriminator," the decisionmaker who observes differences among races or between the sexes and acts to favor members of one group over the other because he believes that will further his business interests. Animus may be wholly absent, but the legal result is identical. While animus-based difference in treatment is probably what first comes to mind when "discrimination" is used, the Supreme Court soon established that such motivations are not essential to a violation. Rather, the rational discriminator is also liable because an employer violates Title VII if it takes an adverse employment action on the basis of one of the prohibited grounds. Consequently, even admittedly rational, business-oriented judgments are discriminatory within the statute's meaning if the employer uses the race or gender criterion to make distinctions. Perhaps the most dramatic examples are the statute's condemnations of sex distinctions in fetal protection policies in

[163] *Id*. at 355; *see also* Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67, 89-90 (2010) ("A stereotype is arguably a form of propositional belief, a schematic construct that provides putative reasons for action or judgment. To act on a stereotype is to act, consciously or unconsciously, on the basis of a belief about members of a particular class – e.g., 'all X's have property F' or 'all good Y's exhibit behavior G.'").

[164] EEOC v. Cherry-Burrell Corp., 35 F.3d 356, 363 (8th Cir. 1994) (refusing to award plaintiff liquidated damages for an Equal Pay Act violation when the "bias and unfair treatment were 'subconscious,' not 'willful'"); EEOC v. Inland Marine Indus., 729 F.2d 1229, 1236 (9th Cir. 1984) ("In today's world, racial discrimination sometimes wears a benign mask. Current practices, though harmless in appearance, may hide subconscious attitudes, and perpetuate the effects of past discriminatory practices. Although subjective employment criteria are not illegal per se, courts should examine such criteria very carefully to make certain that they are not vehicles for silent discrimination." (citations omitted)).

[165] *See* EEOC v. Farmer Bros. Co., 31 F.3d 891, 896 (9th Cir. 1994) (recounting statements of the company president, including that he "would spend every last dime" to keep women from being rehired). *See generally* Mary Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO L.J. 1659, 1667 (1991) (exploring the sources of evil motive discrimination).

UAW v. Johnson Controls, Inc.[166] and employer pension plans in *City of Los Angeles Department of Water & Power v. Manhart*.[167] In both cases, sex distinctions were impermissible even though they were premised on what the Court itself viewed as real differences between the sexes.[168] In short, formal classifications on prohibited grounds are generally impermissible unless within a statutory exception.[169]

However, the meaning of intent to discriminate becomes less clear once we leave behind consciously made decisions and probe more deeply into psychological factors. Referred to by different names, including "cognitive bias," "unconscious discrimination," and "implicit bias,"[170] the notion is that decisionmakers treat individuals differently on prohibited grounds without being fully aware, or perhaps aware at all, of the wellsprings of their actions. There is substantial reason to believe that unacknowledged bias is pervasive, but considerably less consensus on either the extent to which it affects real-world decisions or whether the biases identified are really unconscious.

Social science research on the pervasiveness of bias (conscious or unconscious) has proceeded on three fronts. Perhaps most cogent but least numerous are "field experiments" (or "audit studies"[171]) in which researchers try to directly test the operation of bias by having matched pairs of applicants, each pair as similar as possible except for the variable of interest (race or sex), apply for real-world positions. If one group is more successful than the other, there is reason to believe both that bias exists and that it affects actual decisionmaking. Such studies have been conducted in a variety of settings,[172]

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[166] 499 U.S. 187, 199 (1991) (treating employer policy as discriminatory because it differentiated between the sexes even though it was designed to protect fetuses carried by female employees).

[167] 435 U.S. 702, 711 (1978) (holding that requiring females to contribute more to a pension system because of their longer life expectancies was illegal).

[168] These cases can be contrasted with *Phillips v. Martin Marietta Corp*., 400 U.S. 542, 544 (1971), where the employer's policy against hiring women with preschool age children was apparently based on perceived problems of absenteeism related to child-care duties. It was not clear whether the employer had any evidence that women as a class had such problems and, unlike *Johnson Controls* and *Manhart*, it would have been relatively simple for the employer to deal with absenteeism on an individual basis rather than with a sex-based policy.

[169] The most obvious such exception is the bona fide occupational qualification for sex, which was at issue in *Johnson Controls*. *See* 1 SULLIVAN & WALTER, *supra* note 21, § 3.05.

[170] *See* Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL'Y J. 459 (2003) (suggesting a taxonomy for the terms used in discussing cognitive bias).

[171] *See* Devah Pager, *The Use of Field Experiments for Studies of Employment Discrimination: Contributions, Critiques, and Directions for the Future*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 126-30 (2007).

