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The Emerging Statutory Proximate Cause Doctrine

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I. INTRODUCTION

The year 2011 marked the birth of a new idea. The United States Supreme Court decided *Staub v. Proctor Hospital* and for the first time invoked common law proximate cause in the context of federal employment discrimination law.[1] It is rare in jurisprudence to be pre-

* Judge Joseph P. Kinneary Professor, University of Cincinnati College of Law. The University of Cincinnati College of Law is a great place to work, and this Article benefitted greatly from comments and questions at the College's Summer Workshop Series, with special thanks to Michael Solimine, Chris Bryant, Elizabeth McCord, Felix Chang, Jacob Cogan, and Janet Moore. I deeply appreciate the excellent research assistance provided by Cincinnati Law student Blythe McGregor.

1. Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011).

sent at the birth of an idea and then see that idea develop over its first decade. This Article charts the emerging proximate cause doctrine from its early days as a baby doctrine. Now, the doctrine is pre-adolescent, with all of the changes and turmoil that phase entails.

Charting the first decade of this new doctrine is important because factual cause doctrine is a central battleground of discrimination jurisprudence. In a string of cases starting in 2009, the Supreme Court tightened the factual cause standard for some discrimination and retaliation claims.[2] The majority opinion in *Bostock v. Clayton County* relied heavily on a factual cause analysis when deciding that Title VII prohibits discrimination because of sexual orientation and gender identity.[3] When the Supreme Court first invoked proximate (legal) cause in 2011, it was unclear how proximate cause jurisprudence would develop in discrimination cases and whether proximate cause would become a prominent element in discrimination cases. This Article reviews all of the discrimination cases invoking proximate cause over the last decade and exposes the chaotic, emerging statutory proximate cause doctrine.

This emerging proximate cause doctrine has several important features. First, courts have not settled on a fixed meaning for proximate cause in discrimination cases. Some judges appear to invoke the words "proximate cause" as a general reference to causation without any specific legal meaning.[4] Other judges appear to confuse the concept of proximate cause with the separate concept of factual cause. Frequently, federal judges recite that proximate cause requires a plaintiff to prove that a supervisor's animus was the motivating factor in Title VII discrimination cases or was the "but for" cause in Title VII retaliation or Age Discrimination in Employment Act (ADEA) cases.[5] Still, other cases appear to recognize proximate cause as a separate element that must be proven in a discrimination case.[6]

Second, when courts apply the concept of "proximate cause" in employment discrimination doctrine, the results are inconsistent. Cases with very similar facts often have different outcomes. Strangely, the jurist who introduced the phrase "cat's paw" into discrimination juris-

2. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009); *see also* Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 140 S. Ct. 1009 (2020) (plaintiff must establish "but for" cause to prevail on Section 1981 claim). However in *Babb v. Wilkie*, the Court held that the federal sector ADEA discrimination provision prohibits any discrimination based on age while also holding that remedies may be limited if the age discrimination did not ultimately cause a negative outcome. 140 S. Ct. 1168 (2020).

3. 140 S. Ct. 1731 (2020).

4. *See infra* section V.A.

5. *See infra* section V.B.

6. *See infra* section V.C.

prudence later apologized for doing so and predicted future chaos in proximate cause doctrine. Judge Posner called the cat's paw concept a "judicial attractive nuisance."[7] He also lamented how confused the courts were likely to be when applying proximate cause in cat's paw analysis. He noted that while proximate cause "has been a part of the judicial vocabulary for the last 150 years, . . . its meaning has never become clear."[8] He also lamented that "philosophical conundra such as 'causation' present unnecessary challenges to understanding" how discrimination happens.[9]

Most importantly, the discrimination proximate cause doctrine is unmoored from both tort law and the discrimination statutes. It appears that tort law played almost no role in employment discrimination proximate cause jurisprudence over the past decade. Nor do the courts explicitly rely on the text or policies of the discrimination statutes when crafting proximate cause doctrine.

Given the unprincipled nature of the emerging proximate cause doctrine and its inconsistency, courts should jettison the concept of proximate cause from discrimination law. However, in doing so, they should retain a central insight from *Staub*. Strangely, *Staub*'s use of proximate cause has caused the courts to more fully interrogate the role of factual cause in discrimination. While courts should abolish proximate cause in this context, they should retain the core of *Staub*: the idea that plaintiffs can establish discrimination when a decision is improperly tainted by a protected trait.

Part II of this Article begins by grounding readers in the tort concepts of factual cause and proximate (or legal) cause. Part III examines the language of the federal discrimination statutes and how courts molded factual cause doctrines under those statutes. Part IV explores the Supreme Court opinion in *Staub* in depth, highlighting how the case created the current chaos in proximate cause jurisprudence. Part V summarizes a decade of case law relating to proximate cause, showing how appellate and trial courts do not define it in the same way; some courts see it as a general causation principle, others view it as synonymous with factual cause, and still others indicate there is a separate proximate cause doctrine. It also discusses how courts inconsistently apply proximate cause to similar fact scenarios. Part VI demonstrates that tort proximate cause is performing almost no work in the jurisprudence. Nor do courts rely on the text or policies of the discrimination statutes in developing the doctrine. Despite all of these problems, Part VII argues that courts' struggle with the proximate cause concept over the past decade has helped them to under-

7. Cook v. IPC Int'l Corp., 673 F.3d 625, 628 (7th Cir. 2012).

8. *Id.*

9. *Id.*

stand factual cause more deeply. While jettisoning proximate cause, courts should retain the central insights about factual cause.

II. CAUSATION GENERALLY

Common law proximate cause includes two different kinds of issues: cause in fact and legal or proximate cause.[10] "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct."[11] Even if a party is the factual cause of harm, that party may ultimately not be liable for the harm caused because proximate cause principles may limit liability.

Proximate cause does not have one fixed meaning.[12] Instead, it is an umbrella term that can encapsulate many different concepts, including when intervening actions will cut off liability,[13] whether a tort victim is foreseeable,[14] the scope of risk of the defendant's actions,[15] and policy concerns.[16] In some iterations, courts do not express a spe-

10. The distinction between these two concepts is often blurred. *See* Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 945 (2001). I have discussed common law proximate cause issues in greater depth in previous articles. *See* Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051, 1052–54 (2014) [hereinafter Sperino, *The Tort Label*]; Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 31 (2013) [hereinafter Sperino, *Discrimination Statutes*].

11. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (AM. LAW INST. 2010). It should be noted that the "but for" cause model does not work in certain factual scenarios, such as multiple sufficient cause cases, and courts often modify factual cause standards to deal with these scenarios.

12. *See Proximate Cause*, BLACK'S LAW DICTIONARY (11th ed. 2019) (providing multiple definitions for proximate cause and indicating that the following terms also reflect proximate cause: direct cause, efficient cause, legal cause, procuring cause, and remote cause, among others); Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 51 (1991). Further, the definition of proximate cause has changed over time. *See* RESTATEMENT (THIRD) OF TORTS § 29.

13. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 970 (2010). The term "superseding cause" is often used to refer to an intervening force that is sufficient to cut off liability from the original tortfeasor. RESTATEMENT (THIRD) OF TORTS § 34 cmt. b.

14. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting); *see also* RESTATEMENT (THIRD) OF TORTS § 7 cmt. j (discussing *Palsgraf* and the multiple versions of proximate cause it articulates).

15. RESTATEMENT (THIRD) OF TORTS § 29 ("An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.").

16. The *Restatement* has recently started using the words "scope of liability" to refer to proximate cause and has also focused the inquiry on the scope of risk. RESTATEMENT (THIRD) OF TORTS § 29. Using *Restatement* sections applicable to physical harm cases may not be appropriate in statutes where the harms are emotional or economic in nature. Reference to these sections is only meant to explain the possible scope of proximate cause. Early common law cases used a direct test for proximate cause. Kelley, *supra* note 12, at 52. *But see* RESTATEMENT (THIRD) OF TORTS § 29 cmt. b ("[C]onduct need not be close in space or time to the plaintiff's harm to

cific goal for proximate cause; instead, they describe it generally as being concerned with line drawing, determining when, as a matter of policy, defendants should *not* be liable even though their actions caused the injury in question.[17] In discussing proximate cause, leading torts commentators indicate that "[t]here is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion."[18]

Within the past decade, the Supreme Court has applied proximate cause doctrine in a number of statutory contexts.[19] The most consistent principle to be derived from these cases is that the Supreme Court's proximate cause doctrine lacks consistency. In case after case, the Court chooses among varying iterations of proximate cause without explicitly referencing a decision-making process. However, the version of proximate cause the Justices select is particularly important in statutory cases because some of the iterations will allow claims to proceed and others will not.

In *Bank of America Corp. v. City of Miami*, the Court explicitly rejected a proximate cause test based solely on foreseeability.[20] However, the Court also declined to define proximate cause in detail, noting that it is tied to the goals of the underlying statute, requires a sufficiently close connection between the conduct prohibited by the statute and the alleged injury, and looks at what is administratively possible and convenient.[21] At other times, the Court has listed fore-

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be a proximate cause."). Some courts still rely on arguments about directness when discussing proximate cause. *See, e.g.*, CSX Transp., Inc. v. McBride, 564 U.S. 685, 707 (2011) (Roberts, C.J., dissenting).

17. *See* Stapleton, *supra* note 10, at 985–86 (listing the following concerns that might be involved in proximate cause line drawing: "(1) the perceived purpose of the recognition of a pocket of obligation in the circumstances; (2) the costs of legal rules and their administration; (3) the dignity of the law; (4) the interest in individual freedom; (5) the recklessness or intention to harm, if any, of the defendant; (6) the relative wrongfulness of different actors; (7) the concern that the extent of liability not be wholly out of proportion to the degree of wrongfulness; (8) the fact that the defendant was acting in pursuit of commercial profit; and (9) whether allowance of recovery for such consequences would be likely to open the way to fraudulent claims" (footnotes omitted)).

18. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 263 (5th ed. 1984).

19. *See* Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) (discussing proximate cause in context of Clayton Act); Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1842 (2018) (discussing proximate cause in context of National Voter Registration Act); Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) (discussing proximate cause in context of Lanham Act); *see also* Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016) (using intervening cause in Fourth Amendment context).

20. Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1305 (2017).

21. *Id.*

seeability as a primary touchstone of proximate cause.[22] The Court noted, "A requirement of proximate cause thus serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity."[23]

In 2011, five members of the Supreme Court embraced an ambiguous test for proximate cause.[24] The Court defined proximate cause as "shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability."[25] It quoted the dissent in *Palsgraf v. Long Island Railroad Co.*, which noted 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."[26] The Court also noted how proximate cause includes multiple concepts such as "the 'immediate' or 'nearest' antecedent test; the 'efficient, producing cause' test; the 'substantial factor' test; and the 'probable', or 'natural and probable', or 'foreseeable' consequence test."[27]

At other times, members of the Court have articulated a much narrower view of the doctrine. For example, in *Apple Inc. v. Pepper*, four of the Justices agreed that proximate cause doctrine is about barring suits for injuries that are "derivative of misfortunes visited upon a third person by the defendant's acts."[28] These Justices would not follow injury beyond the first harmed party. A proximate cause doctrine that looks at the first harmed party may lead to different outcomes than other proximate cause iterations.

The Supreme Court has also used proximate cause to mean factual cause. In *Husted v. A. Philip Randolph Institute*, the Court indicated that when statutes contain causal language, the Court must determine whether that language denotes sole cause, "but for" cause, or proximate cause.[29] In another case, the Supreme Court indicated

22. Paroline v. United States, 572 U.S. 434, 445 (2014) ("Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct.").

23. *Id.*

24. CSX Transp., Inc. v. McBride, 564 U.S. 685, 692 (2011).

25. *Id.*

26. *Id.* (quoting Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

27. *Id.* at 701 (citations omitted).

28. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1527 (2019) (Gorsuch, J., dissenting) (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133 (2014)).

29. Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1842 (2018). It should be noted that the Supreme Court is trying to create a canon of construction that imports common law causation into statutes. This is a fairly recent move by the Court. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009); *see also* Comcast v. Nat'l Ass'n of African Am.-Owned Media, 140 S Ct. 1009 (2020) (plaintiff must establish "but for" cause to prevail on Section 1981 claim).

proximate cause embraced both factual cause and legal cause.[30] However, in a third case, the Court described factual cause and proximate cause as two separate doctrines.[31]

In other cases, the Supreme Court has defined proximate cause in different ways. For example, the Court has described proximate cause as a label for "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts."[32] It also has noted that proximate cause relates to concerns about "what is administratively possible and convenient."[33]

These cases demonstrate that the Justices cannot agree on what exactly proximate cause is designed to accomplish.[34] This problem is inherent in proximate cause jurisprudence generally, not just with cases that make it to the Supreme Court.[35]

At times, members of the Supreme Court have been forthright about the lack of inherent meaning. Chief Justice Roberts has suggested that proximate cause is not intended to be captured in one uniform test, but instead, "furnish[es] illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other."[36] Justice Scalia has noted that proximate cause is a necessary concept, even if it is "an imperfect legal doctrine" whose tenets are not "easy to describe or straightforward to apply."[37]

Nor has the concept of proximate cause remained fixed over time.[38] Older articulations of proximate cause often focused on whether the cause at issue was the nearest in time or space to the claimed harm.[39] The *Restatement (First) of Torts* embraced an idea of legal cause that included concepts from factual cause and proximate cause analysis,

30. Paroline v. United States, 572 U.S. 434, 444 (2014) ("To say one event proximately caused another means, first, that the former event caused the latter, *i.e.*, actual cause or cause in fact; and second, that it is a proximate cause, *i.e.*, it has a sufficient connection to the result.").

