CROSS-STATUTE EMPLOYMENT DISCRIMINATION CLAIMS AND THE NEED FOR A "SUPER STATUTE"

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Congress has not drafted one statute to govern all claims of employment discrimination, regardless of whether those claims are based upon any of the protected classifications of race, sex, religion, national origin, age, and disability. The factors which Plaintiff seeks to lump together in this lawsuit under the title of "age-plus" theories of discrimination are contained within four separate and distinct statutes: the Age Discrimination in Employment Act, Title VII, the Americans with Disabilities Act, and the Rehabilitation Act.[1]

[T]here is no super-statute to handle every protected classification even though Congress could have so amended Title VII if that was its intention.[2]

INTRODUCTION

Imagine how an employment discrimination case would be tried and decided in which a plaintiff sued under the federal employment discrimination statutes asserting a claim on the intersectional basis of national origin/age/disability. The plaintiff may claim, for example, that his

1. Luce v. Dalton, 166 F.R.D. 457, 461 (S.D. Cal.), *aff'd*, 167 F.R.D. 88 (S.D. Cal. 1996).
2. Johnson v. Napolitano, No. 10 Civ. 8545, 2013 WL 1285164, at *9 (S.D.N.Y. Mar. 28, 2013).

employer discriminated against him by regarding him as a "crazy, old Russian."[3] The plaintiff would assert the claim under three separate statutes: Title VII of the Civil Rights Act of 1964 (Title VII)[4]; the Age Discrimination in Employment Act of 1967 (ADEA)[5]; and the Americans with Disabilities Act of 1990 (ADA).[6] Courts often characterize as "plus claims" those claims in which the alleged basis for discrimination is a covered characteristic and an uncovered characteristic, such as sex-plus-family-responsibility, or two covered characteristics, such as sex-plus-age.[7] The asymmetries of federal employment discrimination law, with several separate discrimination statutes covering different characteristics and applying different legal principles, create theoretical and practical conundrums. These problems are particularly evident and vexatious in discrimination claims that cross over statutes.

So, what is the standard of causation applicable to a cross-statute claim?[8] This is not simply an interesting theoretical question. Knowing the applicable standard of causation is crucial to a court's deciding of dispositive motions, such as failure to state a claim upon which relief can be granted, summary judgment, and judgment as a matter of law.[9] Discerning the appropriate causation standard may also be essential to drafting jury instructions.[10] Another crucial issue is determining the types of remedies available to a plaintiff who prevails on such a cross-statute claim.[11] For example, in the hypothetical above, the remedies available for national origin discrimination under Title VII and disability discrimination under the ADA differ from the remedies available for age discrimination

3. This is not merely a hypothetical for a law school exam. A plaintiff asserted such a claim in *Chaikin v. Methodist Med. Ctr.*, No. 18-CV-1208, 2018 WL 4643016, at *1 (C.D. Ill. Sept. 27, 2018).

4. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

5. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634).

6. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213).

7. *See, e.g.*, Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1045–48 (10th Cir. 2020). *See generally* Rebecca Hanner White, *Aging on Air: Sex, Age, and Television News*, 50 SETON HALL L. REV. 1323, 1331–38 (2020).

8. As will be discussed below, different standards of causation apply under different employment discrimination statutes. *See infra* Section I.B.

9. It is in analyzing these motions that courts heavily rely on the proof frameworks, which incorporate standards of causation. *Cf.* Robert G. Schwemm, *Fair Housing and the Causation Standard After* Comcast, 66 VILL. L. REV. 63, 102–07 (2021) (stating the role of standards of causation in Fair Housing Act claims); *see also* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 113–14 (2011).

10. Juries must be instructed whether the applicable standard is but-for or motivating factor. *See, e.g.*, Murray v. Mayo Clinic, 934 F.3d 1101, 1102–03 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2720 (2020); Guerra v. North East Indep. Sch. Dist., 496 F.3d 415, 418 (5th Cir. 2007); Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1293–94 (2008).

11. *See infra* Section I.A.

under the ADEA. Thus, if the claim is characterized as a national origin-plus claim under Title VII or a disability-plus claim under the ADA, the plaintiff may recover one set of remedies. On the other hand, if it is deemed an age-plus claim under the ADEA, the plaintiff may recover a different set of remedies.

Turning to a more common scenario, suppose a plaintiff sues for race discrimination under both Title VII and section 1981 of the Civil Rights Act of 1866 (section 1981).[12] Most plaintiffs who sue for race discrimination sue under both statutes.[13] The assertion of claims under those two statutes posed no significant problems until the Supreme Court recently declared that the statutes have different standards of causation.[14] Now, a plaintiff suing for race discrimination must prove such discrimination was a motivating factor of the adverse employment action to recover under Title VII and a but-for cause to recover under section 1981.

The federal employment discrimination law of the United States presents several salient problems because it is principally composed of four separate statutes,[15] and Congress and the Supreme Court have developed asymmetrical law in and under the statutes. Two recent court decisions highlight the difficulties posed by having asymmetrical employment discrimination law when it is applied to cross-statute discrimination claims. In *Comcast Corp. v. National Association of African American-Owned Media*,[16] the United States Supreme Court held that but-for causation is the standard of causation applicable to section 1981.[17] In *Frappied v. Affinity Gaming Black Hawk, L.L.C.*,[18] the Tenth Circuit became the first federal appellate court to hold that a cross-statute discrimination claim (in this case, sex-plus-age) is cognizable under Title VII.[19] The situations posed by the

12. 42 U.S.C. § 1981.

13. *See, e.g.*, Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 190 (2006) (stating that "[c]ivil rights plaintiffs most frequently invoke [section 1981] in conjunction with Title VII claims for workplace race discrimination").

14. Comcast Corp. v. Nat'l Ass'n Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020).

15. I am not including the Genetic Information Nondiscrimination Act (GINA), which Congress enacted in 2008. Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended in scattered sections of 26, 29, & 42 U.S.C.). The volume of charges filed under GINA has been small, and there are few reported cases discussing the Act. Regarding number of charges filed, *see* EEOC, *Charge Statistics (Charges filed with the EEOC) FY 1997 Through FY 2020*, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020 [https://perma.cc/WBP4-BHC5]. However, the number of charges did surge from 209 in 2019 to 440 in 2020. *Id.*

16. 140 S. Ct. 1009 (2020).

17. *Id.* at 1019.

18. 966 F.3d 1038 (2020).

19. *See id.* at 1047–48 (stating that no federal appellate court has recognized a claim for intersectional discrimination across statutes and holding, consistent with the decisions of several federal district courts and the position of the Equal Employment Opportunity Commission, that such claims are cognizable).

two decisions are different because *Frappied* dealt with an intersectional or hybrid discrimination claim that combined covered characteristics (sex and age), while *Comcast* dealt with a race discrimination claim, which can be asserted under section 1981 and/or Title VII.[20] However, the decisions share common ground in highlighting problems that arise in cross-statute employment discrimination claims due to the different law applicable to each statute.

In this Article, I assess the problems in cross-statute employment discrimination claims that are a product of the asymmetry of the federal employment discrimination law. I have addressed in prior work the problem of differing standards of causation and proof frameworks.[21] However, the cross-statute claims in *Comcast* and *Frappied* demonstrate the theoretical incoherence and practical problems spawned when claims are based on different statutes that have different causation standards, remedies, and other provisions. Changes are essential to enable lawyers to litigate and judges and juries to resolve employment discrimination cases. Moreover, the general public needs to have some understanding of the law and a belief that it is fair.[22]

Effective and appropriate resolution of these problems likely outstrips the Supreme Court's ability and will. Thus, it is incumbent on Congress to solve these problems. However, Congress's approach in the past, amending the separate employment discrimination statutes to achieve as much uniformity as policy choices permit, is not a good approach. There is a danger that such an approach produces uncertainty regarding congressional intent and preserves old (or produces new) asymmetry. The Civil Rights Act of 1991,[23] which was Congress's most substantial overhaul of the employment discrimination statutes, produced considerable asymmetry as the Supreme Court interpreted it.[24] The better approach would be for Congress to repeal the various laws and replace them with a consolidated employment discrimination law[25]—what one court termed a "super

20. *Comcast* was not an employment discrimination claim, but section 1981 does cover employment discrimination claims based on race. *See infra* text accompanying notes 48–57.

21. *See* William R. Corbett, *Intolerable Asymmetry and Uncertainty: Congress Should Right the Wrongs of the Civil Rights Act of 1991*, 73 OKLA. L. REV. 419 (2021) [hereinafter Corbett, *Intolerable Asymmetry*].

22. Borrowing from George Orwell, people may wonder why all people covered by employment discrimination laws are equal, but some are more equal than others. *See* GEORGE ORWELL, ANIMAL FARM 112 (Harcourt, Brace & Co. 1946) (containing the memorable and oft-quoted line: "All animals are equal, but some are more equal than others").

23. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

24. *See* Corbett, *Intolerable Asymmetry*, *supra* note 21.

25. William R. Corbett, *Calling on Congress: Take a Page from Parliament's Playbook and Fix Employment Discrimination Law*, 66 VAND. L. REV. EN BANC 135 (2013) [hereinafter Corbett, *Calling*

statute."[26] That single statute should achieve uniformity on most issues across protected characteristics; however, complete uniformity is not essential in a consolidated statute. Should Congress wish to make distinctions among some characteristics on some issues, Congress could specify such issues and make its intent clear in the single statute. The government of the United Kingdom engaged in such a project in enacting the Equality Act of 2010.[27] Ironically, at almost sixty years into the initiative by Congress and the courts to eradicate employment discrimination, the United States, whose laws established the model for the UK's employment discrimination laws,[28] has not taken such a step. Consolidating the various statutes into one is not easy work, and the process will be fraught with controversy. Nonetheless, the time is long past due for the former world leader in employment discrimination law to update its law and create a coherent super-statute within an overall plan.

Part II of this Article examines the asymmetry that has developed in federal employment discrimination law in the enactment and interpretation of several separate statutes. Part III considers significant practical problems created by the asymmetry. Part IV proposes a solution—the creation of a more symmetrical law by the enactment of a single consolidated employment discrimination statute.

I. ASYMMETRY SIX DECADES IN THE MAKING

The occurrence or phenomenon of discrimination is a complex matter.[29] Illegal employment discrimination involves treating one employee differently than others based on a characteristic that the law protects.[30] Unsurprisingly, crafting law to address employment discrimination is very

on Congress]; William R. Corbett, *What is Troubling About the "Tortification" of Employment Discrimination Law?*, 75 OHIO ST. L.J. 1027 (2014).

26. Johnson v. Napolitano, No. 10 Civ. 8545, 2013 WL 1285164, at *9 (S.D.N.Y. Mar. 28, 2013).

27. Equality Act 2010, c. 15 (UK) [hereinafter Equality Act of 2010], http://www.legislation.gov.uk/ukpga/2010/15/contents [https://perma.cc/D3HX-L7S3].

