

# Torts and Discrimination

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*Current tort law contains incentives to target individuals and communities based on race and gender. Surprisingly, the basis for such targeting is the seemingly neutral use of three different race- and gender-based statistical tables (for wages, life expectancy, and worklife expectancy) which, when used in tort damage calculations, result in a great disparity between damages awarded to whites versus blacks and men versus women. Thus, tort law's remedial damage scheme perpetuates existing racial and gender inequalities by compensating individuals (especially children) based on their race and gender. Even worse, tort law creates ex ante incentives for potential tortfeasors to engage in future discriminatory targeting of women and minorities. We provide the first full account of courts' existing discriminatory practices. We then address the deficiencies in the nonblended tables that courts use (tables that use race and gender as discriminating factors) and the reasons behind their continued use. We show how the various theories of tort law (corrective justice, distributive justice, and economic efficiency) have contributed to a misunderstanding of the proper damages calculation and illustrate how the very same theories can be used to engender a change in the current praxis. We then challenge the conventional wisdom that the use of race- and gender-based tables is justified on efficiency grounds, noting fatal flaws inherent in the tables, in how they are used in courts to calculate damages for individuals, and in the incentives they create.*

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*We reveal that similar discriminatory practices ironically exist in federal law, such as the Americans with Disabilities Act, the National Childhood Vaccine Injury Act, and even Title VII—whose goal is to combat gender and race discrimination. Finally, we propose a feasible, low-cost, logical solution that pushes toward a more efficient and less discriminatory tort law remedial system: courts should immediately terminate their use of nonblended tables.*

If the injured child were born to a mixed couple but looks black, like Barack Obama, I would use black tables [in the calculation of damages I present to the jury]. However, if he is educated, and his life style is similar to the average typical white, then I would be inclined to use white tables. It is all a matter of common sense.<sup>1</sup>

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<sup>1</sup> A quote from a telephone conversation with a forensic economist.

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## I. INTRODUCTION

Imagine you are a high-level manager at PhedEx, a courier service. The company has more than 30,000 motorized vehicles traveling across the United States every day. On average, it experiences three accidents per day and fatalities or injuries every two and a half days; lots of harm can be done, and therefore, lots of money is on the line.<sup>2</sup> All else being equal, you might act

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<sup>2</sup> See *Safety Measurement System: FedEx Ground Package System Inc.*, FED. MOTOR CARRIER SAFETY ADMIN., <https://ai.fmcsa.dot.gov/SMS/Carrier/265752/Overview.aspx> [<https://perma.cc/LQ2Y-HMNY>] (last updated Jan. 1, 2017); see also Kim Briggeman, *Concerns Raised over Increase in Trucking-Related Crash Deaths*, MISSOULIAN (Dec. 18,

economically rationally, and probably legally, if you make sure to send your trucks through predominantly nonwhite population centers. We will now explain why this is so.

The fact that courts presumably apply the same standard of care across all neighborhoods regardless of the racial or socioeconomic composition of their residents might promote the misconception that race and gender do not matter. That, of course, is a mistake: race and gender in fact play a crucial role in the calculation of damages, and therefore in potential tortfeasors' precautionary decisions.<sup>3</sup> Tort law's compensation scheme is conventionally understood as intended to restore victims to their preaccident status (to the extent possible).<sup>4</sup> Since blacks and women in the United States earn less than whites and men, respectively, the damages black women receive for future losses caused by bodily injury or wrongful death are lower than the damages their white male counterparts would receive.<sup>5</sup> The disadvantage blacks and women suffer in the United States, in terms of their job market prospects,<sup>6</sup> are reflected in the level of tort damages they receive.

The conclusion is unavoidable: it is less costly for courier companies to have accidents involving blacks (especially females) than whites (especially males). This distorted approach to compensation will have two effects in the case we are examining here: on PhedEx's care level and on its activity level.<sup>7</sup> First, PhedEx will decide to drive more slowly in white neighborhoods, since white neighborhoods generally have higher average incomes than black neighborhoods do.<sup>8</sup> And, as PhedEx's expected liability increases, so too does

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2011), [http://missoulain.com/news/local/concerns-raised-over-increase-in-trucking-related-crash-deaths/article\\_fc944f86-2923-11e1-b9f0-001871e3ce6c.html](http://missoulain.com/news/local/concerns-raised-over-increase-in-trucking-related-crash-deaths/article_fc944f86-2923-11e1-b9f0-001871e3ce6c.html) [<https://perma.cc/B4JV-U78T>].

<sup>3</sup> See Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007*, 27 REV. LITIG. 37, 61 (2007).

<sup>4</sup> *Livingstone v. Raywards Coal Co.* (1880) SC (HL) 25, 39 (Scot.) (“I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”).

<sup>5</sup> See *infra* Part II.A.2–3.

<sup>6</sup> Life span and worklife expectancy also factor into damage calculations and contribute to inequality within tort law damage calculations. See *infra* Part II.A.1–2. These factors will be discussed in detail.

<sup>7</sup> See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 5 (First Harvard Univ. Press paperback ed. 2007) (1987).

<sup>8</sup> In the environmental context, “NIMBYism [(Not-in-my-back-yard)] in more affluent, white communities . . . resulted in industry taking the ‘path of least resistance,’ and targeting communities with fewer resources and political clout as the sites for new hazardous waste facilities . . . . These communities are where the poor and people of color live.” Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the*

its level of optimal precaution (recall the Learned Hand Formula).<sup>9</sup> The striking effect is that PhedEx will apply a very different standard of care when it deals with white neighborhoods than when it deals with black ones, even though courts do not. Second, these perverse incentives will affect PhedEx's activity level. Because driving slowly costs more in terms of added delivery time, PhedEx rationally might decide to reroute through black neighborhoods, where its drivers face less liability costs associated with driving faster. This is the distortion in activity level.

The bottom line is that PhedEx is incentivized to send more of its vehicles driving speedily through black neighborhoods, endangering the people who live there.

To understand this point better, let us look deeper into how tort law calculates damages. In the dark past, judges made "intuitive" judgments about damage awards, which "allow[ed] race and racism to have tremendous influence in ways that are nearly impossible to prove."<sup>10</sup> Today, the damage calculation process is more methodical, perhaps even "scientific."<sup>11</sup> Yet race and gender still exert an enormous influence on monetary remedies, albeit now a structural one.<sup>12</sup> Here is why: the plaintiff in bodily injury or wrongful death cases is usually eligible—upon proving the defendant's liability—for economic and noneconomic damages attributable to past and future harm.<sup>13</sup> Economic damages comprise past and future losses attributable to medical costs and loss of income.<sup>14</sup> Courts use three major types of government-generated statistical tables to form the basis of these calculations.<sup>15</sup> *Life expectancy tables* are used to determine statistical life expectancy, which comprises an important factor in determining the life span multiplier in future

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*Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, ENVTL. RES. LETTERS, Nov. 2015, at 1, 16.

<sup>9</sup>The Learned Hand formula suggests that optimal precautions should be up to the expected liability of the actor. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

<sup>10</sup>Wriggins, *supra* note 3, at 56 (discussing *In re Clyde S.S. Co. (The Saginaw & The Hamilton)*, 139 F. 906, 910 (S.D.N.Y. 1905)). In *The Saginaw & The Hamilton*, the court evaluated damage awards for two "white" decedents and six "colored" decedents, who died when two ships—the Saginaw and the Hamilton—crashed off the coast of Delaware. The Saginaw & The Hamilton, 139 F. at 910. After discussing the categorically shorter life expectancy of "colored" persons as compared to "white" persons, the judge embarked on individualized damages assessments for each of the decedents. *Id.* at 914–16. Ultimately, he chose to lower the awards of the white decedents for reasons directly related to the effects of old age and physical impairment on earning capacity, while he chose to lower the awards of the black decedents for reasons related to the extent of their families' reliance on their incomes. *Id.*

<sup>11</sup>See *infra* notes 31–35 and accompanying text (describing how forensic economists calculate damages in modern tort cases).

<sup>12</sup>See Wriggins, *supra* note 3, at 61.

<sup>13</sup>RESTATEMENT (SECOND) OF TORTS § 910 (AM. LAW INST. 1979).

<sup>14</sup>*Id.*

<sup>15</sup>See *infra* Part II.

noneconomic damages and future medical costs.<sup>16</sup> *Worklife expectancy tables* are used to determine statistical worklife expectancy (the number of years remaining before the victim would normally leave the work force), which is a pivotal issue in determining the remaining worklife multiplier in damages for future loss of earning capacity.<sup>17</sup> In some cases—especially those in which plaintiffs do not have an established earnings record—courts also use *average wage tables* as the annual income multiplier in future loss of earning capacity damages.<sup>18</sup>

Problematically, life expectancy and worklife expectancy tables often delineate on racial lines, and all three types of tables delineate on gender lines.<sup>19</sup> We call them “nonblended” tables, as they do not blend the statistics of men and women, or of blacks and whites. Traditionally, courts have accepted as evidence life expectancy, worklife expectancy, and average income values particularized to the plaintiff’s gender and, where available, race.<sup>20</sup>

Nonblended tables are seen as technical and objective tools to manifest fundamental tort law concepts: that the defendant “takes the victim as he finds her,” or that the goal of the damage award is to “make the plaintiff whole” and to “put the plaintiff back in the position she was in before the negligent act.” Therefore, is it not part of tort law structure—and even logic—that a black woman should be made whole in accordance with her lower life span, fewer working years, and lower wage, as compared with a white man?

In this Article we argue that this logic is deeply flawed, as not only does tort law’s remedial damage scheme perpetuate existing racial and gender

<sup>16</sup> See *infra* Part II.A.1. The Restatement (Second) addresses the use of life expectancy tables and other evidence (possibly other statistical tables) in calculating damages for “harm to the person” in the comment discussing “[t]he determination of length of life” by stating:

In the case of permanent injuries or injuries causing death, it is necessary, in order to ascertain the damages, to determine the expectancy of the injured person’s life at the time of the tort. For this purpose it is permissible to use mortality tables and other evidence as to the average expectancy of a *large number of persons*.

RESTATEMENT (SECOND) OF TORTS § 924(b) cmt. e (emphasis in block quote added). This language could be interpreted as permitting the use of life expectancy tables based on race and gender, since life expectancy tables that determine the average life expectancy of individuals of a certain race and gender are essentially tables that determine the average life expectancy of “a large number of persons.” See *id.*

<sup>17</sup> See *infra* Part II.A.2.

<sup>18</sup> See *infra* Part II.A.3.

<sup>19</sup> See *infra* Part II.

<sup>20</sup> See, e.g., *Watson v. S. Shore Nursing & Rehab. Ctr., LLC*, 965 N.E.2d 1200, 1209 (Ill. App. Ct. 2012) (using a nonblended government table to measure the life expectancy of an African-American male); *Probst v. Wroten*, 433 So. 2d 734, 744 (La. Ct. App. 1982) (authorizing worklife expectancy tables based on gender over the plaintiff’s objection through the trial court’s discretionary powers); *Johnson v. Misericordia Cmty. Hosp.*, 294 N.W.2d 501, 527 (Wis. Ct. App. 1980) (using yearly government salary tables based on the plaintiff’s race), *aff’d*, 301 N.W.2d 156 (Wis. 1981).

inequalities, but also it creates *ex ante* incentives for potential tortfeasors that encourage future targeting of disadvantaged groups. These incentives are what the PhedEx example attempts to demonstrate. We argue that using blended tables (tables containing statistics that do not delineate on racial or gender lines) would improve not only the fairness of tort law (a claim some feminist scholars and one insistent judge have been making for years to no avail), but also its efficiency. However, it is extremely difficult to establish that targeting the disadvantaged (an incentive the use of nonblended tables provides) is inefficient. Conventional wisdom under the economic analysis of law seems to be well entrenched in the position that targeting is socially desirable because it reduces social costs.<sup>21</sup> In this Article we argue the opposite.

In Part II, we discuss current approaches to determining tort damages. In Part A, we provide the first in-depth exploration of how courts use life expectancy tables, worklife expectancy tables, and wage tables in calculating damages. We then show that despite the historical twentieth century tradition of using these tables—a discriminatory common law practice—some initial winds of change were introduced in the twenty-first century, and now a few courts are willing to apply blended tables. In Part B, we demonstrate that courts' discriminatory approach stems not only from a passive perpetuation of old common law practices, but also from legislatures enacting statutes and supporting pattern jury instructions that express a preference for race- or gender-*based* tables. Although some jurisdictions strive to neutralize their damage awards by relying on race- and gender-*blended* tables, most tables supported by state statute or pattern jury instructions still delineate on race or gender lines. In Part C, we explore the academic response to the issue (or lack thereof, with the exception of a few dedicated and persistent feminist scholars). Here, we also show that generations of lawyers and scholars have been conditioned to prefer the principle of *restitutio ad integrum* to the principle of equality. A review of fifteen torts and remedies casebook notes on the discriminatory effects of race- and gender-based statistical tables reveals that very few casebook authors directly address the potential unfairness, unconstitutionality, and inaccuracy of these tables, or the perverse incentives that may be created by using them in future damages calculations.

In Part III we show that such incentives, which lead to targeting of the disadvantaged, are not a hypothetical problem. We provide empirical evidence demonstrating that the targeting of disadvantaged groups exists on the ground, and that it might exist because of the lower liability risk these groups constitute.

In Part IV we establish that the various theories of tort law (that is, corrective justice, distributive justice, and efficiency) have contributed to a misunderstanding of proper damages calculations. We then demonstrate how these theories can be harnessed instead to mobilize positive change in the current practice. In short, distributive justice theories of tort law provide the

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<sup>21</sup> See *infra* Part III.

easiest avenue for change. This is because those who view tort law from a distributive justice perspective are more amenable to the idea that tort law cannot comprise part of a discriminatory legal system.

However, most scholars and courts in the United States either subscribe to corrective justice theories or view tort law from the “economic analysis of law” lens. Indeed, corrective justice theorists are most likely to resist the proposed changes to tort law calculation. These theorists view tort law as a means of restoring the equality that existed between the tortfeasor and the victim prior to the accident.<sup>22</sup> However, the scope of such restoration is limited to eliminating any inequality resulting from the tortfeasor’s wrongdoing itself. Corrective justice theory does not concern itself with distributive justice or problems of discrimination in society.<sup>23</sup> Accordingly, subscribers to corrective justice believe tort law should aspire to award the victim damages that restore her to the position she would most likely have been in, but for the accident.<sup>24</sup> Embarrassingly, in our view, this means that a black victim would receive much lower damages for the same tort than a white victim would. We nonetheless provide some preliminary theoretical outlets for corrective justice theorists that might help them avoid taking this embarrassing position and instead support the abandonment of race- and gender-based tables.

Lastly, Part IV.C shows that economic analysis of law also supports using nonblended tables because more accurate information—especially when it is free of charge, as statistical tables are—is thought to be more efficient. Economic analysis of law is not deterred by the targeting incentives tort law creates. On the contrary, it embraces them, as it allegedly makes economic sense that accidents create as little economic harm as possible. Moreover, like corrective justice theorists, law and economics scholars object to fixing broad social problems of discrimination via tort law, preferring instead that solutions be pursued via broader legislative schemes such as the tax and transfer system.<sup>25</sup>

As in the case of corrective justice, we explore several possible outlets to save economic analysis from the embarrassment of supporting discriminatory awards. First, the use of nonblended tables might be more inaccurate inherently as compared to blended tables. Second, using blended tables helps fix job market discrimination by allowing courts to implicitly correct for market failures stemming from sexist or racist practices by awarding loss of future income based on hypothetical nondiscriminatory efficient markets and ignoring wage gaps based on gender and race. Third, we investigate the incorporation of notions of equality into the social welfare function in general

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<sup>22</sup> See Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349 (2002).