31. Burrage v. United States, 571 U.S. 204, 210 (2014).

32. Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992).

33. *Id.* (quoting KEETON ET AL., *supra* note 18, at 264).

34. For another description of proximate cause, see Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 469–70 (2006) (Thomas, J., concurring in part and dissenting in part).

35. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928). Indeed, even in *Palsgraf*, Justice Cardozo addressed concerns about causation as it relates to duty. *Id.* at 99–100; *see also* Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471–72 (1950) (discussing courts' uses of the proximate cause doctrine).

36. CSX Transp., Inc. v. McBride, 564 U.S. 685, 719 (2011) (Roberts, C.J., dissenting) (quoting Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 839 (1996)).

37. Pac. Operators Offshore, LLP v. Valladolid, 565 U.S. 207, 224 (2012) (Scalia, J., concurring in part).

38. KEETON ET AL., *supra* note 18, at 276–79 (discussing various tests).

39. *Id.* at 276.

while the *Restatement (Third) of Torts* separates factual and proximate cause.[40]

Proximate cause has underpinnings and goals that are both contested and ever-evolving. Courts also apply it differently depending on the tort at issue. In intentional tort cases, proximate cause may play less of a role in cutting off liability. When an actor intentionally causes harm, the actor is liable, even if the harm was unlikely to occur; furthermore, intentional actors are liable for a broader range of harms than negligent actors.[41] In deciding the scope of liability, the *Restatement (Third)* notes that the following play important roles in the analysis: "[T]he moral culpability of the actor, . . . the seriousness of harm intended and threatened by those acts, and the degree to which the actor's conduct deviated from appropriate care."[42] In intentional tort cases, "the defendant's wrongful conduct is [usually] closely linked—temporally and conceptually—to the plaintiff's harm."[43] Intentional tort cases do not typically involve multiple causes.[44] When proximate cause is relevant in intentional tort cases, proximate cause analysis will likely cut off liability for the defendant in fewer circumstances than it would when applied to negligence.[45] Importantly, the underlying tort affects the robustness of proximate cause.

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40. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (AM. LAW INST. 2010); RESTATEMENT (FIRST) OF TORTS: NEGLIGENCE § 430 (AM. LAW INST. 1934) (indicating that to establish legal cause the plaintiff must be in the class of persons to which the defendant's actions create a risk of causing harm); *Id.* § 431 (defining legal cause as being a substantial factor in bringing about the harm, without an exception to relieve the defendant of responsibility); *Id.* § 433 (defining legal cause with concepts such as whether there was a continuous force or series of forces and whether the harm was highly extraordinary given the defendant's conduct).

41. RESTATEMENT (THIRD) OF TORTS § 33. Some question whether traditional notions of proximate cause have a similarly diminished role in non-traditional common law tort cases. *See, e.g.*, Stapleton, *supra* note 10, at 946.

42. RESTATEMENT (THIRD) OF TORTS § 33. The *Restatement* view is even more nuanced, noting that where intent is established by showing the defendant was substantially certain the harm would occur, proximate cause should not be as narrow as it is with other intent cases. *Id.* § 33 cmt. d.

43. Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 832 (2009).

44. *Id.*

45. RESTATEMENT (THIRD) OF TORTS § 33 ("An 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 cmt. a (noting that its scope of risk standard is inadequate with respect to intentional torts); *see also* 57A AM. JUR. 2D *Negligence* § 421 (2020) (noting that proximate cause applies in strict liability). *But see* Michael L. Rustad & Thomas H. Koenig, Parens Patriae *Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of Crimtorts*, 29 UCLA J. ENVTL. L. & POL'Y 45, 68 (2011) (asserting that courts do not typically apply proximate cause to strict liability).

III. FACTUAL CAUSATION IN DISCRIMINATION LAW

Before discussing proximate cause in discrimination statutes, it is important to first consider factual cause. Since the early 1970s, the Supreme Court has been engaged in a decades-long battle about causation in discrimination law. The factual causation question centers on two issues: the substantive standard for establishing causation (motivating factor versus "but for" cause) and the party required to establish causation.[46]

Importantly, throughout this decades-long discussion about causation, the Supreme Court never invoked the separate idea of proximate cause until 2011.[47] And, as discussed in Parts IV and V below, it is unclear when the Court invokes proximate cause whether it is discussing proximate cause as a separate concept or conflating proximate and factual cause.

Federal employment discrimination law is centered on three statutes: Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA).[48] Causation plays a central role in discrimination law. Under the federal discrimination statutes, an employer may not take certain actions "because of" an individual's protected trait, such as race, sex, or age.[49]

Title VII is the cornerstone federal employment discrimination statute. Title VII prohibits an employer from discriminating against a worker "because of . . . race, color, religion, sex, or national origin."[50] Title VII's main operative provision consists of two subparts. Under the first subpart, it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]"[51] Under Title VII's second subpart, it is unlawful for an employer to "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individ-

46. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (discussing both the required substantive standard and which party has the burden of establishing it).

47. *But see id.* at 282 (Kennedy, J., dissenting) (in one sentence noting that the law generally might require a party to establish "but for" cause and also proximate cause).

48. 42 U.S.C. § 2000e–2(a) (2018) (Title VII's primary operative provisions); 29 U.S.C. § 623(a) (2018) (same for ADEA); 42 U.S.C. § 12112(a), (b) (2018) (same for ADA). Race discrimination claims can also be pursued under 42 U.S.C. § 1981 (2018). Comcast v. Nat'l Ass'n of African Am.-Owned Media, 140 S. Ct. 1009 (2020) (plaintiff must establish "but for" cause to prevail on Section 1981 claim).

49. 29 U.S.C. § 623(a); 42 U.S.C. § 2000e–2(a).

50. 42 U.S.C. § 2000e–2(a).

51. *Id.* § 2000e–2(a)(1).

ual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[52] These two subparts form the foundation of Title VII's text.[53] The ADEA contains similar main language,[54] and the ADA contains similar concepts, although not always stated in the same language.[55]

The early Title VII disparate treatment cases were often based on employer decisions that were explicitly race- or sex-based decisions.[56] For example, an employer might reserve certain jobs for white employees or for men. Claims related to these facially discriminatory policies later became grouped into a type of individual disparate treatment case referred to as a direct evidence case.[57] The courts tended to use simple formulations in evaluating direct evidence cases, essentially requiring a plaintiff to establish that a decision was taken because of a protected trait.[58] As the policies explicitly invoked race or

52. *Id.* § 2000e–2(a)(2).
53. Congress amended Title VII in 1991. However, this does not change the fact that the foundational text of Title VII is contained in 42 U.S.C. § 2000e–2(a).
54. 29 U.S.C. § 623(a).
55. 42 U.S.C. § 12112 (2018).
56. *See, e.g.*, Vogler v. McCarty, Inc., 294 F. Supp. 368, 374 (E.D. La. 1968) (alleging that employer engaged in discrimination by only hiring union members when union itself engaged in discriminatory membership practices); Weeks v. S. Bell Tel. & Tel. Co., 277 F. Supp. 117, 117–18 (S.D. Ga. 1967) (alleging that employer had a policy of making gender a qualification for a switchman position), *rev'd*, 408 F.2d 228 (5th Cir. 1969); Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781, 781 (E.D. La. 1967) (alleging discrimination based on company policy that required women to resign upon marriage).
57. *See, e.g.*, Stone v. Autoliv ASP, Inc., 210 F.3d 1132, 1137 (10th Cir. 2000) (indicating that a company policy of discrimination constitutes direct evidence). Outside of the context of facially discriminatory policies, courts have had a difficult time defining direct evidence, and definitions regarding what constitutes direct evidence vary. While the definitions of these terms appear to vary slightly by circuit, direct evidence of discrimination can be described as "evidence, that, if believed, proves the existence of a fact in issue without inference or presumption . . . [and] is composed of only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of some impermissible factor." Rojas v. Florida, 285 F.3d 1339, 1342 n.2 (11th Cir. 2002) (per curiam) (quoting Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999)). One court has described direct evidence as that which "essentially requires an admission by the employer" and explained that "such evidence 'is rare.'" Argyropoulos v. City of Alton, 539 F.3d 724, 733 (7th Cir. 2008) (quoting Benders v. Bellows & Bellows, 515 F.3d 757, 764 (7th Cir. 2008)). "A statement that can plausibly be interpreted two different ways—one discriminatory and the other benign—does not directly reflect illegal animus, and, thus, does not constitute direct evidence." Vaughn v. Epworth Villa, 537 F.3d 1147, 1154–55 (10th Cir. 2008) (quoting Hall v. U.S. Dep't of Labor, 476 F.3d 847, 855 (10th Cir. 2007)).
58. *See. e.g.*, Mach v. Will Cty. Sheriff, 580 F.3d 495, 499 (7th Cir. 2009); Paz v. Wauconda Healthcare and Rehab. Ctr., LLC, 464 F.3d 659, 666 (7th Cir. 2006) (noting that under the direct method of proving discrimination the court should not use a burden-shifting framework).

sex and often explicitly linked those traits with an outcome, there was little need for the courts to define exactly the required causal standard and which party was required to prove it.

However, as these explicit policies and decisions became less common, the courts began to consider the minimal level of evidence that a plaintiff would be required to produce to proceed with a discrimination claim. In *McDonnell Douglas Corp. v. Green*, the Supreme Court created a three-part, burden-shifting test for analyzing individual disparate treatment cases.[59] The central insight from *McDonnell Douglas* is that a plaintiff can establish discrimination by showing that an employer's articulated reason for its action was a pretext for discrimination.[60] In other words, an employee is not required to produce "smoking gun" evidence to prove discrimination. Instead, a plaintiff might be able to prevail if the employer's reasons for its action do not make sense, are not credible, or otherwise seem fishy. Although not explicitly stated in *McDonnell Douglas* and its progeny, the underlying concern in the line of cases is essentially one of causation—whether the plaintiff has enough evidence to establish that an employer made a decision because of a protected trait. Noticeably, the *McDonnell-Douglas* test does not rely heavily on common law notions of factual cause.

McDonnell Douglas did not address the causation question in a context where both legitimate and discriminatory factors might be at work. In the 1989 case of *Price Waterhouse v. Hopkins*, the Court addressed a case in which legitimate and discriminatory factors may have played a role in the employer's decision not to promote a woman to partner.[61] The Court held that a plaintiff must establish that a protected trait was a motivating factor in the employment decision.[62] If the plaintiff does this, the employer has the ability to avoid liability by proving an affirmative defense—that it would have made the same decision even if it had not allowed the protected trait to play a role.[63]

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59. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Some circuits will allow a plaintiff to make a case of discrimination without resorting to *McDonnell Douglas* if the plaintiff has "either direct or circumstantial evidence that supports an inference of intentional discrimination." Coffman v. Indianapolis Fire Dep't, 578 F.3d 559, 563 (7th Cir. 2009).

60. *McDonnell Douglas*, 411 U.S. at 804. The Court noted that the facts required to prove a prima facie case will necessarily vary depending on the case. *Id.* at 802 n.13. In subsequent cases, the Court further considered how the *McDonnell-Douglas* test would operate. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

61. Price Waterhouse v. Hopkins, 490 U.S. 228, 244–45 (1989). For a description of how the decision's language was imported from constitutional claims, see Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 320–21 (2010).

62. *Price Waterhouse*, 490 U.S. at 244–45.

63. *Id.*

Price Waterhouse has a plurality opinion, two concurrences, and a dissent. Given this structure, it is often difficult for courts and commentators to see the hidden majority views within it. The plurality explicitly rejected the idea that Title VII requires a plaintiff to establish "but for" cause.[64] It noted:

> It is difficult for us to imagine that, in the simple words "because of," Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.[65]

There were two main issues in *Price Waterhouse*: the substantive causal standard and which party must prove it. The Court held it was not appropriate to require the plaintiff to carry the entire causal burden.[66] Instead, the plaintiff could prevail after showing her protected trait was a motivating factor. "But for" cause is still part of the inquiry, however, because the employer can prevail by showing that it would have taken the negative action even if the protected trait was absent. A majority of the Court agreed with these main ideas.[67]

In 1991, Congress amended Title VII to change the structure enunciated in *Price Waterhouse*.[68] Congress indicated that a plaintiff could prevail on a discrimination claim under Title VII by establishing that a protected trait played a motivating factor in an employment decision.[69] Congress also created an affirmative defense which, if proven, would be a partial defense to damages.[70] This affirmative defense made Title VII more plaintiff friendly than *Price Waterhouse*. Under *Price Waterhouse*, if the employer proved that it would have made the same decision absent the protected trait, the employer was not liable for discrimination. After the 1991 amendments to Title VII, an employer who prevailed on the affirmative defense would be held liable for discrimination, but the amendments limited the type of damages that could be awarded to the plaintiff.