[172] *E.g*., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991); Ian Ayres, *Further Evidence of*

but a recent example in the employment context sent identical resumes to employers; those using names that did not "sound" African American received more favorable treatment.[173] An earlier instance was a study by the Urban Institute: taking a page from the success of testers in ascertaining housing discrimination, the Institute sent matched pairs of black and white testers into the job market, with African Americans faring substantially worse.[174] One recent summary of audit studies like the Urban Institute's concluded that "[e]ach study comes to the same basic conclusion – that race matters in hiring decisions. Estimates of the magnitude of discrimination do, however, vary across studies, with whites being anywhere from 1.5 to 5 times more likely to receive a callback or job offer relative to equally qualified black applicants."[175] While these kinds of studies may be the most persuasive in establishing discrimination, they are expensive and raise legal[176] and ethical[177] concerns. They have also been critiqued as not being able to match pairs of testers across all the variables that might influence employment decisions.[178]

Discrimination in New Car Negotiations and Estimates of Its Cause, 94 MICH. L. REV. 109, 109 (1995); Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304, 304 (1995).

[173] *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 92 (2004) (explaining a study where the authors, who submitted fictitious resumes in response to help-wanted ads in newspapers and randomly assigned either a "very African-American-sounding names" or a very "White-sounding names," and found a substantially higher number of callbacks for "White-sounding names"); David Neumark, *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Q.J. ECON. 915, 917-18 (1996).

[174] MARGERY A. TURNER, MICHAEL FIX & RAYMOND J. STRUYK, OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING 37-66 (1991) (showing, inter alia, white testers were sixteen percent more likely to receive job offers than blacks).

[175] Pager, *supra* note 171, at 112.

[176] Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 471-73 (2007); Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 409 (1993); *see also* Leroy D. Clark, *Employment Discrimination Testing: Theories of Standing and a Reply to Professor Yelnosky*, 28 U. MICH. J.L. REFORM 1 (1994).

[177] Pager, *supra* note 171, at 126-30.

[178] RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 55-58 (1992). Epstein questioned the conclusion that differential hiring rates establish discrimination because it is impossible to be sure that the only difference between the African American and White members of each pair was race. *Id*. at 57. He also critiqued the study for covering only a small segment of the job market, and being limited to jobs advertised in newspapers, which "destroys any possibility of randomization." *Id*. at 56. He further stressed that "the public sector is excluded from the entire sample, as are a disproportionate percentage of private firms with affirmative action programs." *Id*. at 56. It is not clear, however, whether this latter criticism does not, in fact,

A second approach to the question of the pervasiveness of bias (again, conscious or unconscious) is statistical and uses retrospective data to seek to hold constant a large number of variables in order to determine whether racial bias exists. A dramatic example (albeit not in the employment context) is research showing that the NBA referees were more likely to call fouls on players of a different race than themselves.[179] More attuned to the employment setting, another study found that store managers were more likely to hire members of their own race than members of another race.[180]

A third kind of social science research has perhaps received the most attention and is designed to distinguish between conscious and unconscious biases. The best-known of these efforts, the Implicit Association Test (IAT), purports to measure attitudes (biases) at variance with the subjects' expressed attitudes. Hosted at Harvard and available on the Internet, Project Implicit[181] is open to anyone with an Internet connection. It measures biases (or "implicit attitudes") by comparing how quickly a test-taker equates positive and negative words with images of members of different races (and other categories of interest). These results are then compared with the subject's self-reported views on race. The IAT has generated a substantial amount of social science literature analyzing the results of literally hundreds of thousands of visits.[182]

Although the test has generated both harsh criticism[183] and enthusiastic support[184] in the legal academy, even accepting its results on its own terms

support the study's conclusion to the extent that, absent some affirmative action programs, discrimination exists. For further discussion, see James J. Heckman, *Detecting Discrimination*, 12 J. ECON. PERSP. 101, 107-11 (1998), and James Heckman & Peter Siegelman, *The Urban Institute Audit Studies: Their Methods and Findings*, *in* CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 187, 188 (Michael Fix & Raymond J. Struyk, eds. 1993).

[179] *See* Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q.J. ECON. 1859, 1859-60 (2010) (finding statistically significant evidence of own-race bias among NBA referees); *see also* Christopher A. Parsons et al., *Strike Three: Umpires' Demand for Discrimination* 24 (Nat'l Bureau of Econ. Research, Working Paper No. 13665, 2007), *available at* http://www.nber.org/papers/w13665.pdf (finding that baseball umpires call fewer strikes for players of the same race).

[180] Laura Guliano, David Levine, & Jonathan Leonard, *Manager Race and the Race of New Hires*, 27 J. LAB. ECON. 589, 626 (2009).