<sup>23</sup> See *infra* Part IV.B.

<sup>24</sup> Eliezer Rivlin, *Thoughts on Referral to Foreign Law, Global Chain-Novel, and Novelty*, 21 FLA. J. INT’L L. 1, 17 (2009).

<sup>25</sup> Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 677 (1994).



and into private law in particular—a proposal that counteracts famous objections arguing that private law and notions of equality should be treated as separate spheres.

In Part V we reveal that, surprisingly, courts use race- and gender-based tables even when awarding damages for violations of *federal laws*, such as the Americans with Disabilities Act and the National Childhood Vaccine Injury Act.<sup>26</sup> The biggest disappointment is that courts use gender-based tables when awarding damages for violations of Title VII.<sup>27</sup> There, the very use of these tables is jarring, in light of the federal statute's attempt to reduce discrimination based on race and gender.

In Part VI, we explore various solutions and present the natural policy response to the current practice. We propose the adoption of one blended worklife table, one blended life expectancy table, and one blended wage table for use in damage calculations.

Apart from the dedicated work primarily of Professors Martha Chamallas and Jennifer B. Wriggins, academia has largely ignored this problem. Aside from Judge Jack Weinstein, no judge has repeatedly struck down nonblended tables.<sup>28</sup> Perhaps the issue of the potential unconstitutionality of nonblended tables is yet to be presented in a convincing manner, or the inaccuracy of the tables is yet to be fully revealed, or an adequate efficiency argument is yet to be presented, or perhaps efforts made to date in this regard are intentionally ignored. We posit that this problem can no longer be ignored. Courts should immediately stop using nonblended tables.

## II. CURRENT APPROACHES TO DETERMINING TORT DAMAGES

An understanding of how tort law, as applied in the United States, deals with damages awards is critical to comprehending the perverse targeting incentives tort law creates. In the past, courts routinely accepted race- and gender-based tables without raising any concerns,<sup>29</sup> and they routinely

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<sup>26</sup> See *infra* Part V.B–C.

<sup>27</sup> See, e.g., *Baker v. John Morrell & Co.*, 263 F. Supp. 2d 1161, 1178 (N.D. Iowa 2003) (citing to the U.S. Life Tables when referring to Baker's life expectancy), *aff'd*, 382 F.3d 816 (8th Cir. 2004); see also *infra* Part V.A.

<sup>28</sup> See *infra* pp. 687–88, 700–01.

<sup>29</sup> See, e.g., *Zuchowicz v. United States*, No. 2-91-CV-1033(WWE), 1996 WL 776585, at \*2–3 (D. Conn. Nov. 25, 1996) (accepting the average worklife expectancy for a thirty-one-year-old white female as the appropriate base for calculating lost earning capacity), *aff'd*, 140 F.3d 381 (2d Cir. 1998); *Frankel v. United States*, 321 F. Supp. 1331, 1337–38 (E.D. Pa. 1970) (reducing the lost income award on the assumption the female plaintiff would marry, bear children, and leave or interrupt her career), *aff'd sub nom.* *Frankel v. Heym*, 466 F.2d 1226 (3d Cir. 1972); *Morrison v. State*, 516 P.2d 402, 404–05 (Alaska 1973) (endorsing data for white Alaskan females); *Powell v. Parker*, 303 S.E.2d 225, 228 (N.C. Ct. App. 1983) (affirming race-based statistics for lost income calculation); *Gilborges v. Wallace*, 379 A.2d 269, 277 (N.J. Super. Ct. App. Div. 1977) (implicitly endorsing gender-based tables), *aff'd in part, rev'd in part*, 396 A.2d 338 (N.J. 1978);

continue to do so today.<sup>30</sup> In this Part, we discuss current approaches to determining tort damages. Part A reviews approaches explicitly or implicitly approved by courts. Part B shows that many legislatures (shockingly, in our view) have adopted statutes or pattern jury instructions that enable race- and gender-based damage calculations. Part C reviews viewpoints within the academic community: first, focusing on law review articles written by scholars addressing the topic; and second, exploring the approach taken by the authors of tort law and remedies casebooks that address (or fail to address) discrimination in damages awards.

### A. Courts

Many find it hard to believe that in 2017, American courts routinely use race- and gender-based tables. Perhaps the main reason so few lawyers, scholars, and judges are aware of this fact is that these tables' usage is hidden in the testimony provided by forensic economists. Today, as was the case over a hundred years ago, plaintiffs seeking damages for future harm and expense are typically required to present expert testimony that statistically demonstrates the harm they will suffer over their lifetime.<sup>31</sup> Generally, forensic economists are the damage calculation experts called on to "place dollar values on the harms that have occurred."<sup>32</sup> Traditionally, these statistical calculations have infused race and gender bias into damage calculations through the three major statistical tables mentioned earlier: life expectancy, worklife expectancy, and average national wage. Next, we discuss each in turn.

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Johnson v. Misericordia Cmty. Hosp., 294 N.W.2d 501, 527 (Wis. Ct. App. 1980) (affirming race-based statistics for lost income calculation), *aff'd*, 301 N.W.2d 156 (Wis. 1981).

<sup>30</sup> See, e.g., Smith v. United States, No. 08-2375-JWL, 2009 WL 5126623, at \*8 (D. Kan. Dec. 18, 2009) (accepting the average life expectancy for a thirty-year-old black female as the appropriate base for calculating future medical expenses); Rhoades v. Walsh, No. 08-368-P-H, 2009 WL 2600094, at \*11 n.24 (D. Me. Aug. 19, 2009) (recommended findings of fact and conclusions of law) (using the Bureau of Labor Statistics worklife expectancy for a twenty-six-year-old white male currently active in the workforce as the appropriate base for calculating future earnings losses).

<sup>31</sup> See, e.g., Ruzzi v. Butler Petrol. Co., 588 A.2d 1, 7 (Pa. 1991) (holding that presentation of expert testimony was appropriate to assist the jury in calculating the plaintiff's lost earning capacity). For an example of how damage calculations are usually presented in court, see *Moody v. Blanchard Place Apartments*, 793 So. 2d 281, 299–301 (La. Ct. App. 2001).

<sup>32</sup> Thomas R. Ireland, *The Role of a Forensic Economist in a Damage Assessment for Personal Injuries*, in *MEASURING LOSS IN CATASTROPHIC INJURY CASES* 15, 16 (Kevin S. Marshall & Thomas R. Ireland eds., 2006).

### 1. *Life Expectancy Tables*

Life expectancy comprises a major component in calculating a plaintiff's future medical expenses and future pain and suffering damages.<sup>33</sup> To determine future medical expenses, courts typically instruct the jury to determine the total cost of the future medical payments the plaintiff must endure over the rest of his or her life.<sup>34</sup> A similar exercise applies for future pain and suffering damages,<sup>35</sup> except in the type of evidence presented to the jury regarding the pain and suffering the plaintiff will endure after all economic costs have been reimbursed.

Proof of remaining life expectancy usually begins with using a life expectancy table to determine the total life expectancy of an individual who has reached the plaintiff's age.<sup>36</sup> Although tables do not provide conclusive proof of life expectancy, and the jury is encouraged to adjust the figure based on evidence of the specific plaintiff's health and habits, the tables often determine juries' findings.<sup>37</sup> Generally, courts prefer to receive the most reliable table available. Accordingly, experts tend to present evidence based on the most recent version of the federal government's U.S. Life Tables.<sup>38</sup> The U.S. Life Tables provide life expectancy statistics for the population as a whole, for each gender, and for certain racial categories (white, black, Hispanic, non-Hispanic white, and non-Hispanic black), as well as for genders within those racial categories.<sup>39</sup>

Traditionally, experts provided life expectancy statistics specific to the plaintiff's gender and race.<sup>40</sup> Practically, this means that a black boy and a white boy who suffer an identical injury at age one would receive significantly disparate awards for future medical expenses. To provide some idea about the scale of this gap, a simple (even simplistic) back-of-the-envelope calculation can be illuminating. Assume annual medical expenses for each boy is \$2,000. Using the most recent U.S. Life Tables, the black boy would receive a damage

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<sup>33</sup> See Robert J. Thornton & Frank Slesnick, *New Estimates of Life Expectancies for Persons with Medical Risks*, 10 J. FORENSIC ECON. 285, 285 (1997).

<sup>34</sup> Ireland, *supra* note 32, at 31; see also Thornton & Slesnick, *supra* note 33, at 285.

<sup>35</sup> See, e.g., Earl v. Bouchard Transp. Co., 735 F. Supp. 1167, 1177 (E.D.N.Y. 1990) (awarding pain and suffering damages for the plaintiff's remaining life expectancy of fourteen years), *aff'd in part, rev'd and remanded in part*, 917 F.2d 1320 (2d Cir. 1990).

<sup>36</sup> See Thornton & Slesnick, *supra* note 33, at 285, 287–90.

<sup>37</sup> 4 JEROME H. NATES ET AL., DAMAGES IN TORT ACTIONS § 36.02 & n.35 (2004) (citing Sullivan v. Price, 386 So. 2d 241 (Fla. 1980)).

<sup>38</sup> See, e.g., *id.* § 36.02 n.34 (citing McCue v. Low, 385 N.E.2d 1162 (Ind. Ct. App. 1979)); see also T.W. ANDERSON, LIFE EXPECTANCY IN COURT 21–22 (2002) (using U.S. Life Tables as a foundation for life expectancy calculation); Richard B. Singer, *How to Prepare a Life Expectancy Report for an Attorney in a Tort Case*, 37 J. INS. MED. 42, 43 (2005) (using U.S. Life Tables as a foundation for life expectancy calculation).

<sup>39</sup> See, e.g., Elizabeth Arias, *United States Life Tables, 2008*, NAT'L VITAL STAT. REP., Sept. 24, 2012, at 1, 4 tbl.B.

<sup>40</sup> See, e.g., Thornton & Slesnick, *supra* note 33, at 286.

award that was \$11,000 less than the white boy, simply because of his race.<sup>41</sup> Applying the same scenario to white siblings results in the white boy receiving \$9,600 less than his sister, simply because of his gender.<sup>42</sup>

Often, when life expectancy is adjusted to account for specific injuries or health conditions, further race- and gender-based bias is imported into the calculation. Many forensic economists apply “relative mortality ratios”<sup>43</sup> to reflect life expectancy reductions due to disability or health factors such as paraplegia or smoking habits. Often, these relative mortality ratios are particularized to race and gender.<sup>44</sup> This further compounds race- and gender-based disparities in damage award calculations.

Traditionally, courts have accepted the use of race- and gender-based life expectancy statistics unquestioningly in the calculation of future medical expense and pain and suffering damages.<sup>45</sup> Astonishingly, many continue to do so today.<sup>46</sup>

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<sup>41</sup> According to the 2008 U.S. Life Tables, the statistical life expectancy of a one-year-old white male is 75.5 years. Arias, *supra* note 39, at 4 tbl.B. The statistical life expectancy of a one-year-old black male is 70.6 years. *Id.* To calculate the difference above, we multiplied the life expectancy by the assumed \$2,000 annual medical expenses for both individuals. The difference was \$11,000.

<sup>42</sup> According to the 2008 U.S. Life Tables, the statistical life expectancy of a one-year-old white male is 75.5 years. *Id.* The statistical life expectancy of a one-year-old white female is 80.3 years. *Id.* To calculate the difference above, we multiplied the life expectancy by the assumed \$2,000 annual medical expenses for both individuals. The difference was \$9,600.

<sup>43</sup> The relative mortality ratio (RMR) represents the relative chances a person is likely to die in any year, as compared to the general population (for example, an RMR of two means the person is twice as likely to die in any year, an RMR of three means the person is three times as likely to die in any year, and so on). Thornton & Slesnick, *supra* note 33, at 285.

<sup>44</sup> See, e.g., *id.* at 287–90.

<sup>45</sup> See, e.g., *Watson v. S. Shore Nursing & Rehab. Ctr., LLC*, 965 N.E.2d 1200, 1209 (Ill. App. Ct. 2012) (using a nonblended government table to measure the life expectancy of an African-American male).

<sup>46</sup> See, e.g., *Adkins v. Asbestos Corp.*, 18 F.3d 1349, 1350–51 (6th Cir. 1994) (upholding the trial court’s use of a standard life expectancy table particularized to the plaintiff’s race and gender in calculating the life expectancy for future pain and suffering damages); *Smith v. United States*, No. 08-2375-JWL, 2009 WL 5126623, at \*8 (D. Kansas Dec. 18, 2009) (accepting the average life expectancy for a thirty-year-old black female as the appropriate base for calculating future medical expenses); *Diebold v. Gulf States Optical Lab., Inc.*, No. CIV.A. 96-579, 1997 WL 537689, at \*2 (E.D. La. Aug. 25, 1997) (awarding the plaintiff, who suffered a back injury during a car accident, \$3,000 for future medical expenses—calculated on the assumption of \$40/month chiropractic treatment over his remaining life, which for a white male of his age was 9.6 years); *Smith v. U.S. Dep’t of Veterans Affairs*, 865 F. Supp. 433, 441 (N.D. Ohio 1994) (using the life expectancy for an average man of the plaintiff’s age and race, discounted to account for his schizophrenia, to calculate the plaintiff’s future medical expenses).

## 2. Worklife Expectancy Tables

In the United States, worklife expectancy comprises a major factor in the calculation of a plaintiff's damages for the loss of future earning capacity.<sup>47</sup> To determine loss of future earning capacity, courts typically instruct the jury to determine the plaintiff's future earnings for the duration of his or her worklife expectancy.<sup>48</sup> Whereas courts in other countries use their country's mandatory retirement age as a relevant benchmark,<sup>49</sup> since (in general) no mandatory retirement age exists in the United States, courts draw on the results of labor market analysis to predict future patterns of earnings and employment for the individual plaintiff.<sup>50</sup> Since women and blacks fare worse in the labor market,<sup>51</sup> they fare worse in torts as well.

Just like life expectancy tables, worklife expectancy tables provide the starting point for determinations of loss of future earning capacity and may be adjusted according to the plaintiff's circumstances.<sup>52</sup> While various tables are available,<sup>53</sup> many experts rely on worklife expectancy tables set forth by the

<sup>47</sup> See Ireland, *supra* note 32, at 26–30.

<sup>48</sup> See *id.*

<sup>49</sup> For a discussion of Israel's worklife expectancy, see Rivlin, *supra* note 24, at 22–26. For a similar discussion of Australia's, see PAUL THOMSON ET AL., EXPERT ACTUARIAL EVIDENCE 6–9, [https://www.cumsar.com.au/docs/expert\\_actuarial\\_evidence.pdf](https://www.cumsar.com.au/docs/expert_actuarial_evidence.pdf) [<https://perma.cc/RD7Z-U3B8>]. For a discussion of England's, see *What Retirement Age Should Be Agreed For Loss of Earnings Claims?*, KENNEDYS (Mar. 10, 2011), <http://www.kennedyslaw.com/article/defaultretirementage/> [<https://perma.cc/X6BG-GLKT>].

<sup>50</sup> See Shirley J. Smith, *Revised Worklife Tables Reflect 1979–80 Experience*, in BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN 2254, WORKLIFE ESTIMATES: EFFECTS OF RACE AND EDUCATION 1, 1–2 (Feb. 1986), <https://www.bls.gov/opub/reports/worklife-estimates/archive/worklife-estimates-1986.pdf> [<https://perma.cc/U33N-LPFQ>].

<sup>51</sup> *Id.* at 4–5.