Unfortunately, the statutory language did not explain how this new "motivating factor" language fit in with the existing frameworks for evaluating discrimination cases. Additionally, when Congress ad-

64. *Id.* at 240.

65. *Id.* at 241–42.

66. *Id.*

67. *Id.* at 259–60 (White, J., concurring) (stating in addition that a "semantic discussion" about "but for" causation was not necessary to understand the substantial factor issue); *id.* at 265–66 (O'Connor, J., concurring). The main disagreement between Justice O'Connor and the plurality was whether the plaintiff must present direct evidence to use the proof structure.

68. *See* 42 U.S.C. § 2000e–2(m) (2018).

69. *Id.*

70. *Id.*

ded the motivating factor language to Title VII, it did not make similar changes to the ADEA or ADA.[71]

In *Gross v. FBL Financial Services*, the Supreme Court held that plaintiffs proceeding under the ADEA must prove that age was the "but for" cause of the alleged employment action.[72] The *Gross* decision fractured the factual causation inquiry in discrimination cases, requiring the plaintiff to prove a stronger causal link in age cases than in cases under Title VII.

The fracturing continued in *University of Texas Southwestern Medical Center v. Nassar*.[73] In *Nassar*, the Supreme Court held that a plaintiff in a Title VII retaliation case must establish that her protected activity was a "but for" cause of the contested employment decision.[74] *Nassar* and *Gross* require the plaintiff to bear the burden of persuasion regarding causation. They also require the plaintiff to meet a certain substantive standard: "but for" cause.

Thus, a plaintiff has a different substantive burden in Title VII discrimination cases (motivating factor) than she has in Title VII retaliation cases and ADEA cases ("but for" cause). The Supreme Court has also resolved the causal standard in other discrimination contexts.[75] Importantly, throughout this decades-long discussion about causation, the Supreme Court never invoked the separate idea of proximate cause.[76]

IV. PROXIMATE CAUSE AND *STAUB*

Although the Supreme Court explored the role of causation in employment discrimination law for decades, it did not invoke the idea of proximate cause.[77] In *Staub v. Proctor Hospital*, the Supreme Court imported the concept of proximate cause into discrimination jurispru-

71. Struve, *supra* note 61, at 288.
72. 557 U.S. 167, 176 (2009).
73. 570 U.S. 338 (2013); *see* Smith v. Bd. of Supervisors of S. Univ., 656 F. App'x 30, 33 (5th Cir. 2016).
74. *Nassar*, 570 U.S. at 362.
75. Comcast v. Nat'l Ass'n of African Am.-Owned Media, 140 S. Ct. 1009 (2020) (plaintiff must establish "but for" cause to prevail on Section 1981 claim); Babb v. Wilkie, 140 S. Ct. 1168 (2020) (plaintiff not required to establish "but for" cause to prove liability under federal sector age discrimination provision).
76. Any references to proximate cause have been sporadic and not central to the decisions. In many cases, it appears members of the Court are using the term "proximate cause" as a synonym for factual cause. *See, e.g.*, Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 626 (1999) (Thomas, J., dissenting); Price Waterhouse v. Hopkins, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring). In the *Price Waterhouse* dissent, Justice Kennedy briefly noted that a statute might require proof of proximate cause in addition to "but for" cause but does not otherwise explore the idea. *Id.* at 282 (Kennedy, J., concurring).
77. *See Olmstead*, 527 U.S. at 626 (using term "proximate cause" but appearing to refer to factual cause).

dence.[78] Revisiting *Staub* in detail, and with special attention to the proximate cause discussion, is important because it highlights some of the problems that plague the appellate and district courts' current proximate cause analysis.

The opinion is a mess from a torts perspective. Two ideas are especially salient. First, while the opinion uses many tort-like words, it never clarifies what any of those words mean. Instead, the opinion mixes together concepts of causation, agency, intent, and animus. This occurred because the Court focused on connecting the animus of individual actors to an outcome, rather than focusing on the statutory language that connects the protected trait to an outcome. Second, the Court discussed both factual cause and proximate cause, often without distinguishing the two concepts. At times, the Court appears to be using the words "proximate cause" to discuss factual cause.

A. *Staub* Generally

In *Staub*, the Court considered whether cat's paw cases are cognizable under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[79] A cat's paw case is one in which a biased individual takes an action against another person based on a protected trait, but an unbiased individual ultimately makes the challenged employment decision. For example, a biased supervisor could place a bad evaluation in an employee's file, and a second supervisor (not knowing about the bias of the first supervisor) would then decide to terminate the employee in a reduction in force based on the bad evaluation.

Although *Staub* is a USERRA case, courts have applied it to other discrimination statutes, such as Title VII. The USERRA prohibits an employer from terminating an individual if the individual's military service is a motivating factor in the decision.[80]

In *Staub*, the plaintiff Vincent Staub alleged that two supervisors were hostile to his military obligations and reported him to human resources claiming he violated hospital rules.[81] There were factual disputes about whether the hospital had these rules and whether Staub violated the rules if they existed. The vice president of human

78. Staub v. Proctor Hosp., 562 U.S. 411, 419 (2011); *see also* Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1455–56 (2012) (noting how the Supreme Court avoided and even rejected placing the proximate cause doctrine into Title VII discrimination cases prior to *Staub*). The proximate cause language in *Staub* is arguably dicta because the case's core issue relates to factual cause. However, as discussed throughout this Article, federal courts have used the concept of proximate cause post-*Staub*.

79. *Staub*, 562 U.S. at 416.

80. 38 U.S.C. § 4311(a), (c) (2018).

81. *Staub*, 562 U.S. at 414–15.

resources ultimately made the decision to terminate Staub based on the rule violations.[82]

Ultimately, the *Staub* Court approved the use of a cat's paw theory, at least in a limited set of circumstances. The Court held that "if a supervisor performs an act motivated by antimilitary animus 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, then the employer is liable under USERRA."[83]

The Court then discussed how this holding would affect the outcome in two situations: (1) when the decisionmaker exercised independent judgment, and (2) when the employer investigated the employee's alleged wrongdoing. First, the Court noted that the independent judgment of a decisionmaker does not break the causal chain. The Court purported to address this problem through proximate cause jurisprudence stating:

> And it 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."[84]

The Court acknowledged that the decisionmaker's judgment is also a proximate cause of the decision but noted that the common law allows for multiple proximate causes.[85] The Court also indicated that the ultimate decisionmaker's judgment is not a superseding cause because a cause is only superseding if it is a "cause of independent origin that was not foreseeable."[86]

Additionally, the Court rejected the idea that independent judgment breaks the causal chain for practical and fairness reasons:

> 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. That seems to us an implausible meaning of the text, and one that is not compelled by its words.[87]

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82. *Id.*

83. *Id.* at 422 (footnotes and emphasis omitted).

84. *Id.* at 419 (citation omitted) (quoting Hemi Grp., LLC v. City of New York, 559 U.S. 1, 9 (2010)).

85. *Id.* at 420.

86. *Id.* (quoting Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 837 (1996)).

87. *Id.*

Next, the Court discussed what should occur when the employer investigates the employee's alleged misconduct. The Court held that the mere fact that an investigation occurred did not relieve the employer of liability.[88] Instead, 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."[89] "Since a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a 'motivating factor in the employer's action,' precisely as the text requires."[90]

However, the Court left room for an investigation to break the causal chain in very limited circumstances. It held that the employer's investigation must be "unrelated" to the supervisor's original biased action.[91] The Court also noted that under USERRA, the defendant would be required to prove the causal break.[92] The biased report remains a factor in the outcome "if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified."[93]

Turning to the details of the *Staub* case, the Court held that the facts presented could meet the new cat's paw standard.[94] However, because the jury was not instructed with this standard, the Court remanded the case to the Seventh Circuit to determine whether the jury's verdict in favor of Staub should be reinstated or whether a new trial should be granted.[95]

B. Proximate Cause Problems in *Staub*

Staub sowed the seeds of chaos present in today's employment discrimination proximate cause jurisprudence. This section explores two issues. First, it is not clear what the Court meant when it used the term "proximate cause." It could be using the term proximate cause as a general way of stating causation. It could be using the term proximate cause to mean both factual and proximate cause. It could be using the term proximate cause to mean factual cause alone. It also could be using the term proximate cause to mean legal cause. Any of these meanings could plausibly be extracted from the opinion. Second,

88. *Id.* at 421.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 422–23.
95. *Id.*

the Court's use of proximate cause is hopelessly entangled with other ideas, such as intent, animus, factual cause, and agency.

In *Staub*, the Court ultimately held: "[I]f a supervisor performs an act motivated by antimilitary animus 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, then the employer is liable under USERRA."[96] With this sentence, the Court imported proximate cause into cat's paw analysis and potentially into employment discrimination more broadly.

Staub makes the most sense if one actually ignores tort law and the very specific wording in the holding. Instead, imagine that *Staub* is using the term proximate cause to refer to causation in a general, non-legally specific way. Under this reading, *Staub* is a directional signal from the Court—in cases with facts like this one, the plaintiff might be able to establish causation. Read this way, *Staub* tells lower courts that if a supervisor provides biased information that is connected to a negative outcome, the plaintiff can prevail under that set of facts.

This reading is most consistent with the text of USERRA and employment discrimination statutes like Title VII, the ADEA, and the ADA. The text of the USERRA and the other federal discrimination statutes does not require that any particular person be motivated by a protected trait. Instead, the statutes' language connects three concepts: (1) a person's protected trait (e.g., military service in USERRA), (2) a causal standard (e.g., motivating factor in USERRA), and (3) certain prohibited outcomes. In these statutes, there are no requirements that any particular person act with intent or animus. Although intent or animus can be evidence of causation, they are not required elements of USERRA or the other federal discrimination statutes. This reading of *Staub* harkens back to an earlier time when the Supreme Court was less concerned with the role that tort law should play in discrimination jurisprudence.

Unfortunately, it is difficult to read *Staub* without infusing it with tort meaning. The Court's analysis began with the statement: "[W]e start from the premise that when Congress creates a federal tort it adopts the background of general tort law."[97] The Court then appears to apply a tort law overlay to USERRA. Taking this language seriously means investigating in what tort sense the Court is using the term "proximate cause." Unfortunately, pursuing a tort identity does not lead to concrete answers.

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96. *Id.* at 422 (footnotes omitted).

97. *Id.* at 417; *see also* Sperino, *The Tort Label*, *supra* note 10 (discussing the ways a tort framework in discrimination cases is problematic); Sperino, *Discrimination Statutes*, *supra* note 10 (noting how the *Staub* Court did not discuss whether Congress used the common law as a background for USERRA).

At times, it appears that the Court is using the term proximate cause to mean factual cause or some combination of factual and legal cause. At the beginning of the opinion, the Court framed the case as a case about factual cause. It stated that it was construing the "motivating factor" language in USERRA.[98] When the Court in *Price Waterhouse* explored the factual cause standard for Title VII cases, it did so through the motivating factor concept.[99] Later, when the Supreme Court changed the factual cause standard for Title VII retaliation cases and ADEA cases, it contrasted the motivating factor language in the 1991 amendments to Title VII with "but for" cause.[100]

Discussing the "motivating factor" language in a discrimination statute necessarily implicates factual cause. The Court framed *Staub* through the concept of motivating factor and never explicitly changed the framing or noted that it was transitioning from factual cause to proximate cause. Additionally, the Court cited the "motivating factor" language of Title VII, drawing a parallel between the two statutes.[101] When the Court applied its holding to the facts of the case, it appeared to engage in a factual cause analysis by noting that the supervisors' biased input caused the hospital to fire Staub.[102]

However, other parts of the opinion make it difficult to read *Staub* as purely a factual cause case. Even though the case is framed as a case about the "motivating factor" language, the Court never appears to address the factual cause debate that a reader would expect given the Court's history of cases grappling with the motivating factor standard versus the "but for" standard. Although USERRA clearly uses the "motivating factor" language, a reader would expect a factual cause case to distinguish the two causal standards, at least in a footnote or through citations. And, as discussed below, the Court does not focus its analysis solely, or even primarily, on factual cause concerns. Instead, the outcome is a mix of concerns about causation, agency, intent, and animus.

This mix of concerns lends credibility to reading *Staub* as a case that uses the term proximate cause to refer to a combined concept of factual cause plus traditional proximate cause. Under this version of proximate cause, a reader might expect the Court to first analyze factual cause and then to analyze proximate cause. Taking a holistic view of the opinion leads to this outcome. When the Court applied its new

98. *Staub*, 562 U.S. at 417.

99. Price Waterhouse v. Hopkins, 490 U.S. 228, 244–45 (1989).

100. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

101. *Staub*, 562 U.S. at 417.