28. Steven L. Willborn, *Theories of Employment Discrimination in the United Kingdom and the United States*, 9 B.C. INT'L & COMPAR. L. REV. 243, 244 (1986) ("While the roots of U.S. law are found in English legal history, the roots of British discrimination law are found in recent U.S. legal history."); Shari Engels, Comment, *Problems of Proof in Employment Discrimination: The Need for a Clearer Definition of Standards in the United States and the United Kingdom*, 15 COMPAR. LAB. L.J. 340, 341 (1994) (stating that Civil Rights Act of 1964 was the model for the United Kingdom's Race Relations Act).

29. *See, e.g.*, Jacob E. Gersen, *Markets and Discrimination*, 82 N.Y.U. L. REV. 689, 691 (2007) (stating that "employment discrimination is an enormously complex phenomenon").

30. *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1740 (2020) (explaining that discrimination in 1964 and today means treating an individual worse than others who are similarly situated).

challenging.[31] As many commentators have explained, the law developed in the United States over almost six decades to address invidious employment discrimination fits poorly with the way discrimination actually occurs in the workplace.[32]

Congress embarked on the mission of enacting laws to redress employment discrimination with the passage of Title VII of the Civil Rights Act of 1964.[33] In the ensuing years, Congress covered additional characteristics with the passage of the ADEA in 1967,[34] the ADA in 1990,[35] and the Genetic Information Nondiscrimination Act of 2008.[36] Congress also has amended the employment discrimination laws many times in an effort to keep pace with the doctrinal developments by the Supreme Court.[37] The Supreme Court and lower federal courts, for their part, have developed an elaborate structure for proving employment discrimination based on two general theories of discrimination and the associated proof frameworks.[38] In developing and explaining these theories and frameworks, the courts have

31. One experienced attorney who regularly argues cases before the Supreme Court expressed this idea well: "I will say in 25 years of advocacy before this Court I have not seen one area of the law that seems to me as difficult to sort out as this particular one is." Transcript of Oral Argument at 29, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) (No. 08-441) (statement by Carter G. Phillips, arguing for respondent) https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-441.pdf [https://perma.cc/9A4G-VDH9].

32. The literature is voluminous. Professor Krieger explained that much discrimination results from subconscious cognitive functioning involving routine categorization rather than malevolent conscious motivation. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995). Professor Paul Gudel argued that the concept of causation—on which proof of employment discrimination is based—is ill-suited to linking the mental process of discrimination with the adverse employment actions. Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 88–92 (1991); Robin Dembroff, Issa Kohler-Hausmann & Elise Sugarman, *What Taylor Swift and Beyoncé Teach Us About Sex and Causes*, 169 U. PA. L. REV. ONLINE 1 (2020–21).

33. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

34. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634).

35. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213).

36. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended in scattered sections of 26, 29, & 42 U.S.C.).

37. Among the amendments have been the following: the Pregnancy Discrimination Act of 1978, amending Title VII, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2012)); the amendment to add the definition of religion to Title VII, including non-accommodation, Act of Mar. 24, 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j) (2012)); the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.); the ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (codified as amended at 42 U.S.C. § 12101 (2012)); and the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 & 42 U.S.C.).

38. *See, e.g.*, Sandra F. Sperino, *Justice Kennedy's Big New Idea*, 96 B.U. L. REV. 1789, 1790 (2016).

borrowed liberally from tort law, including standards of causation.[39] The courts have clung tenaciously to the doctrinal structures notwithstanding the many criticisms directed at them.

A. Asymmetry Regarding Remedies

Asymmetry between the statutes and among the covered characteristics significantly expanded[40] with Congress's decision not to include age as a protected characteristic under Title VII but instead, to direct the Secretary of Labor to study the need for such law.[41] After Secretary Wirtz delivered his report in 1965,[42] Congress proceeded to enact the ADEA in 1967. Although the prohibition on discrimination in the ADEA generally mirrors the language of Title VII, there are a few textual differences between the ADEA and Title VII. In particular, two differences present fundamental problems in Title VII-ADEA intersectional claims—remedies and standards of causation. The remedies asymmetry was created by Congress when it enacted the ADEA and incorporated the remedial provisions of the Fair Labor Standards Act, rather than those of Title VII.[43] Thus, under the ADEA the remedies available are: equitable relief,[44] including unpaid amounts due, and liquidated damages in cases of willful violations.[45] In contrast, Title VII, as enacted in 1964, provided for only equitable relief, including backpay.[46] For a period of time, this distinction in remedies also resulted in an

39. *See generally* Martha Chamallas & Sandra F. Sperino, Symposium, *Torts and Civil Rights Law: Migration and Conflict: Symposium Introduction*, 75 OHIO ST. L.J. 1021 (2014); Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012); Sandra F. Sperino, *Discrimination Statutes, The Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1; Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014).

40. There already was some asymmetry within Title VII among the protected characteristics. For example, the bona fide occupational qualification (BFOQ) defense applies to sex, religion, and national origin but not race and color. 42 U.S.C. § 2000e-2(e)(1). Congress considered a BFOQ defense for race but rejected the idea. *See* 110 CONG. REC. 7217 (1964) (statement of Sens. Clark & Case); Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 686–87 (2004).

41. *See* Victoria A. Lipnic, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 2018), https://www.eeoc.gov/reports/state-age-discrimination-and-older-workers-us-50-years-after-age-discrimination-employment, [https://perma.cc/T354-BCT7].

42. U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) [hereinafter WIRTZ REPORT], *reprinted in* EEOC, *The Older American Worker—Age Discrimination in Employment*, https://www.eeoc.gov/reports/older-american-worker-age-discrimination-employment [https://perma.cc/UMU3-JP36].

43. 29 U.S.C. § 626.

44. The statute provides for "equitable relief as may be appropriate to effectuate the purposes of this [Act], including . . . judgments compelling employment, reinstatement or promotion . . . ." 29 U.S.C. § 626(b).

45. *Id.*

46. 42 U.S.C § 2000e-5(g).

additional significant distinction between Title VII and the ADEA—jury trials were available under the ADEA but not under Title VII. Congress eliminated the right-to-a-jury-trial distinction when the Civil Rights Act of 1991[47] amended Title VII (and the ADA) to make available compensatory and punitive damages, capped according to the employer's number of employees.[48] Although the 1991 Act made capped damages available under Title VII, the remedies available under Title VII and the ADEA remain different.

Another important asymmetry regarding remedies under the employment discrimination statutes flows from the case law holding that employment discrimination claims based on race can be pursued under not only Title VII but also under section 1981 of the Civil Rights Act of 1866.[49] Section 1981 is part of the Reconstruction era civil rights law intended to secure the rights of former slaves regarding several matters, including their ability to enter into contracts.[50] Section 1981 provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, [and] give evidence . . . as is enjoyed by white citizens."[51] The Supreme Court has interpreted the statute as providing a civil remedy of equitable and legal relief, including compensatory damages, and in some circumstances, punitive damages.[52] There are no caps on these damages. It is worth noting that many employment discrimination claims can be plausibly asserted under section 1981 because the Supreme Court has broadly interpreted the definition of race. In the leading Supreme Court decision on point, the Court held that a plaintiff who claimed to be discriminated against because of his Arab ancestry could assert a race discrimination claim under section 1981 in *St. Francis College v. Al-Khazraji*.[53] The Court reasoned that Congress "intended to protect from discrimination identifiable classes of persons who are subjected to

47. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

48. 42 U.S.C. § 1981a(b).

49. *See, e.g.*, Johnson v. Ry. Express Agency, 421 U.S. 454 (1975); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

50. "Sections 1981 and 1983 are parts of the Civil Rights Acts that were enacted after the Civil War to 'give force and effect to the newly ratified Thirteenth, Fourteenth, and Fifteenth Amendments.'" Kelly Koenig Levi, *Allowing a Title VII Punitive Damage Award Without an Accompanying Compensatory or Nominal Award: Further Unifying the Federal Civil Rights Law*, 89 KY. L.J. 581, 589 (2001) (quoting BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 668 (2d ed. 1983)); *see also* Tarantolo, *supra* note 13, at 185–88 (discussing the history of section 1981).

51. 42 U.S.C. § 1981.

52. *See Johnson* 421 U.S. at 459–60; Runyon v. McCrary, 427 U.S. 160 (1976).

53. 481 U.S. 604 (1987). *See also* Abdullahi v. Prada USA Corp., 520 F.3d 710, 712 (7th Cir. 2008) (stating that a "loose sense" of race "is the right one to impute to a race statute passed in 1866").

intentional discrimination solely because of their ancestry or ethnic characteristics."[54]

Congress has long been aware of the availability of remedies for racial discrimination in employment under both Title VII and section 1981, and it has preserved the dual remedies; specifically, when debating the Equal Employment Opportunity Act of 1972, Congress considered and rejected an amendment that would have made Title VII the exclusive remedy for race discrimination in employment.[55] Thus, race claims have been different from, and treated more favorably than, Title VII claims for sex, national origin, or religion discrimination because of the availability of uncapped damages under section 1981. Additionally, as with age claims, race discrimination plaintiffs had a right to jury trial because of the availability of legal damages.[56] With the remedies available under section 1981, race discrimination plaintiffs could forego Title VII claims and sue under only section 1981,[57] unless they wish to avail themselves of the opportunity to have the Equal Employment Opportunity Commission (EEOC) attempt to resolve the Title VII case.[58]

With the enactment of the Civil Rights Act of 1991, Congress put sex, religion, national origin, and disability discrimination claims on closer to even footing with race discrimination claims[59] by enacting section 1981a,[60] a new statute which made compensatory and punitive damages, as well as jury trials, available under each.[61] However, a political compromise to secure passage of the 1991 Act preserved a distinction in remedies under section 1981 and Title VII by instituting damages caps on the aggregate of compensatory and punitive damages based on the number of employees,[62]

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54. *Al Khazraji*, 481 U.S. at 613. *See, e.g.*, Sinai v. New England Tel. & Tel. Co., 3 F.3d 471 (1st Cir. 1993) (race discrimination claim under section 1981 based on Jewish/Hebrew race), *cert. denied*, 513 U.S. 1025 (1994).

55. *See, e.g.*, Donald R. Livingston & Samuel A. Marcosson, *The Court at the Crossroads:* Runyon, *Section 1981 and the Meaning of Precedent*, 37 EMORY L.J. 949, 973–74 (1988) (recounting Senate debate over the Equal Employment Opportunity Act of 1972); Patterson v. McLean Credit Union, 491 U.S. 164, 201–03 (1989) (Brennan, J., concurring in part).

56. United States v. Burke, 504 U.S. 229, 240 (1992).

57. *Cf.* DuBose v. Boeing Co., 905 F. Supp. 953, 960 (D. Kan. 1995) (stating that "[a]s a practical matter [Title VII] adds nothing to the recovery by plaintiff under § 1981").

58. The EEOC does not have jurisdiction over section 1981 claims. For charges received under Title VII, the EEOC has statutory duties to investigate and attempt to resolve cases by informal methods, such as conciliation. 42 U.S.C. § 2000e-5(b).