<sup>52</sup> Just as in life expectancy calculations, either side can present evidence that adjusts the statistical worklife expectancy up or down depending on characteristics of the particular individual in question. See, e.g., *Earl v. Bouchard Transp. Co.*, 735 F. Supp. 1167, 1176 (E.D.N.Y. 1990) (reducing the plaintiff's worklife expectancy from the statistical worklife expectancy because he testified as to his preaccident intention to retire several years earlier than his statistical worklife expectancy), *aff'd in part, rev'd and remanded in part*, 917 F.2d 1320 (2d Cir. 1990).

<sup>53</sup> Alternative calculations include other worklife expectancy tables, see Thomas R. Ireland, *Why Markov Process Worklife Expectancy Tables Are Usually Superior to the LPE Method*, 16 J. LEGAL ECON. 95, 100–01 (2010), and worklife probability tables (LPE method), see VOCATIONAL ECON., INC., CALCULATION OF WORKLIFE EXPECTANCY USING THE LIFE, PARTICIPATION, EMPLOYMENT METHOD 1 (2006), <http://www.vocecon.com/resources/ftp/data/lpecalc.pdf> [<https://perma.cc/T33X-ULQG>] (computing “a person's probability of working in any particular year by combining his or her probabilities of life (L), participation (P), and employment (E) into a joint probability”).

Bureau of Labor Statistics (BLS)<sup>54</sup> or on the Skoog, Ciecka, and Krueger tables.<sup>55</sup> The BLS tables provide worklife expectancies for gender, for certain racial categories (white and “[b]lack and other”), and for genders within those racial categories.<sup>56</sup> The Skoog, Ciecka, and Krueger tables provide worklife expectancies by gender at various levels of educational attainment.<sup>57</sup> Experts sometimes employ worklife expectancy tables particularized to specific industries<sup>58</sup> or tables particularized to a specific disability.<sup>59</sup>

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<sup>54</sup> See 2 JEROME H. NATES ET AL., DAMAGES IN TORT ACTIONS § 10.03(3)(c)(iv) (2016); see also 29 AM. JUR. PROOF OF FACTS 3D § 53 (1995) (using Department of Labor statistics as the basis for average worklife expectancy in model expert testimony regarding loss of earning capacity).

<sup>55</sup> Frank L. Slesnick et al., *A 2012 Survey of Forensic Economics: Their Methods, Estimates, and Perspectives*, 24 J. FORENSIC ECON. 67, 86–87 (2013).

<sup>56</sup> See, e.g., BUREAU OF LABOR STATISTICS, *supra* note 50, at 9 tbl.A-1, 13 tbl.A-2, 15 tbl.A-4, 19 tbl.A-5.

<sup>57</sup> See, e.g., Edward M. Foster & Gary R. Skoog, *The Markov Assumption for Worklife Expectancy*, 17 J. FORENSIC ECON. 167, 181 (2004); Kurt V. Krueger et al., *Worklife in a Markov Model with Full-Time and Part-Time Activity*, 19 J. FORENSIC ECON. 61, 64–65, 74–77, 79–82 (2006); Gary R. Skoog et al., *The Markov Process Model of Labor Force Activity: Extended Tables of Central Tendency, Shape, Percentile Points, and Bootstrap Standard Errors*, 22 J. FORENSIC ECON. 165, 183–221 (2011) [hereinafter Skoog et al., *Markov Process Model*]. See generally Gary R. Skoog & James E. Ciecka, *A Markov (Increment-Decrement) Model of Labor Force Activity: Extended Tables of Central Tendency, Variation, and Probability Intervals*, 11 J. LEGAL ECON. 23 (2001) (using extensive tables for every age up to seventy-five, with five different levels of education).

<sup>58</sup> For example, Skoog and Ciecka have produced worklife tables for major-league baseball players and railroad workers. Gary R. Skoog & James E. Ciecka, *An Autoregressive Model of Order Two for Worklife Expectancies and Other Labor Force Characteristics with an Application to Major League Baseball Hitters*, 18 J. LEGAL ECON. 47, 48, 55–63 (2012); Gary R. Skoog & James E. Ciecka, *Worklife Expectancy via Competing Risks/Multiple Decrement Theory with an Application to Railroad Workers*, 19 J. FORENSIC ECON. 243, 248–57 (2006). Neither of these tables distinguishes its findings on race or gender lines. However, the admissibility of the railroad workers table is questionable; the Eastern District of Wisconsin criticized it as unreliable in an unpublished 2012 decision. *Larson v. Wis. Cent. Ltd.*, No. 10-C-446, 2012 WL 359665, at \*5 (E.D. Wis. Feb. 2, 2012) (order on motions in limine regarding opinions of expert economist and loss of pension benefits) (citing *Marcel v. Placid Oil Co.*, 11 F.3d 563, 567 (5th Cir. 1993)).

<sup>59</sup> See, e.g., A.M. GAMBOA JR. & DAVID S. GIBSON, GAMBOA GIBSON WORKLIFE TABLES: BY GENDER, LEVEL OF EDUCATIONAL ATTAINMENT, AND TYPE OF DISABILITY (2010). Some disagreement exists among legal economists as to the reliability of these tables. Legal economist Thomas Ireland claims that the Gamboa-Gibson tables are unreliable and without merit, arguing that (1) the data underlying the tables comes from government sources that were not intended to collect information on the prevalence of permanent disabilities, (2) the LPE method is not effective when a disability variable is introduced, and (3) general disability status is not reflective of worklife expectancy particularized to a specific injury. Thomas R. Ireland, *Why the Gamboa-Gibson Disability Work-Life Expectancy Tables Are Without Merit*, 15 J. LEGAL ECON. 105, 105–06 (2009).

In sum, courts routinely accept worklife expectancy statistics specific to the particular race and gender of the plaintiff.<sup>60</sup> As in the past, juries can make adjustments to base-salary estimations that provide an additional opportunity for race- and gender-based damage award gaps to arise.<sup>61</sup>

To demonstrate the implications, a further back-of-the-envelope calculation is due. According to the most recent BLS statistics, a white boy and a black girl with the same projected educational levels who were injured identically at age sixteen would receive monumentally different damage awards.<sup>62</sup> Assuming each earned an averaged annual income of \$25,000, the white male would receive \$302,500 more in future loss of earning capacity than the black woman.<sup>63</sup>

### 3. Wage Tables

The third important factor that gives rise to race and gender discrimination in tort damages is the average national wage. Generally, courts integrate the plaintiff's established earnings record with her worklife expectancy to predict future loss of earning capacity.<sup>64</sup> However, when the earnings record is not reflective of the individual's projected earnings—because she is either a child and thus without an earnings record or a young adult whose current job does

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<sup>60</sup>But see MICHAEL L. BROOKSHIRE & STAN V. SMITH, ECONOMIC/HEDONIC DAMAGES 127 (1990), for an argument that experts should separately analyze a black male who demonstrates a record of continuous workforce participation and employment because the expert would be disserving him by adjusting his earning capacity to that provided by the table. However, Brookshire and Smith also argue that worklife adjustments should be categorized by race and sex, because although probabilities of worklife expectancy are lower for the average black person as opposed to the average white person, the differential is not as great for black females. *Id.*

<sup>61</sup>After calculating the base annual income and multiplying it over the individual's work life expectancy, legal economists usually take additional factors into account, including the salary growth rate, personal consumption rate, nonmarket loss, taxes, and discount rate for inflation. T.L. "Smith" Boykin III, *The Economist's New Clothes: Exposing Unreliable Testimony*, DRI FOR DEF., Sept. 2011, at 36, 38–41, 86. Both the salary growth rate and the personal consumption rate can be particularized to race and gender. *See id.* at 40–41; *see also* ELIZABETH M. KING & JAMES P. SMITH, COMPUTING ECONOMIC LOSS IN CASES OF WRONGFUL DEATH 36–40 (1988).

<sup>62</sup>*See* BUREAU OF LABOR STATISTICS, *supra* note 50, at 6 tbl.5.

<sup>63</sup>In practice, race and gender will inform forensic economists' projections of the plaintiff's educational attainment, resulting in even larger gaps. *See id.* at 5 tbl.4. Furthermore, the size of the gap increases as expected annual income rises. Annual incomes over \$25,000 result in significant increases in the total gap. This increased income-exacerbated gap is likely to occur where, for example, the plaintiffs had already applied for college, even if they went to the same college, sat in all classes together, and received the same grades on all exams.

<sup>64</sup>*See* Ireland, *supra* note 32, at 26.

not reflect her ultimate career—courts rely on the BLS’ annual wage tables.<sup>65</sup> For example, the Mississippi Supreme Court held that in wrongful death cases for children, who cannot establish earnings records, the Department of Labor’s average national wage comprises the appropriate starting point for calculating future lost earning capacity, which can be adjusted up or down upon presentation of “credible evidence.”<sup>66</sup> At their most general, these tables provide average national wage statistics for males and females.<sup>67</sup> However, they also provide data by educational level<sup>68</sup> and occupation.<sup>69</sup> Because choosing a wage-base involves a consideration of expected future earnings, broad discretion is afforded to the forensic economist, whose decision must, of course, conform to “a common sense standard of reasonableness.”<sup>70</sup>

Most courts prefer that projected average earnings be adjusted according to predictions particularized to the plaintiffs regarding their likely educational attainment, in light of their personal characteristics and family background.<sup>71</sup>

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<sup>65</sup> See, e.g., *Greyhound Lines, Inc. v. Sutton*, 765 So. 2d 1269, 1277 (Miss. 2000) (en banc).

<sup>66</sup> *Id.* (“[T]here is a rebuttable presumption that the deceased child’s income would have been the equivalent of the national average as set forth by the United States Department of Labor. . . . Either party may rebut the presumption by presenting relevant credible evidence to the finder of fact. Such evidence might include, but is certainly not limited to, testimony regarding the child’s age, life expectancy, precocity, mental and physical health, intellectual development, and relevant family circumstances. This evidence will allow the litigants to tailor their proof to the aptitudes and talents of the individual’s life being measured.”).

<sup>67</sup> See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES: 2. EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION 16 YEARS AND OVER BY SEX, 1975 TO DATE (2015), <https://www.bls.gov/cps/a2015/cpsaat02.pdf> [<https://perma.cc/TR92-Y7SE>].

<sup>68</sup> See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES: 7. EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION 25 YEARS AND OVER BY EDUCATIONAL ATTAINMENT, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY (2015), <https://www.bls.gov/cps/aa2015/cpsaat04.pdf> [<https://perma.cc/BC4T-LPGB>].

<sup>69</sup> See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES: 39. MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS BY DETAILED OCCUPATION AND SEX (2015), <https://www.bls.gov/cps/aa2015/cpsaat39.pdf> [<https://perma.cc/E4FP-JPVX>].

<sup>70</sup> George A. Barrett & Michael L. Brookshire, *Assessing Economic Damages in Personal Injury and Wrongful Death Litigation: The State of West Virginia*, 16 J. FORENSIC ECON. 315, 317 (2003).

<sup>71</sup> Courts usually consider the individual plaintiff according to his or her race and gender. See, e.g., *Wheeler Tarpeh–Doe v. United States*, 771 F. Supp. 427, 455 (D.D.C. 1991) (discussing expert’s use of the average wage for black male college graduates in calculating lost income for an eight-year-old boy suffering from blindness and neurological damage resulting from medical negligence), *rev’d sub nom.* *Tarpeh–Doe v. United States*, 28 F.3d 120 (D.C. Cir. 1994) (reversing on grounds that the defendant was not liable in tort); *Vincent ex rel. Vincent v. Johnson*, 833 S.W.2d 859, 865 (Mo. 1992) (en banc) (affirming the jury’s use of female average wage in lost earning capacity calculation and



Courts generally favor the opinions of such vocational experts over those of medical doctors.<sup>72</sup> Such projections reinforce the already existent discriminatory effects of plaintiffs' race or gender on their access to education and opportunities and essentially perpetuate that discrimination into the future.<sup>73</sup> Take, for example, a recent Mississippi case, wherein an expert testified that the average income for a high school graduate was \$28,631 and for a junior college graduate was \$36,021.<sup>74</sup> Assume a court is calculating future lost earning capacity for our white and black males from the previous example. Even assuming that both plaintiffs have the same worklife expectancy, if (based on familial patterns) the court uses the average national earnings for a junior college graduate for the white boy and the earnings for a high school graduate for the black boy, the white plaintiff will receive \$294,861 more in damages than the black plaintiff.

#### 4. *Weak Winds of Change*

It is puzzling how such a discriminatory practice has survived for so many years. In one case, the court noted that the expert involved in economic damage calculations "testified that no one had ever asked him to provide race- and sex-neutral calculations in wrongful death cases," even though he had performed thousands of income-loss analyses throughout his career.<sup>75</sup> That said, despite a long history of race- and gender-based damage calculations in

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noting: "This Court will not consider it error for a jury to refuse to minimize an award of lost minimum wages for an infant female on the assumption that the average wage for women in the future will still be only two-thirds of the average wage for men."); *see also* *Musick v. Dorel Juvenile Grp., Inc.*, 818 F. Supp. 2d 960, 964 (W.D. Va. 2011); *Athridge v. Iglesias*, 950 F. Supp. 1187, 1193 (D.D.C. 1996), *aff'd per curiam*, Nos. 96-7261, 89CV01222, 1997 WL 404854 (D.C. Cir. 1997).

<sup>72</sup> *E.g.*, *Barrett & Brookshire*, *supra* note 70, at 319.

<sup>73</sup> For a discussion on this issue in a foreign context, see the Israeli case *Migdal Insurance Co. v. Rim Abu Hanna*, which comments that "[r]estoring the status quo under the heading of loss of earning power means bringing the injured person to the place destined for him in the future, not returning him to the position of his forefathers (and foremothers) were in the past." CA 100064/02 *Migdal Ins. Co. v. Abu-Hana* (3) TakSC 3932 (2005) (Isr.), [http://elyon1.court.gov.il/files\\_eng/02/640/100/p04/02100640.p04.pdf](http://elyon1.court.gov.il/files_eng/02/640/100/p04/02100640.p04.pdf) [<https://perma.cc/44XP-T8FL>]. This case is discussed further in Rivlin, *supra* note 24, at 22.

<sup>74</sup> *Sears, Roebuck & Co. v. Learmonth*, 95 So. 3d 633, 638 (Miss. 2012) (en banc).

<sup>75</sup> *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1315 (D. Utah 2004), *rev'd and remanded sub nom.* *United States v. Serawop*, 410 F.3d 656 (10th Cir. 2005). This expert's experience was echoed in conversations on the subject that we have had with practicing lawyers and is also reflected in our own experience. The lawyers interviewed—who represent plaintiffs in tort suits—were completely unaware of how experts sourced their statistics and had never thought about questions of race and gender discrimination in this context.

both personal injury and wrongful death actions,<sup>76</sup> finally some courts in the United States and other countries have begun to shift toward a race- or gender-neutral framework, although primarily with regard to future lost earning capacity awards and life expectancy.<sup>77</sup> For example, in *Wheeler Tarpeh-Doe*, the United States District Court for the District of Columbia required that the loss of future earnings of a *mixed-race* plaintiff be based on race- and gender-neutral calculations.<sup>78</sup> The court found that average black male earnings were not representative of the plaintiff's earning capacity and, more broadly, that "it would be inappropriate to incorporate current discrimination resulting in wage differences between the sexes or races or the potential for any future such discrimination into a calculation for damages resulting from lost wages."<sup>79</sup>

For the sake of context, recall another famous mixed-race case—*Plessy v. Ferguson*, decided in 1896—wherein Plessy, despite being seven-eighths white, was still kicked off of a train.<sup>80</sup> The nineteenth century ended; the twentieth century ended. Is the only progress made throughout the centuries that mixed-race children are now treated like whites? The good news is that a few courts have recently ignored gender and race even for nonmixed race, minority plaintiffs.<sup>81</sup> The bad news is that only a few have done so.