102. *Id.* at 423.

holding to the facts of the particular case, it analyzed whether the supervisors' biased input caused the outcome.[103] This is factual cause.

The Court then considered the effects, if any, of the ultimate decisionmaker's exercise of independent judgment or of an independent investigation. The Court appears to frame this part of the inquiry as relating to traditional proximate cause.[104]

Staub can also be read as using proximate cause as a separate, stand-alone concept. The Court indicated: "As we have already acknowledged, the requirement that the biased supervisor's action be a causal factor of the ultimate employment action incorporates the traditional tort-law concept of proximate cause."[105] This sentence suggests that proximate cause is a separate concept within the broader umbrella of causation generally.

There are multiple paragraphs in *Staub* that refer to proximate cause in the traditional tort sense of that term. The Court discussed why the decisionmaker's exercise of judgment does not cut off liability.[106] In doing so, it invoked two concepts from proximate cause. The first is whether the decisionmaker's judgment rendered the discriminatory actor's input as too far removed from the outcome.[107] The Court cited *Hemi Group, LLC v. City of New York*, which discussed proximate cause as a concept separate from "but for" cause.[108] Relatedly, the Court considered whether the supervisor's judgment was a superseding cause.[109]

The causation portion of *Staub* is heavily clouded by other concepts. Causation, animus, intent, and agency all mix together. The Court interspersed these topics throughout the opinion without ever clearly indicating which of the concepts drove the outcome in the case.[110]

In fact, the case contains a very confusing paragraph about agency. In this paragraph, the Court contrasted two possible agency rules. Under one possible agency rule, an employer cannot be liable when the intent of one agent and the action of another combine.[111] The Court supported this rule by citing to the *Restatement of Agency* and several cases.[112] Strangely, none of the cited materials stand for the

103. *Id.*
104. *Id.* at 419–20.
105. *Id.* at 420.
106. *Id.* at 419–20.
107. *Id.* at 419.
108. *Id.* (citing Hemi Grp., LLC v. City of New York, 559 U.S. 1, 9 (2010)).
109. *Id.* at 420.
110. *Id.* at 417 (discussing intent).
111. *Id.* at 418.
112. *Id.* The *Restatement (Second) of Agency* section cited by the Court covers situations where an agent has a duty to reveal certain knowledge the agent possesses. The cases cited by the Court include *United States v. Science Applications Inter-*

proposition indicated by the Court. The other possible agency rule allowed the intent of one employee to be combined with the action of another.[113]

After introducing the agency concept, the *Staub* Court appeared to immediately abandon any resort to common law agency principles. What is less clear is whether the Court abandoned agency ideas altogether or whether it read USERRA's motivating factor language as relating to agency. The Court noted:

> Ultimately, we think it unnecessary in this case to decide what the background rule of agency law may be, since the former line of authority is suggested by the governing text, which 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."[114]

This paragraph is problematic for a number of reasons. First, it appears to define the words "motivating factor" as relating to agency, intent, and causation. It is unlikely that Congress would have used "motivating factor" to refer to all three of these concepts.

Second, the paragraph reads federal discrimination law as requiring a plaintiff to prove animus or intent, rather than causation. It also seems to define the term "motivating factor" as what "motivated" the final decisionmaker. Instead, the federal discrimination statutes require the protected trait to motivate the outcome, not a particular person. This paragraph seems to take a factual cause standard (motivating factor) and convert it into an amorphous intent or animus requirement.

A protected trait can be the factual cause (motivating factor) of an employment outcome even when the final decisionmaker is not aware of how the protected trait affected the outcome. Here is an example. Imagine a male manager who believes that people of Race A are more likely to steal than people of Race B. He falsely reports to his boss that a person of Race A stole company property. The boss fires the employee. In this scenario, it is easy to understand how the employee's race was a motivating factor in the outcome. Had the employee been a

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national Corp., 626 F.3d 1257, 1273–76 (D.C. Cir. 2010), *Chaney v. Dreyfus Service Corp.*, 595 F.3d 219, 241 (5th Cir. 2010), and *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1122 (D.C. Cir. 2009). These cases relate to whether a scienter requirement can be met by showing collective intent when no single actor within a company possesses the required intent. By contrast, in *Staub*, the Court indicated that two supervisors were acting because of military animus. Additionally, the cited cases allowed for corporate liability when the company deliberately avoided knowing the truth or when its actions constituted gross negligence. *See, e.g.*, *Sci. Applications Int'l Corp.*, 626 F.3d at 1273–76.

113. *Staub*, 562 U.S. at 418.

114. *Id.* at 418–19.

member of Race B, it is unlikely he would have been fired. This is true even if the employee's race is not visibly motivating the upper management decision. To prove factual cause, the discrimination statutes do not require a plaintiff to piece together the animus of one person and show how that animus impacted other people in the decision-making chain as long as the protected trait played the required causal role.[115] In *Staub*, however, the Court combines concepts of intent, animus, agency, and causation.

The uncertainty present in *Staub* is evident in the appellate and trial court opinions that follow it. These opinions use the words "proximate cause" to mean causation in a general sense, factual cause, legal cause, and both factual and legal cause. The lower court opinions also intermingle intent, animus, and agency into proximate cause.

V. THE CURRENT PROXIMATE CAUSE MUDDLE

Even though the Supreme Court decided *Staub* almost a decade ago, the federal district and appellate courts have not settled on a fixed way of using the concept of proximate cause in employment discrimination. Several main paths have emerged. Some courts appear to use the term "proximate cause" as a generic way to describe the concept of cause without any particular legal meaning. Some courts use the term to mean factual cause. Still others use the term to denote a separate concept of proximate cause. At times, it is difficult to determine which version of proximate cause a court is using.[116] And even within these categories, some courts view proximate cause as being bound with questions of agency and vicarious liability.

Importantly, this muddle remains confined to cat's paw cases. Outside of cat's paw scenarios, very few cases over the past decade import the concept of proximate cause into discrimination cases.[117]

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115. *Staub* also gets off track because it expresses concern about combining the intent of one actor with an outcome reached by another actor. This concern might be valid if the plaintiff was trying to hold an individual actor liable for discrimination. However, in federal discrimination law, the employer is the liable entity, not the individual actors. *Id.* at 422 & n.4. The Court cited the *Restatement (Second) of Agency*, but it is unclear how the section cited even applies to discrimination law or supports the proposition for which the Court cited it. *Id.* at 418 (citing RESTATEMENT (SECOND) OF AGENCY § 275, illus. 4 (AM. LAW INST. 1958)).

116. *See, e.g.*, Duncan v. Alabama, 734 F. App'x 637, 641 (11th Cir. 2018) (holding that the plaintiff cannot establish either proximate cause or "but for" cause); Lawson v. Graphic Packaging Int'l, Inc., 549 F. App'x 253, 258 (5th Cir. 2013) (discussing a jury instruction that substituted determinative factor for proximate cause).

117. A few courts have used proximate cause to determine if a plaintiff's damages are closely connected enough with discrimination; however, even these cases are fairly rare. *See, e.g.*, Morgan v. Chao, No. CV-16-04036-PHX-DLR, 2017 WL 3215647, at *1 (D. Ariz. July 28, 2017), *aff'd*, 773 F. App'x 419 (9th Cir. 2019); Rice v. N.Y.C. Dep't of Educ., No. 13-CV-4915-FB-RML, 2015 WL 6965172, at *2–3 (E.D.N.Y. Nov. 10, 2015) (discussing concept in the context of remedies and

A. Generic Cause

Many courts appear to use the words "proximate cause" as a generic causal concept without any specific legal meaning.[118] Indeed, courts often focus on replicating the outcome they think the Supreme Court would reach based on the reasoning of *Staub*, with very little attention to the term "proximate cause."

Here is an example of using proximate cause in this way. In *Steele v. Mattis*, the D.C. Circuit considered whether to affirm a district court's grant of summary judgment in favor of an employer.[119] The plaintiff, a professor, alleged that his employer terminated him because of his age.[120] He presented evidence that one of his supervisors made comments that older professors were stubborn and hard to work with.[121] He also presented evidence that this supervisor was involved in the discussions about whether to fire him.[122]

The D.C. Circuit reversed the grant of summary judgment.[123] It cited the holding in *Staub* and noted that the "actions of a discriminatory supervisor that feed into and causally influence the decisionmaker's ultimate determination may also be the proximate cause of an adverse employment action."[124] The court did not otherwise describe proximate cause or lean heavily on the concept in reaching the outcome. Relying primarily on the summary judgment standard, the court held there was a question of fact about whether the plaintiff's age played a causal role in his termination.[125]

Another example of using proximate cause as a general, non-specific causal standard is found in the Fifth Circuit's opinion in *Alviar v. Macy's, Inc.*[126] The panel recited that to survive summary judgment, the plaintiff must present evidence that a protected trait was a "proximate cause—a motivating factor" of the contested employment ac-

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noting that there is little guidance about how to apply proximate cause in discrimination cases); Crump v. Tcoombs & Assocs., LLC, No. 2:13-CV-707, 2015 WL 12806526, at *2 (E.D. Va. Sept. 30, 2015) (discussing proximate cause in the context of damages); Monette v. Cty. of Nassau, No. 11-CV-539 JFB AKT, 2015 WL 1469982, at *18 (E.D.N.Y. Mar. 31, 2015). Some courts have incorporated proximate cause into retaliation cases. *See, e.g.*, Mutter v. Bragg, No. 1:16 CV 309, 2017 WL 9515322, at *4 (W.D.N.C. Dec. 8, 2017) (invoking term as element of retaliation claim).

118. *See, e.g.*, Velázquez-Pérez v. Developers Diversified Realty Corp., 753 F.3d 265, 271 (1st Cir. 2014); Lovern v. Jackson, No. CV 08-0082, 2015 WL 494069, at *9 (D.V.I. Feb. 3, 2015).
119. Steele v. Mattis, 899 F.3d 943, 950 (D.C. Cir. 2018).
120. *Id.* at 946.
121. *Id.*
122. *Id.* at 951.
123. *Id.* at 952.
124. *Id.* at 950.
125. *Id.* at 951–52.
126. Alviar v. Macy's, Inc., 784 F. App'x 213, 220 (5th Cir. 2019).

tion.[127] However, the court did not significantly discuss the meaning of these words and largely reached its result by analogizing to other cases and relying on the procedural posture of the case.[128]

B. Proximate Cause Is Factual Cause

In many cases, judges appear to be equating proximate cause with factual cause.[129] Courts often conflate the two concepts when applying cat's paw doctrine in age discrimination cases.[130]

Two appellate court cases illustrate this way of framing proximate cause. The Tenth Circuit considered how and whether to apply *Staub* in the context of an ADEA discrimination case in *Simmons v. Sykes Enterprises, Inc.*[131] The court held that the plaintiff could try to prove her case under a cat's paw theory, which it called the subordinate bias doctrine.[132] However, the Tenth Circuit noted: "If we were to apply *Staub* directly to an age-discrimination case, the plaintiff would then only need to prove her supervisor's animus was somehow related to the termination and not that the animus was necessary to bring about the termination."[133] The court went on to hold that a plaintiff must prove "but for" cause to prevail in an ADEA discrimination case and then purported to define "but for" cause as requiring that the "subordinate's animus . . . was the factor that made a difference."[134]

The Tenth Circuit then provided examples of when "but for" cause could and could not be established. It indicated that the plaintiff could

127. *Id.* at 219. It is unclear whether the court is confusing proximate cause with factual cause.

128. *Id.* at 219–21.

129. *See, e.g.*, Wojtanek v. Dist. No. 8, Int'l Ass'n of Machinists & Aerospace Workers, 435 F. App'x 545, 549 (7th Cir. 2011); Moore v. Delta Airlines, Inc., No. 5:18-CV-00485-HNJ, 2020 WL 230978, at *18 (N.D. Ala. Jan. 15, 2020); McLean v. Delhaize Am. Distribution, LLC, No. 2:18-CV-00152-GZS, 2019 WL 4046546, at *5 (D. Me. Aug. 27, 2019); Tuttle v. Baptist Health Med. Grp., Inc., 379 F. Supp. 3d 622, 634 (E.D. Ky. 2019); Heard v. City of Union City, No. 1:15-CV-2228-MHC, 2017 WL 4475926, at *6 (N.D. Ga. July 25, 2017); Washington v. City of Nettleton, No. 1:15-CV-124-SA-DAS, 2017 WL 888351, at *6 (N.D. Miss. Mar. 6, 2017); Harkness v. Bauhaus U.S.A., Inc., 86 F. Supp. 3d 544, 559 (N.D. Miss. 2015); Vázquez-Pagán v. Borges-Rodríguez, No. CV 12-1972 MEL, 2014 WL 5148457, at *2 (D.P.R. Oct. 14, 2014) (in section 1983 context); Cole v. Mgmt. & Training Corp., No. 4:11CV-118-JHM, 2014 WL 2612561, at *4 (W.D. Ky. June 11, 2014); Herbert v. Nat'l Amusements, Inc., No. 3:08CV1945 VLB, 2012 WL 201758, at *3 (D. Conn. Jan. 23, 2012); Dubin v. Bd. of Madison Area Tech. Coll. Dist., No. 10-CV-035-WMC, 2011 WL 13209629, at *4 (W.D. Wis. Dec. 19, 2011); Saviano v. Town of Westport, No. 3:04-CV-522 RNC, 2011 WL 4561184, at *7 n.17 (D. Conn. Sept. 30, 2011).