[181] *Project Implicit*, HARVARD UNIV., https://implicit.harvard.edu/implicit (last visited Sept. 3, 2011).

[182] *E.g.*, Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 101-02 (2002) (reporting results from some 600,000 tests).

[183] *See* Gregory Mitchell, *Second Thoughts*, 40 MCGEORGE L. REV. 687, 687 (2009) ("[C]onsiderable evidence [exists] that individuals often naturally engage in self-correction and that situational pressures often encourage self-correction . . . to overcome biased judgments, decisions, and behavior."); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1023 (2006)

reveals its limitations. First, critics have argued that, even assuming there is a phenomenon that could be described as "attitudes" as measured by milliseconds of differences in reaction times to different racial stimuli,[185] it does not follow that such individuals' real-world decisions would be influenced by such attitudes.[186] Second, even if the IAT accurately identifies a divergence between implicit attitudes and expressed measures of bias, it does

("[I]mplicit prejudice research should be accepted as neither legislative authority nor litigation evidence until there is more: (1) rigorous investigation of the error rates of the new implicit measures of prejudice (and of how investigators balance Type I errors of false accusations against Type II errors of failing to identify prejudice); (2) thorough analysis of how well implicit measures of prejudice predict discriminatory behavior under realistic workplace conditions; and (3) open debate about the societal consequences of setting thresholds of proof for calling people prejudiced so low that the vast majority of the population qualifies as prejudiced."); Amy L. Wax, *Supply Side or Discrimination? Assessing the Role of Unconscious Bias*, 83 TEMP. L. REV. 877, 883-902 (2011) [hereinafter Wax, *Supply Side*] (finding no convincing evidence that the IAT in fact measures what it purports to); Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 984-85 (2008) [hereinafter Wax, *The Discriminating Mind*] (arguing that, even assuming that tests such as the IAT establish unconsciously biased mental associations, these associations may not be unlawful discrimination because "[b]iased thinking and attitudes, and mental processing of stimuli and concepts, are not the same as unlawful discrimination").

[184] *See* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 482 (2007) (criticizing Mitchell & Tetlock because "[t]o say that the concept of implicit bias lacks validity because implicit bias does not correlate empirically with explicit prejudice is therefore to assume the very conclusion that implicit bias scholars seek to challenge – that any 'real' bias must be reflected in expressed attitudes"). In response, Professors Mitchell and Tetlock argue that

> the legal community is under no obligation to agree when a segment of the psychological research community labels the vast majority of the American population unconsciously prejudiced on the basis of millisecond reaction-time differentials on computerized tests. [T]he legal community . . . should require evidence that scores on these tests of "unconscious prejudice" map in replicable functional forms onto tendencies to discriminate in realistic settings and that proposed remedies actually work before making wholesale changes to antidiscrimination law and policy.

Gregory Mitchell & Philip E. Tetlock, *Facts Do Matter: A Reply to Bagenstos*, 37 HOFSTRA L. REV. 737, 738 (2009); *see also* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1510-11 (2005); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1072-78 (2006); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1033-62 (2006).

[185] Mitchell & Tetlock, *supra* note 183, at 1032 ("[T]hese academics have set their threshold for declaring people prejudiced so low that the vast majority of the American population qualifies as bigoted by blinking more frequently in the presence of a minority or by associating elderly persons with positive traits milliseconds slower than they associate young persons with positive traits.").

[186] For that reason, the stronger arguments rest on a combination of implicit attitudes, statistical analysis, and field experiments.

not follow that what that divergence reflects is cognitive bias; it might instead reveal mental operations of which the actor is aware but unwilling to admit, even in the context of an anonymous test. The point here is that even if the IAT correctly identifies attitudes with real world implications, the test subjects may be conscious of their own biases. Any discrimination may or may not be unconscious.[187]

Indeed, the point can be generalized to the other kinds of research that purport to demonstrate discrimination – testers can uncover discrimination, but it does not follow that it stems from unconscious bias. And statistical showings of different treatment of out-group races may well reflect bias of which the decisionmaker is aware, maybe even fully cognizant. Indeed, the mistake is apparent in Justice Ginsburg's dissent in *Wal-Mart Stores, Inc. v. Dukes*.[188] Citing one well-known study,[189] she wrote:

> An example vividly illustrates how subjective decisionmaking can be a vehicle for discrimination. Performing in symphony orchestras was long a male preserve. In the 1970's [sic] orchestras began hiring musicians through auditions open to all comers. Reviewers were to judge applicants solely on their musical abilities, yet *subconscious bias led some reviewers to disfavor women*. Orchestras that permitted reviewers to see the applicants hired far fewer female musicians than orchestras that conducted blind auditions, in which candidates played behind opaque screens.[190]

Justice Ginsburg did not notice that her third sentence did not necessarily follow from the first. That is, subjective decisionmaking could facilitate discrimination of either the conscious or subconscious variety.[191] As a number of scholars have pointed out, the most obvious proof that bias is implicit is the difference between test results and self-reports of conscious views.[192] This

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[187] Framed this way, the question might in fact suggest a false dichotomy, i.e., biases may often lie somewhere between those the subject is fully aware of (whether or not willing to admit to them) and those buried deep in the unconscious.