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<sup>76</sup>Courts have been long disposed toward using nonblended life expectancy, worklife, and salary tables in wrongful death actions as well. *See, e.g.,* *Watson v. S. Shore Nursing & Rehab. Ctr., LLC*, 965 N.E.2d 1200, 1209 (Ill. App. Ct. 2012) (using a nonblended government table to measure the life expectancy of a black male); *Probst v. Wroten*, 433 So. 2d 734, 744 (La. Ct. App. 1982) (authorizing worklife expectancy tables based on gender over the plaintiff's objection through the trial court's discretionary powers); *Johnson v. Misericordia Cmty. Hosp.*, 294 N.W.2d 501, 527 (Wis. Ct. App. 1980) (using yearly government salary tables based on the plaintiff's race), *aff'd*, 301 N.W.2d 156 (Wis. 1981).

<sup>77</sup>In Canada, courts have moved toward a gender-neutral conception of damages awards. *See, e.g.,* *Shaw ex rel. Shaw v. Arnold*, 1998 CarswellBC 2731, para. 69 (Can. B.C. S.C.) (WL) (calculating future loss of earnings for a female plaintiff by averaging the damages for a man and a woman of the plaintiff's age); *Walker v. Ritchie*, 2003 CarswellOnt 10, para. 132 (Can. Ont. Super. Ct. J.) (WL) (holding that the use of gender-neutral average income statistics was appropriate in calculating the plaintiff's future loss of income), *aff'd*, [2006] 197 O.A.C. 81 (Can. Ont. C.A.), *rev'd*, 2006 SCC 45, [2006] 2 S.C.R. 428 (Can.). In the Israeli case *Migdal Insurance Co. (3) TakSC 3932*, the court commented that "[r]estoring the status quo under the heading of loss of earning power means bringing the injured person to the place destined for him in the future, not returning him to the position of his forefathers (and foremothers) were in the past," as discussed further in Rivlin, *supra* note 24, at 22. For examples of such practices in the United States, see *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, 116 F. Supp. 3d 126, 139 (E.D.N.Y. 2015), and *McMillan v. City of New York*, 253 F.R.D. 247, 248–49 (E.D.N.Y. 2008).

<sup>78</sup>*Wheeler Tarpeh-Doe v. United States*, 771 F. Supp. 427, 455 (D.D.C. 1991), *rev'd sub nom. Tarpeh-Doe v. United States*, 28 F.3d 120 (D.C. Cir. 1994) (reversing on grounds that the defendant was not liable in tort).

<sup>79</sup>*Id.*

<sup>80</sup>*Plessy v. Ferguson*, 163 U.S. 537, 541–42 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>81</sup>*See infra* notes 82–88 and accompanying text.

For example, in *United States v. Bedonie*, the District Court of Utah declined to apply race- and gender-based data in assessing damages for the loss of future income of two Native American victims.<sup>82</sup> The court concluded that blended, race- and gender-neutral data should be used, unless the defendant could prove that the reduction based on race or gender was warranted.<sup>83</sup> On appeal, the Tenth Circuit affirmed that reduced damage awards based on nonblended statistics were inappropriate under the circumstances of the case.<sup>84</sup> The district court “observ[ed] that ‘[a]s a matter of fairness, the court should exercise its discretion in favor of victims of violent crime and against the possible perpetuation of inappropriate stereotypes,’” and the Tenth Circuit ruled that it was thus within the district court’s discretion to reject a race-based approach.<sup>85</sup>

While these courts declined to apply race and gender tables because they were “inappropriate” or “unwarranted,” others have declined to use race- or gender-based statistics on the rationale that racial and gendered disparities reflected in the tables should have little effect in the long term. For example, in *Reilly v. United States*, the court rejected the expert’s suggested reduction of a female plaintiff’s loss of earning capacity by 40%, which was based on the BLS’ determination that a woman of her age would have fewer remaining years in the workforce than a man of her age.<sup>86</sup> The court commented thus: “[a]s a factual matter, I seriously doubt the probative value of such a statistic with respect to twenty-first century women’s employment patterns, particularly in light of current, ongoing changes in women’s labor force participation rates.”<sup>87</sup> Similarly, in *Drayton v. Jiffee Chemical Corp.*, the court declined to reduce a black, female plaintiff’s future earnings on racial or gendered calculations because the court “recognize[d] the likelihood that these disadvantages will have considerably less impact in the future on the ability of a black female . . . to obtain gainful employment comparable to that available to white males.”<sup>88</sup>

Interestingly, these courts made no constitutional arguments about using race and gender, but only argued that using these tables was inappropriate as a

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<sup>82</sup>*United States v. Bedonie*, 317 F. Supp. 2d 1285, 1319 (D. Utah 2004), *rev’d and remanded sub nom. United States v. Serawop*, 410 F.3d 656 (10th Cir. 2005). These are two consolidated cases. *Id.* at 1288. One concerns a Native American teenage boy who died in a DUI car accident, *id.* at 1288–89, and the other concerns a Native American baby girl who was killed by her father, *id.* 1291–92. The court needed to determine damages under the Mandatory Victims Restitution Act. *Id.* at 1298–99, 1302.

<sup>83</sup>*Id.* at 1319.

<sup>84</sup>*United States v. Serawop*, 505 F.3d 1112, 1126 (10th Cir. 2007).

<sup>85</sup>*Id.* (second alteration in original) (quoting *Bedonie*, 317 F. Supp. 2d at 1319).

<sup>86</sup>*Reilly v. United States*, 665 F. Supp. 976, 997 (D.R.I. 1987), *aff’d in part and remanded*, 863 F.2d 149 (1st Cir. 1988).

<sup>87</sup>*Id.*

<sup>88</sup>*Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352, 368 (6th Cir. 1978).

matter of actuarial science.<sup>89</sup> Neither did these courts attempt to reveal the perverse targeting incentives such rules provide to potential tortfeasors.<sup>90</sup>

## B. Legislatures

Tort law is state law; therefore, undesirable common law practices can be reformed by state legislatures, if seen fit. Indeed, over the past few decades, all states have passed laws overriding the common law of torts—caps on damages being the classic example.<sup>91</sup> Thus, one might have expected states to enact statutes mandating blended or neutral life expectancy tables to mitigate similar concerns. In fact, several states have elected to adopt statutes or pattern jury instructions that express preference for specific life expectancy or worklife expectancy tables in damage awards.<sup>92</sup> Alas, most of the tables receiving such support delineate on race or gender lines.<sup>93</sup>

Specifically, three states have codified their own life expectancy tables.<sup>94</sup> Of these, North Carolina has codified blended tables based only on age and does not delineate between races or genders.<sup>95</sup> The other two—South Carolina and Virginia—have codified race-neutral tables, but distinguish between genders.<sup>96</sup> In contrast, three states—Colorado, Georgia, and Rhode Island—have passed statutes that guarantee admissibility of certain life expectancy and worklife expectancy tables for proof of life and worklife expectancy,<sup>97</sup> yet these tables are separated by race and gender.<sup>98</sup> Many more states have pattern

<sup>89</sup> See generally *Drayton*, 591 F.2d 352; *Reilly*, 665 F. Supp. 976.

<sup>90</sup> See *Drayton*, 591 F.2d at 368 (declining to assign specific figures for future earning computations as opposed to judicial discretion of all factors); *Reilly*, 665 F. Supp. at 997 (doubting the probative value of such statistics).

<sup>91</sup> See generally Ronen Avraham, *Database of State Tort Law Reforms (5th)* (Univ. of Tex. Sch. of Law, Law & Econ. Research Paper No. e555, 2014), <https://ssrn.com/abstract=902711> [<https://perma.cc/G2PG-TX9X>] (state by state dataset of the most prevalent tort reforms in the United States between 1980 and 2012).

<sup>92</sup> See *infra* notes 94–102.

<sup>93</sup> See, e.g., *Eackelbary v. Nipper*, No. 9476, slip op. at 11 (Ohio Ct. App. May 21, 1980) (gender-based instruction listing “sex” as a factor (quoting *Immel v. Richards*, 93 N.E.2d 474, 476 (Ohio 1950))); see also *Franchell v. Sims*, 424 N.Y.S.2d 959, 962 (N.Y. App. Div. 1980) (same); *King v. Louisville & Nashville R.R. Co.*, No. 87-199-II, 1987 WL 26384, at \*5 (Tenn. Ct. App. Dec. 9, 1987) (citing *Crowe v. Provost*, 374 S.W.2d 645 (Tenn. Ct. App. 1963)) (same).

<sup>94</sup> N.C. GEN. STAT. § 8-46 (2015); S.C. CODE ANN. § 19-1-150 (2014); VA. CODE ANN. § 8.01-419 (2015).

<sup>95</sup> N.C. GEN. STAT. § 8-46.

<sup>96</sup> S.C. CODE ANN. § 19-1-150; VA. CODE ANN. § 8.01-419.

<sup>97</sup> COLO. REV. STAT. § 13-25-102 (2016); GA. CODE ANN. § 24-14-44 (2013); 9 R.I. GEN. LAWS § 9-19-38 (2012).

<sup>98</sup> COLO. REV. STAT. § 13-25-102; GA. CODE ANN. § 24-14-44; 9 R.I. GEN. LAWS § 9-19-38. Amazingly, before 2014 Colorado mandated a table which was only based on age, just like North Carolina. See COLO. REV. STAT. § 13-25-103 (repealed 2014).

jury instructions that express a preference for certain life expectancy tables.<sup>99</sup> Of the jury instructions we examined, eleven had relevant provisions.<sup>100</sup> Ten provisions delineate along gender lines.<sup>101</sup> Six are race-neutral, leaving five that distinguish along racial lines.<sup>102</sup>

Interestingly, nearly all other tort reform statutes, such as caps on noneconomic damages, were challenged in state court as being unfair or contradictory to public policy, or for violating various constitutional provisions—including equal protection and due process.<sup>103</sup> And yet, our efforts revealed no attempt to strike down any of these statutes on the basis that they themselves were unfair, in contradiction of public policy, or unconstitutional.

### C. Scholars

#### 1. Articles and Law Reviews

Since the 1990s, a growing body of literature has drawn attention to the discriminatory effects of using race- and gender-based tables in damage award

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<sup>99</sup> See *infra* note 101.

<sup>100</sup> See *infra* note 101.

<sup>101</sup> These states include Alaska, California, Kansas, Kentucky, Michigan, Minnesota, New York, North Dakota, Tennessee, and Washington. ALASKA CIVIL PATTERN JURY INSTRUCTIONS § 20.13 (ALASKA CIVIL PATTERN JURY INSTRUCTIONS COMM. 2016); CAL. CIVIL JURY INSTRUCTIONS § 3932 (JUDICIAL COUNCIL OF CAL. 2016); PATTERN INSTRUCTIONS KAN. CIVIL 4th § 171.45 (KAN. JUDICIAL COUNCIL 2008); MICH. MODEL CIVIL JURY INSTRUCTIONS §§ 53.01–.02 (MICH. COMM. ON MODEL CIVIL JURY INSTRUCTIONS 2017); 4A MINN. PRACTICE: JURY INSTRUCTION GUIDES—CIVIL § 91.85 (MINN. DISTRICT JUDGES ASS'N, 6th ed. 2014); 1B N.Y. PATTERN JURY INSTRUCTIONS—CIVIL app. A (COMM. ON PATTERN JURY INSTRUCTIONS ASS'N OF JUSTICES OF THE SUPREME COURT OF THE STATE OF N.Y., 3d ed. 2010); 2 N.D. PATTERN JURY INSTRUCTIONS—CIVIL §§ 70.47, .50 (STATE BAR ASS'N OF N.D. & N.D. PATTERN JURY INSTRUCTION COMM'N 2000); 8 TENN. PRACTICE: TENN. PATTERN JURY INSTRUCTIONS—CIVIL app. C (COMM. ON PATTERN JURY INSTRUCTIONS (CIVIL) OF THE TENN. JUDICIAL CONFERENCE 2012); 6 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS—CIVIL § 34.04 (WASH. SUPREME COURT COMM. ON JURY INSTRUCTIONS, 6th ed. 2012); RONALD W. EADES, KY. WRONGFUL DEATH ACTIONS § 13:3 (2012). Of the states that we examined, only New Jersey's court rules identified tables that were gender-neutral. N.J. Ct. R. 1:13-5, app. I.

<sup>102</sup> Of the states above, Alaska, California, Minnesota, New Jersey, New York, and Washington expressed a preference for race-neutral tables or statistics. ALASKA CIVIL PATTERN JURY INSTRUCTIONS § 20.13; CAL. CIVIL JURY INSTRUCTIONS § 3932; 4A MINN. PRACTICE: JURY INSTRUCTION GUIDES—CIVIL § 91.85; N.J. Ct. R. 1:13-5, app. I; 1B N.Y. PATTERN JURY INSTRUCTIONS—CIVIL app. A; 6 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS—CIVIL § 34.04. The remainder of the states supported race-based tables. PATTERN INSTRUCTIONS KAN. CIVIL 4th § 171.45; MICH. MODEL CIVIL JURY INSTRUCTIONS §§ 53.01–.02; 2 N.D. PATTERN JURY INST.—CIVIL §§ 70.47, .50; 8 TENN. PRACTICE: TENN. PATTERN JURY INSTRUCTIONS—CIVIL app. C; EADES, *supra* note 101, § 13:3.

<sup>103</sup> See generally Avraham, *supra* note 91.

calculations.<sup>104</sup> Scholars recognize that a trial judge's decision to admit nonblended tables in damage award calculations can be couched as state action and is therefore unconstitutional.<sup>105</sup> They generally argue that race- and gender-based tables perpetuate existing social inequalities by locking plaintiffs into the life expectancies or worklife expectancies of their predecessors, which in practice means locking them into historical racial and gendered inequities. Yet, as demonstrated earlier, courts largely ignore these criticisms.<sup>106</sup>

As mentioned earlier, a few dedicated scholars—primarily Martha Chamallas and Jennifer Wriggins—are still studying the full legal and societal implications of race- and gender-based future damage awards. These scholars advocate for one of two major solutions to the problem: using either blended tables<sup>107</sup> or male tables<sup>108</sup> to calculate loss of earning capacity. Although these

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<sup>104</sup> See, e.g., *infra* notes 106–08 and accompanying text; see also Elaine Gibson, *The Gendered Wage Dilemma in Personal Injury Damages* (attempting to “expose hidden biases” in calculating damages and examining how “these biases contribute to the impoverishment of disabled women”), in *TORT THEORY* 185, 185 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993); Alec Shelby Bayer, Comment, *Looking Beyond the Easy Fix and Delving into the Roots of the Real Medical Malpractice Crisis*, 5 *HOUS. J. HEALTH L. & POL’Y* 111, 128–29 (2005) (finding that women—housewives in particular—stand to lose more when noneconomic damages are curtailed because the value of contributions to the family, such as cooking, general domestic upkeep, etc., will remain uncompensated and she will only be able to recover for medical bills); Amanda Edwards, Note, *Medical Malpractice Non-Economic Damages Caps*, 43 *HARV. J. ON LEGIS.* 213, 221 (2006) (“[B]ecause of unique harms that affect women and minorities, jury tendencies, and reliance upon flawed economic tables, non-economic damages caps silently plague these groups.”).

<sup>105</sup> See, e.g. Jennifer B. Wriggins, *Constitution Day Lecture: Constitutional Law and Tort Law: Injury, Race, Gender, and Equal Protection*, 63 *ME. L. REV.* 263, 272 & n.48 (2010) (discussing the equal protection implications of nonblended tables and the plausibility of finding state action).