130. *See, e.g.*, *Wojtanek*, 435 F. App'x at 549; *Dubin*, 2011 WL 13209629, at *4.

131. Simmons v. Sykes Enters., Inc., 647 F.3d 943, 949 (10th Cir. 2011).

132. *Id.* at 950–51.

133. *Id.* at 949.

134. *Id.* at 950.

establish "but for" cause if the "biased supervisor falsely reports the employee violated the company's policies, which in turn leads to an investigation supported by the same supervisor and eventual termination."[135] The plaintiff might also prevail when the biased supervisor writes "a series of unfavorable periodic reviews which, when brought to the attention of the final decision-maker, serve as the basis for disciplinary action against the employee."[136]

However, the court noted that the plaintiff could not prevail under the following circumstances:

> [W]here a violation of company policy was reported through channels independent from the biased supervisor, or the undisputed evidence in the record supports the employer's assertion that it fired the employee for its own unbiased reasons that were sufficient in themselves to justify termination, the plaintiff's age may very well have been in play—and could even bear some direct relationship to the termination if, for instance, the biased supervisor participated in the investigation or recommended termination—but age was not a determinative cause of the employer's final decision.[137]

The Tenth Circuit did not use any tort language to explain why the first set of examples might establish liability while the second set of examples would not.[138]

In *Sims v. MVM, Inc.*, the plaintiff alleged that his employer violated the ADEA by firing him because of his age.[139] Sims was seventy-one years old at the time MVM ended his employment as part of a reduction in force.[140] Sims alleged that his immediate supervisor made a comment that he was "old and slow."[141] The supervisor denied knowing the plaintiff's age at the time of the reduction in force.[142] The Eleventh Circuit considered whether a cat's paw analysis could be applied to the case. It held that while cat's paw analysis could be used in ADEA cases, *Staub* could not be imported into ADEA cases because the ADEA required the plaintiff to prove a higher factual cause standard than *Staub*.[143]

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135. *Id.*
136. *Id.*
137. *Id.*
138. Importantly, under traditional "but for" principles, a plaintiff might be able to establish "but for" causation in the second set of scenarios. For example, even if one supervisor has reasons that are sufficient on their own for termination, a plaintiff could still establish discrimination if the facts suggested that the supervisor would not have taken that action absent the biased input. A "but for" cause can be "the straw that broke the camel's back." Burrage v. United States, 571 U.S. 204, 211 (2014). In *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1739 (2020), the Court noted that "but for" cause is a "sweeping" standard that allows a plaintiff to prevail when there are multiple causes.
139. Sims v. MVM, Inc., 704 F.3d 1327, 1329 (11th Cir. 2013).
140. *Id.*
141. *Id.* at 1331.
142. *Id.* at 1334.
143. *Id.* at 1336.

The Eleventh Circuit noted that the "motivating factor" causal standard "is simply the traditional tort law standard of proximate cause," and that 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."[144] The court went on to hold that in an age discrimination case, the plaintiff was required to establish that age was the "but for" cause of the outcome, not just the proximate cause.[145] The court noted that *Staub*'s proximate cause principle cannot apply in ADEA cases.[146]

The Third Circuit has cryptically stated that the proximate cause analysis in *Staub* is about factual cause, agency, and vicarious liability.[147] The court also noted that in an ADEA case, the factual cause standard requires the plaintiff to establish "but for" cause, but that the plaintiff can still proceed under a cat's paw theory.[148] The Third Circuit did not clarify, however, what it meant when it claimed that proximate cause was really factual cause plus agency plus vicarious liability.

C. A Separate Concept

Some courts view *Staub*'s proximate cause doctrine as separate from factual cause.[149] Many of these cases focus on questions of intervening causes.[150]

As discussed in the prior section, the Tenth Circuit, in *Simmons v. Sykes Enterprises, Inc.*, articulated proximate cause as a factual cause concept.[151] However, another panel of the Tenth Circuit described proximate cause completely differently just two years later in *Lobato v. New Mexico Environment Department*.[152]

144. *Id.* at 1335 (quoting Staub v. Proctor Hosp., 562 U.S. 411, 419 (2011)).
145. *Id.*
146. *Id.* at 1336.
147. Marcus v. PQ Corp., 458 F. App'x 207, 212 (3d Cir. 2012); *see also* McKenna v. City of Philadelphia, 649 F.3d 171, 180 (3d Cir. 2011) (appearing to apply proximate cause to jury instructions related to factual cause).
148. *Marcus*, 458 F. App'x at 212.
149. *See, e.g.*, Jones v. SEPTA, 796 F.3d 323, 330 (3d Cir. 2015); Swann v. Office of the Architect of the Capitol, 185 F. Supp. 3d 136, 144 (D.D.C. 2016) (noting that the plaintiff is required to establish not only "but for" cause but also proximate cause).
150. *See, e.g.*, Breeden v. Novartis Pharm. Corp., 646 F.3d 43, 53 (D.C. Cir. 2011) (in the FMLA retaliation context, the court considered whether there was an unbroken connection and whether there was a new and independent cause of the outcome); Duncan v. Johnson, 213 F. Supp. 3d 161, 194 (D.D.C. 2016).
151. Simmons v. Sykes Enters., Inc., 647 F.3d 943, 949 (10th Cir. 2011).
152. Lobato v. N.M. Env't Dep't, 733 F.3d 1283, 1295 (10th Cir. 2013). Judge Tymkovich was on both panels.

In *Lobato*, the Tenth Circuit recognized that the allegedly biased individual's input might have been the "but for" cause of the plaintiff's termination.[153] However, the Tenth Circuit noted that "but for" cause is a separate concept from proximate cause.[154] The court cited a law review article that defined proximate cause as "little more than a swirling maelstrom of policy, practicality, and case-specific fairness considerations."[155] The court cited a second article by discrimination scholar Charles Sullivan noting, "The only purpose of adding a proximate cause requirement is to limit liability short of the full reach of but-for causation."[156] Ultimately, the court held that because the decisionmaker investigated the facts underlying the original input, proximate cause principles cut off the employer's liability.[157]

The District of Columbia Circuit and the Fifth Circuit have specifically noted that proximate cause is a doctrine that helps courts answer questions related to superseding cause.[158] The Fifth Circuit examined a case in which the plaintiff presented evidence that the employer fired him after he complained about a supervisor's racial harassment.[159] A magistrate judge, sitting as a special master, had ruled that a supervisor and a co-worker tried to get the plaintiff fired after he complained about harassment.[160] However, the magistrate judge did not hold the employer liable for the retaliation because the plaintiff lied during an investigation into whether the plaintiff was selling DVDs at work and did not fully cooperate with the investigation.[161]

The Fifth Circuit considered whether this outcome comported with *Staub*'s proximate cause analysis.[162] Citing *Staub*, the Fifth Circuit held that the magistrate judge's proximate cause analysis was incorrect because the plaintiff's refusal to participate in the investigation was foreseeable.[163] In other words, the plaintiff's refusal to participate in the investigation did not cut off the causal chain started by the retaliatory investigation because the plaintiff's conduct was foreseeable

153. *Id.*
154. *Id.* at 1295 n.5.
155. *Id.* (quoting David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1680–85 (2007)).
156. *Id.* (quoting Sullivan, *supra* note 78, at 1432).
157. *Id.* at 1298.
158. Fisher v. Lufkin Indus., Inc., 847 F.3d 752, 759 (5th Cir. 2017), *as revised* (Mar. 30, 2017); Morris v. McCarthy, 825 F.3d 658, 672 (D.C. Cir. 2016); *see also* Wheeler v. City of Columbus, No. 2:16-CV-1159, 2019 WL 3753579, at *10 (S.D. Ohio Aug. 8, 2019) (stating it is a question of fact whether a subsequent investigation cut off liability).
159. *Fisher*, 847 F.3d at 754.
160. *Id.*
161. *Id.* at 756–57.
162. *Id.* at 758.
163. *Id.* at 759.

given the underlying reason for the investigation. The court was concerned that ruling otherwise would incentivize employers to start sham investigations and then escape liability when employees properly resisted such investigations.[164] Notably, the Fifth Circuit did not cite to any common law proximate cause sources in its analysis, instead relying on Supreme Court cases.

D. Inconsistent Outcomes

As discussed in the prior sections, the courts cannot agree on whether proximate cause is a general causal term, factual cause, or a stand-alone proximate cause doctrine. Not surprisingly, when courts apply the concept of "proximate cause" in employment discrimination doctrine, the results are often inconsistent. Cases with very similar facts often have different outcomes.

Almost ten years after *Staub*, it is difficult to predict the circumstances under which a court will grant summary judgment for an employer using a proximate cause analysis.[165] An example of this inconsistency involves cases in which an allegedly biased individual acts and then multiple levels of review follow. In some cases, the courts hold that the multiple levels of review break the causal chain between the biased input and the outcome.[166] In other very similar cases, the courts hold that the causal chain is not broken. This split is especially prominent in tenure cases.

For example, in *Singh v. Cordle*, the Tenth Circuit considered whether a plaintiff could prevail on a discrimination claim related to a university's decision not to reappoint him.[167] The decision involved multiple layers of review by a dean, the provost, and a separate grievance committee.[168] The court recognized that there might be evidence

164. *Id.* at 759 n.8.

165. Also lingering within the proximate cause issue is a question about which party bears the burden of proof. Under the USERRA, the Supreme Court held that the employer bears the burden of proving that its investigation of the plaintiff was independent of any biased input. Staub v. Proctor Hosp., 562 U.S. 411, 421 (2011). Some courts have asserted that the plaintiff must establish proximate cause. *E.g.*, Morris v. Pruitt, 308 F. Supp. 3d 153, 160 (D.D.C. 2018). Some courts have hinted that the employer would have some responsibility related to disproving proximate cause. *E.g.*, Wheeler v. City of Columbus, No. 2:16-CV-1159, 2019 WL 3753579, at *11 (S.D. Ohio Aug. 8, 2019) (noting the employer would need to establish that firing the plaintiff was "entirely justified" without considering the recommendation from the allegedly biased individual). The procedural posture of the case may also affect the required level of proof. City of Philadelphia v. Wells Fargo & Co., No. CV 17-2203, 2018 WL 424451, at *5 (E.D. Pa. Jan. 16, 2018) (discussing proximate cause under Fair Housing Act and noting the level of required proof at the motion to dismiss stage).

166. *See, e.g.*, Duncan v. Johnson, 213 F. Supp. 3d 161, 194 (D.D.C. 2016).

167. Singh v. Cordle, 936 F.3d 1022, 1038 (10th Cir. 2019).

168. *Id.* at 1029.

of bias from the dean but held that the dean's bias was not the proximate cause of the outcome because the decisions of the provost and the grievance committee broke the causal chain.[169] The court held this even though there was evidence that the provost relied on input from the dean.[170]

In a similar case, the Sixth Circuit held that multiple layers of review meant the allegedly biased recommendation against tenure by the department chair was not the proximate cause of a tenure denial, even considering evidence that subsequent review levels often rubber-stamped the initial recommendation.[171]

However, the D.C. Circuit held that a dean's negative recommendation related to tenure could be the proximate cause of the university's ultimate decision to deny tenure even if the tenure review process also involved faculty committees, a provost, and a university president.[172] Indeed, there are a number of cases holding that multiple layers of review do not break the causal chain unless the outcome is completely unrelated to the biased input.[173]

In other cases, courts have noted that "getting the ball rolling" is not sufficient to establish liability.[174] In these cases, plaintiffs argue that initial complaints about their work performance would not have been made if they were not members of a protected class. Therefore, any negative outcome that results from the initial complaint is discriminatory because the allegedly biased individual "got the ball rolling." For example, in one case, a plaintiff alleged that an anonymous letter prompted an investigation into whether she submitted false information on her resume about her prior work experience and her education credentials.[175] She asserted that the anonymous letter was sent in retaliation for her participation in prior lawsuits against her employer.[176] After the investigation, the employer concluded that the information on the plaintiff's resume was not correct and fired her.[177]

169. *Id.* at 1039.
170. *Id.*
171. Li v. Jiang, 673 F. App'x 470, 475 (6th Cir. 2016).
172. Mawakana v. Bd. of Trs., 926 F.3d 859, 866 (D.C. Cir. 2019).
173. *See, e.g.*, Morris v. McCarthy, 825 F.3d 658, 672 (D.C. Cir. 2016); Zamora v. City of Houston, 798 F.3d 326, 334 (5th Cir. 2015).
174. Jones v. SEPTA, 796 F.3d 323, 330–31 (3d Cir. 2015) (getting the ball rolling is not enough); *see also* Lamb v. Montgomery Twp., 734 F. App'x 106, 113 (3d Cir. 2018) (same); Terpstra v. Shoprite Supermarket, Inc., No. 17-CV-6840 KMK, 2019 WL 3338267, at *11 (S.D.N.Y. July 25, 2019) (same); Swann v. Office of the Architect of the Capitol, 185 F. Supp. 3d 136, 144 (D.D.C. 2016) (same).
175. *Swann*, 185 F. Supp. 3d at 139.
176. *Id.* at 140. It should be noted that it is difficult to understand the plaintiff's evidence in this case because the judge never described the evidence offered by the plaintiff or even described the conduct on which the plaintiff based her retaliation claim.
177. *Id.* at 139.