59. The Sponsors' Interpretative Memorandum states that the purpose of amending Title VII by § 1981a(a)(1) was to allow victims of intentional sex or religious discrimination to recover compensatory and punitive damages which already were permitted for victims of racial or ethnic discrimination under § 1981. 137 Cong. Rec. S15, 483–84 (1991).

60. 42 U.S.C. § 1981a.

61. 42 U.S.C. § 1981a(c).

62. *See* M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311, 312 n.8 (1999) (citing 137 Cong. Rec. S15020 (daily ed. Oct. 22, 1991) (remarks of Senator DeConcini)); Michael C. Harper, *Eliminating the Need for Caps on Title*

with the highest cap being $300,000 for employers with more than 500 employees.[63] Consequently, plaintiffs asserting race discrimination claims still frequently assert their claims under both section 1981 and Title VII because of the uncapped damages available under section 1981. Additionally, section 1981a includes limiting language which states that a plaintiff cannot recover damages under section 1981a if damages are available under section 1981: capped damages are available "provided that the complaining party cannot recover under section 1981 of this title [42 U.S.C. 1981]."[64] Presumably, this language was intended to obviate the possibility of a double recovery of damages under section 1981 and section 1981a.[65] After *Comcast*, however, the limiting language may provide an avenue for race discrimination plaintiffs to forego their section 1981 claims and instead seek damages under section 1981a.[66]

B. Asymmetry Regarding Causation Standards

The second significant asymmetry among the federal employment discrimination statutes is the different causation standards applicable under different statutes. This asymmetry began with the enactment of the Civil Rights Act of 1991 and the Supreme Court's interpretations of that law.[67] Congress amended Title VII to add a statutory mixed-motives analysis to replace the framework developed by the Supreme Court in *Price Waterhouse v. Hopkins*.[68] For the first part of the two-part framework, Congress inserted a "motivating factor" standard in Title VII,[69] opting for

VII Damage Awards: The Shield of Kolstad v. American Dental Association, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 477, 483 (2011). The earlier iteration of the 1991 Act, the failed Civil Rights Act of 1990, did not cap damages in section 1981a. *See, e.g.*, Lynn Ridgeway Zehrt, *Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 YALE J.L. & FEMINISM 249 (2014).

63. *See* 42 U.S.C. §1981a(b)(2). Over the years since the enactment of the 1991 Act, bills have been introduced that would remove the caps, but they have not been enacted. *See, e.g.*, Equal Remedies Act of 2007, S. 1928, 110th Cong. (2007–08).

64. 42 U.S.C. § 1981(a)(1)–(2).

65. *See, e.g.*, Bradshaw v. Univ. of Me. Sys., 870 F. Supp. 406, 407 (D. Me. 1994).

66. *See infra* notes 137–43 and accompanying text.

67. *See generally*, Corbett, *Intolerable Asymmetry*, *supra* note 21.

68. 490 U.S. 228 (1989). In *Price Waterhouse*, the Court announced the mixed-motives framework for analysis of individual disparate treatment claims. Under this two-stage framework, the plaintiff established a prima facie case by proving that sex was a motivating or substantial factor (the plurality and Justice O'Connor, concurring, disagreed as to which standard applied) in the employer's decision. If the plaintiff established a prima facie case, the burden of persuasion shifted to the defendant employer to establish the same-decision defense—that it would have made the same decision for a nondiscriminatory reason. If the employer satisfied the affirmative defense, it avoided liability. The *Price Waterhouse* mixed-motives framework was adapted from an analysis developed for constitutional claims in *Mt. Healthy City Sch. Dist. Bd. Educ. v. Doyle*, 429 U.S. 274 (1977).

69. 42 U.S.C. § 2000e-2(m).

the standard articulated by the plurality in *Price Waterhouse*[70] rather than the "substantial factor" standard favored by Justice O'Connor in her concurrence.[71] The Supreme Court later described "motivating factor" as a "more forgiving"[72] or "relaxe[d]"[73] standard compared with the but-for causation standard which the Court gleaned from the original "because of" language. In 2009, the Supreme Court in *Gross v. FBL Financial Services, Inc.*[74] held that the "motivating factor" standard of causation and the mixed-motives proof framework do not apply to age discrimination claims under the ADEA. The Court reasoned that Congress in the 1991 Act amended Title VII to add the "motivating factor" standard of causation and the mixed-motives analysis, but it did not similarly amend the ADEA.[75] When Congress amends one statute but not another, "it is presumed to have acted intentionally."[76] The Court noted that the only standard of causation in the ADEA is the original "because of" language,[77] which the Court interpreted as necessarily meaning but-for causation.[78] The Court extended its holding in *Gross* to retaliation claims under Title VII in *University of Texas Southwestern Medical Center v. Nassar*,[79] requiring proof of but-for causation because the Civil Rights Act of 1991 similarly did not amend the retaliation provision of Title VII to include "motivating factor."

The standard of causation under the ADA is unclear. Although the Civil Rights Act of 1991 provides the same capped compensatory and punitive damages for both Title VII and the ADA, the 1991 Act did not amend the ADA to provide for a mixed-motives causation standard as it did with Title VII. After *Gross* and *Nassar*, it seems likely that the Court will interpret the "because of" language in the ADA as requiring but-for causation. However, the ADA Amendments Act of 2008[80] amended the ADA to change the language from "because of" to "on the basis of."[81] Although a majority of federal courts that have considered the issue have held that *Gross* controls and the standard of causation under the ADA is but-for, there is a division

70. *Price Waterhouse*, 490 U.S. at 244, 249.
71. *Id.* at 265 (O'Connor, J., concurring).
72. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1740 (2020).
73. EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 773 (2015); Univ. of Tx. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 349 (2013).
74. 557 U.S. 167 (2009).
75. *Id.* at 174–75.
76. *Id.* at 174.
77. 29 U.S.C. § 623(a)(1).
78. *Gross*, 557 U.S. at 176.
79. 570 U.S. 338 (2013).
80. Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (codified as amended at 42 U.S.C. § 12101 (2012)).
81. 42 U.S.C. §12112(a).

of authority.[82] The Supreme Court declined to resolve the issue in *Murray v. Mayo Clinic*.[83] Still, the Supreme Court's discrimination but-for causation trilogy of *Gross/Nassar/Comcast* portends extension of but-for causation to the ADA.[84]

C. Should Asymmetry Be a Cause for Concern?

These differences in remedies and standards of causation are not the only differences among the statutes or even among the several covered characteristics within Title VII. For example, the bona fide occupational qualification (BFOQ) defense[85] is an affirmative defense to discrimination based on sex, religion, national origin,[86] and age,[87] but not race, color, and disability. Reverse discrimination claims are permitted under Title VII,[88] but not under the ADEA[89] and the ADA.[90] Disparate impact claims are cognizable under all employment discrimination statutes,[91] but not under section 1981.[92] Failure-to-make-reasonable-accommodation claims are available for only discrimination based on religion under Title VII,[93] disability discrimination under the ADA,[94] and in an indirect way pregnancy discrimination under Title VII.[95] Jury trials are available in all cases under

82. *See* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. 2010) (applying "but-for" causation to ADA claims in light of Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009)); Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012) (same); Gentry v. East West Partners Club Management Co., 816 F.3d 228 (4th Cir. 2016) (joining 6th and 7th Circuits in applying but-for causation). *But see* Hoffman v. Baylor Health Care Sys., 597 F. App'x 231 (5th Cir. 2015) (applying "motivating factor"); Siring v. Or. State Bd. Higher Educ., 977 F. Supp. 2d 1058 (D. Or. 2013) (applying "motivating factor"). *Siring* apparently was overruled by the Ninth Circuit's holding that but-for causation applies under the ADA in *Murray v. Mayo Clinic*, 934 F.3d 1101 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2720 (2020). The Fifth Circuit's holding in *Hoffman* was questioned by a federal district court in the Fifth Circuit in Burns v. Nielsen, 506 F. Supp. 3d 448 (W.D. Tex. 2020).

83. *Murray*, 934 F.3d 1101, *cert. denied*, 140 S. Ct. 2729.

84. *Civil Rights Act of 1866—Antidiscrimination Law—Pleading Standards*—Comcast Corp. v. National Ass'n of African American-Owned Media, 134 HARV. L. REV. 580, 588–89 (2020).

85. Under the bona fide occupational defense, the defendant admits to discriminating based on sex, national origin, religion, or age, but argues that an employee's not having that particular characteristic is "reasonably necessary" to successful performance of the job. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (upholding as a BFOQ Alabama prison rule that prison guards must be of the same sex as the inmates they guard).

86. 42 U.S.C. § 2000e-2(e).

87. 29 U.S.C. § § 623(f)(1).

88. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

89. General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).

90. 42 U.S.C. § 12201(g).

91. 42 U.S.C. § 2000e-2(a)(2) & (k) (Title VII); 29 U.S.C. § 623 (a)(2) (ADEA); 42 U.S.C. § 12112(b)(6) (ADA).

92. Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982).

93. 42 U.S.C. § 2000e(j).

94. 42 U.S.C. § 12112(b)(5)(a).

95. Title VII does not expressly impose a duty to make reasonable accommodations for pregnancy, 42 U.S.C. § 2000-e(k), but the Supreme Court has held that pregnancy discrimination

section 1981,[96] in both disparate treatment and disparate impact claims under the ADEA,[97] and in only disparate treatment cases under Title VII and the ADA.[98]

I do not suggest that employment discrimination law must be uniform in every facet. Nonetheless, it should be a source of concern to policymakers, judges, and lawyers that the employment discrimination statutes are asymmetrical regarding remedies and standards of causation. Cross-statute claims, such as race claims asserted under both Title VII and section 1981, and so-called intersectional claims, such as sex-and-age claims under Title VII and the ADEA, illustrate the practical quandaries posed by these asymmetries. Two cases in particular demonstrate these issues and the corresponding great need for a super-statute.

II. PROBLEMS IN CROSS-STATUTE CLAIMS CREATED BY ASYMMETRICAL EMPLOYMENT DISCRIMINATION LAW

A. Comcast *and Title VII/Section 1981 Claims*

1. The Comcast *Decision*

Comcast involved a claim of discrimination in contracting—not an employment discrimination claim—under section 1981. The plaintiff ESN sued Comcast after negotiations between the two media companies did not result in an agreement. The plaintiff, an African American entrepreneur, owned ESN, which was comprised of seven television networks. Comcast, a television network conglomerate, and ESN could not come to an agreement for Comcast to carry the ESN networks. ESN sued Comcast under section 1981, claiming race discrimination, and Comcast argued that its viewers preferred a different type of programming not offered by ESN.[99] The district court granted a 12(b)(6) motion, dismissing the action and holding that ESN had not plausibly pled but-for causation based on race.[100] The Ninth Circuit reversed, holding that the district court applied the wrong standard of causation to a section 1981 claim, and instead it should have applied the standard that race "played some role" in the decision.[101] The

plaintiffs, under some circumstances, may recover for failure to make reasonable accommodations. Young v. United Parcel Serv., Inc., 575 U.S. 206 (2015).