[188] 131 S. Ct. 2541, 2564 n.6 (2011) (Ginsburg, J., dissenting).

[189] Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000).

[190] 131 S. Ct. at 2564 n.6 (Ginsburg, J., dissenting) (emphasis added) (citations omitted).

[191] Indeed, one recounting of the story of the development of blind auditions is replete with evidence that the decisionmakers opposed employing women even after the women had successfully performed in blind auditions. MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 245-48 (2005) (describing discriminatory treatment of Abbie Conant by the Munich Philharmonic Orchestra after her blind selection).

[192] *E.g.*, Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1058 (2009) ("In fact, the findings of the IAT are ambiguous. The characterization of the IAT as a measure of implicit bias depends on being able to distinguish implicit bias from conscious bias. Yet it is extraordinarily difficult to disentangle the two because, since the disavowal of racism

means that, even if the IAT is correct in discerning a difference, it does not necessarily establish that the subject is unaware of his biases, as opposed to being reluctant to honestly report them.[193]

Does it matter which form is at stake – conscious bias or implicit bias – in any given employment decision? Both those who argue that implicit bias is a serious social problem and those who remain at least agnostic on the subject tend to agree that, if it can be established that cognitive bias causes an adverse employment action, a violation of Title VII is made out. The argument is basically a straightforward application of the "because of" language in Title VII's prohibition of discrimination. Thus, Professor Krieger argues against the "equation of causation and intentionality in disparate treatment jurisprudence."[194] She explains:

> [T]he complete picture is more nuanced. To say that a decisionmaker made an employment decision *because* of someone's race or sex is not the same as saying that the decisionmaker meant to take that group status into account. An employee's group status may have affected the decisionmaker in completely nonconscious ways by affecting what he saw, how he interpreted it, the causes to which he attributed it, what he remembered, and what he forgot.[195]

And Professor Wax, although skeptical about the phenomenon, agrees that proof that cognitive bias caused an adverse action establishes a violation.[196] "[T]here is no conceptual or theoretical reason to distinguish among decisions that are influenced by a person's racial identity on the basis of whether those decisions implicate conscious or unconscious mental processes or are the product of deliberate awareness or inadvertency."[197] Professor Wax, like a

during the civil rights era, research participants have become increasingly unwilling to openly express views that may be condemned as racist. Thus, the IAT could defensibly be viewed as a subtle measure of conscious psychological processes, of attitudes and beliefs that are known to oneself yet intentionally concealed from researchers. This empirical ambiguity has been practically eclipsed by the unconscious bias account.").

[193] A number of studies have tried to assess this possibility with dubious success. *See, e.g.*, John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 91, 98-120 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (attempting to measure covert racial prejudice by assessing attitudes toward political ideologies). As one author notes, "this indirect questioning risks confounding political conservatism with racism." Kang, *supra* note 184, at 1507.

[194] Krieger, *supra* note 158, at 1170.

[195] *Id*. at 1170. *See also* Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 47-48 (2011) ("The statute does not specify a particular manner of influence (e.g., that the plaintiff's sex was consciously considered by the defendant or that the defendant, consciously or not, was motivated by an animus against members of the plaintiff's sex). Thus, disparate treatment liability should require neither conscious consideration of, nor negative affect toward, the plaintiff's status.").

[196] Wax, *The Discriminating Mind*, *supra* note 183, at 982.

[197] *Id*. She explains:

number of other scholars,[198] raises normative questions about making truly unconscious motivations the basis for liability,[199] but she sees no problem as a matter of statutory construction with adopting a pure causation-in-fact regime.

However, some version of the notion of proximate cause may offer an alternative, and this potential use may explain the *Staub* Court's incorporation of the concept into Title VII. The next Part explores this possible application.

VI. PROXIMATE CAUSE AND COGNITIVE BIAS

At first glance, there seems to be little reason to suspect that proximate cause may oust cognitive bias from discrimination jurisprudence. After all, an adverse employment action would seem to be very proximate to the unconscious operations that prompted it. While that is true in an intuitive sense, various formulations of the proximate cause concept that we have mentioned suggest that the answer is not so clear.