Although the plaintiff contested the evidence, the court held that the employer honestly believed the outcome of the investigation.[178] While the court noted that the allegedly retaliatory letter may have been the "but for" cause of the outcome, it found that the plaintiff failed to establish proximate cause.[179]

In other instances, however, courts have allowed the plaintiff to survive summary judgment with similar evidence.[180] Given that the courts cannot arrive at a consistent way to define proximate cause, it is not surprising that the outcomes in cases that invoke the doctrine are inconsistent.

VI. UNPRINCIPLED PROXIMATE CAUSE

While inconsistent cases are worrisome, there is an even greater cause for concern. Most cat's paw cases that use proximate cause to limit employer liability do not rely on either tort law or the discrimination statutes in their proximate cause analysis. Instead, most of the cases seem to reflect one of two things: (1) the judge's own sense about whether the employer should be liable, or (2) the judge's attempt to reconcile the underlying facts with the outcome in *Staub* or subsequent appellate cases to reach the outcome that the judge believes these courts would reach.

This implicates separation of power concerns. There is a strong argument that the courts are not actually invoking common law proximate cause in cat's paw cases. Instead, they use the language of proximate cause to justify an outcome without deriving any meaning from the concept itself.

When courts invoke the concept of "proximate cause," they have not clearly defined which version of proximate cause they are using. Principles are important in proximate cause doctrine because the type of proximate cause chosen implicates substantive and procedural issues and might be outcome determinative. One version of proximate cause might lead to a worker winning a case while another might lead to a verdict for the employer. Procedurally, some versions of proximate cause rely more heavily on the jury determining the outcome and others rely on line-drawing by judges. Thus, the type of proximate

178. *Id.* at 143.

179. *Id.* at 144.

180. Murphy v. Ctr. for Emergency Med. of W. Pa., Inc., 944 F. Supp. 2d 406, 431 (W.D. Pa. 2013); *see also* Remus v. Vill. of Dolton, No. 15-CV-5066, 2019 WL 2568528, at *5 (N.D. Ill. June 21, 2019) (in the hiring context, there would need to be evidence of a sufficient, independent investigation by the decisionmaker); Chase v. Frontier Commc'ns Corp., 361 F. Supp. 3d 423, 448 (M.D. Pa. 2019) (explaining that cat's paw liability might be established on the basis that allegedly biased individual did not provide full details to decisionmaker when additional details would have been favorable to the plaintiff and may have prevented the plaintiff's termination).

cause also plays an important role in who gets to decide the outcome of discrimination cases—judges or juries.

A. Proximate Cause Without a Source

When courts analyze proximate cause in discrimination cases, they often do not rely on either the common law or the discrimination statutes. *Moore v. Delta Airlines, Inc.* provides a good example.[181] In this case, Delta Airlines terminated a customer service representative. The plaintiff alleged that the company discriminated against her because of her race and also retaliated against her after she complained about race discrimination, violating 42 U.S.C. § 1981.[182] The court considered whether to grant summary judgment in the employer's favor.

The trial court examined two actions taken by the company. The first was a Final Corrective Action Notice issued by the plaintiff's supervisor.[183] The second was the company's ultimate decision to terminate the employee.[184] The district court held that it could not grant summary judgment in the employer's favor on the Final Corrective Action Notice claim because there was a dispute of material fact about whether the supervisor issued the notice to retaliate against the plaintiff.[185]

Even though the same supervisor recommended that the company fire the plaintiff, the court held that summary judgment in the employer's favor *was* appropriate on the termination claim.[186] The court held that the plaintiff could not establish proximate cause—which it equated with "but for" cause—because the decision to terminate the plaintiff went through several levels of review.[187] The court granted summary judgment even though it called the supervisor's recommendation to terminate the plaintiff a "necessary" part of the termination process.[188]

Although the court cited to *Staub* and other cases for the applicable legal standard regarding causation, it never actually analyzed either "but for" cause or proximate cause. For example, in a "but for" analysis, one would expect the court to engage the counterfactual. In this case, this means the court would have asked what would have happened if the supervisor did not recommend the plaintiff be fired and

181. Moore v. Delta Airlines, Inc., No. 5:18-CV-00485-HNJ, 2020 WL 230978, at *21 (N.D. Ala. Jan. 15, 2020).
182. *Id.* at *1.
183. *Id.* at *3, *17.
184. *Id.* at *18.
185. *Id.* at *17.
186. *Id.* at *18–24.
187. *Id.* at *21.
188. *Id.*

did not issue the Final Corrective Action Notice. Given that the court recognized the supervisor played a necessary role in the termination, it is difficult to understand how the court could grant summary judgment on behalf of the employer based on a tort law "but for" cause analysis. Although it is certainly possible that a factfinder may have determined causation did not exist, it is unclear how the court could declare this at the summary judgment stage.

Nor did the court engage in any kind of separate proximate cause analysis. In such an analysis, one would expect the court to invoke one or more rationales underlying proximate cause and to apply those rationales to the facts. The court did not invoke any common law proximate cause concept.

Additionally, the court did not attempt to justify its analysis through the text or history of the discrimination statutes. It did not even explain why *Staub* or other cat's paw cases justify the outcome.

In another cat's paw case, the Tenth Circuit held that any alleged bias was "conclusively filtered out through the layers of independent consideration that resulted in [the] firing."[189] The court affirmed the trial court's grant of summary judgment in favor of the employer.[190] In discussing proximate cause, the Tenth Circuit cited *Staub* and other cases from the Tenth Circuit.[191] The court's proximate cause analysis did not refer to the common law of proximate cause.

Very few of the proximate cause cat's paw cases refer to the *Restatement*, state tort law, law review articles about tort law, or any other tort-specific source. Indeed, most of the cases contain no discussion of tort law, independent of discrimination law. In these cases, it is fair to say the courts are not explicitly relying on tort principles of causation to reach the outcomes.

Nor do the courts appear to be relying on the underlying discrimination statutes when limiting liability through proximate cause. From a textualist perspective, when the courts interpret Title VII and the ADEA, they are drawing from the two main operating provisions of the statutes. Neither of the statutes uses the term "proximate cause."[192] Congress has used the word proximate cause in other statutes and knows how to explicitly use proximate cause.[193]

189. Hanson v. Colo. Judicial Dep't, 564 F. App'x 916, 921 (10th Cir. 2014).

190. *Id.* at 920.

191. *Id.*

192. 29 U.S.C. § 623(a) (2018); 42 U.S.C. § 2000e–2(a) (2018).

193. *See, e.g.*, 33 U.S.C. § 2704(c)(1) (2018) (providing that plaintiffs may recover damages in excess of cap if a showing of proximate cause is made under certain qualifications); H.R. 7041, 68th Cong. § 261(2) (1924) (United States is liable for "any disease proximately caused" by federal employment); H.R. 5723, 65th Cong. § 105(306) (1917) (United States is liable to member of Armed Forces for post-discharge disability that "proximately result[ed] from [a pre-discharge] injury");

Despite this, the Supreme Court in *Staub* appears to draw proximate cause from the motivating factor language of USERRA. Under Title VII and the ADEA, the proximate cause concept presumably derives from the "because of" language.[194]

It is strange that even though Title VII and the ADEA have existed for more than fifty years, the courts have not needed or applied a robust proximate cause doctrine. Finding a new element within statutory causes of action more than fifty years after Congress enacted them seems to be a stretch. And, if proximate cause is contained within the "because of" language, it seems strange that courts largely reach for it in cat's paw cases. In other words, courts have largely not needed proximate cause doctrine for half a century and only began to robustly adopt the concept after giving a subset of discrimination cases a fancy title. If a concept is truly an element of the underlying statute, it is strange that in five decades the concept has only been needed in a special subset of cases.

Unfortunately, in the decade since *Staub*, most courts that have invoked proximate cause have not looked at the underlying language of the discrimination statutes to see if the language discusses concepts that might be relevant to proximate cause. When deciding whether an investigation by an employer cuts off liability or whether to trace the input of an allegedly biased individual through to a decision, courts have not looked to the text of the discrimination statutes to draw lines.

If they did, they would find a regime that already limits liability in many ways. For example, Title VII limits the people it protects and the entities that are liable for discrimination. Under Title VII, it is unlawful for an employer, employment agency, or certain labor organizations to engage in certain types of behavior.[195] Although the Supreme Court has never decided the question, lower courts have largely rejected individual supervisor or co-worker liability.[196] The statutes generally protect applicants for employment, employees, and former

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H.R. 15316, 64th Cong. § 458(1) (1916) (United States not liable to injured employee whose "intoxication . . . is the proximate cause of the injury").

194. 29 U.S.C. § 623(a); 42 U.S.C. § 2000e–2(a).

195. 42 U.S.C. § 2000e–2(b) to (c). Similar restrictions are provided in the ADEA. 29 U.S.C. § 623(b)–(c). Some joint labor-management committees may also be liable for discriminatory conduct. *See* 42 U.S.C. § 2000e–3(a). Within the ADA, the term "covered entity" is defined to include employment agencies and labor organizations. 42 U.S.C. § 12111(2) (2018). The ADA, whose statutory provisions are structured differently, prohibits a "covered entity" from discriminating in certain ways enumerated by the statute. 42 U.S.C. § 12112(a)–(b) (2018).

196. *See, e.g.*, Creusere v. Bd. of Educ., 88 F. App'x. 813, 822 n.12 (6th Cir. 2003); Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1179 (9th Cir. 2003).

employees[197] but usually do not protect independent contractors and volunteers.[198]

Even within this narrow band of protected relationships, not all discriminatory conduct is prohibited. Title VII requires that there be an unlawful employment practice as the statute defines that term.[199] The employment discrimination statutes also contain defenses and affirmative defenses to liability or damages. For example, under the bona fide occupation qualification (BFOQ) provision, the employer is allowed to make employment decisions based on a person's protected class in limited instances.[200] Title VII also protects certain seniority systems from statutory reach, even though they arguably perpetuate past discrimination.[201]

Federal discrimination law also has other liability-limiting principles, such as the deadlines for filing suit, court-created limits on employer liability, and limits on damages. Each of these devices confines employment discrimination liability within a fairly fixed range. The federal employment discrimination statutes do not contain normal statutes of limitations. Rather, plaintiffs must file a Charge of Discrimination with a federal or state agency within a specified time and then must file the lawsuit within a specified time period.[202] If a plaintiff does not file the Charge within the required period, the claim is usually barred.[203] The time period for filing the Charge of Discrimination varies by the type of conduct at issue.[204] For discrete discriminatory conduct, such as a termination, plaintiffs must file suit within 180 or 300 days of the discriminatory act.[205]

197. 42 U.S.C. §§ 2000e(f), 2000e–2(a); Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (indicating that Title VII applies to former employees).

198. Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1160 (5th Cir. 1986) (holding that independent contractors are not protected by Title VII); Smith v. Berks Cmty. Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987) (same for volunteers).

199. 42 U.S.C. § 2000e–2(a).

200. *Id.* § 2000e–2(e).

201. *Id.* § 2000e–2(h).

202. *Id.* § 2000e–5(e)(1). The requirements under the ADEA vary slightly but still require the filing of a charge. *See* Lowe v. Am. Eurocopter, LLC, No. 1:10CV24-A-D, 2010 WL 5232523, at *2 (N.D. Miss. Dec. 16, 2010) (discussing how Title VII requires plaintiffs to receive a right to sue letter from the Equal Employment Opportunity Commission while ADEA does not contain this requirement).

203. 42 U.S.C. § 2000e–5(e)(1).

204. *Id.*; Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 (2002). The period begins when the plaintiff has notice of the discriminatory action. Del. State Coll. v. Ricks, 449 U.S. 250, 259 (1980); *see also* 42 U.S.C. § 2000e–5(e)(1) (providing limits for compensation cases); Lewis v. City of Chicago, 560 U.S. 205 (2010) (describing how limits work in disparate impact cases); *Morgan*, 536 U.S. at 117 (discussing limits for harassment claims).