96. *See, e.g.*, Bibbs v. Jim Lynch Cadillac, Inc., 653 F.2d 316, 318 (8th Cir. 1981) (collecting cases).

97. *See, e.g.*, 29 U.S.C. § 626(c)(2).

98. 42 U.S.C. §1981a(c).

99. Comcast Corp. v. Nat'l Ass'n Afr. Am.-Owned Media, 140 S. Ct. 1009, 1013 (2020).

100. *Id.*

101. *Id.*

Supreme Court granted certiorari and reversed the Ninth Circuit, holding that the trial court applied the correct standard of but-for causation.[102]

The Court began its analysis by observing that the default standard of causation, derived from tort law, is but-for causation.[103] Section 1981 is silent regarding standards of causation, but the Court found nothing in the statute's text, history, or Court precedent to persuade it that section 1981 presented an exception to what the Court views as the default rule for statutory torts.[104] The Court further rejected the plaintiff's invitation to import the "motivating factor" standard from Title VII into section 1981.[105] First, the Court rejected the plaintiff's reliance on *Price Waterhouse v. Hopkins*[106] because Congress superseded that decision with a statutory version of the motivating factor standard in the Civil Rights Act of 1991.[107] Congress in the 1991 Act amended Title VII to insert the motivating factor standard into that statute. Although the 1991 Act also amended section 1981, the Act did not correspondingly insert the motivating factor standard into that statute.[108] Thus, employing the statutory interpretation tool invoked in *Gross* and *Nassar*, the Court reasoned that when Congress simultaneously amends one statute in one way and another in another way, the difference in language implies a difference in meaning.[109] The Court also rejected the argument that the statutory language "make and enforce contracts" requires a motivating factor standard because it includes claims for contract process as well as contract outcomes.[110] The Court explained that it did not need to resolve whether section 1981 covers process claims because it did not find that "motivating factor" is necessarily the appropriate standard for process-based claims.[111]

The Court's decision in *Comcast* is not surprising. As the Court stated in *Comcast*, it presumes Congress legislates against a default or background common law rule of but-for causation, and the Court consistently applies that presumption to employment discrimination statutes.[112] Ironically, during the same term that it decided *Comcast*, the Court held in *Babb v. Wilkie*[113] that Congress intended to create a different standard of causation

102. *Id.* at 1019.
103. *Id.* at 1014.
104. *Id.*
105. *Id.* at 1017–18.
106. 490 U.S. 228 (1989).
107. *Comcast*, 140 S. Ct. at 1017.
108. *Id.* at 1017–18.
109. *Id.* at 1018.
110. *Id.*
111. *Id.*
112. *See id.* at 1014. The Court reasoned that Congress expressly adopted the common law in the Civil Rights Act of 1866, and the tort law of that period generally required but-for causation, although there were exceptions. *Id.* at 1016.
113. 140 S. Ct. 1168 (2020).

in the federal sector provision of the ADEA, but that was based on statutory language that could not be reconciled with the default standard. In contrast, the *Comcast* Court found nothing in the statutory text, its history, or Court precedent that persuaded it to vary from the default rule.[114] Although the *Comcast* holding is consistent with Court precedent regarding the default rule, the Court could have and should have identified a good reason to depart from its default rule, since the statutory language of section 1981 certainly does not *require* the Court to interpret it as requiring but-for causation. Even though *Comcast* was not a section 1981 employment discrimination claim, the Court certainly is aware that many section 1981 claims are employment discrimination claims. The vexatious asymmetry the decision portends in employment discrimination law should have provided the Court with a good reason to depart from the default rule.

2. Asymmetry Created by Comcast Complicates Cross-Statute Claims Under Title VII and Section 1981

After *Comcast*, race discrimination claims present a number of issues based on the asymmetry that now exists between Title VII and section 1981. The overarching asymmetry is that race claims, despite being based on the same set of facts, have different standards of causation under the two statutes. Commentators predicted this problem would arise after the Court's decision in *Gross*.[115] A plaintiff pursuing a race discrimination claim under Title VII and section 1981 may survive dispositive motions and may win by satisfying the relaxed or "more forgiving" motivating factor causation standard for the Title VII claim. However, to survive and win under section 1981, the plaintiff must satisfy the more demanding but-for causation standard. Should we be concerned about this asymmetry? It is worth considering some ramifications.[116]

The first issue is how courts will analyze intentional discrimination claims under Title VII and section 1981. Differently stated, the question is which proof framework, mixed-motives or pretext, if either, applies under each statute. The Court's decision that there is a different standard of causation under section 1981 than there is under Title VII is a significant change in the law. Before *Comcast*, courts did not conduct separate analyses under the two statutes,[117] meaning that if a court analyzed the plaintiff's

114. *Comcast*, 140 S. Ct. at 1014.

115. *See, e.g.*, Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 916–17 (2012).

116. These observations are based on a small sample size, as only a handful of courts of appeals and several district courts have explored the ramifications of *Comcast*.

117. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989); Humphries v. CBOCS W., Inc., 474 F.3d 387, 403–04 (7th Cir. 2007).

Title VII race claim under the *McDonnell Douglas* pretext framework, it did the same with the section 1981 claim.[118] Thus, a single analysis determined liability or nonliability under the two statutes, and the principal function of section 1981, after the enactment of the Civil Rights Act of 1991, was simply to add an uncapped damages component to the Title VII claim.[119] After the Court's *Comcast* decision, the single uniform analysis of race claims under Title VII and section 1981 must change.

Courts recognize that different causation standards apply under Title VII and section 1981, but some courts do not seem to fully engage with the idea that the different causation standards will require different proof frameworks. The Supreme Court and other courts have assumed that the *McDonnell Douglas* pretext framework measures but-for causation,[120] although the *Comcast* decision may have called that interpretation into question.[121] The statutory mixed-motives framework installed in Title VII by the Civil Rights Act of 1991 begins with motivating factor. So, a plaintiff should be able to insist that her Title VII claim be evaluated under the less rigorous statutory mixed-motives analysis, although the section 1981 claim almost certainly will be evaluated under the *McDonnell Douglas* pretext framework. However, the Court's dicta in *Comcast* left uncertain whether the *McDonnell Douglas* analysis continues to apply to section 1981 claims: "Whether or not *McDonnell Douglas* has some useful role to play in § 1981 cases, it does not mention the motivating factor test, let alone endorse its use only at the pleadings stage."[122] Several post-*Comcast* decisions assert that *Comcast* did nothing to change the applicability of the *McDonnell Douglas* framework to section 1981 claims.[123] Other courts have been less

118. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); Bratton v. Roadway Package Sys., Inc., 77 F.3d 168, 176 (7th Cir. 1996); Tarantolo, *supra* note 13, at 190.

119. There are other differences that may make pursuing claims under section 1981 advantageous, such as no requirement to exhaust administrative remedies, a longer statute of limitations, and no minimum number of employees for an employer to be covered. Tarantolo, *supra* note 13, at 191. Also, most courts considering the issue have held that individual liability may be imposed under section 1981, whereas liability under Title VII may be imposed on only those who satisfy the definition of "employer." *See, e.g.*, Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 75 (2d Cir. 2000) (citing circuit and district court decisions so holding); James v. Countrywide Fin. Corp., 849 F. Supp. 2d 296, 318 (E.D.N.Y. 2012).

120. *See, e.g.*, *McDonald*, 427 U.S. at 282 n.10; Foster v. Univ. of Md.-Eastern Shore, 787 F.3d 243, 249 (4th Cir. 2015).

121. Comcast Corp. v. Nat'l Ass'n Afr. Am.-Owned Media, 140 S. Ct. 1009, 1019 (2020) (stating "[b]ecause *McDonnell Douglas* arose in a context where but-for causation was the undisputed test, it did not address causation standards").

122. *Id.* This is the same kind of ambiguity the Court has engaged in regarding whether the McDonnell Douglas pretext analysis applies to age discrimination claims. Gross v. FBL Financial Servs., Inc., 557 U.S. 167, 175 n.2 (2009) (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996)).

123. *See, e.g.*, Mann v. XPO Logistics Freight, Inc., 819 F. App'x 585, 594 n.15 (10th Cir. 2020); Gary v. Facebook, Inc., 822 F. App'x 175, 180 (4th Cir. 2020); Gipson Mechanical Contractors, Inc. v. U.A. Local 572, No. 3:18-cv-00768, 2021 WL 4909726 at *10 (M.D. Tenn. Oct. 21, 2021); Jacquett v.

certain about application of *McDonnell Douglas* pretext analysis to section 1981[124] or interpreted the *Comcast* dicta as changing the law.[125] In some post-*Comcast* decisions, courts, striving to maintain a uniform analysis of race claims under Title VII and section 1981, have analyzed both claims under the more stringent *McDonnell Douglas* framework,[126] although this approach ignores the applicability of the mixed-motives framework to race claims under Title VII.

Perhaps the best demonstration of the confusion wrought by *Comcast* is *Kilgore v. FedEx Freight*,[127] in which the district court considered a defendant's motion for summary judgment on the plaintiff's claim of race discrimination under both Title VII and section 1981. The court explained that different standards of causation now apply to the two statutes after *Comcast*—motivating factor for Title VII and but-for for section 1981.[128] Despite this difference, the court then brought some uniformity to the question by saying that the standard for summary judgment is the same—whether the evidence would permit a reasonable juror to find that the plaintiff suffered an adverse job action because of race.[129] Alas, the court then proceeded to apply the *McDonnell Douglas* pretext analysis to the issue, making no distinction between the Title VII and section 1981 claims.[130]

Another unusual interpretation of the ramification of the *Comcast* decision on use of the *McDonnell Douglas* analysis for section 1981 claims is that of the federal district court in *Balkiewicz v. Wawa, Inc.*[131] The plaintiff in that case asserted a race discrimination claim under only section 1981. The court explained that after *Comcast*, a plaintiff asserting a claim under section 1981 may use the *McDonnell Douglas* framework but additionally must prove that race was a but-for cause of the adverse

Oklahoma *ex rel.* Bd. of Okla. Corp. Comm'n, No. Civ.-17-01133, 2021 WL 5989785 (W.D. Okla. Feb. 17, 2021).

124. "It is unclear whether *McDonnell Douglas* has a role to play in analyzing evidence in § 1981 claims, but the United States Supreme Court appears to sanction its use as 'a tool for assessing claims, typically at the summary judgment stage.'" Kingori v. Citizens Fin. Grp., Inc., No. 18-340-JJM-LDA, 2020 WL 5517643, at *3 n.5 (D.R.I Sept. 14, 2020) (citing Comcast Corp. v. Nat'l Ass'n Afr. Am.-Owned Media, 140 S. Ct. 1009, 1019 (2020)).

125. *See* McKenzie-El v. Am. Sugar Refinery, Inc., No. RDB-20-0917, 2020 WL 7489021, at *8 (D. Md. Dec. 21, 2020) (noting that "in *Comcast Corporation* . . . the Supreme Court clarified that *McDonnell Douglas* does not address the causation standard relevant for claims of discrimination brought under Section 1981").