Take the question of "foreseeability." Although debates about the meaning of proximate cause go back at least as far as the dueling positions of Cardozo

> If, for example, a person treats someone differently – and adversely – because of that person's race, then that would violate the plain terms of Title VII of the Civil Rights Act of 1964, which forbids such conduct. That would constitute unlawful disparate treatment whether or not the actor is fully aware that another person's protected characteristic – his race, for example – has influenced the decision. . . . All that is required to satisfy the plain terms of the statute is that race be causally implicated. This can happen consciously or unconsciously.

Id. at 982-83; *see also* Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1900 (2009) (siding with "those scholars who believe that Title VII already prohibits unconscious as well as conscious race and gender discrimination"); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 294 (1997) ("In defining intentional discrimination, the question is not what the particular decisionmaker subjectively intended, but whether the record allows for an inference that an impermissible factor such as race served as the impetus for the challenged action."); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1138 (1999) ("Central to the concept of disparate treatment in discrimination law is the existence of a causal link between a person's group identity or group-based trait and an actor's response to that person. The existence of that link, however, does not require that the actor be aware of the connection.").

[198] *See* Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 942 (2008) ("[W]hile this scholarship's focus on the mechanisms of cognitive categorization has taught us much about how implicit bias works, it may have also undermined my project by turning our attention away from the unique place that the ideology of white supremacy holds in our conscious and unconscious beliefs. I find this outcome unfortunate, if unintended . . . ."); Shin, *supra* note 163, at 101 ("[T]he causal conception of discrimination is susceptible to some worries – one having to do with diminishing the moral seriousness of the charge of discrimination, and the other with a potential instability that might undermine the distinction between individual and 'societal' discrimination.").

[199] *See infra* note 207 and accompanying text.

and Andrews in *Palsgraf*,[200] foreseeability seemed important to both. Cardozo took what the *Restatement (Second)* calls the "scope of liability" position: since negligence is defined by the risks one's conduct imposes on others, liability should extend only as far as the harm (or individuals who suffer the risk) – or, at least, as far as the class of harms (and individuals).[201] As applied to cognitive bias, how foreseeable is it to the decisionmaker that he might be influenced by unconscious influences? Almost by definition, the decisionmaker is unaware of the wellsprings of his conduct – they are, therefore, not actually foreseen. But perhaps they were foreseeable – if not by the decisionmaker himself then by the employer. This is all *Palsgraf* requires for liability for negligence, and much current scholarship on employer liability for cognitive bias is rooted in seeking to have employers take reasonable steps to debias the workplace.[202]

While there are critiques of the effectiveness of debiasing,[203] assume both that cognitive bias in individual decisionmaking is foreseeable – at least in the sense that a reasonable supervisor, informed by the social science literature, would have realized there was a real risk of biased individual decisions – and that debiasing mechanisms exist that could have reduced the risks of biased decisionmaking. It is still possible that a version of proximate cause might insulate the employer. For Judge Andrews in *Palsgraf*, in contrast to Cardozo, foreseeability was not enough: once conduct was deemed negligent in the first place, individuals harmed by it could recover, subject to somewhat arbitrary

[200] Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

[201] *See* RESTATEMENT (SECOND) OF TORTS § 430 (1965); *id*. § 430 cmt. b.

[202] *See* Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 897-98 (2007) ("The employer wrong in structural discrimination lies less in the individual decisionmaker's action than in the employer's structuring of a work environment that facilitates bias in the individual decisionmaker's action. The existence of unconscious or subtle bias of employees is not itself the fault of the employer (any more than the conscious animus of employees is the fault of the employer in the traditional, conscious bias story). Instead, the argument is that employers are responsible for their causal role in the moral wrong of different treatment in the workplace."); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 900 (1993) ("An employer should be found liable under Title VII for negligent discrimination when the employer fails to take all reasonable steps to prevent discrimination that it knows or should know is occurring, or that it expects or should expect to occur.").

The extent to which negligence theories survive the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), is unclear. The Court formally held only that an employer policy that allowed individual managers discretion in promotion and hiring to engage in discrimination did not create a common question for purposes of Federal Rule of Civil Procedure 23 for all members of the class of women subject to such managers' decisions. From a substantive viewpoint, however, the Court's decision could be viewed as implicitly rejecting employer liability for merely permitting discrimination by managers.

[203] Wax, *Supply Side*, *supra* note 183, at 897 (criticizing some recommended debiasing measures as "suffer[ing] from breathtaking scope and maddening vagueness," and resting on "say-so").

lines, drawn for reasons other than causation.[204] As he wrote: "What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."[205] One exercise of practical politics might be for the Supreme Court to hold that a showing that cognitive bias caused an adverse employment action in fact does not suffice for liability. Rather, a plaintiff must show that the employer consciously factored a prohibited consideration into the decision in question.

