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What Happens if We Call Discrimination a Tort?

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Sandra Sperino, "*Let's Pretend Discrimination is a Tort*," 75 **Ohio St. L.J.** 1107 (2014).

Sandra Sperino's *Let's Pretend Discrimination is a Tort*, 75 **Ohio St. L.J.** 1107 (2014), argues that if the United States Supreme Court is really serious about treating Title VII and other federal anti-discrimination laws as nothing more than extensions of tort law, then the current Supreme Court's anti-plaintiff approach is insupportable. Sperino does not hide her personal disapproval of the current trend to "tortify" federal anti-discrimination law (especially Title VII), but she recognizes that the fight against discrimination may have to be fought "through any means necessary" (to quote Malcolm X, not Sperino). So her article is a bit legal jujitsu – to take the Supreme Court's most favored tool to weaken Title VII, and to use it to make federal anti-discrimination law friendlier to plaintiffs than it has ever been.

In this essay I review the three attributes of common law tort that Sperino finds especially useful for her project of expanding the reach of federal anti-discrimination law. I then raise questions about Sperino's assumption about common law tort. The features found in tort law that Sperino finds so congenial are not universal features of common law tort, but only found in those parts of tort that are concerned with one's right to bodily integrity and security in land. Does it therefore make sense to argue (as Sperino does) – even for rhetorical purposes – that the interests Congress chose to protect in federal anti-discrimination law are akin to bodily integrity and security interests, or, rather (as I argue), more like other interests protected quite differently in tort, such as economic interests and interests in emotional tranquilty?

Sperino identifies three areas where the adoption of tort law would expand the rights of plaintiffs beyond the Court's current understanding of federal anti-discrimination law.

1. Removing intent from Title VII and the ADEA. Sperino reminds us that Title VII and the Age Discrimination in Employment Act (ADEA) do not require a finding of intentional discrimination by an employer in order to trigger liability. (*Let's Pretend* at 1107.) The word "intent" does not appear in either statute. Part of Sperino's argument in this article which I do not address is her very pointed jab at conservative textualists, such as Justice Scalia, who embrace a nontextualist interpretation of these statutes that inserts a requirement of intentional discrimination where Congress was silent. (*Let's Pretend* at 1113-14.)

Sperino argues that the "most textually compatible reading" of the phrase "because of" in Title VII refers to causation not, intent. (*Let's Pretend* at 1117.) In other words, as long as a plaintiff can show that had she *not* had the protected trait, the employment action would have been different, she has satisfied her *prima facie* case. Causation, in this context, is a post-hoc description of human behavior, not an attribution of either motive or purpose. If a factfinder concludes that, had the plaintiff been a man, it more likely than not that she would have had a different employment outcome, the outcome that occurred was "caused" by her sex.

Let's assume, for the moment, that Sperino's use of the term "causation" is similar to the way the term is used in tort. It clearly reflects a theory of anti-discrimination law which sees disparate treatment as more than an evidentiary doctrine for making it easier to prove subjective animus. As Sperino says, "replacing an intent standard with a causation standard makes it possible to prove cases of unconscious or structural discrimination, without proceeding through a disparate impact analysis." (*Let's Pretend* at 1117.)

2. Defining intent in relation to an "employment action". Sperino reminds us that, despite inserting it into federal anti-

discrimination law, neither the Supreme Court nor the lower federal courts have actually defined the term “intent”. In a case like Staub v. Proctor Hosp., 599 U.S. 1066 (2011), the Court suggested that the plaintiff had to prove that the defendant possessed a mental state similar to *mens rea*, since it held that the plaintiff had to prove that the defendant acted with “animus.”

Sperino points out that the concept of intent adopted in *Staub* is not that found in the *Restatement of Torts*. As every torts professor knows, the concept of intent in tort law differs from that in criminal law. It is two pronged, allowing the defendant to have acted intentionally if she either desired the outcome or if she was substantially certain of the outcome without desiring it. For Sperino, the adoption of the Restatement conception of intent would make it easier for plaintiffs to prevail in federal anti-discrimination cases than now, where the federal courts often act as if plaintiffs have to prove that the defendant specifically desired the discriminatory outcome that resulted from their employment decision. According to Sperino, if antidiscrimination law followed tort law, all the plaintiff would have to prove is that the employer took an employment action and was substantially certain that there would be a discriminatory result, without proving that the employer desired that result.

3. Decoupling injury from harm. In Meritor Savings Bank v. Vinson, 477 U.S. 57(1986), the Court held that a plaintiff had standing to allege hostile environment under Title VII only if the defendant’s discrimination was “sufficiently severe or pervasive to alter the conditions of [the victim’s] employment.” (*Let’s Pretend* at 1121.) As Sperino notes, this is not how tort law treats intentional torts such as battery, assault, or false imprisonment; in the common law, *any* invasion of a protected interest, regardless of its severity, completes the tort and gives the plaintiff standing to sue. Sperino contrasts the Court’s current approach in Title VII to trespass, which has for centuries allowed for suits for nominal damages without any evidence of either animus or actual injury. She argues that physical invasions in Title VII should be treated “with the same level of respect” as physical invasions in tort law.” (*Let’s Pretend* at 1122.)