126. *See, e.g.*, *Mann*, 819 F. App'x at 594; Stovall v. ASRC Energy Servs.–Houston Contracting Co., No. 3:18-cv-00259-TMB, 2021 WL 3361680, at *7 (D. Alaska Aug. 2, 2021).

127. 458 F. Supp. 3d 973 (N.D. Ill. 2020).

128. *Id.* at 978.

129. *Id.*

130. *Id.* at 979–80.

131. No. 20-2148, 2021 WL 5198091 (E.D. Pa. Nov. 9, 2021).

employment action.[132] After evaluating the evidence, the court concluded that even if the plaintiff could establish a prima facie case and satisfy *McDonnell Douglas*, she could not satisfy the additional but-for causation standard imposed by the Court in *Comcast*.[133] That interpretation is quite unusual in light of the Supreme Court's and other courts' interpretation that the *McDonnell Douglas* framework measures but-for causation.[134]

Comcast's creation of asymmetry of causation standards for Title VII and section 1981 poses a significant problem for courts when deciding how to analyze claims on dispositive motions. Courts yearn to continue conducting a uniform analysis of race claims under the two statutes, as they did before *Comcast*, which seems reasonable because the same facts are the basis for both claims.[135] However, given the different causation standards required by *Comcast*, there no longer should be a uniform analysis. Title VII claims should be evaluated under the mixed-motives framework, incorporating motiving-factor causation, and section 1981 claims should be evaluated under the *McDonnell Douglas* pretext framework, if that framework still measures but-for causation.[136]

Applying these different frameworks could result in a plaintiff's satisfying the lower motivating factor standard and recovering under Title VII for race discrimination, but failing to satisfy the more rigorous but-for standard and not recovering under section 1981. That result would be a change from the pre-*Comcast* law and would raise a significant issue regarding the asymmetry of remedies between Title VII and section 1981. Since the Court held that race discrimination plaintiffs could recover damages under section 1981,[137] race claims have enjoyed favored status among the types of discrimination claims available under Title VII. That favored status has remained intact, though reduced, even after the enactment by the Civil Rights Act of 1991 of section 1981a with its capped compensatory and punitive damages.[138] Congress enacted that law, in part,

132. *Id.* at *8.

133. *Id.* at *10.

134. *See supra* note 120.

135. *See, e.g.*, Stovall v. ASRC Energy Servs.–Houston Contracting Co., No. 3:18-cv-00259-TMB, 2021 WL 3361680, at *7 (D. Alaska Aug. 2, 2021) ("Courts generally analyze Title VII and Section 1981 claims the same, and 'facts sufficient to give rise to a Title VII claim are also sufficient for a section 1981 claim.'" (quoting Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1412 (9th Cir. 1987))); Nelson v. Idleburg, No. 18 CV 2839, 2020 WL 2061555, at *9 (N.D. Ill. Apr. 29, 2020) (on summary judgment, analyzing Title VII claim under pretext analysis and concluding that plaintiff could not succeed under that standard or "the more stringent standard required for Section 1981").

136. I acknowledge the Court's unwillingness in *Comcast* to reaffirm that *McDonnell Douglas* measures but-for causation. Before *Comcast*, the Court did so interpret the pretext framework. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976).

137. *See* Johnson v. Ry. Express Agency, 421 U.S. 454, 459–60 (1975); Runyon v. McCrary, 427 U.S. 160 (1976).

138. *See supra* text accompanying notes 59–63.

to put the other protected characteristics under Title VII on a closer to equal footing with race by making damages and jury trials available under Title VII.[139] However, section 1981a also expressly states that it does not limit the scope of relief available under section 1981.[140] Thus, the damages caps of section 1981a left race in the more favorable position regarding damages. Now, it is arguable that race is in a worse position than the other protected characteristics under Title VII because a plaintiff asserting a race claim could lose under the but-for standard of section 1981[141] and thus not recover compensatory or punitive damages. In contrast, a plaintiff asserting a sex, religion, or national origin claim under Title VII and section 1981a need only prove her claim under the motivating factor standard to recover capped damages.

If race discrimination plaintiffs begin prevailing on Title VII claims but losing section 1981 claims, plaintiffs may choose to avoid the risk of losing under section 1981's higher causation standard. They may forego a claim under that law and instead assert a claim under only Title VII, seeking the capped damages under section 1981a so that the only standard of causation is motivating factor.[142] However, whether section 1981a permits that strategy remains unclear. When Congress enacted section 1981a as part of the Civil Rights Act of 1991, it was aware that race discrimination plaintiffs could assert their claims under section 1981 and did not need the additional statute. Presumably to prevent a windfall from duplication of recovery, Congress included a provision stating that a plaintiff could recover damages under section 1981a "provided that the complaining party cannot recover

139. *See generally* Levi, *supra* note 50, at 598 (stating "[w]hile § 1981a took major steps to unify the remedies among the federal civil rights statutes, the relief available and the process for obtaining such relief remains more favorable under § 1981 and § 1983."); *see also* Zehrt, *supra* note 62, at 274 n.175 (recounting testimony before Congress on the inequality of remedies under the employment discrimination laws). Section 1981a differs from section 1981 in that section 1981 creates a cause of action independent of Title VII whereas section 1981a does not. Section 1981a is dependent on a violation of Title VII. A plaintiff can sue for a violation of section 1981 without suing under Title VII, but that is not true of section 1981a. *See, e.g.*, West v. Boeing Co., 851 F. Supp. 395, 400 n.7 (D. Kan. 1994).

140. 42 U.S.C. §1981a(b)(4).

141. This scenario is not based on wild speculation. *See, e.g.*, Balkiewicz v. Wawa, Inc., Civ. Action No., 20-2148, 2021 WL 5198091 (E.D. Pa. Nov. 9, 2021), discussed *supra* text accompanying notes 131–34. After the Supreme Court decided *Gross*, many decisions referred to age discrimination plaintiffs' inability to satisfy the more rigorous but-for causation standard. *See, e.g.*, Arthur v. Pet Dairy, 593 F. App'x 211, 219 (4th Cir. 2015); Sims v. MVM, Inc., 704 F.3d 1327, 1336 (11th Cir. 2013).

142. A plaintiff will need to make this decision early in a case and certainly before a judgment is rendered. For at least two reasons, a plaintiff certainly could not assert a race claim under both Title VII and section 1981, win the Title VII claim, lose the section 1981 claim, and then assert a claim under 1981a. First, section 1981a does not create a cause of action independent of Title VII. *See supra* note 139. Second, the facts on which a Title VII race claim and section 1981 claim are the same, so a judgment on the first race claim would be res judicata as to a subsequent race discrimination claim based on those same facts.

under section 1981."[143] Does that provision permit or preclude a plaintiff who does not assert an available claim under section 1981 from recovering under section 1981a? Before the *Comcast* decision, this issue was rarely presented because plaintiffs had no reason to forego a section 1981 claim. With the emergence of the possibility that a plaintiff could win a race claim under Title VII but lose under section 1981, courts may see plaintiffs bring race discrimination claims under Title VII only, seeking capped damages under section 1981a.[144]

Both plaintiffs and defendants now will have arguments regarding whether the limiting language of section 1981a permits this result. On the one hand, the plaintiff will argue that the language permits the claim because, in fact, the plaintiff, having not asserted the section 1981 claim, cannot recover damages under that section.[145] Because the purpose of the limiting language in section 1981a is to prevent windfall,[146] the plaintiff will argue she is not seeking double recovery. A federal district court accepted this argument in a pre-*Comcast* decision.[147] On the other hand, the defendant will argue that Congress included the limiting language to preclude those who *have* a claim under section 1981, whether they assert it or not, from seeking damages under section 1981a. The defendant's position on this issue seems more likely to prevail, but the result is uncertain. As one court offering three possible interpretations of the limiting language commented, "[t]his range of possibilities suggests that §1981 is not well drafted."[148] It seems implausible that Congress intended to create a body of employment discrimination law in which plaintiffs would need to strategize under which statute(s) to sue in order to achieve the best recovery.

143. 42 U.S.C. §1981a(a)(1).

144. Alternatively, plaintiffs may assert their race discrimination claims under only section 1981 and not Title VII. They may adopt this strategy if they think it is worth the challenge of proving but-for causation under section 1981 with the prospect of uncapped damages in exchange for avoiding the same-decision defense that is available to defendants under part two of the mixed-motives framework for Title VII claims. A defendant that establishes that defense significantly limits remedies, avoiding monetary remedies and affirmative relief such as reinstatement or instatement. *See* 42 U.S.C. § 2000e-5(g)(2)(B). A strategy of race discrimination plaintiffs foregoing the Title VII claim would leave the Equal Employment Opportunity Commission out of the processing and attempted resolution of such claims. That could not have been Congress's intent. I am grateful to Professor Rebecca White for making this point.

145. *See* Dunning v. Gen. Elec. Co., 892 F. Supp 1424, 1431 (M.D. Ala. 1995). The court cited legislative history of section 1981a supporting the interpretation that relief is available under section 1981, thus precluding recovery under section 1981a only when it is actually awarded. *Id.*

146. *See, e.g.*, Roberts v. Roadway Express, Inc., 149 F.3d 1098, 1110 (10th Cir. 1998) (stating that "[t]his provision may do no more than bar double recovery").

147. Bradshaw v. Univ. of Me. Sys., 870 F. Supp. 406, 408 (D. Me. 1992) (holding that "[s]imply because [plaintiff] could have pled a claim for relief under § 1981, and did not, is no reason to bar his claim for damages from going forth under § 1981a").

148. Dunning v. General Elec. Co., 892 F. Supp. 1424, 1428 (M.D. Ala. 1995).

Another issue stemming from the asymmetry of causation standards in section 1981 and Title VII is jury instructions. When a plaintiff asserts Title VII and section 1981 race discrimination claims, a court must give a jury a motivating factor instruction for Title VII and a but-for instruction for section 1981. Giving two different, complicated instructions on causation applicable to the same set of facts risks juror confusion.[149] Nonetheless, one may think that juries, even if they do not fully understand jury instructions, usually get the result right. However, the Supreme Court has expressed concern about confusing jury instructions in employment discrimination law. In *Gross v. FBL Financial Services*,[150] the Court majority expressed its discontent with the mixed-motives analysis developed by the Court in *Price Waterhouse v. Hopkins*.[151] The Court stated that in the aftermath of *Price Waterhouse*, courts found articulating jury instructions that adequately explain the burden-shifting framework to jurors to be difficult.[152] If the Court was concerned with the difficulty of explaining how the burden of persuasion shifts at stage two of the mixed-motives analysis, the Court should be at least as concerned with trial courts crafting jury instructions that adequately explain how the jury is to apply different standards of causation to two different claims based on the same set of facts.