From a normative perspective, this would draw on the critiques of commentators like Amy Wax and Patrick Shin. Professor Wax, for example, couples her economic critique with the argument that making cognitive bias actionable "could have the effect of 'normalizing' discrimination and even destigmatizing its practice."[206] Professor Shin, having undertaken a thought experiment about liability for unconscious bias, is more measured in his conclusions but recognizes serious questions about this possibility. The argument in favor of such liability

> implies a shift in the operative model of discrimination from a justificatory conception (in which discrimination is centrally defined by a certain kind of inadequacy in an agent's putative rationale in acting) to a causal conception (in which discrimination is defined by the presence of a certain kind of causal influence in an action's psychological etiology). . . . Entertaining the normative plausibility of such liability calls forth the familiar philosophical tension between viewing an action as the determined consequence of antecedent causal conditions that are not responsive to the agent's own judgments, and at the same time holding the agent responsible for that action.[207]

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[204] *Palsgraf*, 162 N.E. at 106 (Andrews, J., dissenting).

[205] *Id*. at 103.

[206] Wax, *supra* note 197, at 1220 ("[E]xposure to scientific evidence for unconscious categorization or trait-based stereotyping might lead triers of fact to believe that inadvertent bias against disfavored groups is a pervasive and constitutive feature of workplace life. Information about unconsciously biased patterns of thought, by creating the impression that stereotyping is a widespread and unavoidable mental habit, could have the effect of "normalizing" discrimination and even destigmatizing its practice. Inadvertent discrimination would understandably be regarded as less morally blameworthy than animus-based bias.").

[207] Shin, *supra* note 163, at 100-01. He goes on to suggest that, should we "chang[e] our understanding of discrimination from an agent-centered, moralistic conception to a predominantly psychosocial, diagnostic one, then perhaps our wisest response might be to bite the necessary bullets and adopt that latter conception. If unconscious discrimination really is best characterized as akin to passing on an infectious disease, then maybe the law should approach the problem of such discrimination not in the traditional manner of assigning individual responsibility and blame, but much more in the manner of addressing an issue of public health." *Id*. at 101. *See also* Rich, *supra* note 195, at 8 ("[T]hough it

Nor would it be unprecedented for the Court to find that other considerations justify imposing a limit on what the law appears to otherwise require. Perhaps the most dramatic example of this is *McCleskey v. Kemp*,[208] where the Court found a statistical study establishing race disparities in capital punishment sentencing to be insufficient to overturn the death sentence at issue. Although the Court assumed the study's accuracy, it nevertheless concluded that it was not sufficiently probative of bias by the actors in any particular capital sentence,[209] nor did it show that the state had the requisite racial intent in establishing its system of capital sentencing.[210] In other words, the existence of proof of bias (in this case, statistical) was not sufficient to invalidate real-world decisions.[211] Although *McCleskey* can be viewed as an epistemological exercise in the relationship between "naked statistics" and individual cases,[212] it can also be understood as the Court refusing to provide a remedy for racially influenced decisions, many or most of which may have been unconscious.

Similarly, proximate cause might offer the Supreme Court a way to avoid making cognitive bias actionable even when it results in an adverse employment action. And, while *Staub* is a case of individual disparate treatment, *McCleskey* suggests that a proximate cause analysis might allow the Court to limit systemic disparate treatment theories which rely on statistical

certainly holds value for antidiscrimination law, the cognitive account of prejudice may cause unforeseen harm if it persuades jurists and scholars to abandon a broad equality-based understanding of the law's normative commitments which may be applied to identify discrimination even in circumstances that do not involve prejudice.").

[208] 481 U.S. 279, 297 (1987). *See generally* RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN DISCRIMINATION CASES § 11.05 (2002).

[209] *McCleskey*, 481 U.S. at 297 ("Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose.").

[210] Citing *Feeney*, the Court ruled that "McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because* of an anticipated racially discriminatory effect," rather than merely despite it, and there was no such evidence. *Id*. at 298.

[211] The Court has used a similar rationale in other cases. For instance, in *Giles v. Harris*, 189 U.S. 475, 488 (1903), it refused to provide equitable relief to a claim of racial discrimination in voter registration, in part because of the difficulties of enforcement, stating that, "Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the State itself, must be given to them by the legislative and political department of the Government of the United States."

[212] *See generally* Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949 (2006).

proof.[213] Further, such a rule, although it would complicate a pure causal analysis, would have the advantage of aligning liability with normative notions of what makes discrimination so objectionable.[214]

One question remains: Would it matter if the law took this path?