<sup>106</sup> See, e.g., Anita Bernstein, *What’s Wrong with Stereotyping?*, 55 *ARIZ. L. REV.* 655, 711 (2013) (citing *McMillan v. City of New York*, 253 F.R.D. 247, 251 (E.D.N.Y. 2008), for the proposition that use of race-neutral data in courts has been given legal effect); see also Elizabeth Adjin-Tettey, *Replicating and Perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies*, 49 *MCGILL L.J.* 309, 311 (2004) (arguing that when judges sanction the awarding of depressed damages to tort claimants from historically disadvantaged groups, they reinforce the marginalization of minorities in society); Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 *LOY. L.A. L. REV.* 1435, 1439 (2005) (“[H]istorical patterns of discrimination in the labor market are replicated in tort awards, even though the labor force participation of women and minorities may be changing rapidly.”); Deirdre M. Smith, *The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation*, 31 *CARDOZO L. REV.* 749, 821–22 (2010) (citing *McMillan*, 253 F.R.D. at 250, 255–56, to support the argument that use of race-based statistics should be discontinued); cf. Michael I. Meyerson & William Meyerson, *Significant Statistics: The Unwitting Policy Making of Mathematically Ignorant Judges*, 37 *PEPP. L. REV.* 771, 797 (2010) (“[T]he introduction of racially-based DNA numbers into a courtroom proceeding is fundamentally misleading.”).

<sup>107</sup> MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURIES* 158–70 (2010); Chamallas, *supra* note 106, at 1445, 1450; see also Meyerson & Meyerson, *supra*

scholars refer to race- and gender-based statistics generally, they do not discuss in much detail the impact these statistics have on future medical expenses or future pain and suffering damages.<sup>109</sup> Rather, they limit their analysis to future loss of income.<sup>110</sup> However, as discussed above, these overlooked expenses comprise an important component of companies' *ex ante* liability calculations and targeting incentives, and thus are critical to damage award calculations.<sup>111</sup>

## 2. Casebooks

Although critiques of nonblended tables have reached first-year tort casebooks, discussion of racial and gender bias in future damage awards receives far less attention in these casebooks than do other doctrinal and economic issues. Our review of fifteen current torts and remedies casebooks revealed that only six torts and two remedies casebooks mention or discuss the role of race and gender in damages calculations.<sup>112</sup> Within this subset of eight textbooks, most of which are over 1,000 pages long, attention granted to this issue spans from a few sentences on the use of statistical tables to anchor future damages calculations to a few pages on the critical implications of race- and gender-based statistics.<sup>113</sup>

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note 106, at 810; Wriggins, *supra* note 105, at 275; Wriggins, *supra* note 3, at 60–61; Laura Greenberg, Comment, *Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards*, 28 B.C. ENVTL. AFF. L. REV. 429, 430 (2001).

<sup>108</sup> ASS'N OF TRIAL LAWYERS OF AM., SHOW ME THE MONEY: CALCULATING ECONOMIC DAMAGES (Feb. 2003), Westlaw WINTER2003 ATLA-CLE 325; Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51, 70–71 (2003).

<sup>109</sup> See *supra* notes 107–08; *infra* notes 110–11.

<sup>110</sup> See Chamallas, *supra* note 106, at 1438; Meyerson & Meyerson, *supra* note 106, at 802; Greenberg, *supra* note 107, at 430.

<sup>111</sup> Scholars may not focus on future medical costs and pain and suffering awards because using these blended tables might leave women worse off.

<sup>112</sup> The following books were reviewed: GEORGE C. CHRISTIE ET AL., CASES AND MATERIALS ON THE LAW OF TORTS 1000, 1007 (5th ed. 2012); 3 DAN B. DOBBS ET AL., THE LAW OF TORTS 23–24 (2d ed. 2011); MEREDITH J. DUNCAN & RONALD TURNER, TORTS (2d ed. 2012); RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 857–59 (10th ed. 2012); WARD FARNSWORTH & MARK F. GRADY, TORTS (2d ed. 2009); JOHN C.P. GOLDBERG ET AL., TORT LAW 478 (2d ed. 2008); JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 558–71 (7th ed. 2007); CANDACE S. KOVACIC-FLEISCHER ET AL., EQUITABLE REMEDIES, RESTITUTION AND DAMAGES (8th ed. 2011); DOUGLAS LAYCOCK ET AL., MODERN AMERICAN REMEDIES 211–12 (4th ed. 2010); DAVID I. LEVINE ET AL., REMEDIES 528–35 (5th ed. 2009); EMILY SHERWIN ET AL., AMES, CHAFEE, AND RE ON REMEDIES (2012); ELAINE W. SHOBBEN ET AL., REMEDIES (5th ed. 2012); ROBERT S. THOMPSON ET AL., REMEDIES (4th ed. 2009); AARON D. TWERSKI & JAMES A. HENDERSON, JR., TORTS 668 (2d ed. 2008); and FRANK J. VANDALL ET AL., TORTS (3d ed. 2011).

<sup>113</sup> CHRISTIE ET AL., *supra* note 112, at 1000 (one paragraph explaining the use of nondeterminative life expectancy tables or worklife tables to establish the period over which the plaintiff will experience diminished capacity and giving an example of a typical

Five casebooks only touch on the specific issue of race- and gender-based statistics in future damages calculations.<sup>114</sup> Their discussions are usually limited to a few sentences but acknowledge potential controversy surrounding nonblended life and worklife expectancy tables and refer to the critical response of scholars such as Martha Chamallas, Jennifer Wriggins, and others.<sup>115</sup> Despite their brevity, shorter treatments can convey significant

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jury instruction on this point); 3 DOBBS ET AL., *supra* note 112, at 23–24 (one paragraph explaining that life expectancy and worklife tables used as baselines for fixing loss periods “may cause controversy because of different statistical expectancies by race and gender”); EPSTEIN & SHARKEY, *supra* note 112, at 857–58 (one page noting increasing scrutiny toward worklife expectancy calculations); *id.* at 858–59 (one page reporting judicial responses to race- and gender-based statistics in *McMillan v. City of New York*, 253 F.R.D. 247 (E.D.N.Y. 2008), and *CA 100064/02 Migdal Ins. Co. v. Abu-Hana* (3) TakSC 3932 (2005) (Isr.)); *id.* at 859 (one paragraph referencing the Special Master of the September 11th Victim Compensation Fund’s use of the tables based on white males for all victims of the disaster); GOLDBERG ET AL., *supra* note 112, at 478 (two paragraphs questioning whether the use of race- or gender-specific statistics violates the Equal Protection Clause, or, even if not, whether courts should adjust for biases in statistics); HENDERSON ET AL., *supra* note 112, at 558–71 (several pages explaining the difference between actual loss of earnings and loss of earning capacity using cases and life and worklife expectancy tables, and examining the challenges of calculating lost earning capacity for women and the young); LAYCOCK ET AL., *supra* note 112, at 211 (one paragraph noting that gender- and race-based data are often introduced in tort trials, without objections); *id.* at 211–12 (one paragraph commenting on the insurance industry, where race-based premiums and benefits were generally abandoned but gender-based premiums and benefits persist); LEVINE ET AL., *supra* note 112, at 528–35 (four pages analyzing *Walker v. Ritchie*, 2003 CarswellOnt 10 (Can. Ont. Super. Ct. J.) (WL), in which a Canadian court decided whether the use of gender-neutral statistics for a female plaintiff would be erroneous); *id.* at 531–33 (two pages contrasting the approach of Canadian courts with American courts in determining lost earning capacity: one court decided to use gender-based wages, *Caron v. United States*, 410 F. Supp. 378, 398 (D.R.I. 1975); two lined up with *Walker*, 2003 CarswellOnt 10, *United States v. Serawop*, 505 F.3d 1112, 1126 (10th Cir. 2007), and *Wheeler Tarpeh–Doe v. United States*, 771 F. Supp. 427, 455 (D.D.C. 1991); and one reversed appellate court instructions to base a child’s lost earning capacity on “some type of average income for persons [in] the community.” *Greyhound Lines, Inc. v. Sutton*, 765 So. 2d 1269, 1276 (Miss. 2000) (en banc) (quoting the court below)); *id.* at 534–35 (three paragraphs reviewing Judge Weinstein’s reasoning in *McMillan*, 253 F.R.D. 247); TWERSKI & HENDERSON, *supra* note 112, at 668 (two paragraphs discussing various difficulties calculating future damages, especially for young female plaintiffs).

<sup>114</sup> See CHRISTIE ET AL., *supra* note 112, at 1000, 1007; 3 DOBBS ET AL., *supra* note 112, at 23–24; GOLDBERG ET AL., *supra* note 112, at 478; LAYCOCK ET AL., *supra* note 112, at 211–12; TWERSKI & HENDERSON, *supra* note 112, at 667–68.

<sup>115</sup> See CHRISTIE ET AL., *supra* note 112, at 1007 (citing CHAMALLAS & WRIGGINS, *supra* note 107); EPSTEIN & SHARKEY, *supra* note 112, at 857–58 (reproducing a portion of an argument from Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 481–83 (1998)); HENDERSON ET AL., *supra* note 112, at 571 (citing Greenberg, *supra* note 107); LEVINE ET AL., *supra* note 112, at 534 (first citing August McCarthy, *The Lost Futures of Lead-Poisoned Children: Race-Based Damage Awards and the Limits of Constitutionality*, 14 GEO. MASON U. C.R.L.J. 75 (2004); then



tension: in a two-paragraph note, John C.P. Goldberg and coauthors question the constitutionality of race- and gender-differentiated damages when they reproduce the effects of past discrimination.<sup>116</sup> Douglas Laycock and coauthors remind students that federal employment discrimination laws forbid gender-based disparities in employer-sponsored insurance, while race- and gender-based data are still routinely introduced in tort trials without objection.<sup>117</sup>

Three casebooks expand on this discussion, dedicating pages rather than paragraphs to examining the problem.<sup>118</sup> James A. Henderson, Jr. and coauthors describe the variables involved in determining lost earning capacity damages and identify the statistical tables and factors that are taken into account.<sup>119</sup> Richard A. Epstein and Catherine M. Sharkey share a portion of Chamallas's argument against the use of historical tables and present three examples of instances when race- and gender-based statistics were rejected as providing the basis for determining damages.<sup>120</sup> David I. Levine and coauthors use the Canadian case *Walker v. Ritchie*—in which the Canadian court decided to allow the use of gender-neutral earnings tables—to compare and contrast the reasoning in various American cases dealing with race- or gender-based tables.<sup>121</sup>

This review of casebook notes on the discriminatory effects of race- and gender-based statistical tables leads us to conclude that today's students are not sufficiently educated about the fairness, efficiency, and constitutional problems presented by race- and gender-based damages awards or the perverse targeting incentives that may be generated by their use in future damages calculations.

### III. THE EXISTENCE OF PERVERSE *EX ANTE* INCENTIVES

The previous Part established the discriminatory practice of courts and legislatures and the lack of sufficient purposeful attention from academia to such practice. The PhedEx example at the beginning of this Article

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citing Chamallas, *supra* note 108; and then citing Martha F. Davis, *Valuing Women: A Case Study*, 23 WOMEN'S RTS. L. REP. 219 (2002)); TWERSKI & HENDERSON, *supra* note 112, at 668 (first citing Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 75 (1994); and then citing Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1281 (2004)).

<sup>116</sup> GOLDBERG ET AL., *supra* note 112, at 478.

<sup>117</sup> LAYCOCK ET AL., *supra* note 112, at 211–12.

<sup>118</sup> See EPSTEIN & SHARKEY, *supra* note 112, at 857–59; HENDERSON ET AL., *supra* note 112, at 558–71; LEVINE ET AL., *supra* note 112, at 528–35.

<sup>119</sup> HENDERSON ET AL., *supra* note 112, at 558–71.

<sup>120</sup> EPSTEIN & SHARKEY, *supra* note 112, at 858–59 (discussing *McMillan v. City of New York*, 253 F.R.D. 247 (E.D.N.Y. 2008); CA 100064/02 *Migdal Ins. Co. v. Abu-Hana* (3) TakSC 3932 (2005) (Isr.); and the September 11th Victim Compensation Fund).

<sup>121</sup> See LEVINE ET AL., *supra* note 112, at 528–35.

demonstrated the perverse *ex ante* targeting incentives this practice creates.<sup>122</sup> But how plausible is it that such incentives actually operate on the ground? Do potential tortfeasors really calculate their conduct based on damages tables, or is this issue just an academic exercise? In this Part we discuss some examples of real-life situations.

### A. *Some Real-Life Examples*

The theoretical examples play out in a multitude of contexts. But does any real evidence show that companies are actually making these calculations? To begin with, consider the leaked 2005 Wal-Mart memo highlighting the company's strategic consideration of costs associated with certain demographics.<sup>123</sup> Among other things, the memo proposed discouraging unhealthy people from working at Wal-Mart.<sup>124</sup> It encouraged Wal-Mart to ensure that "all jobs [would] include some physical activity (e.g., all cashiers do some cart-gathering)" to dissuade unhealthy individuals from seeking open positions.<sup>125</sup> The memo further stated, "[i]t will be far easier to attract and retain a healthier work force than it will be to change behavior in an existing one . . . . These moves would also dissuade unhealthy people from coming to work at Wal-Mart."<sup>126</sup> Quite simply, the memo demonstrated a rational actor's assessment of the high healthcare costs of obese workers—and the negative effects of those costs on Wal-Mart's bottom line—without caring about the consequences of such calculations for the workers themselves.

Still, the Wal-Mart memo did not propose to injure anyone to improve the company's bottom line, only to ignore the impact of its policy on potential employees. Indeed, finding memos that would prove a targeting intent is extremely hard. And yet, consider the leaked 1991 World Bank memo which indicates that companies might well attempt to minimize their liability costs by targeting low-income victims.<sup>127</sup> Lawrence Summers, the organization's then-chief economist (and later president of Harvard University) wrote:

Just between you and me, shouldn't the World Bank be encouraging MORE migration of the dirty industries to the LDCs [Less Developed Countries]? . . .

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<sup>122</sup> See *supra* Part I.

<sup>123</sup> Steven Greenhouse & Michael Barbaro, *Wal-Mart Memo Suggests Ways to Cut Employee Benefit Costs*, N.Y. TIMES (Oct. 26, 2005), [http://www.nytimes.com/2005/10/26/business/walmart-memo-suggests-ways-to-cut-employee-benefit-costs.html?\\_r=0](http://www.nytimes.com/2005/10/26/business/walmart-memo-suggests-ways-to-cut-employee-benefit-costs.html?_r=0) [<https://perma.cc/CT8E-CT2M>].

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* (quoting Memorandum from M. Susan Chambers, Exec. Vice President for Benefits, Wal-Mart).

<sup>126</sup> *Id.* (quoting Memorandum from M. Susan Chambers, Exec. Vice President for Benefits, Wal-Mart).

<sup>127</sup> *Lawrence Summers: The Bank Memo*, WHIRLED BANK GROUP, <http://www.whirledbank.org/ourwords/summers.html> [<https://perma.cc/RDN8-XMFE>].

... The measurements of the costs of health impairing pollution depends [sic] on the foregone earnings from increased morbidity and mortality. From this point of view a given amount of health impairing pollution should be done in the country with the lowest cost, which will be the country with the lowest wages. I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that.<sup>128</sup>

Without similar “smoking-gun” memos it is hard to prove discriminatory intent, and we are therefore left with demonstrating something akin to disparate impact.

One may wonder whether bad publicity, boycotts, and adherence to social norms more generally might prevent such targeting; yet for now, it continues. In the remainder of this Part, we discuss three important areas in which sufficient empirical evidence documents real-life race- or gender-based disparity—evidence that raises the specter of forbidden discrimination.