205. 42 U.S.C. § 2000e–5(e)(1) (outlining 180-day filing period for compensation cases); *Morgan*, 536 U.S. at 110 (outlining 300-day filing period for hostile work environment claim). The potential scope of federal employment discrimination law also is limited by court-created doctrine that restricts the circumstances

The purposes of the discrimination statutes also militate against a robust proximate cause doctrine that limits employer liability. All of the employment discrimination statutes have the broad, liberal purpose of prohibiting employment discrimination. The Supreme Court has indicated that Title VII does not tolerate discrimination "subtle or otherwise."[206] And, the employer is the party best able to minimize discrimination. It controls the processes it uses to engage in official decision making, including the decision to have an attenuated chain of decisionmakers. It controls the training it gives regarding those processes. It controls whether decisionmakers conduct independent investigations of the underlying facts and how strenuous those investigations are. The "bad" actors in a cat's paw case are typically employees of the company or those for whom the company would be liable under an agency or negligence analysis.[207] All of the wrongful actions for which the plaintiff would be suing would be connected to the workplace.

While the texts and purposes of the discrimination statutes arguably support an inference that proximate cause ideas are not applicable in employment discrimination cases, the courts have not relied on them in creating the emerging proximate cause doctrine after *Staub*.

B. Separation of Powers

If the courts are not drawing proximate cause from either the common law or the federal discrimination statutes, this implicates serious separation of powers concerns. Under the Constitution, Congress is vested with legislative power, and the courts have the power to interpret the laws that Congress creates.[208] Separation of powers thus contemplates a line between construing an existing statutory regime and creating a statutory regime.[209]

Importantly, some versions of proximate cause inherently relate to policy decisions about where liability should end. And all versions of proximate cause ultimately serve a liability-limiting function because they further define the scope of prohibited conduct in cases where an actor has factually caused an outcome or harm. Proximate cause often

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under which an employer will be held liable for discriminatory conduct. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 791 (1998); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

206. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

207. In *Staub v. Proctor Hospital*, 562 U.S. 411, 422 n.4 (2011), the Court expressed no view about liability for information provided by co-workers.

208. U.S. CONST. art. I, § 1; *id.* art. III, § 1.

209. This sentence is not meant to imply that the Constitution carefully defines where this line is to be drawn. J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 928 (1988).

expresses a normative preference about where the line should be drawn.

If courts are not relying on tort law or the discrimination statutes to forge proximate cause doctrine, separation of powers principles loom large. When interpreting a statute, separation of powers principles limit the power of the courts. For example, in the statutory proximate cause context, a court might make the argument that Congress intended for common law proximate cause principles to be imported into a statute. Or, it might argue that the statutory language evinces a proximate cause doctrine. Although more of a stretch, a court might even argue that both of these statements are accurate, and that the court is importing a common law concept of proximate cause and then using the language, history, or policy of the statute to alter proximate cause in specific ways.

However, something different appears to be happening in many proximate cause cases involving the discrimination statutes. Courts appear to invoke the idea of proximate cause to mask the real decisions they are making. In other words, they are not relying on the common law, the statutes, or some combination of the two to reach their outcomes. Instead, they appear to be imposing their own liability limits on the discrimination statutes. Proximate cause is simply a cover for courts to impose their own ideas about when liability should occur and when it should not.

This is especially evident in cases involving multiple levels of review or employer investigations. In many of these cases, even if the person's protected class played a role in a negative outcome, courts are holding that an employer should be insulated from liability in some instances. Thus, courts are deciding which kinds of human resources practices are sufficient to cut off liability and which are not. Even if Congress has the power to override such a decision by subsequent action,[210] using the language of proximate cause as a mask for overt policymaking by the courts is deeply problematic in a separation of powers sense.[211]

Admittedly, statutory interpretation methodologies vary widely in their goals.[212] These methodologies encapsulate broader questions regarding the appropriate role of the courts in relation to the legislative and executive branches. Such questions include whether the courts

210. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 521 (2009) (discussing separation of powers concerns in the context of congressional statutory amendments).

211. *See* Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 395 (1942) ("No American court has probably ever declared that it might, if it chose, disregard a statute.").

212. *See generally* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988) (describing various statutory interpretation techniques).

should only consider Congress's expectations as actually expressed in statutory language, whether they should arrive at intent from other sources, or whether courts have broader powers to engage in common law decision making or decision making that relies on the broader purposes of the underlying statutory regimes.[213]

When courts interpret statutes, they risk intruding upon the prerogatives of the legislative and executive branches. The emerging proximate cause analysis provides reasons to be concerned. In conducting this analysis, courts do not appear to be relying on the underlying text of the discrimination statutes. Take, as an example, the Tenth Circuit case discussed earlier in which the court held that any alleged bias was "conclusively filtered out through the layers of independent consideration that resulted in [the] firing."[214] The court affirmed the trial court's grant of summary judgment in favor of the employer.[215] In discussing proximate cause, the Tenth Circuit cited to *Staub* and to other cases from the Tenth Circuit.[216] The court's proximate cause analysis did not rely on the text of the discrimination statute (or its policy or history) and did not rely on the common law of proximate cause. Instead, the court appears to be applying its own liability limit.

Given these circumstances, it is appropriate to wonder under what authority the court is exercising its authority. The court does not appear to be engaging in statutory interpretation, common law decision-making, or some principled combination of the two. Even though it is difficult to agree on a theory of adjudication with regard to statutes, this does not mean that courts have or should have unbounded power to make law. If courts engage in statutory interpretation that is not faithful to any accepted rationale for appropriate judicial choice, then it is appropriate to question whether these courts are overstepping their constitutional boundaries. This appears to be happening in many statutory proximate cause cases.

C. First Principles: Substance and Procedure

Even ignoring separation of power concerns, there are practical questions left open by the way courts have approached proximate cause in the employment discrimination context. The federal courts

213. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5–7 (1982) (arguing that so-called judicial activism is actually a function courts perform in diminishing the importance of outdated statutes "in the face of the manifest incapacity of legislatures to keep those statutes up to date"); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994) (arguing for a more fluid notion of statutory interpretation); WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999).

214. Hanson v. Colo. Judicial Dep't, 564 F. App'x 916, 921 (10th Cir. 2014).

215. *Id.* at 921.

216. *Id.* at 920.

have not articulated what version of proximate cause they are using. The type of proximate cause the courts invoke is important both substantively and procedurally.

As discussed earlier, there are a number of different versions of proximate cause, some of which might lead to a different answer depending on the underlying facts of the case. In *Staub*, for example, the Court described proximate cause as being concerned with whether there is a "direct relation between the injury asserted and the injurious conduct alleged,"[217] whether the cause is "too remote, purely contingent, or indirect,"[218] and whether the cause was of "independent origin that was not foreseeable."[219] This version of proximate cause involves two related concepts: directness and superseding cause.

A directness test is one way to articulate proximate cause.[220] However, at common law, the directness test is considered an older way of thinking about proximate cause, and modern iterations largely abandon the directness test.[221] If courts frame proximate cause as relating to directness, they are making a choice about which version of common law proximate cause to invoke. And, it is a strange choice to pick an older version of proximate cause to insert into discrimination jurisprudence. Such a choice at least seems worthy of commentary about why it is the appropriate version of proximate cause to import.

When courts use directness, they often connect the idea with superseding cause. Any proximate cause test that relies on directness and superseding cause as the animating principles quickly runs into interesting problems in the discrimination context. Typically, when tort law expresses concerns about directness or superseding cause, it is discussing an action taken by one actor and then a second action taken by a legally separate actor. Superseding cause questions often arise when the acts of a third party interrupt the sequence of conduct, consequence, and injury between the defendant and plaintiff such that the liability of the defendant is no longer appropriate.[222]

However, in the federal employment discrimination context, the employer is the entity that is liable for the discrimination. In almost all of the cat's paw cases, the various actors are agents of the em-

217. Staub v. Proctor Hosp., 562 U.S. 411, 419 (2011) (quoting Hemi Grp., LLC v. City of New York, 559 U.S. 1, 9 (2010)).

218. *Id.* (quoting Hemi Grp., LLC v. City of New York, 559 U.S. 1, 9 (2010)).

219. *Id.* at 420 (quoting Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 837 (1996)).

220. Kelley, *supra* note 12, at 51–52 (describing how early common law cases used a directness test for proximate cause).

221. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. b (AM. LAW. INST. 2010) ("[C]onduct need not be close in space or time to the plaintiff's harm to be a proximate cause."). However, some courts still rely on arguments about directness when discussing proximate cause. *See, e.g.*, CSX Transp., Inc. v. McBride, 564 U.S. 685, 707 (2011) (Roberts, C.J., dissenting).

222. Goldberg & Zipursky, *supra* note 13.

ployer. Most of the cases involve a co-worker or a supervisor (with alleged bias) taking actions against the plaintiff followed by the employer taking a negative employment action against the plaintiff. This scenario is fundamentally different than the typical situation involved in superseding cause analysis. The employer as an entity is in charge of the employment outcomes it allows. It controls the formal policies and informal norms that its employees use to make employment decisions. It controls how it handles discrimination complaints and how it investigates employee misconduct. Superseding cause questions in this context are fundamentally different than they are in tort law given the fact that the employer is the entity liable in discrimination cases and that most cases involve conduct by various agents of that employer.

Superseding cause is also likely not the right legal concept since the cat's paw cases involve a second *non-culpable* act breaking the chain of causation. In tort law, superseding cause is usually used in cases where the second event is criminal in nature or tortious, where the intervening force operates independently of the original action, and/or where the second act is extraordinary in nature.[223] Further, a cause is not superseding if the action of the original actor created the same risk of harm that was brought about by the second action.[224]

Because courts are applying the superseding cause analysis in such a superficial way, it is difficult to determine what role the tort concept is playing and which principles are actually driving the analysis. Before the doctrine develops further, it would be fruitful for courts to explain which subconcepts they are invoking from the broader concept of proximate cause.

These principles can be important in resolving actual cases. Imagine that a court has a menu of choices about which proximate cause doctrine to invoke in a cat's paw case. It could focus on directness. It might also choose a more amorphous, policy-based proximate cause doctrine that focuses on fairness and whether the employer should be liable under a particular set of facts. Or, as discussed earlier in this Article, it could draw from any number of principles, such as whether there is a foreseeable plaintiff or the scope of risk of the defendant's actions.[225]

223. RESTATEMENT (SECOND) OF TORTS § 442 (AM. LAW INST. 1965) (listing circumstances in which second event will be superseding); *id.* § 442A (noting that the second act is not superseding if the original actor creates or increases the risk of harm); *id.* § 447 (discussing negligence of second actor). The concept of superseding cause may be of diminishing importance in the *Restatement*. RESTATEMENT (THIRD) OF TORTS § 34 cmt. a (discussing how importance of superseding cause is diminishing in tort cases).

224. RESTATEMENT (SECOND) OF TORTS § 442B.

225. The *Restatement* has started to use the words "scope of liability" to refer to proximate cause and has also focused the inquiry on the scope of risk. RESTATEMENT

The court is then presented a case with the following evidence: A plaintiff alleges that a supervisor generally rated women as less competent than men with no objective evidence to support his ratings. He placed two performance reviews in the plaintiff's file. One review rated her work as "very good, but not exceptional." The second review rated her work as "satisfactory." Two years later, the company makes decisions about which employees to fire during a reduction in force. The human resources department decides to fire the plaintiff. The department claims it did an independent review of each employee, although it started that process by looking at the performance reviews. A company vice president then reviewed and approved the human resources department's decision.

If proximate cause analysis comes into play, the outcome of the case may depend on which version of proximate cause the court adopts and how it uses the language of proximate cause principles in the discrimination context. If the court is concerned about directness, it can draw a line from the low (and biased) performance reviews to the company's decision to fire the plaintiff. Since all of the actors are agents of the company, superseding cause should not cut off liability. Additionally, the foreseeable risk created by the lower performance reviews is that the company might use those reviews to make a negative decision related to an employee. That is what occurred here.

However, a court-created, policy-based proximate cause doctrine might lead to a different outcome. Some courts might argue that the policy of proximate cause is to cut off an employer's liability in certain instances. For example, some of the current cat's paw cases suggest that an employer can escape liability when it takes certain steps or when the biased input is removed from the outcome because of multiple layers of review.

As shown in this example, the kind of proximate cause invoked by the court is substantively important because it can affect the outcome of cases. However, many of the proximate cause cases do not invoke any proximate cause principle. Those that do draw on common law proximate cause ideas do not provide helpful information about which kind they are invoking or how the choice affects the case. At best, there are a few sentences reciting basic ideas about directness, superseding cause, or foreseeability.

The type of proximate cause a court chooses is also procedurally important. When proximate cause is about policy, judges often play a larger role in crafting the appropriate policies and deciding whether

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(THIRD) OF TORTS § 29. Using *Restatement* sections applicable to physical harm cases may not be appropriate in statutes where the harms are emotional or economic in nature. Reference to these sections is only meant to explain the possible scope of proximate cause.

liability is limited in a particular case.[226] On the other hand, when proximate cause is about directness, superseding cause, or foreseeability, the factfinder is usually the entity that decides the proximate cause question.[227] In these latter cases, the plaintiff's claim will often survive the employer's motion for summary judgment because the plaintiff's evidence will be sufficient to raise a question of fact about the link between the biased input and the outcome. Indeed, courts that view proximate cause in this way often hold that it is "for a jury to decide whether the ultimate decisionmaker reached his decision independently of the subordinate supervisor's discriminatory act."[228]

VII. A PATH FORWARD

A decade of employment discrimination proximate cause doctrine has the following features: Courts cannot decide whether the term proximate cause is a general causal term, whether it means factual cause, or whether it describes a separate concept akin to common law proximate (legal) cause. The cases invoking proximate cause do not have consistent results. Very few of the cases discuss common law proximate cause in any way. The cases that use proximate cause to limit the employer's liability do not explain how the common law or the discrimination statutes lead to this result.