Overall, the cross-statute asymmetry the Court created for race discrimination claims in its *Comcast* decision creates significant problems with standards of causation, analysis of claims, and remedies. The ruling puts plaintiffs and their attorneys in a quandary regarding litigation strategy—how to plead and litigate their cases in order to effectuate the maximum recovery. All of this seems contrary to the legislative history and intent in view of the fact that in enacting the Civil Rights Act of 1991, Congress buttressed section 1981[153] and bolstered the other types of discrimination claims under Title VII and the ADA. Clearly, Congress desired stronger vehicles for alleging and proving discrimination—not a more convoluted manner of doing so. Therefore, Congress needs to correct the asymmetry now permeating cross-statute race discrimination claims under Title VII and section 1981.

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149. Jury instructions already are complicated enough in disparate treatment cases. *See, e.g.*, Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 380–81 (2020); Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 311 (2010); Kenneth R. Davis, *Price-Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 901 (2004).

150. 557 U.S. 167 (2009).

151. 490 U.S. 228 (1989).

152. *Gross*, 557 U.S. at 179.

153. The 1991 Act overturned *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), in which the Supreme Court held that section 1981 addressed issues of contract formation and enforcement but not conduct of the employer after contract formation.

B. The Frappied *Decision and Intersectional Discrimination Claims*

1. The Frappied *Decision*

In *Frappied v. Affinity Gaming Black Hawk, LLC*,[154] the Tenth Circuit held that plaintiffs could state a claim for discrimination on the basis of their status as "older women." The court characterized the claim as a sex-plus-age claim.[155]

In *Frappied*, a new casino owner laid off many of the former owner's employees and then advertised to hire for open positions.[156] Of the nine laid off plaintiffs, eight were women over the age of forty.[157] The women asserted disparate treatment and disparate impact claims under Title VII and the ADEA.[158] Among the claims were sex-plus-age disparate treatment and disparate impact claims asserted under Title VII. The district court had dismissed the sex-plus-age claims because it concluded that such claims were not cognizable under Title VII,[159] reasoning that the ADEA has a narrower scope than Title VII.[160] The court noted that plaintiffs also asserted an age discrimination claim under the ADEA. Thus, it viewed the inclusion of the sex-plus-age claim as a "spare bullet" under the broader scope of Title VII if the plaintiffs failed to prove liability under the ADEA.[161] The court thought this was emphasized by the fact that the plaintiffs conceded that they could not assert a successful sex discrimination claim under Title VII.[162] Additionally, the court raised the interesting issue of why the plaintiffs should be able to "handpick" the statute under which they asserted their sex-plus-age claim.[163]

On appeal, the Tenth Circuit observed that it is well-established that sex-plus claims are cognizable under Title VII.[164] Indeed, the United States Supreme Court affirmed the viability of sex-plus claims in its landmark decision *Bostock v. Clayton County*.[165] The Court's discussion of sex-plus claims in *Bostock*, however, required the Tenth Circuit, which had recognized sex-plus claims in the past, to revise its own conception of such

154. 966 F.3d 1038 (10th Cir. 2020).
155. *Id.* at 1047.
156. Frappied v. Affinity Gaming Black Hawk, LLC, No. 17-cv-01294-RM-NYW, 2018 WL 3093326, at *1–2 (D. Colo. June 22, 2018).
157. *Id.*
158. *Id.*
159. *Id.* at *3.
160. By "scope," the court apparently was referring to the standard of causation because it cited *Gross*. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Frappied*, 966 F.3d at 1045 (citing Pullman-Standard v. Swint, 456 U.S. 273, 276 (1982)).
165. *Id.* (citing Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020)).

claims. The Tenth Circuit previously required plaintiffs asserting sex-plus claims to prove discrimination against an entire subclass, such as black women.[166] The court found this conception of the sex-plus claim to be inconsistent with the Supreme Court's focus in *Bostock* on discrimination against individuals, not groups. Thus, under the court's revised view, a sex-plus plaintiff need not prove discrimination against her entire subclass.[167]

The Tenth Circuit also noted that the Supreme Court long ago recognized the viability of a sex-plus claim for women with preschool children, a scenario in which the plus characteristic is not even a protected characteristic under any federal employment discrimination statute.[168] The distinctive feature about the plaintiffs' sex-plus claim in *Frappied* was that the plus characteristic was covered by a different federal employment discrimination statute—the ADEA. Although no federal appellate court had yet addressed that issue, some district courts[169] and the EEOC[170] had recognized the viability of such claims. The Tenth Circuit then announced that sex-plus claims are cognizable under Title VII.[171] Accordingly, the Tenth Circuit reversed the district court's dismissal of the sex-plus-age claim.

The *Frappied* court's holding does not seem remarkable because many courts have recognized sex-plus discrimination claims. Moreover, several courts, conceptualizing the claims as intersectional or hybrid discrimination claims,[172] have recognized that plaintiffs have viable claims for combined protected characteristics, such as discrimination against black women (intersectionality of race and sex).[173] As the Tenth Circuit recognized in

166. *Id.*

167. *Id.* at 1047.

168. *Id.* at 1046 (citing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam)). *Phillips* was the first decision of the Supreme Court addressing a Title VII issue.

169. *See Frappied*, 966 F.3d at 1047 n.6 (citing cases).

170. *Id.* at 1047–48 (citing 2 EEOC Compliance Manual § IIA (Aug. 6, 2009) (stating that "[i]ntersectional discrimination can involve more than one EEO statute, e.g., discrimination based on age and disability, or based on sex and age").

171. *Id.* at 1048.

172. The term "intersectionality" was coined by Professor Kimberlé Crenshaw, one of the pioneers in theorizing such discrimination. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 145 (1989); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). Professor Bradley Areheart traces the origins of "interacting inequalities" to earlier works. *See* Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEORGE MASON U. CIV. RTS. L.J. 199, 201 n.15 (2006).

173. Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980); Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir.1994); Harrington v. Cleburne Cnty. Bd. of Educ., 251 F.3d 935, 937 (11th Cir. 2001); Shazor v. Pro. Transit Mgmt., Ltd., 744 F.3d 948, 957–58 (6th Cir. 2014); Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 109–10 (2d Cir. 2010); Kimble v. Wis. Dep't of Workforce Dev., 690 F. Supp. 2d 765, 769–71 (E.D. Wis. 2010); Westmoreland v. Prince George's Cnty., Md., 876 F. Supp. 2d 594, 604 (D. Md. 2012).

Frappied, however, it was the first circuit court of appeals to address whether a sex-plus-age claim, characteristics covered by separate federal employment discrimination statutes, is cognizable. Some district courts, however, have declined to recognize intersectional discrimination claims that cross over statutes[174] or specifically, age-plus claims.[175]

Frappied may be characterized as a sex-plus claim, as the court characterizes it, or as an intersectional or hybrid discrimination claim. The terms overlap, but they are not synonymous. While sex-plus claims often combine protected characteristics covered under employment discrimination cases, the plus characteristic in some cases is not another protected characteristic,[176] such as sex plus childcare responsibilities or sex plus physical appearance. Intersectional claims necessarily combine protected characteristics. For purposes of this Article, it is the intersectional characterization of *Frappied* that is relevant,[177] as the issue at hand is the problems created by asymmetry across statutes.

2. Asymmetry Across Statutes Creates Problems for Intersectional Discrimination Claims

Many courts have been receptive of intersectional discrimination claims within Title VII, such as race-and-sex claims, but the reception has not been universal.[178] Indeed, the standard bearer (and perhaps seminal decision) for recognition of intersectional discrimination claims is *Jeffries v. Harris County Community Action Ass'n*,[179] which involved a claim of discrimination against a black woman.[180] Intersectional claims that cross statutes, however, have not been accorded the same level of acceptance by the courts. Moreover, sex-and-age claims, although approved by *Frappied*, have not been approved by all courts.[181]

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174. Chaikin v. Methodist Med. Ctr. of Ill., No. 18-cv-1208, 2018 WL 4643016 (C.D. Ill. Sept. 27, 2018).

175. *See* Kayla King, Comment, *Tenth Circuit Ruled in Favor of Sex-Plus-Age Claims of Discrimination Under Title VII in the Wake of* Bostock v. Clayton County, 62 B.C. L. REV. E. SUPP. II 185, 196 n.72 (2021) (citing cases).

176. *See* Marc Chase McAllister, *Extending the Sex-Plus Discrimination Doctrine to Age Discrimination Claims Involving Multiple Discriminatory Motives*, 60 B.C. L. REV. 469 (2019).

177. As Professor Areheart explains, treating a protected characteristic as a plus factor relegates that characteristic to an inferior status. Such treatment ignores the principle that in intersectional claims, each characteristic merits equal consideration. *See* Areheart, *supra* note 172, at 222.

178. *See, e.g.*, *id.* at 214–15.

179. 615 F.2d 1025, 1032 (5th Cir. 1980). *See* Areheart, *supra* note 172, at 220 (discussing the Fifth Circuit's "unflinching" recognition of sex-plus-race in *Jefferies*).

180. *See* Alice Abrokwa, *"When they Enter, We All Enter": Opening the Door to Intersectional Discrimination Claims Based on Race and Disability*, 24 MICH. J. RACE & L. 15, 48 (2018).

181. *See, e.g.*, McAllister, *supra* note 176, at 488–93; White, *supra* note 7, at 1331–38.

Even though courts approving the cross-statute claims often cite as support the Supreme Court's decision in *Phillips v. Martin Marietta Corp.*,[182] as the Tenth Circuit did in *Frappied*,[183] *Phillips* was a 1971 decision. Some recent decisions rejecting sex-plus-age claims have noted the different causation standards applicable under Title VII and the ADEA after the Court's more recent 2009 decision in *Gross*.[184] For courts that permit the claims, most view them as a sex-plus-age claims under Title VII, as in *Frappied*, and permit the plaintiff to proceed under the motivating factor standard and circumvent the more rigorous but-for standard of the ADEA.[185] On the other hand, some courts have explained that characterizing such claims as age-plus-sex under the ADEA presents another causation problem as plaintiffs would be arguing for two but-for causes.[186] The latter rationale should have been effectively repudiated, however, by the Supreme Court in *Bostock*, as it explained that there can be more than one but-for cause.[187] Further highlighting the uncertainties and inconsistencies regarding cross-statute claims, the same judge that recognized a sex-plus-age claim in *Bauers-Toy v. Clarence Central School District*,[188] rejected an age-plus-disability claim in *Kelly v. Drexel University*.[189] No reported decision appears to have considered the viability of intersectional claims under Title VII and the ADA, such as race-and-disability.[190]

Courts also generally reject intersectional claims asserted under Title VII and section 1981 because section 1981 is limited to race and does not provide protection for any of the other characteristics protected under Title VII.[191] However, the rationale that section 1981 covers only race[192] is no more persuasive than arguing that age claims cannot be brought under Title VII because Title VII does not cover age. Moreover, under the Supreme

182. 400 U.S. 542 (1971).

183. Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1045–46 (10th Cir. 2020).