VII. COGNITIVE BIAS IN THE COURTROOM

It may seem odd to ask whether comprehensive social science research and the extensive legal commentary regarding cognitive bias matters. Obviously, this literature matters quite a lot in terms of broader public policy concerns, and I am by no means suggesting that debiasing efforts are not very important in the workplace.[215] My point is much narrower: It is not likely to make much difference to the litigation of a typical Title VII case were the Supreme Court to hold that a plaintiff must show not only cause-in-fact but also proximate cause in the broad policy-oriented sense of foreseeability, which would require conscious bias.

As Professor Ann McGinley notes, "while courts justified the modes of proof as a means of determining which employers are guilty of conscious intentional discrimination, the proof methods used to establish intent under the disparate treatment theory . . . *are all capable of holding liable employers who have discriminated unconsciously as well as those who have done so consciously*."[216] In the typical individual disparate treatment case, without regard to the various proof structures that encrust Title VII,[217] juries infer

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[213] Professor Willborn suggested this possibility in commenting on an earlier draft. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), may be a step in this direction.

[214] A kind of half-way house in this regard is *EEOC v. Cherry-Burrell Corp.*, 35 F.3d 356, 363 (8th Cir. 1994), which refused to award the plaintiff liquidated damages for an Equal Pay Act violation when the "bias and unfair treatment were 'subconscious,' not 'willful.'" Notice, however, that the court did not deny liability but merely limited remedies.

[215] *E.g.*, Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435, 1435-36 (2008); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200-03 (2006); Kang & Banaji, *supra* note 184, at 1062-67; Gowri Ramachandran, *Antisubordination, Rights, and Radicalism*, 40 CONN. L. REV. 1045, 1047-49 (2008).

[216] Ann C. McGinley, *¡Viva la Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 447 (2000); s*ee also* Wax, *supra* note 197, at 1229 ("[C]urrent practice almost certainly awards relief in some cases where unconscious bias is at work. Although *McDonnell Douglas* stands as an impediment to favorable decisions in many such cases, the methods of proof employed in some individual cases under existing law either do not permit fact-finders cleanly to separate deliberate from inadvertent motive or do not require them to do so.").

[217] For a discussion of these different proof structures, see Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE. L.J. 728, 734 (2011) (criticizing the "judicial demand for comparators" as narrowing "the possibility of success for individual litigants and, more generally, the very meaning of discrimination"), and Charles A. Sullivan, *The*

intent to discriminate from employer conduct, which means that the employer's decision is a black box.[218] Although the jury's decision is occasionally assisted by evidence of admissions of bias,[219] the outcome is likely to turn on whether the decision is "fishy" enough that the jurors are prepared to infer that something untoward is occurring.[220] In other words, jurors will ask whether the employer's decision is correct in terms of traditional views of merit or explainable by traditional non-merit factors (such as seniority) influencing decisions at workplaces generally or at that workplace in particular. In this analysis, comparators – individuals similarly situated to the plaintiff but of a different race or sex – will often be critically important.[221] Reaching such a conclusion, a jury facing an African American or female plaintiff must decide whether to take the next step and infer that it is that status that explains what is otherwise an inexplicable decision. In this context, it is hard to see many juries taking that step but refusing to take the ultimate step of finding proximate cause by determining that "intent" was not known to the employer.

Nevertheless, one way in which the theoretical distinction between conscious and unconscious bias might play itself out in practice is by a defendant asking for a jury instruction to the effect that, "if you believe the employer's denial that bias motivated the challenged decision, you must find

Phoenix from the Ash*: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 198-202 (2009).

[218] See Michael Evan Gold, *Towards a Unified Theory of Employment Discrimination*, 22 BERKELEY J. EMP. & LAB. L. 175, 216 (2001) (explaining, via U.S. District Court Judge for the Eastern District of Virginia, T.S. Ellis III, that an employer's decision is like a black box because "the plaintiff's evidence tells us nothing concerning the decision-making process. Something goes into it – the qualified labor pool. Something comes out of it – new hires. We do not know precisely what happens within . . . .").

[219] If credited, such admissions may be sufficient by themselves to prove that bias was a motivating factor in the decision, shifting the burden of proof to the employer to show that it would have made the same decision in any event, Desert Palace, Inc. v. Costa, 539 U.S. 90, 101-02 (2003), but admissions are not essential to prove a motivating factor, which can be established whenever a plaintiff "present[s] sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice,'" *id*. at 101.

While admissions might typically reflect conscious bias, that is not necessarily true. In *Price Waterhouse v. Hopkins*, for example, the partners who criticized the plaintiff's use of profanity might not have been aware that they were applying a different standard to a woman. 490 U.S. 228, 235 (1989) ("[S]everal partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only 'because it's a lady using foul language.'").