Given this state of affairs, it might make sense to remove proximate cause doctrine from employment discrimination law.[229] When I started writing this Article, I thought I would advocate for this result. However, in re-reading all of the proximate cause cases, I realized that even though most courts are not using proximate cause appropriately, they are using the proximate cause concept to have a broader discussion about causation and liability under the discrimination statutes.

Staub stands for an important underlying idea: If a protected trait plays a causal role in an outcome, the employer can be liable for discrimination. It gets to this outcome in a convoluted way by merging ideas of intent, animus, agency, factual cause, and proximate cause.

On causation issues, many (but not all) courts appear to be reciting the holding of *Staub* and trying to reach the same outcome they think the Supreme Court would have reached. They tend to view proximate cause as either general causal language or about factual cause. Many of the appellate and district courts do not appear to be wedded to any

226. *See, e.g.*, Sanem v. Home Ins. Co., 350 N.W.2d 89, 93 (Wis. 1984).

227. *See, e.g.*, Hulbert v. Vogt, 972 So. 2d 1041, 1042 (Fla. Dist. Ct. App. 2008).

228. Ridgell v. Colvin, No. DKC 10-3280, 2013 WL 952253, at *13 (D. Md. Mar. 11, 2013) (citing Clayton v. John H. Stone Oil Distrib., LLC, No. 2:11-CV-2276, 2012 WL 4359293, at *8 (E.D. La. Sept. 21, 2012)).

229. The author is expressing no opinion about proximate cause in the remedies context.

technical version of proximate cause. Viewing *Staub* as an outcome, apart from its proximate cause analysis, is helpful.

While some of the language of *Staub* focused on the idea of proximate cause, the core of the case actually relates to factual cause. Let's return to the facts of *Staub* as presented by the parties and ignore the legal language the Court used to frame its holding. Doing so highlights how the case is, at its core, about factual cause.

Staub worked as an angiography technologist at a hospital.[230] He was also a member of the Army Reserve. As an Army Reservist, Staub would miss work for training and deployments, often on the weekends. After working for the hospital for fourteen years, the hospital terminated his employment. Staub filed suit, arguing that the hospital provided false reasons for firing him and that the real reason was animosity toward his military service.

In 2000, Janice Mulally began to prepare work schedules for the imaging department where Staub worked.[231] Staub informed Mulally of his Army Reserve duties, which required him to attend training one weekend a month and for two weeks during the summer. Before Mulally took over scheduling, Staub did not work on the weekends; however, Mulally scheduled Staub for weekend work knowing about his Reserve duties.[232] At times, Mulally would change the schedule when Staub reminded her about his drill requirements. However, sometimes she would tell Staub's co-workers that volunteers were needed to cover his weekend shift. Occasionally, she required Staub to use vacation days to cover weekend shift time when he was at Reservist training. She also scheduled him for extra shifts without notice. Mulally called Staub's military duties "bullshit" and said the extra shifts were his "way of paying back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves."[233]

The department head for Staub's unit was Michael Korenchuk, who sometimes intervened on the scheduling issues but never finally resolved them. According to the appellate court, "Korenchuk characterized drill weekends as 'Army Reserve bullshit' and 'a b[u]nch of smoking and joking and [a] waste of taxpayers[']' money.'"[234]

A co-worker, Amy Knoerle, reported that Mullaly would roll her eyes and make sighing noises when Staub would approach her about his drill obligations.[235] A new employee, Leslie Sweborg, joined the unit. She testified that two weeks into the job she met Mulally and

230. Staub v. Proctor Hosp., 560 F.3d 647, 647 (7th Cir. 2009), *rev'd and remanded*, 562 U.S. 411 (2011).
231. *Id.* at 651.
232. *Id.*
233. *Id.* at 652.
234. *Id.*
235. *Id.*

another co-worker (Angie Day) for drinks after work. Sweborg testified that Mulally told her Staub's "military duty had been a strain on the[ ] department and she did not like him as an employee"; Mulally also asked Sweborg "to help her get rid of him."[236] Sweborg refused.

In January of 2004, Staub received a notice that he needed to report for duty as a precursor to an active deployment. Korenchuk became concerned about work coverage because, at that time, Sweborg and Staub were the only angiography technologists. In late January, Mulally gave both Sweborg and Staub written warnings for failure to help another diagnostic unit when requested. Sweborg and Staub both disputed the facts upon which Mulally relied to issue the warnings, and Staub also disputed whether the two violated any work rule.[237] As part of the warning, Staub was required to report to Korenchuk or Mulally when he did not have any patients and to remain in the general diagnostic area unless Korenchuk or Mulally gave him permission to go elsewhere.[238]

According to the facts as stated by the appellate court, Staub's problems got worse in April of 2004. The court noted:

> On April 2, 2004, Day had a meeting with Korenchuk, Linda Buck (vice-president of Human Resources), and R. Garrett McGowan (chief operating officer). Day was upset with Korenchuk because she complained to him about Staub and he did nothing in response. Day said she had difficulty working with Staub, he would "absent himself from the department," and he tended to be "abrupt." After Day left the room, Korenchuk, Buck, and McGowan discussed what they should do. This wasn't the first time McGowan had heard about "availability" problems involving Staub, so he told Korenchuk to work with Buck to create a plan that would solve the issue. They never found time to do that—Staub ran into trouble again and was fired three weeks later on April 20.[239]

On April 20, Sweborg and Staub wanted to go to lunch. They could not find Korenchuk, so they left a voicemail for him letting him know they were going to lunch. When they returned 30 minutes later, Korenchuk demanded to know where they had been. Even though they explained that they were at lunch and about the voicemail, Korenchuk took Staub to the Human Resources office where Buck told him he was fired.

A written report indicated that the hospital fired Staub because he failed to comply with the conditions of the written warning. Buck made the decision to fire Staub with Korenchuk's input. According to the appellate court, "Without the January 27 write-up, Day's April 2 complaint, and the event on April 20—all of which involved unavailability or 'disappearances'—Buck said she would not have fired

236. *Id.*
237. Staub v. Proctor Hosp., 562 U.S. 411, 414 (2011).
238. *Staub*, 560 F.3d at 653.
239. *Id.* at 653–54.

Staub."[240] Buck reviewed his personnel file before making her decision and based her decision on past issues regarding Staub of which she was aware. Buck claimed she was not aware of potential animus related to Staub's military service. Staub filed an internal grievance to his termination and raised the issue of potential military animus. Buck did not investigate this claim and re-affirmed her decision to terminate Staub's employment.[241] A jury heard Staub's case and awarded him $57,640.00 in damages.[242]

The important issue in *Staub* was whether his military obligations played a causal role in the hospital's decision to fire him. This is a factual cause question. It also happens to be the same question asked by the text of the federal discrimination statutes. The first operative provision of both Title VII and the ADEA focuses on whether a protected trait factually caused an outcome.[243] And, the text of the statutes asks this question in a rather unadorned way, without the fancy legal language of intent, agency, and proximate cause.

Many of the trial courts and appellate courts that are using *Staub* are reciting its convoluted legal language, but it is unclear whether they are using any of it. Instead, many of the courts appear to use *Staub* to explore whether a plaintiff can establish factual cause. For this purpose, large portions of *Staub* are actually helpful.

Here are a few of the key takeaways from *Staub*. If a supervisor expresses a negative opinion about a protected trait, that supervisor might also try to get a worker with that protected trait in trouble. The supervisor might report the worker for minor workplace infractions and possibly even report the worker for conduct that does not violate any workplace rule or norm. These reports may factually cause the employer to fire the worker.

It is no great insight to suggest that a supervisor who does not like certain employees might try to get them fired by making work harder for them, micromanaging their work, reporting work infractions that they would not report for other employees, reporting misconduct when none occurred, or creating new work "rules" that only apply to the targeted employees. This causal connection can exist even when other people are involved in the process. It can also exist when the employer investigates the reported misconduct.

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240. *Id.* at 654.

241. *Id.* at 655.

242. Staub v. Proctor Hosp., No. 04-1219, 2008 WL 2001935, at *1 (C.D. Ill. May 7, 2008), *rev'd in part*, 560 F.3d 647 (7th Cir. 2009), *rev'd and remanded*, 562 U.S. 411 (2011). The trial in *Staub* was delayed while the appellate courts considered issues related to cat's paw. Joint Appendix at 89a–90a, Staub v. Proctor Hosp., 562 U.S. 411 (2011) (No. 09-400), 2010 WL 2707600.

243. 29 U.S.C. § 623(a) (2018); 42 U.S.C. § 2000e–2(a) (2018).

Nor is it surprising that once the supervisor gets the ball rolling, that momentum plays a causal role in the ultimate outcome. Every worker knows that it is better for one's long-term job prospects to have a clean disciplinary record and that workplace infractions might have real consequences. Everyone knows that higher-level supervisors and human resources departments often rely on the input from supervisors in making decisions. Once these individuals believe a worker is a problem worker, it is difficult to shake that reputation.

It is also not a profound insight that an employer investigation does not wash away the causal connection in most cases. For example, if the supervisor excessively scrutinized the worker or reported infractions that she would not report for other workers, the protected trait is factually causing the outcome. This is true even if the employer finds during a subsequent investigation that the worker engaged in the conduct.

A simple example is helpful. Imagine two workers, Betty and Dan. Betty is seventy, and Dan is twenty-five. Betty and Dan are occasionally fifteen minutes late for work. Rita supervises both Betty and Dan. Rita has said on multiple occasions that people should retire when they are sixty-five. Rita carefully watches Betty's desk and writes down every time Betty is late. She never watches Dan's desk, and even when she notices Dan is late, she does not write it down. Rita reports Betty to human resources and human resources conducts an investigation. It finds Betty is late, and the employer fires her.

It is clear that the investigation does not necessarily break the causal chain between Betty's protected class and her termination. This is true even if the investigation reveals that Betty was late for work. If Betty was twenty-five instead of seventy, Rita would not have excessively scrutinized her absences or reported them. Betty would still have a job.

The outcome in *Staub* supports these commonsense ideas about factual causation, the same ideas that the jury in *Staub* likely relied on to reach its result. While these inferences do not seem particularly insightful to anyone who works, they often get lost as complex doctrines cause courts to lose sight of the core question asked by the employment discrimination statutes in disparate treatment cases: Did this worker's protected trait play a role in a negative outcome?

Staub's technical holding shows how easy it is for courts to embellish fairly straightforward questions with legal bells and whistles. Fortunately, many of the courts that are applying *Staub* are reciting the bells and whistles but not using them for substantive purposes. Instead, for many courts, *Staub* stands for the following ideas: (1) a plaintiff can establish factual cause even when more than one person is involved in an outcome, (2) a plaintiff can establish factual cause even when there are multiple layers of review, and (3) a plaintiff can

establish factual cause even when an employer investigates alleged workplace misconduct.[244]

Even though the courts do not consistently apply these lessons from *Staub*, many courts are applying them. Strangely, although *Staub* introduced the idea of proximate cause into discrimination jurisprudence, its greatest impact has been allowing courts to see how a protected trait is factually causing an outcome. Unfortunately, the *Staub* holding comes dressed in the language of intent, agency, and proximate cause. Courts can benefit by retaining the outcome in *Staub* but ignoring its technical language.

VIII. CONCLUSION

It is exciting to witness the birth of a new legal doctrine. In *Staub*, the Supreme Court introduced the concept of proximate cause into employment discrimination jurisprudence. Reviewing the early years of this new doctrine reveals several important insights.

The words "proximate cause" do not yet have a fixed meaning in discrimination law. Some judges appear to invoke the words "proximate cause" as a general reference to causation. Other judges appear to confuse the concept of proximate cause with the separate concept of factual cause. Still, other cases appear to recognize proximate cause as a separate element that must be proven in a discrimination case. This results in inconsistent outcomes in cases.

The emerging doctrine is unmoored from both tort law and the discrimination statutes. It is so unmoored that the holding of *Staub* raises serious separation of powers concerns.

Despite its inconsistency and lack of solid legal foundation, the preadolescent doctrine is contributing to discrimination law in important ways. By ignoring the technical noise of *Staub*, courts can more fully interrogate the role of factual cause in discrimination. While courts should abolish proximate cause, they should retain the core of *Staub*: the idea that plaintiffs can establish discrimination when a decision is improperly tainted by a protected trait.

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244. Some sentences within *Staub* are still problematic. For example, the Supreme Court noted:

> 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."

Staub v. Proctor Hosp., 562 U.S. 411, 418–19 (2011).