### 1. *Lead-Based Paint*

We start with the potential targeting undertaken by landlords as a means of managing the toxic effects of lead-based paints. In 1991, the Centers for Disease Control and Prevention (CDC) identified lead-based paint as “the most common and societally devastating environmental disease of young children.”<sup>129</sup> Lead poisoning from lead-based paints can cause learning disabilities and lead to serious behavioral problems.<sup>130</sup> Children are at the greatest risk of lead poisoning because they tend to be exposed to more lead than adults and their lead absorption rates are higher.<sup>131</sup> The unborn are also at risk: lead can pass from the woman to her fetus through the placenta.<sup>132</sup> Since low-income, minority families are more likely to occupy older homes with lead-based paint, the majority of children poisoned by lead in the United States are poor African-American and Latino children.<sup>133</sup>

Accordingly, investors who buy an old property have diluted incentives to renovate the apartments in a way that will encapsulate the lead paint.<sup>134</sup> And that, unfortunately, is exactly what happened in the 2015 case of *G.M.M. ex rel. Hernandez-Adams v. Kimpson*.<sup>135</sup> There, Judge Weinstein cited scholars

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<sup>128</sup> *Id.* (quoting Memorandum from Lawrence H. Summers, Chief Economist, World Bank, to Distribution, World Bank (Dec. 12, 1991)).

<sup>129</sup> CTRS. FOR DISEASE CONTROL, U.S. DEP’T OF HEALTH & HUMAN SERVS., STRATEGIC PLAN FOR THE ELIMINATION OF CHILDHOOD LEAD POISONING xi (Feb. 1991).

<sup>130</sup> Clifford L. Rechtschaffen, *The Lead Poisoning Challenge: An Approach for California and Other States*, 21 HARV. ENVTL. L. REV. 387, 390–91 (1997).

<sup>131</sup> *Id.* at 390.

<sup>132</sup> *Id.*

<sup>133</sup> See CHAMALLAS & WRIGGINS, *supra* note 107, at 138–53.

<sup>134</sup> See *infra* note 136 and accompanying text.

<sup>135</sup> *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, 116 F. Supp. 3d 126 (E.D.N.Y. 2015).

who identified the perverse incentives behind landlords' motivation to clean up the toxic hazards in neighborhoods most affected by lead-based paint: because it is cheaper to injure poor and minority children, landlords have lesser incentives to remove lead-based paint from deteriorating homes in those communities.<sup>136</sup> The underlying reason is a familiar one: because most of the victims of lead-based paint poisoning are children, and given the lack of individualized evidence that indicates what career path particular children would have taken and how much they would have earned absent the negative interference, courts rely on statistics from nonblended tables that provide considerably lower awards for black and Hispanic defendants than for comparable white victims.<sup>137</sup> Judge Weinstein summarized the effect of these incentives: the use of race-based statistics ensures that "lead poisoned children will continue to be 'inadequately compensated' for their present and future."<sup>138</sup>

## 2. Healthcare

Numerous studies and scholarly articles confirm that minorities across the United States receive inferior healthcare treatment.<sup>139</sup> For example, a Harvard

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<sup>136</sup>*Id.* at 143 ("[B]ecause it is cheaper to injure poor minority children, there is less incentive for defendants to take measures to clean up toxic hazards in the neighborhoods most affected by lead paint." (alteration in original) (emphasis omitted) (quoting Chamallas, *supra* note 106, at 1441)); *see also id.* at 141 ("[W]hen damages for injuring members of minority groups are lowered, the legal regimen [has] the perverse result of encouraging torts against them." (alterations in original) (quoting Meyerson & Meyerson, *supra* note 106, at 808)).

<sup>137</sup>Chamallas, *supra* note 106, at 1440–41.

<sup>138</sup>*Kimpson*, 116 F. Supp. 3d at 154 (quoting Greenberg, *supra* note 107, at 457).

<sup>139</sup>*E.g.*, Amber E. Barnato et al., *Hospital-Level Racial Disparities in Acute Myocardial Infarction Treatment and Outcomes*, 43 MED. CARE 308, 308 (2005) ("These findings indicate that, on average, blacks went to hospitals that had lower rates of evidence-based medical treatments, higher rates of cardiac procedures, and worse risk-adjusted mortality after AMI."); Jerry Cromwell et al., *Race/Ethnic Disparities in Utilization of Lifesaving Technologies by Medicare Ischemic Heart Disease Beneficiaries*, 43 MED. CARE 330, 330 (2005) ("Despite having similar Medicare health insurance coverage, elderly utilization and IHD mortality rates differ markedly not only between whites and minorities, but within minority groups themselves."); Lisa C. Ikemoto, *Racial Disparities in Health Care and Cultural Competency*, 48 ST. LOUIS U. L.J. 75, 76 (2003) ("A close look at the health care industry's institutional practices reveals an English-only, ethnocentric, racist culture that does interfere with patient care."); Timothy Stoltzfus Jost, *Racial and Ethnic Disparities in Medicare: What the Department of Health and Human Services and the Centers for Medicare and Medicaid Services Can, and Should, Do*, 9 DEPAUL J. HEALTH CARE L. 667, 668–72 (2005) (noting that there is a disparity in the quality of treatment that black Medicare patients receive compared to white Medicare patients, and pointing out "what those who administer the Medicare program can do to address [this]"); Sidney D. Watson, *Race, Ethnicity and Quality of Care: Inequalities and Incentives*, 27 AM. J.L. & MED. 203, 206 (2001) ("[H]ealth care professionals provide different—and generally less—care to their minority patients. When hospitalized, African-

study conducted for the City of New York documented higher numbers of adverse actions caused by negligence in hospitals serving minority communities.<sup>140</sup> Another study conducted by the Institute of Medicine provided similar results.<sup>141</sup>

Whereas the reason for this disparity is not understood fully, it could be related to the lower liability risks that minorities present. In the event of a medical malpractice suit involving a minority or female plaintiff, healthcare providers would be required to pay lower damages than they would have been had a white male plaintiff brought the suit.<sup>142</sup> Additionally, caps on

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Americans receive fewer surgical interventions, diagnostic tests, medical services, and less optimal interventions than whites—even when their diagnosis, symptoms, and source of payment are the same.”); Michael Foster, *Don't Sacrifice the Tort System on the Altar of Health Care Reform*, FLA. B.J., Dec. 1994, at 22, 27 (“[E]ven among insured patients, those who are black or from poor neighborhoods receive worse care.”); see also *Racial Disparities in Health Care: Confronting Unequal Treatment: Hearing Before the Subcomm. on Criminal Justice, Drug Policy & Human Res. of the H. Comm. on Gov't Reform*, 107th Cong. 6–7 (2003) (statement of Rep. Elijah E. Cummings, Member, H. Comm. on Gov't Reform) (discussing the IOM study's findings of racial disparity in health care treatment, and stating that witnesses would “address a range of . . . initiatives that must be undertaken if we were to achieve . . . the Nation's goal, of ending racial disparities in health care”). But see Darrell J. Gaskin et al., *Do Hospitals Provide Lower-Quality Care to Minorities than to Whites?*, 27 HEALTH AFF. 518, 526 (2008) (suggesting that “when minority patients receive hospital care, they receive the same standard of care that white patients receive” and, therefore, the focus should be on “eliminating disparities in quality across hospitals rather than within hospitals” (emphasis added)).

<sup>140</sup> The study analyzed different possible risk factors associated with suffering from an “adverse event” (injuries resulting from medical interventions) and found that “blacks had a higher standardized rate of [adverse events] over all [sic] and [adverse events] resulting from negligence.” HARVARD MED. PRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK 6-2 (1990); see also Joanne Doroshov & Amy Widman, *The Racial Implications of Tort Reform*, 25 WASH. U. J.L. & POL'Y 161, 162–63 (2007) (discussing the Harvard Medical Practice Study and the larger implications of tort reform on minorities). Although the study found that these differences overall were not significant, it did note that higher rates of adverse events resulting from negligent events were found in hospitals that served a higher proportion of minority patients. HARVARD MED. PRACTICE STUDY, *supra*, at 6-2.

<sup>141</sup> A 2002 study was conducted at the request of Congress to “assess the extent of racial and ethnic differences in the quality of health care received by patients, not attributable to . . . factors such as access to care, ability to pay, or insurance coverage.” Alan Nelson, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care*, 94 J. NAT'L MED. ASS'N 666, 666 (2002). The study found that “[r]acial and ethnic disparities in health care exist even when insurance status, income, age, and severity of conditions are comparable.” *Id.* (highlighting the key findings from the study presented in INST. OF MED., *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTHCARE* (Brian D. Smedley et al. eds., 2003)).

<sup>142</sup> This is because minorities on average make less money than white individuals, affecting their economic damages (which are calculated by using race- and gender-specific data that “project[] that white men are worth more economically than women or minorities”). Edwards, *supra* note 104, at 220.

noneconomic damages in medical malpractice suits, which most states have enacted,<sup>143</sup> further exacerbate this effect. Minorities and females are less likely to receive a high amount of economic damages for their future-loss-of-income calculations because their income is usually lower.<sup>144</sup> Before caps on noneconomic damages were instituted, the pain and suffering component of noneconomic damages could, and often did, make up for the lower amount received through economic damages—but that is no longer the case.<sup>145</sup> The caps on noneconomic damages greatly limit the overall recoveries of women and minorities, thus making it less likely for them to find a lawyer who will take on their case at all, as lawyers in that field work on a contingency fee basis.<sup>146</sup> The result is that women and minorities pose a significantly lower liability risk than men and whites, which might explain why the former collectives receive inferior care.

### 3. Pollution

Pollution is another area where disparity exists on the ground. Extensive literature highlights the relationship between high-polluting entities and low-income communities. Scholars and scientists generally concur regarding the existence of a disproportionate allocation of environmental hazards, pollution, and locally undesirable land uses (LULUs) in poorer minority communities.<sup>147</sup> Recent studies confirm this consensus.<sup>148</sup>

While the literature on environmental injustice documents this correlation between the locations of disadvantaged towns or neighborhoods and industrial activities, evidence demonstrating “causation” was once less prevalent. It was conjectured that the correlation was attributable to disadvantaged groups’ choices to live near industries due to the other benefits they receive, such as lower property prices and proximity to work.<sup>149</sup> However, the limited research into this issue calls into question the likelihood of such a choice/convenience model.<sup>150</sup>

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<sup>143</sup> See *id.* at 221.

<sup>144</sup> See *id.* at 220.

<sup>145</sup> See *id.* at 219–20.

<sup>146</sup> *Id.* at 219.

<sup>147</sup> Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 485, 497–98 (1997) (“Although there was a delayed acknowledgment of the disproportionate allocation of environmental burdens, there is presently a strong consensus that, in the United States, . . . the burdens associated with the national effort to control pollution fall on those who are poor or politically weak.” (footnote omitted)).

<sup>148</sup> See *infra* note 150.

<sup>149</sup> See Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75, 80–81 (1996).

<sup>150</sup> The most recent study, published in November 2015, concludes that racial discrimination best explains present-day disparate siting of polluting industrial facilities. Mohai & Saha, *supra* note 8, at 15–16. *But see* Vicki Been & Francis Gupta, *Coming to the*

Recall the Larry Summers leaked memo.<sup>151</sup> There is no reason to assume that similar calculations are not being made regarding domestic legal liability. While domestic environmental regulation aims to protect poor or minority neighborhoods, when companies do violate environmental laws or regulations in these neighborhoods they will most likely not have to suffer severe consequences (if any at all), due to the lack of political power of the residents to pursue legal action. Among other factors, this weakness stems from the difficulty residents of such neighborhoods face in attaining adequate legal representation, since their expected recovery is low.<sup>152</sup> Therefore, the outcome of a 2004 study that found the risk of accidents for chemical facilities in heavily African-American counties to be twice as high as the risk in other counties is not surprising.<sup>153</sup>

The incentives to target blacks do not elude local governments. A history of legislative bodies targeting black communities and families for hazardous waste dumps has been documented.<sup>154</sup> In one notable example, the State of North Carolina dumped toxic waste in Warren County, targeting an area that was not scientifically suitable for containing such waste but was populated mostly by black, poor, rural, and politically powerless families whose historic protests had had little effect on state authorities.<sup>155</sup> In theory, the citizens of Warren County—individuals living in poverty—could have chosen to pack up and move away following state targeting; but this could hardly be characterized as a real choice.

Though the Warren County case involved a black-majority community, many black families living near environmental hazards have been treated by legislative bodies in a way that their comparable white counterparts have not, showing a race-dependent concern for liability on a more granular level. For example, in Dickson County, Tennessee, a state-authorized landfill contaminated the wells of both African-American and white families.<sup>156</sup>

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*Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 *ECOLOGY L.Q.* 1, 34 (1997) (suggesting that siting processes do not intentionally or unintentionally target neighborhoods with high percentages of people with incomes below the poverty level).

<sup>151</sup> See *supra* notes 127–28 and accompanying text.

<sup>152</sup> See Edwards, *supra* note 104, at 219.

<sup>153</sup> M.R. Elliott et al., *Environmental Justice: Frequency and Severity of U.S. Chemical Industry Accidents and the Socioeconomic Status of Surrounding Communities*, 58 *J. EPIDEMIOLOGY & COMMUNITY HEALTH* 24, 24 (2004).

<sup>154</sup> See generally Robert D. Bullard & Beverly Wright, *Disastrous Response to Natural and Man-Made Disasters: An Environmental Justice Analysis Twenty-Five Years After Warren County*, 26 *UCLA J. ENVTL. L. & POL'Y* 217 (2008).

<sup>155</sup> *Id.* at 223–24. Only in 2003 did the citizens of Warren County receive redress for the hastily planned 142-acre toxic dump in their backyards with the completion of efforts by state and federal sources, costing \$18 million, to detoxify or neutralize contaminated soil stored in Warren County since 1982. *Id.* at 221.

<sup>156</sup> See *id.* at 236.

However, the treatment of the two groups was markedly different.<sup>157</sup> For one, testing and monitoring of the black families' wells differed from the treatment of those of white families: the state government did not even include the black families' water wells in a water toxicity study.<sup>158</sup> Indeed, the government's heightened concern for the liability imposed by white families versus comparable black families played out in public: the Dickson County Commissioners voted unanimously to settle lawsuits with several white families that alleged groundwater leaks and ignored the sole black family to file against such leaks.<sup>159</sup>

In sum, both theory and empirical evidence suggest that at least to some extent, perverse *ex ante* incentives exist. The next Part of this Article engages the various theories of tort law. We scrutinize race- and gender-based statistical tables from within. We explore such use from a distributive justice perspective in Part A, from a corrective justice perspective in Part B, and from a law and economics perspective in Part C.

#### IV. THE VARIOUS OBJECTIVES OF TORT LAW AS A REASON FOR BIAS

We have established that courts in the United States overwhelmingly use nonblended tables.<sup>160</sup> Does this practice stem from an incorrect application of tort doctrine, or is it something intrinsic to tort theory? To answer this question, this Part discusses the theoretical foundations of tort law.

In the first two Parts that follow, we very briefly demonstrate how corrective justice and distributive justice theories of tort law *can* accommodate the use of blended race- and gender-based statistical tables. A full discussion of corrective justice and distributive justice in the context of discrimination, however, lies beyond the scope of this Article.

In the third Part, we first show that conventional economic analysis of law suggests that targeting the disadvantaged is socially desirable. We then offer several potential alternatives to the economic analysis perspective and endeavor to demonstrate that, far from socially desirable, the use of *blended* tables is, in fact, necessary to legal economists' pursuit of optimal deterrence.