While Sperino first illustrates her argument in the context of physical touchings that give rise to hostile environment claims in Title VII, her point is broader. The interest protected by anti-discrimination law is the interest against discriminatory treatment, and this interest can be invaded (like land in trespass) without any harm at all to the employee. As Sperino notes, “once the interest [against discrimination] is violated, the plaintiff can legally establish the claim without proving additional harm. . . . like [in] most torts.” (*Let’s Pretend* at 1123-24.)

Sperino’s argument is fascinating: it is like a work of speculative fiction about what would have happened if at some crucial point in time history had followed a different path. It also has another purpose: by pointing out the surprising (and surprisingly pro-plaintiff) places textualism would take the Supreme Court, Sperino, I suspect is interested in embarrassing the current Court out of using textualism as a pretext for their policy-driven interpretation of these federal statutes.

If these are Sperino’s goals, I applaud them: as an outsider to the debate over anti-discrimination law, I am inclined to support interpretations of the statutes that tip the balance back towards plaintiffs. As a torts scholar, however, I am anxious over the monolithic treatment of “tort law” by Sperino. It is not clear to me that, were Congress to order the courts to model anti-discrimination law on the “principles of common law tort” that the results would necessarily look like those predicted by Sperino.

First, it should be acknowledged, as Sperino herself notes, that Congress knows how to write a statutory tort. A clear example of this is the Federal Employers’ Liability Act [FELA] (45 U.S.C. § 51), which explicitly is a statutory negligence action. And, it should be further acknowledged, as Sperino also observes, that when there is a lacuna in the statutory language, the Supreme Court has resorted to the “principles of the common law” to fill those gaps. Here too, FELA provides an illustration, although not one that Sperino may like to admit: the Court interpreted common law tort principles to deny plaintiffs recovery for foreseeable pure emotional distress resulting from a railroads’ negligence suffered outside of a “zone of [physical] danger.” *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).

In fact, if approached from the perspective of FELA, Title VII looks curiously obscure. It announces that certain acts will

be “unlawful” and it establishes standing for certain person to receive certain remedies for those acts. Sperino’s point is that whenever Congress identifies certain acts as wrongs and allows for private persons to secure remedies for damages flowing from the successful completion of those wrongs, Congress is implicitly referring to common law tort. There is nothing odd about this argument – it is, in fact, identical to the argument made on behalf of implied rights of action. *See, e.g.*, Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1916).

“Common law tort” is a concept that has many mutually competing modalities. The ground of liability is different in trespass than in fraud. Some torts require an actual injury (trespass to chattel) and some do not (trespass to land). Some require specific intent to invade the protected interest (false imprisonment) and some do not (battery). Some require intent, as defined in the Restatement of Torts (assault) and some do not (intentional infliction of emotional distress, which requires only recklessness). The job of the courts, therefore, is to pick the appropriate modality when Congress is silent. Common law precedents usually instruct the courts, leaving scholars to think up post hoc rationales for the choices history has passed down to us. Only in rare liminal cases do the courts need to choose between modalities in order to decide concrete cases. An illustration of this latter point is the problem of informed consent: at first, the courts saw the injury arising from contact by a medical professional as a battery, and only later reconceptualized the same wrong as negligence.

Sperino is to be praised for noting that the textualists on the court have boxed themselves in and have to take common law tort seriously when it come to federal anti-discrimination law. But she opens a Pandora’s Box and she may not like what comes out of it. When the United States Supreme Court defined the ground of liability in *Rigsby*, it held that railroads who were under a duty established by federal law to “equip” all their cars with “secure steps” could be sued in strict liability for injuries resulting from the absence of a secure step. On the other hand, it held in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), that an issuer of securities who was prohibited by federal law from using any “manipulative or deceptive device” with regard to the sale of securities could only be sued if the if the party injured by such a device could prove the elements of the intentional tort of fraud. Unfortunately for the both the textualists and law professors playing at textualism like Sperino, there is no way to discern from either the words of most federal statutory torts what the proper modality is. In particular, Sperino is assuming far too much when she assume that Title VII is to be read as if Congress had lifted the structure of liability found in trespass to land or battery and inserted the modern interest of workers to freedom of discrimination on the basis of a protected status.

In fact, there some reason to suspect that the internal structure of the system of common law inherited by Congress when it wrote the modern suite of anti-discrimination law suggests that the modalities adopted are not like trespass to land or battery. The elephant in the room, so to speak, and one which Sperino could address only if her article was much longer, is the nature of the protected interest in anti-discrimination law. Is it an interest against offensive contacts? That seems far too narrow. Is it an interest against pure emotional distress (arising from status-denying conduct?) Perhaps, but the modalities of the torts that protect dignitary interests and emotional tranquility (false imprisonment, IIED, and, arguably fraud) require much more from plaintiffs than battery or trespass to land. Is it an interest in economic well-being (arising from the denial of employment opportunities due to prohibited conduct)? Again, perhaps: but then the modalities entailed will be far more defendant-friendly than anything mentioned by Sperino. The torts of common law fraud and interference with contract and prospective advantage require specific intent and a showing of actual injury.

Sperino has performed a great service by writing *Let’s Pretend*. Above all else, she reminds us of the complexity of the relationship between common law tort and statutory torts. Further, she exposes the laziness of the current Supreme Court’s invocation of textualism as a way to avoid doing the hard work of figuring out a defensible theory of federal anti-discrimination law. Sperino also opens the door to allowing tort law to inform any theory that the Court will develop. But as to this last point, Sperino has not fully addressed the possibility that, if we pretend that discrimination is a tort, advocates for equal rights may not like what they get.

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