[220] In tort law, proximate cause is usually treated as a jury question. *See* Owen, *supra* note 129, at 1305 ("It is hornbook law, of course, that duty is a question of law for courts, whereas breach and proximate cause are questions of fact for juries.").

[221] Sullivan, *supra* note 217, at 191.

for the defendant."[222] Such an instruction is likely not required,[223] even if cognitive bias were to be held insufficient; however, it would presumably be permissible if the Supreme Court recognized that cognitive bias is not enough for liability. The effect would be to turn the case into a question of whether the employer is telling the truth – that is, testifying to his intent as he sincerely believed it to be, regardless of whether he was driven by motives of which he was unaware. Whether different verdicts would result in an appreciable number of cases is doubtful.

A second way in which a requirement of conscious bias for a violation could affect litigation is more theoretical. Commentators, myself included,[224] have urged plaintiffs' attorneys to proffer social science testimony as part of garden-variety individual disparate treatment cases, not merely in systemic cases.[225] Were cognitive bias to be labeled a non-proximate cause, such evidence would be largely irrelevant to a plaintiff's case. Indeed, it might be defendants who

[222] Some courts already come close to such a view of the law. *E.g.*, McCoy v. Maytag Corp., 495 F.3d 515, 523 (7th Cir. 2007) ("[P]retext means more than a mistake on the part of the employer; pretext means a lie, specifically a phony reason for some action." (citation and internal quotation marks omitted)). This view is the foundation of the "honest belief" rule – it does not matter if the employer is correct, say, about the plaintiff's deficiencies so long as it sincerely believed them at the time of the challenged decision. *See generally* Krieger & Fiske, *supra* note 184, at 1038 (2006) ("[E]mpirical cognitive social psychology has demonstrated that the lay psychological theory that underlies the honest belief rule is woefully incomplete.").

[223] A trial judge is required to state the law correctly in his or her instructions, but is not required to state all the law. *See generally* Tom DeVine, Jr., Survey, *The Critical Effect of a Pretext Jury Instruction*, 80 Denv. U. L. Rev. 549 (2003).

[224] In an earlier article I wrote:

> Perhaps the most obvious use of such testimony is to remind or convince the jury that discrimination is still prevalent (at least given the particular employment context) and therefore, to convince jurors that discrimination in the case at hand is more likely than they might at first believe. More dramatically, the new cognitive bias scholarship suggests that plaintiffs must go much further to explain why discrimination is both prevalent and largely invisible. That is, they must deploy expert testimony to educate the jury about the continued operation of race animus, consciously held stereotypes, the more subtle operation results of racially slanted cognitive biases, and/or the effect of workplace dynamics and cultures in enabling these biases.

Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 951 (2005).

[225] Such expert testimony was highlighted recently in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553-54 (2011), where the Court considered the "social framework" testimony of Dr. William Bielby in the context of class action certification. Because it found that his testimony was insufficient to establish the requisite commonality in any event, the Court had no need to decide on its admissibility. *Id.* But the Justices have shown little enthusiasm for this kind of social science in the discrimination arena. *See generally* Martha Chamallas, *Listening to Dr. Fiske: The Easy Case of* Price Waterhouse v. Hopkins, 15 VT. L. REV. 89, 90-91 (1990) (discussing several Justices' displeasure with an expert witness's testimony based on social psychology research).

introduce cognitive bias experts to bulwark employers' testimony that they did not intend to discriminate! Such a result would turn the current literature on its head since efforts to identify cognitive bias to date seem generally driven by a desire to expand the reach of the antidiscrimination laws. Nevertheless, practically speaking, few employers would want to educate the jury about their managers' propensity for discrimination, even if it were of a piece with everyone else's and could be legally (and maybe morally) excused by virtue of being unconscious.

CONCLUSION

Having reached the end of a long excursion into the wilds of both discrimination and tort law, our terminus may be less interesting than various parts of the trip. *Staub v. Proctor Hospital* added another layer to the question of the relevant mental state for a violation of the antidiscrimination laws, but it may have simultaneously offered an opportunity to clarify a confused lexicon. More problematically, it introduced proximate cause into the vocabulary of discrimination law and thereby added at least a soupçon of additional complication to an already confused causal analysis. Our discussion suggests that, in the subordinate liability arena in which the concept arose, it is likely to have little, if any, significance as an additional requirement for plaintiffs. Whether it has much effect in other areas depends on a number of factors. One potential application, however, is theoretically of great moment – using the concept to exclude cognitive bias as a sufficient basis of liability in order to re-direct discrimination law towards conscious intent. Even if that were to eventuate, however, the consequences for litigation may not be significant, although there might be renewed importance in the policy debates about using debiasing techniques to deal with a phenomenon that, by hypothesis, would then be outside the realm of traditional individual disparate treatment attacks.