##### A. *The Distributive Justice Perspective*

Distributive justice theorists are often pluralists who adopt more than one rationale for the justification of tort law.<sup>161</sup> They frequently acknowledge both

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<sup>157</sup> *Id.* at 236–37.

<sup>158</sup> *Id.* at 237–40.

<sup>159</sup> *Id.* at 236.

<sup>160</sup> *See supra* Part II.A.

<sup>161</sup> *See, e.g.*, IZHAK ENGLAND, *THE PHILOSOPHY OF TORT LAW* 2 (1993); ARIEL PORAT & ALEX STEIN, *TORT LIABILITY UNDER UNCERTAINTY* 12 (2001); Ronen Avraham & Issa Kohler-Hausmann, *Accident Law for Egalitarians*, 12 *LEGAL THEORY* 181, 217 (2006) (“Our intuitions about fairness in compensation for misfortunes and liability for careless



corrective justice and law and economics rationales, while also reasoning that social good can, and should, arise from tort law's distributive capabilities.<sup>162</sup> We discuss the distributive justice rationale of tort law only very briefly because it seems most natural for its subscribers to readily adopt the use of blended tables in the calculation of tort damages awards, as the distributive benefits of such tables are clear.

In short, distributive justice rationales in tort law can be conceptualized as one rationale based on three primary theories: "loss spreading,"<sup>163</sup> "fairness,"<sup>164</sup> and "egalitarianism."<sup>165</sup> First, loss-spreading reasons that "all things being equal, accident losses should be spread across many bearers" because small, predictable losses hurt less than abrupt losses that are considerable and unpredictable.<sup>166</sup> Loss-spreading is supported by Calabresi's reasoning that tort law should not only reduce primary accident costs—the absolute loss caused by the accident—but also seek to reduce secondary accident costs—which are the negative effects of those costs on the individuals required to bear them.<sup>167</sup> And since the negative effects are greater for individuals belonging to disadvantaged groups, policymakers should be concerned not only with the extent of accident costs and the number of bearers of these costs, but also with whether their bearers belong to advantaged or disadvantaged groups.

Second, distributive justice theorists believe that *fairness* is a crucial consideration in tort law.<sup>168</sup> From this perspective, "the distributive effects of a legal rule, including the effects on third parties are relevant" in judging "the rule's desirability."<sup>169</sup> Gregory Keating, for example, adopts the view that tort

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actions are best captured when we integrate insights of both [restorative justice] and [distributive justice] in theorizing what justice demands in liability for risks and compensation for harms."); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1083–84 (1972); Guido Calabresi & Alvin K. Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585, 593–94 (1985); Tsachi Keren-Paz, *Egalitarianism as Justification: Why and How Should Egalitarian Considerations Reshape the Standard of Care in Negligence Law?*, 4 THEORETICAL INQUIRIES L. 275, 278–79 (2003) (drawing on insights from egalitarianism, corrective justice, economic analysis, loss-spreading, and fairness perspectives); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997).

<sup>162</sup> See sources cited *supra* note 161.

<sup>163</sup> See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 39–45 (1970). Though Calabresi discusses "loss spreading" in the context of efficiency, namely as it relates to overdeterrence, *see id.*, the consideration has an undeniable justice element as well.

<sup>164</sup> Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 219–21 (2000).

<sup>165</sup> Keren-Paz, *supra* note 161, at 277; *see also* Ken Cooper-Stephenson, *Corrective Justice, Substantive Equality and Tort Law*, in *TORT THEORY*, *supra* note 104, at 48, 48.

<sup>166</sup> Keren-Paz, *supra* note 161, at 283.

<sup>167</sup> CALABRESI, *supra* note 163, at 26–27.

<sup>168</sup> *See* Keating, *supra* note 164, at 194–95.

<sup>169</sup> Keren-Paz, *supra* note 161, at 284 (emphasis omitted).

law is a matter of the fair apportionment of the burdens and benefits of mutually beneficial but risky activities.<sup>170</sup> This perspective contradicts that of corrective justice theorists, who argue that tort law is a matter of wrongdoing and redress.<sup>171</sup> Fairness only factors into the corrective justice approach indirectly, if at all. Under the distributive justice approach, fairness is the distributive criterion.<sup>172</sup> Thus, fair distribution of the burdens and benefits of risky activities occurs when those who reap the benefits of activities also bear their burdens, even if no wrongdoing was involved. Under this approach, the costs of nonnegligent accidents are not to be borne exclusively by the unfortunate victims, and the costs of negligent accidents are not left exclusively to the unfortunate doers whose wrongdoing causes injury.<sup>173</sup>

Finally, some distributive justice theorists support a third theory of tort law, namely egalitarianism.<sup>174</sup> Proponents of an egalitarian regime hold that the standard of care individuals owe depends on the extent of their social advantage: the rich should take more care than the poor.<sup>175</sup> Whereas Keating's conception of fairness ignores parties' relative socioeconomic conditions, the egalitarian approach does not.<sup>176</sup>

Each of the three primary rationales adopted by distributive justice theorists supports the ability to reduce the discriminatory effects of tort law by requiring the use of blended tables.<sup>177</sup> First, proponents of a loss-spreading

<sup>170</sup> *Id.* at 285.

<sup>171</sup> See Keating, *supra* note 164, at 194–95.

<sup>172</sup> See also Avraham & Kohler-Hausmann, *supra* note 161, at 181 (“[T]he theory of corrective justice, along with its institutional embodiment of tort law, is at odds with an egalitarian commitment to fairness because it allows luck an unjustifiable role in determining dissimilar liability for similar wrongs and dissimilar compensation for similar losses to bodily integrity.”).

<sup>173</sup> See *id.* at 217–19 (“[O]nce someone is negligent, she should bear liability even if the damage is remote (as in *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928)), if it is not clear that the negligent act caused the damage at all (as in *Summers v. Tice*, 199 P.2d 1 (Cal. 1948) (in bank)), if it is clear that it did not (as in *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989)), or if the defendant cannot disprove her causation of harm (as in *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980)).”); see also Keating, *supra* note 164, at 202.

<sup>174</sup> E.g., Avraham & Kohler-Hausmann, *supra* note 161, at 184–85; Ken Cooper-Stephenson, *Economic Analysis, Substantive Equality and Tort Law*, in TORT THEORY, *supra* note 104, at 131; Tsachi Keren-Paz, *An Inquiry into the Merits of Redistribution Through Tort Law: Rejecting the Claim of Randomness*, 16 CAN. J.L. & JURIS. 91, 91–92 (2003); Tsachi Keren-Paz, *The Limits of Private Law: Tort Law and Distributive Justice iv–v* (Dec. 2000) (unpublished J.D. thesis, York University) (on file with the National Library of Canada).

<sup>175</sup> Keren-Paz argues that since “[f]indings of negligence are based on the failure to balance properly between one’s own interests and those of another,” a morally relevant criterion for determining the extent to which defendants should burden themselves “in order to prevent a loss to potential victims . . . is the parties’ relative abilities to bear precaution costs and expected accident loss.” Keren-Paz, *supra* note 161, at 278.

<sup>176</sup> See *id.* at 285.

<sup>177</sup> See *supra* Parts II, III.

theory should welcome the use of blended tables. Because targeting exposes disadvantaged populations to a substantially greater *ex ante* probability of actual injury or death,<sup>178</sup> nonblended tables cause the costs of accidents to be misallocated, increasing the secondary accident costs. Next, distributive justice theorists adopting a fairness rationale would be inherently inclined to support the adoption of blended tables in the calculation of tort damages. Because the use of nonblended tables imposes a risk that some parties will be undercompensated (for example, those women and blacks who succeeded beyond what was predicted by the tables),<sup>179</sup> fairness requires that this risk be equally distributed among all demographics. Finally, distributive justice theorists adopting an egalitarian perspective should be equally welcoming of the mandated use of blended tables in the calculation of tort damages, as such tables provide no unfavorable incentives to target the worseoff.<sup>180</sup>

### B. *The Corrective Justice Perspective*

As with distributive justice, there is no single theory of corrective justice; yet some common threads prevail. As Ernest Weinrib puts it, corrective justice is the idea that imposing liability on one who injures another rectifies the injustice inflicted.<sup>181</sup> According to corrective justice, tort law requires the defendant to provide some *ex post* justice to redress the harm she has caused—and only the harm she has caused—to the plaintiff.<sup>182</sup> This perspective has sheltered prominent corrective justice theorists and the courts from any obligation to argue against the inclusion of racial and gender characteristics in the calculation of damages awards.<sup>183</sup> Because corrective justice is about justice between the parties themselves, and not in society at large, social problems such as race or gender discrimination simply do not comprise part of the corrective apparatus.<sup>184</sup>

We argue the time has come for corrective justice theorists to engage with the inconvenient truth of race and gender inequity and allow for the possibility that the corrective justice rationale actually embraces notions of antidiscrimination. There are two ways to arrive at this conclusion. First, one can observe that tort doctrine has often aspired to compensate the victim not for loss of income, but rather for loss of income *capacity*.<sup>185</sup> Viewed this way, it is easier to see why a white boy and a black girl should receive the same compensation for similar injuries. Their income capacity should be identified, as a normative matter, as being equal. Their life story is yet to be written, and

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<sup>178</sup> See *supra* Part III.

<sup>179</sup> See *supra* Part II.

<sup>180</sup> See *supra* Part III.

<sup>181</sup> Weinrib, *supra* note 22, at 349.

<sup>182</sup> 1 DOBBS ET AL., *supra* note 112, at 19–20; see also Rivlin, *supra* note 24, at 23.

<sup>183</sup> See, e.g., Rivlin, *supra* note 24, at 23.

<sup>184</sup> See 1 DOBBS ET AL., *supra* note 112, at 20.

<sup>185</sup> See Rivlin, *supra* note 24, at 22.

their stories should be given an equal chance.<sup>186</sup> This reading helps to justify the incorporation of antidiscrimination objectives into the calculation of damages for lost wages, which includes estimations of both future salary and future worklife years.<sup>187</sup> A similar conception might help remove discrimination from other damages components, such as future medical costs and future pain and suffering, where life expectancy tables are relevant.<sup>188</sup>

The second approach to broadening the perspective taken by corrective justice is to read basic human rights into its framework. The Israeli Supreme Court used this notion of corrective justice as part of its rationale in holding that race- and gender-neutral statistics were needed to calculate an Arab girl's loss of earning potential.<sup>189</sup> One justice deemed the rationale a "new reading of corrective justice which embraces fundamental values and universal creeds."<sup>190</sup> Under this conception of corrective justice, race- and gender-blended statistics are not in conflict with the goals of tort law.<sup>191</sup> However, even the Israeli case only dealt with wage tables, not life expectancy or worklife tables.<sup>192</sup>

A further, related way to enable corrective justice to find a realistic level of engagement with this issue might also exist. One would need to ponder on how victims' right to rectification in a *constitutional democracy*—a system of many rights—impacts the operation of tort law. The argument, in short, is that within a constitutional democracy, the manner in which the common law carries out its corrective justice aims will be influenced by constitutional norms.<sup>193</sup> A tortfeasor who harms a victim may not later redress the victim outside the scope of the victim's constitutional rights.<sup>194</sup> As tort law has long recognized, the eggshell skull rule requires tortfeasors to take their victim as they find them physically.<sup>195</sup> Within a constitutional democracy, one can argue, the tortfeasor must also take victims within the scope of their constitutional rights.<sup>196</sup> If the constitutional norms are such that an individual may not be subjected to discrimination on the basis of gender and race, then corrective justice theorists must bend to those constitutional norms as well.

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<sup>186</sup> See *id.* at 26.

<sup>187</sup> See *id.*

<sup>188</sup> See *id.* at 23 & n.112.

<sup>189</sup> *Id.* at 22–23 (discussing CA 100064/02 Migdal Ins. Co. v. Abu-Hana (3) TakSC 3932 (2005) (Isr.)).

<sup>190</sup> *Id.* at 23.

<sup>191</sup> See Rivlin, *supra* note 24, at 23.

<sup>192</sup> *Id.* at 22–23.

<sup>193</sup> See Keren-Paz, *supra* note 161, at 295–96.

<sup>194</sup> See Weinrib, *supra* note 22, at 352–54.

<sup>195</sup> John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 466–67 (2006).

<sup>196</sup> See Weinrib, *supra* note 22, at 352–54.

The scope of this Article prevents us from further developing here these ideas or others;<sup>197</sup> we now turn to the economic analysis of law perspective.

### C. *The Economic Analysis Perspective*

As demonstrated earlier, the use of race- and gender-based statistics incentivizes potential tortfeasors to direct dangerous behavior toward certain groups.<sup>198</sup> But is this behavior *efficient*?

In this Part we explain why a conventional economic analysis of law *supports* targeting the disadvantaged under the current tort law regime. We then argue once again for a much-needed shift in thinking within the economic analysis of law and suggest alternative approaches to achieve this shift.

#### 1. *The Theory: Why Economic Analysis of Law Supports Targeting*

As identified in the examples presented above, the current structure of tort law incentivizes potential tortfeasors to target disadvantaged groups. On its surface, this targeting seems to be efficient. The optimal deterrence model uses tort law to induce companies to engage in behavior that minimizes the costs of precautions and the costs of harm from accidents not prevented.<sup>199</sup> Generally, the resulting effect on companies' choices is positive: tort law incentivizes optimal caretaking, product safety testing, and other socially beneficial solutions that seek to avoid excessive accident costs.<sup>200</sup> However, tort law also achieves all of that by leading rational companies to choose among alternatives by determining which has the lowest potential *private* liability costs.<sup>201</sup> If race and gender are accounted for when calculating damages, companies will target the "cheapest" race and gender—blacks and women, respectively.<sup>202</sup> Recall the PhedEx example.<sup>203</sup> The manager does not have to be a bigot to make that managerial decision; suffice it that she follow the economic incentives tort law provides, whereby it is less costly to have accidents involving blacks than accidents involving whites.

Even if courts apply the same standard of care when determining negligence absent consideration of the potential victim's race or gender, the targeting incentive remains. For example, implementing a universal speed limit across all areas—regardless of whether it is predominantly black or white—will not eliminate the targeting incentives. It is the structure of the

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<sup>197</sup> Another possible approach is to build on the distinction between "full compensation" and "fair compensation." *E.g.*, Goldberg, *supra* note 195, at 437–38 (emphasis omitted).

<sup>198</sup> *See supra* Part III.

<sup>199</sup> *See* CALABRESI, *supra* note 163, at 26–27.

<sup>200</sup> *See id.* at 244–46.

<sup>201</sup> *See id.*

<sup>202</sup> *See id.*

<sup>203</sup> *See supra* Part I.

*compensation scheme* that encourages rational actors to disproportionately allocate harm among the least costly race or gender group.<sup>204</sup>

And such targeting, the economic argument goes, is *efficient*.<sup>205</sup> After all, if some types of victims systematically receive lower damages in courts, why should tortfeasors not target *them*? Surely, doing so will save (private) costs to the tortfeasors? Does it not save costs to society at large as well?

Indeed, from a law and economics perspective we must ask whether targeting the disadvantaged reduces *social* costs and not merely *private* costs.<sup>206</sup> Many legal economists will perceive the higher liability costs as reflective of the higher value society places on high-income earners due to their higher productivity.<sup>207</sup> For those legal economists, the private costs tortfeasors save reflect savings in social costs as well.<sup>208</sup> Therefore, according to this view, targeting is efficient.<sup>209</sup>

To better illustrate this perspective, let us start with an example. Suppose we seek to know how much members of different groups would be willing to invest in their members' safety. Individuals in an advantaged group have been found to be willing to invest more in safety than individuals in a disadvantaged group.<sup>210</sup> Why? Because all else being equal, their future loss of income is higher, and therefore higher investments in precautions are cost-justified.<sup>211</sup>

Consider the following school bus example. Imagine you are the manager of a school bus company that serves private schools. Your company serves only two types of institution: all-white boys' schools and all-black girls' schools. You need to decide how to assign buses and drivers to the two schools your company serves. The company has modern, safer buses, as well as older, less safe buses. It employs very good, experienced drivers, as well as not-so-good, inexperienced ones.