184. *See* Joann Song McLaughlin, *Limited Recourse for Older Women's Intersectional Discrimination Under the Age Discrimination in Employment Act*, 26 ELDER L.J. 287, 307–08 (2019) (citing Cartee v. Wilbur Smith Assocs., No.: 3:08-4132-JFA-PJG, 2010 WL 1052082 (D.S.C. Mar. 22, 2010); DeAngelo v. DentalEZ, Inc., 738 F. Supp. 2d 572 (E.D. Pa. 2010)). *See generally* White, *supra* note 7, at 1336–37 (noting that reliance on *Phillips v. Martin Marietta* has been called into question by *Gross*).

185. Bauers-Toy v. Clarence Cent. Sch. Dist., No. 10-CV-845, 2015 WL 13574291 at *1 (W.D.N.Y. Sept. 30, 2015).

186. *Id.* at *6.

187. Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020).

188. *Bauers-Toy*, 2015 WL 13574291.

189. 907 F. Supp. 864, 875 n.8 (E.D. Pa. 1995), *aff'd*, 94 F.3d 102 (3d Cir. 1996).

190. *See* Abrokwa, *supra* note 180, at 18.

191. A court rejected the intersectional claim of a black woman in *McCowan v. City of Philadelphia*, No. 19-3326-KSM, 2021 WL 84013, at *20 (E.D. Pa. Jan. 11, 2021).

192. *See id.*

Court's broad interpretation of race in *St. Francis College v. Al-Khazraji*,[193] intersectional claims could come within the definition of race.

Although some intersectional claims fare better than others, on the whole, intersectional claims do not fare well in the courts.[194] Yet, intersectional claims appear to be asserted with increasing frequency.[195] Furthermore, the Tenth Circuit in *Frappied* found support for the intersectional claim it recognized in the Supreme Court's landmark decision in *Bostock*. The court noted that in *Bostock* the Supreme Court stated that if sex plays a role in the employer's decision, the employer does not avoid liability by proving that some other factor "'might also be at work,'" even if that other factor plays a more important role than sex.[196] If the Tenth Circuit was correct in its interpretation, and I think it was, there now is a tension between *Phillips* and *Bostock* on the one hand and *Gross* on the other.

The district court in *Frappied* noted the different causation standards under the ADEA and Title VII. Although other courts have permitted sex-plus-age claims under Title VII, which would invoke the lower motivating factor causation standard, the *Frappied* district court queried why plaintiffs "should be able to handpick the statute under which" their intersectional claims are governed.[197] The district court thereby posed a perceptive inquiry. Although the Tenth Circuit characterized the plaintiffs' claim as a sex-plus-age claim under Title VII, it is not obvious why that is a better characterization than age-plus-sex under the ADEA. An equally reasonable interpretation of the law is that a plaintiff should have to satisfy the more stringent causation standard implicated in an intersectional claim.

In addition to the issues regarding causation standards, something else vexes courts about intersectional discrimination claims. Some courts are troubled by the notion that the discrimination the plaintiffs are alleging does not fit the structure of separate statutes created by Congress.[198] For example,

193. 481 U.S. 604, 607 (1987). *See also* Abdullahi v. Prada USA Corp., 520 F.3d 710, 712 (7th Cir. 2008) (stating that a loose sense of race is the correct interpretation of a statute passed in 1866).

194. *See* Nicole Delaney & Joanna N. Lahey, *The ADEA at the Intersection of Age and Race*, 40 BERKELEY J. EMP. & LAB. L. 61, 79 (2019); Rachel Kahn Best, Lauren B. Edelman, Linda Hamilton Krieger & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC'Y REV. 991, 995 (2011).

195. Delaney & Lahey, *supra* note 194, at 81 n.148. Professor Rebecca White discussed the need for recognition of sex-plus-age claims in light of the prevalence of discrimination against older women. *See* White, *supra* note 7, at 1327–29. Professor White used the example of widespread allegations of discrimination against older female television news anchors. *See id.*

196. Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1046 (10th Cir. 2020) (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1744 (2020)).

197. Frappied v. Affinity Gaming Black Hawk, LLC, No. 17-01294-RM-NYW, 2018 WL 3093326, at *3 (D. Colo. June 22, 2018).

198. *See* Delaney & Lahey, *supra* note 194, at 83; White, *supra* note 7, at 1334–35.

the district courts in *Johnson v. Napolitano*[199] and *Luce v. Dalton*[200] rejected intersectional claims in part because Congress did not create an employment discrimination "super statute" covering all protected characteristics.[201] The *Luce* court stated that permitting such a blending "would amount to judicial legislation."[202] Expressing a similar view that the discrimination alleged must fit within the structure of separate statutes enacted by Congress, the court in *Chaikin v. Methodist Medical Center of Illinois*[203] rejected the intersectional claim of the plaintiff who alleged that his employer discriminated against him as a "crazy, old Russian." The court said it had seen intersectional claims of discrimination under a single statute advance in federal courts. However, the claim of the plaintiff sought to "transmogrify several different statutes into a new superseding legal cause of action."[204] The reluctance of the courts to recognize claims crossing over statutes and the coverage of the various protected characteristics under separate statutes reflect a view of employment discrimination that is one dimensional and categorical.[205] The courts see the separate statutes with different governing principles and decide, not unreasonably, that Congress intended such a disjointed and incoherent approach.

Related to the idea that intersectional discrimination plaintiffs are not conforming to the structure of the statutes is the idea that some plaintiffs who assert tenuous single-characteristic discrimination claims hope to bolster them with the hybrid claims.[206] For example, the district court in *Frappied*, while not labeling the plaintiffs' age discrimination claim "weak," opined that the sex-plus-age claim was "effectively an attempt to have a spare bullet in plaintiffs' chamber" in the event the age claim failed.[207] The court undoubtedly is correct that the plaintiffs adopted a strategy of presenting claims in a way that maximized their potential for recovery. However, such strategizing by plaintiffs is not indicative of the weakness of their claims; rather, it demonstrates their cognizance of the asymmetries of federal employment discrimination law in which claims based on different protected characteristics are not treated the same.

199. No. 10 Civ. 8545(ALC), 2013 WL 1285164, at *9 (S.D.N.Y. Mar. 28, 2013).

200. 166 F.R.D. 457, 461 (S.D. Cal. 1996), *aff'd*, 167 F.R.D. 88 (S.D. Cal. 1996).

201. *See supra* text accompanying notes 1–2. *See Luce*, 166 F.R.D. at 461; *Napolitano*, 2013 WL 1285164, at *9.

202. *Luce*, 166 F.R.D. at 461.

203. No. 18-cv-1208, 2018 WL 4643016, at *2 (C.D. Ill. Sept. 27, 2018).

204. *Id.*

205. *See* Best et al., *supra* note 194, at 994–95.

206. *See, e.g.*, Delaney & Lahey, *supra* note 194, at 80–81.

207. Frappied v. Affinity Gaming Black Hawk, LLC, No. 17–cv–01294–RM–NYW, 2018 WL 3093326, at *3 (D. Colo. June 22, 2018), *aff'd in part, rev'd in part and remanded*, 966 F.3d 1038 (10th Cir. 2020).

Frappied is a landmark decision in that a federal appellate court recognized that a discrimination claim that crosses statutes is actionable under federal employment discrimination law.[208] The decision does not, however, adequately address the important questions of which standard of causation applies and which remedies are available under the asymmetrical law of Title VII and the ADEA; rather, it assumes, without discussing, that the claim is governed by Title VII. I submit that there is no good answer to these questions in a legal regime with separate statutes covering various protected characteristics and asymmetrical law governing fundamental issues such as causation and remedies.

III. IT IS TIME FOR A SUPER STATUTE

For far too long, Congress has permitted federal employment discrimination law to develop asymmetrically under Title VII, section 1981, the ADEA, and the ADA. The asymmetrical law creates many practical and theoretical problems and makes employment discrimination law difficult to understand and/or trust for many people.[209] Cross-statute claims of discrimination demonstrate the vexatious nature of this asymmetry.[210]

Before the Supreme Court began interpreting the causation standards under the statutes as different, there were no significant problems with race discrimination claims asserted under both Title VII and section 1981. Similarly, intersectional discrimination claims crossing over Title VII and the ADEA or other claims involving combinations did not present problems of causation, although the different remedies under Title VII and the ADA on the one hand, and the ADEA on the other should have posed a problem

208. Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038 (10th Cir. 2020).

209. Consider, for example, the consternation of many people upon learning from the Supreme Court's decision in *Gross* that plaintiffs asserting age discrimination claims must satisfy a more stringent causation standard than plaintiffs asserting claims under Title VII. *See, e.g.*, Kenneth Terrell, *AARP Urges Congress to Strengthen Age Discrimination Laws*, AARP (May 21, 2019), https://www.aarp.org/politics-society/advocacy/info-2019/powada-age-discrimination.html [https://perma.cc/G7UH-5HKS]; AARP, *AARP Poll: Protecting Older Workers Against Discrimination Act National Public Opinion Poll*, GS STRATEGY GRP. (June 2012), https://ropercenter.cornell.edu/ipoll/study/31086265; Patricia Barnes, *Finally, U.S. House Will Address Disastrous U.S. Supreme Court Ruling on Age Discrimination*, FORBES (Jan. 13, 2020, 1:16 PM), https://www.forbes.com/sites/patriciagbarnes/2020/01/13/finally-us-house-will-address-disastrous-us-supreme-court-ruling-on-age-discrimination/?sh=7521da8d5efd [https://perma.cc/D9DY-D7QS]; Editorial, *Age Discrimination*, N.Y. TIMES (July 6, 2009), https://www.nytimes.com/2009/07/07/opinion/07tue2.html [https://perma.cc/AU9X-XRUW] (calling for Congress to overturn *Gross*).

210. There are problems of asymmetry beyond those revealed by cross-statute claims. *See, e.g.*, Corbett, *Intolerable Asymmetry*, *supra* note 21, at 18, *passim*.

for courts to resolve.[211] Now, after the Supreme Court's causation decisions, the problems with Title VII-section 1981 claims and intersectional discrimination claims are more pronounced, and they demand attention. The Supreme Court cannot unilaterally fix the asymmetry for a couple of reasons. First, the Court will not overturn its decisions interpreting "because of" to mean but-for causation and disallowing the mixed-motives analysis for statutes requiring but-for causation—*Gross*[212]*-Nassar*[213]*-Comcast*.[214] Second, the Court cannot make the remedies provisions uniform across statutes because of Congress's express statutory language.

Therefore, reforming employment discrimination law to eliminate or reduce the problems of asymmetry is a job for Congress. However, Congress should not follow its familiar "playbook" of simply amending the statutes in a way that overturns Supreme Court decisions with which Congress disagrees. The Civil Rights Act of 1991 demonstrates the folly of that approach.[215] Instead, the time has come for Congress to enact a single "super statute" for employment discrimination. That is the approach that Parliament took in reforming the employment discrimination law of the United Kingdom in the Equality Act of 2010,[216] which consolidated nine pieces of employment discrimination law into one.[217] Additionally, many state employment discrimination laws in the United States are omnibus "super statutes."[218]

I have argued before for Congress to undertake a holistic reform of employment discrimination law.[219] Over the past decade or so, the need has become even more acute with the increasing asymmetry across the statutes and the difficulties posed by employment discrimination claims that cross

211. Not all courts perceived this to be a problem. For example, the Tenth Circuit in *Frappied* treated the sex-plus-age claim as a Title VII claim. As discussed above, this should have been a debatable issue. *See supra* text accompanying and following note 197.

212. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009).

213. Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).

214. Comcast Corp. v. Nat'l Ass'n Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020).

215. *See* Corbett, *Intolerable Asymmetry*, *supra* note 21.

216. Equality Act of 2010, *supra* note 27.

217. The nine consolidated pieces of legislation were the Equal Pay Act of 1970, the Sex Discrimination Act of 1975, the Disability Discrimination Act of 1995, the Employment Equality (Religion or Belief) Regulations 2003, the Employment Equality (Sexual Orientation) Regulations 2003, the Employment Equality (Age) Regulations 2006, the Equality Act 2006, Part 2, and the Equality Act (Sexual Orientation) Regulations 2007. *See What Is the Equality Act*, EQUAL. & HUM. RTS. COMM'N (June 19, 2019), https://www.equalityhumanrights.com/en/equality-act-2010/what-equality-act [https://perma.cc/PBF7-X9CZ].

218. *See, e.g.*, Louisiana Employment Discrimination Law, LA. STAT. ANN. § 23:301 (1997); Montana Employment Discrimination Law, MONT. CODE ANN. § 49-2-303 (2011); Arizona Employment Discrimination Law, ARIZ. REV. STAT. ANN. § 41-1463 (2021); Oklahoma Employment Discrimination Law, OKLA. STAT. ANN. tit. 25, § 1302 (West 2011); Tennessee Employment Discrimination Law, TENN. CODE ANN. § 4-21-401 (West 2017).

219. *See* Corbett, *Calling on Congress*, *supra* note 25.

over statutes. The Tenth Circuit was correct in *Frappied* that the Supreme Court's *Bostock* decision, while not directly on point, lends support for such cross-statute claims.[220] The different remedies across the statutes is not a new problem. Rather, the different causation standards have become a more significant problem after the Supreme Court's *Gross-Nassar-Comcast* line of decisions. If the Tenth Circuit was correct about the ramifications of *Bostock*, there is an undeniable tension between *Gross-Nassar-Comcast* on the one hand and *Bostock* on the other.

If Congress were to repeal the existing employment discrimination statutes and enact a consolidated statute, it could address all of the problems created by asymmetry. A super-statute would enable Congress to achieve as much uniformity as it is willing to accept. Ideally, there would be one standard of causation for all protected characteristics, one set of remedies, and a recognition of the viability of intersectional claims among the characteristics covered in the statute. Congress could, however, make distinctions within the single statute if it chose to do so, favoring one or more protected characteristics over others. If, for example, Congress did intend to have a more stringent standard of causation for proof of age discrimination claims than for race, color, religion, sex, and national origin, as the Supreme Court interpreted the Civil Rights Act of 1991 in *Gross*, Congress could so specify in the statute. If there were different standards of causation, Congress also could specify how an intersectional claim, if recognized, consisting of characteristics with different standards, is to be addressed—whether it would require satisfaction of the higher standard or the lower standard.

In the single statute, Congress could specify whether intersectional claims are permitted or not. On this point, I urge Congress *not* to follow the path of the United Kingdom. The Equality Act of 2010 includes a provision, section 14,[221] proscribing what it calls "combined discrimination: dual characteristics," which never went into effect.[222] Section 14 limited a claim to "a combination of two relevant protected characteristics": age, disability, gender reassignment, race, religion or belief, sex, and sexual orientation.[223] The government of the United Kingdom determined that not bringing that section into force would be a way to reduce the cost of regulation for

220. *See* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1045–47 (10th Cir. 2020).

221. Equality Act of 2010, *supra* note 27.

222. *See* Catherine Borne, *Falling Between the Cracks—Is It Time to Legislate for Dual Discrimination?* KINGSLEY NAPLEY (Mar. 10, 2020), https://www.kingsleynapley.co.uk/insights/blogs/employment-law-blog/falling-between-the-cracks-is-it-time-to-legislate-for-dual-discrimination#page=1 [https://perma.cc/97W9-LBZM].

223. Equality Act of 2010, *supra* note 27.

businesses.[224] By not bringing that statutory section into force, the government left the decision on the permissibility of intersectional claims to the case law, which has been generally receptive of the claims.[225] Congress should instead take the path of affirmatively addressing the permissibility of intersectional claims in the super statute, and I think it should permit claims that combine more than two characteristics.[226]

Regarding remedies, Congress should recognize uniform remedies among all covered characteristics. If Congress wanted to make different remedies available depending on whether a plaintiff proved a higher or lower level of causation,[227] it could do that. Nonetheless, if Congress chose, as the uniform remedies, the remedies of Title VII and section 1981, there would be no reason for plaintiffs to assert race discrimination claims under both Title VII and section 1981.

Turning to other current issues, Congress could consider whether the law should be symmetrical among the protected characteristics. Should the bona fide occupational qualification defense be expanded to apply to race, color, and disability?[228] Should the theory of failure to reasonably accommodate be maintained for religion, disability, and pregnancy (per *Young*),[229] extended to other protected characteristics, or contracted? Also, what would Congress do with the application of the theory of associational or relational discrimination, which is expressly recognized by statute in the ADA[230] and recognized in the case law for race and other protected characteristics?[231] These and other asymmetries could be maintained or eliminated. Examining the whole of employment discrimination law and reforming it involves many difficult choices, but the reform is worthwhile and much needed.

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224. *See What Is the Equality Act*, *supra* note 217; Borne, *supra* note 222.

225. *See* Borne, *supra* note 222.

226. Professor Areheart recommended that Congress amend Title VII, adding to the list of protected characteristics "or any combination thereof." *See* Areheart, *supra* note 172, at 234. That amendment would provide Congressional recognition of intersectional claims for characteristics covered by Title VII, but it would not recognize cross-statute intersectional claims. A super statute is the preferable solution.

227. This occurs, for example, with the mixed-motives analysis in Title VII with its motivating factor standard and limitation of remedies for defendants who disprove but-for causation under the same-decision defense. *See* 42 U.S.C. §§ 2000e-2(m) & 2000e-5(g)(2)(B). A similar result pertains in the Supreme Court's interpretation of the federal-sector provision of the ADEA, 29 U.S.C. § 633a(a) in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020).

228. Currently, Title VII recognized the BFOQ defense for sex, national origin, and religion, 42 U.S.C. § 2000e-2(e)(1), and the ADEA recognizes it for age, 29 U.S.C. § 623(f)(1). The ADA provides for a different defense—the direct threat defense. *See* 42 U.S.C. § 12113(b). The direct threat defense differs from the BFOQ defense because BFOQ permits employers to make categorical judgments, whereas direct threat requires individualized inquiry. *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479, 1490 (2001).

229. *See supra* note 95; Young v. United Parcel Serv., Inc., 575 U.S. 206 (2015).

230. 42 U.S.C. § 12112(b)(4).

231. *See, e.g.*, Ellis v. United Parcel Serv., Inc., 523 F.3d 823 (7th Cir. 2008); Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209 (2012).

Congress should enact a super employment discrimination statute with the goal of providing a high degree of symmetry in employment discrimination law, thus eliminating problems of cross-statute claims. I do not mean to suggest that undertaking the reform of employment discrimination law is simple or noncontroversial—a holistic reform of this type would be extremely controversial, particularly in the current polarized political climate.[232] Nonetheless, our employment discrimination law is almost sixty years old and in need of such reform.

There is a final concern more alarming than the prospect of hard work and the difficulty of cooperation in the current political environment: beyond potentially futile attempts to enact a super employment discrimination statute, a greater concern is that a consolidated statute would be enacted that strips protections that exist in the current regime.[233] Although enactment of a less protective statute is a valid concern, I think it is an unlikely result. More likely results are the failure of the project and continuation of the current regime or enactment of a single statute, resulting from compromises, that is better than what exists today. In that consolidated statute, perhaps age discrimination plaintiffs no longer would have available liquidated damages for willful violations, but they may have a lower standard of causation and the remedies currently available under Title VII and section 1981a or section 1981. Consider, for example, the Civil Rights Act of 1991 and its failed precursor in 1990. Political compromise regarding the 1991 Act brought about capped damages for Title VII and ADA claims.[234] The result was not the equalization of other Title VII and ADA claims with race claims, which the failed 1990 Act would have brought about, but rather, the disparity was lessened. The compromise in the 1991 Act may not have produced the best law, but the result was better than what we had before.[235]

The current asymmetry and uncertainty burden and confuse both employers and employees, so there should be incentive enough for advocates on both sides and those in the middle to work together to craft a

232. *See, e.g.*, *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/ [https://perma.cc/4NXZ-MQ4N].

233. Professor Charles Sullivan urged this point, and I am grateful to him.

234. *See supra* notes 59–63 and accompanying text.

235. Another example that gives reason for guarded optimism is Congress's enactment of the ADA Amendments Act of 2008, the purpose of which was to strengthen the ADA of 1990, under which plaintiffs lost a breathtakingly high percentage of claims because of courts' restrictive interpretations of the statute. *See generally* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027 (2013); Bradley A. Areheart, *Disability Trouble*, 29 YALE L. & POL'Y REV. 347 (2011); James Concannon, *Mind Matters: Mental Disability and the History and Future of the Americans With Disabilities Act*, 36 L. & PSYCH. REV. 89 (2012).

consolidated statute. At a minimum, the effort should bring about careful consideration of a body of law that has developed haphazardly for almost six decades, which is worthwhile in itself. That consideration and recognition of the asymmetrical state of the law should result in some needed improvement. The time has come for an employment discrimination super statute.

CONCLUSION

Asymmetry of the employment discrimination law regarding the various protected characteristics in Title VII, the ADEA, and the ADA has made the law unnecessarily complicated and inscrutable. Why is it harder to prove age discrimination than race or sex discrimination? Why are the remedies different for age discrimination than for race, sex, religion, national origin, or disability discrimination? Why can race discrimination plaintiffs recover better remedies than sex discrimination plaintiffs? Why must race discrimination plaintiffs prove but-for causation to recover compensatory and/or punitive damages, but plaintiffs claiming sex, religion, or national origin discrimination can recover compensatory and/or punitive damages by proving motivating factor? The Supreme Court's decisions of the past decade on standards of causation in employment discrimination have exacerbated the problems of asymmetry. These problems come into clearest focus in cross-statute claims, such as race claims under Title VII/section 1981 and intersectional claims.

The problems of asymmetry are a product of Congress's initially enacting separate statutes and following up with piecemeal amendments to those employment discrimination statutes and the Supreme Court interpreting those amendments. The solution is for Congress to enact an employment discrimination super statute with the goal of achieving uniformity. Six decades into the employment discrimination project, we need a less discriminatory employment discrimination law.