Let's assume that the children are identical in every way except for their statistically predicted future incomes, which differ. Assume that their non-income-related losses (medical costs, pain and suffering, etc.) are equivalent at

<sup>204</sup> Adjin-Tetty recognizes this distortion in incentives, stating:

The current system creates and reinforces the relative worth of human life and potential. It gives the impression that persons with favourable personal traits and/or socio-economic backgrounds are worth more than others, making it cheaper to injure persons in the latter category. *This undermines one of the central aims of tort law, that is, to create disincentives or deterrence for wrongdoing.*

Adjin-Tetty, *supra* note 106, at 344 (emphasis added); *see also* Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 82, 86–87 (2011) (discussing a similar misalignment in tort law in the context of wealth).

<sup>205</sup> Porat, *supra* note 204, at 101–02.

<sup>206</sup> *Id.*

<sup>207</sup> Adjin-Tetty, *supra* note 106, at 344–45; *see also* Porat, *supra* note 204, at 86–87.

<sup>208</sup> Porat, *supra* note 204, at 100–01.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

\$1,000,000, but their future loss of income is determined to be \$1,000,000 and \$500,000 for the white boys and the black girls, respectively. Suppose their baseline risk of getting injured with a regular driver is 0.3%. They are now offered a better driver that will reduce their risk of injury to 0.2%. How much would they each rationally be willing to pay to switch? A white boy will pay up to \$2,000. Why? Because this is his expected benefit from reducing the risk. Switching drivers reduces the risk by 0.1% (0.3%–0.2%), and when we multiply this by his expected total loss of \$2,000,000, we get \$2,000. Similar calculations will lead us to conclude that a black girl, in contrast, will pay up to \$1,500, because this is her expected benefit from the better driver. Thus, measured by their willingness-to-pay, the children (or their benevolent agent) rationally will be willing to invest a different amount in safety, merely because their future loss of income projection is different.<sup>212</sup>

Courts, so goes the argument, should not incentivize tortfeasors to invest in precautions more than the potential victims themselves would have been willing to invest.<sup>213</sup> That would be paternalistic and disrespectful of the victims' preferences and autonomy, and, importantly, would not be welfare-maximizing.<sup>214</sup> Going back to our example, suppose that hiring a safer driver costs an extra \$1,800. For the white boys, the costs are lower than the expected benefit and therefore on pure cost–benefit grounds, switching is beneficial. In contrast, the black girls will be better off if they choose not to switch. It is not worth it for them to spend \$1,800 to save expected costs of \$1,500. They will prefer to keep the risky driver and receive instead, say, \$1,600 in cash. The cash will not allow them to get the better driver, but will more than compensate them for their expected loss, enabling them to also satisfy some other needs, thus improving their total welfare.

In sum, a policy that mandates equal safety for both groups is Pareto-inferior to a policy that incentivizes differential safety while distributing cash to the disadvantaged group.<sup>215</sup> As Kaplow and Shavell, two of the most influential scholars writing about efficiency in the law, famously argued, tort law should be tuned to efficiency, and distribution to the disadvantaged groups should be undertaken through the tax and transfer system.<sup>216</sup> This is roughly how an economic analysis of law would justify the current tort law regime and its targeting incentives.

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<sup>212</sup> *Id.*

<sup>213</sup> *See id.* at 104–05.

<sup>214</sup> Porat, *supra* note 204, at 127; *see also* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 178–79 (2004) (explaining that social welfare is optimized when the cost of care is equal to the reduction in expected accident losses).

<sup>215</sup> *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J. LEGAL STUD. 331, 350 (2003).

<sup>216</sup> Kaplow & Shavell, *supra* note 25, at 677. *See generally* Louis Kaplow, *On the (Ir)Relevance of Distribution and Labor Supply Distortion to Government Policy*, 18 J. ECON. PERSPS. 159 (2004) (making this claim).

In what follows, we attempt to provide several possible outlets to save economic analysis of law from this embarrassment. Even when the outlets we provide are successful, they are not equally so. Nonetheless, we believe it is worthwhile to discuss both the strong and the weak outlets.

## 2. *Saving Law and Economics from Embarrassment*

### a. *First Potential Outlet: Nonblended Tables Are Inherently Less Accurate than Blended Ones*

While any attempt to quantify damages resulting from a tort is necessarily fraught with some degree of imprecision, a number of factors suggest that the use of life expectancy, worklife expectancy, and wage tables in determining tort damages presents special limitations when it comes to accuracy.<sup>217</sup> For example, criticizing race-based tables specifically, in *Kimpson*, Judge Weinstein commented that the current tables ignore the resiliency of individual children who rise to the top of their potential from very adverse conditions (a perspective urged by Resiliency Theory).<sup>218</sup> In *McMillan v. City of New York*, Judge Weinstein criticized the use of race-based expectancy tables for ignoring the fact that many of the disparities disappear altogether when socioeconomic factors are controlled for.<sup>219</sup> Yet in fact, the tables are plagued by even more fundamental statistical errors—errors that have avoided scrutiny from other commentators.<sup>220</sup>

There are three glaring issues with these tables. First, they are only based on a snapshot of the world as it was prior to their compilation, and thus ignore significant historical trends leading to convergence between the races and the genders. Second, they are imprecisely measured, generally providing only a single statistic—the mean—for a given population. Using only the mean to represent what really is a distribution of different individuals, thus ignoring the standard deviation of the distribution, might be problematic. Third, race-based expectancy tables ignore the skewness of the distributions. As we show next, a problem can arise when the distributions for the different groups (men vs. women, whites vs. blacks) are skewed in opposite directions, suggesting that outliers impact the group means' differences. In the following Parts, we explain these concerns in more detail.

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<sup>217</sup> For now, we assume that accuracy in the determination of damages is a legitimate and important goal of tort law. We will discuss this point further on in the Article.

<sup>218</sup> See G.M.M. *ex rel.* Hernandez-Adams v. Kimpson, 116 F. Supp. 3d 126, 153 (E.D.N.Y. 2015); see also Marc A. Zimmerman, Editorial, *Resiliency Theory: A Strengths-Based Approach to Research and Practice for Adolescent Health*, 40 HEALTH EDUC. & BEHAV. 381, 381 (2013).

<sup>219</sup> *McMillan v. City of New York*, 253 F.R.D. 247, 250 (E.D.N.Y. 2008) (citing Audrey Smedley & Brian D. Smedley, *Race as Biology Is Fiction, Racism as a Social Problem Is Real*, 60 AM. PSYCHOLOGIST 16, 23 (2005)).

<sup>220</sup> Cf. Zimmerman, *supra* note 218, at 381.



### i. Data Tables Capture Only a Snapshot in Time

One concern regarding the use of life expectancy, worklife expectancy, and wage tables in determining tort damages relates to the fact that all of these tables look at the world only as it stands at a single point in time.<sup>221</sup> Judge Weinstein recently highlighted this problem in *Kimpson* and *McMillan*, arguing that race- and ethnicity-based statistics assume that the status-quo will continue in the future despite ongoing legal and intuitional efforts to fight discrimination in areas such as the workplace,<sup>222</sup> and tables relying on archaic notions of race “fail to account for the nuanced reality of ‘racial’ heritage in the United States today.”<sup>223</sup>

Predictions about the future based on these data sources without any correction necessarily introduce systematic inaccuracy into the models, leading to inefficient incentives for tortfeasors. Three examples of this type of limitation are: changing trends in life expectancy; workforce participation (which is relevant for worklife tables); and academic achievement (which is relevant for wage tables).

#### 1. Life Expectancy

Life expectancy for men is about five years less than for women; yet it is increasing at a much faster pace.<sup>224</sup> For example, in Britain, where records have been kept since the 1840s, the difference in life expectancy peaked in 1967 and has been in a relatively steep decline ever since.<sup>225</sup> A group of expert actuaries and scientists, backed by the British insurer Legal & General, studied the root of this trend and found that lifestyle choices such as tobacco and alcohol consumption accounted for much of the difference in life expectancies.<sup>226</sup> Writing about Europe as a whole, the expert panel found that deaths related to smoking “accounted for 40-60% of the gender gap,” a trend

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<sup>221</sup> *McMillan*, 253 F.R.D. at 251.

<sup>222</sup> See *Kimpson*, 116 F. Supp. 3d at 152–53.

<sup>223</sup> *McMillan*, 253 F.R.D. at 251.

<sup>224</sup> For example, “[f]rom 1989 to 2009, life expectancy [at birth] for men improved by 4.6 years on average but only by 2.7 years for women. And throughout the country, women were more likely than men to have no progress in life expectancy or to have their lifespans get shorter over time.” Ali Mokdad, *Girls Born in 2009 Will Live Shorter Lives than Their Mothers in Hundreds of US Counties*, INST. FOR HEALTH METRICS & EVALUATION (Apr. 19, 2012), <http://www.healthdata.org/news-release/girls-born-2009-will-live-shorter-lives-their-mothers-hundreds-us-counties> [<https://perma.cc/BUB9-9H5A>].

<sup>225</sup> *Lifespan and the Sexes: Catching Up*, ECONOMIST (Jan. 12, 2013), <http://www.economist.com/news/science-and-technology/21569362-rich-world-men-are-closing-longevity-gap-women-catching-up> [<https://perma.cc/W9PB-P8VL>].

<sup>226</sup> LONGEVITY SCI. ADVISORY PANEL, LSAP PAPER 2, LIFE EXPECTANCY: PAST AND FUTURE VARIATIONS BY GENDER IN ENGLAND AND WALES 1, 20 (2012), [http://www.longevitypanel.co.uk/\\_files/life-expectancy-by-gender.pdf](http://www.longevitypanel.co.uk/_files/life-expectancy-by-gender.pdf) [<https://perma.cc/A8K6-GAYB>].

that now appears to be in reverse as men (a much larger smoking population to begin with) are abandoning their smoking habits at a greater rate than women.<sup>227</sup> In 1840s Britain, the life expectancy gap was a mere nine months—suggesting that the current trends of a decreasing gap may continue for some time into the future.<sup>228</sup>

## 2. *Workforce Participation*

Another trend supporting the use of blended tables involves the changing gender demographics of the American workforce. The gender gap exists in prevailing estimated damages models at least in part because women, on average, are less likely to participate in the workforce.<sup>229</sup>

As a result, proportionately, women are better represented in younger segments of the workforce.<sup>230</sup> Since a worker's earnings are thought to reach their maximum at around the age of forty,<sup>231</sup> if current Labor Force Participation Rate trends continue, women today will likely also realize larger increases in income over their working lives than past generations experienced. Furthermore, the fact that some companies are enacting policies allowing female employees who give birth more flexibility in returning to work will likely lead to fewer mothers withdrawing entirely from the workforce.<sup>232</sup> This shift seems especially likely when also considering current trends in educational attainment.<sup>233</sup>

## 3. *Relative Academic Achievement*

The wage tables used in the forensic models are susceptible to similar inaccuracies stemming from a failure to account for developing academic

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<sup>227</sup> *Id.* at 19–20.

<sup>228</sup> *See id.* at 7, 8 figs.1 & 2.

<sup>229</sup> For example, the Bureau of Labor Statistics's worklife estimate, last updated in 1986, suggested that a forty-year-old male would have an estimated worklife expectancy of twenty years while a woman of the same age would only be predicted to work 14.3 more years—a difference of nearly 40%. Smith, *supra* note 50, at 3. Today, an employed forty-year-old woman with a bachelor's degree is predicted to have a remaining worklife of 21.78 years. Skoog et al., *Markov Process Model*, *supra* note 57, at 204 tbl.25.

<sup>230</sup> Laura Cox Kaplan, *How Young Women Are Changing the Workplace*, WORLD ECON. F. (Oct. 29, 2014), <https://www.weforum.org/agenda/2014/10/millennial-women-changing-workplace/> [<https://perma.cc/XTL5-6HWD>]; *see also* Cate Doty, *Addressing the Gender Gap in College Aspirations*, N.Y. TIMES: THE CHOICE (Oct. 23, 2009), [https://thechoice.blogs.nytimes.com/2009/10/23/addressing-the-gender-gap-in-colleges/?\\_r=1](https://thechoice.blogs.nytimes.com/2009/10/23/addressing-the-gender-gap-in-colleges/?_r=1) [<https://perma.cc/7A4A-TQ6W>].

<sup>231</sup> Katie Bardaro, *Pay Goes Nowhere After 40*, Payscale (2011), <http://www.payscale.com/career-news/2011/03/pay-goes-nowhere-after-40> [<https://perma.cc/M3TP-TMGL>].

<sup>232</sup> *See* Kaplan, *supra* note 230.

<sup>233</sup> *See* Doty, *supra* note 230.

achievement trends. Numerous studies have documented the association between education and increased earning power.<sup>234</sup> In fact, for every 100 female college graduates, there are now only seventy-three male graduates,<sup>235</sup> and a corresponding adjustment in earning power for women vis-à-vis men may already be apparent.<sup>236</sup> While women, across all age demographics, earn on average about 80% as much as men, unmarried women under thirty without children earn significantly more than their male counterparts.<sup>237</sup> In some major cities—such as New York, Memphis, and Atlanta—this difference may even be in the 15% to 20% range.<sup>238</sup> Notably, the BLS announced a few years ago that “for the first time, women made up the majority of the workforce in highly paid managerial positions.”<sup>239</sup>

In sum, the datasets forensic economists use when creating models that estimate tort damages only view those data at one single point in time. However, in a dynamic and ever-changing world, this approach does not account for such fluidity and introduces a number of inaccuracies into these models, which systematically distorts parties’ incentives.

## ii. *Structural Problems*

The previous Part revealed a problem that theoretically forensic economists can remedy by building more sophisticated models that take into account convergence trends between the sexes and races. Obviously, using inaccurate tables is a bad policy decision. But what about using accurate tables? Is that good policy? In this Part we discuss structural problems that cannot be as easily remedied, as they are inherent to any usage of tables’ averages.

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<sup>234</sup> ANTHONY P. CARNEVALE ET AL., THE GEORGETOWN UNIV. CTR. ON EDUC. & THE WORKFORCE, THE COLLEGE PAYOFF: EDUCATION, OCCUPATIONS, LIFETIME EARNINGS 1 (Aug. 2011), <https://cew.georgetown.edu/wp-content/uploads/2014/11/collegepayoff-complete.pdf> [<https://perma.cc/8JDH-YFJ6>]; *Earnings and Unemployment Rates by Educational Attainment, 2015*, BUREAU LAB. STAT., [http://www.bls.gov/emp/ep\\_chart\\_001.htm](http://www.bls.gov/emp/ep_chart_001.htm) [<https://perma.cc/D5JS-TH2N>] (last modified Mar. 15, 2016).

<sup>235</sup> Doty, *supra* note 230.

<sup>236</sup> Belinda Luscombe, *Workplace Salaries: At Last, Women on Top*, TIME (Sept. 1, 2010), <http://content.time.com/time/business/article/0,8599,2015274,00.html> [<https://perma.cc/TG7P-ZTAP>].

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

## 1. Ignoring Standard Errors

Forensic economists commonly offer a number of different scenarios to “establish a high and low range of expected losses.”<sup>240</sup> This practice is likely also a result of the large standard deviations with which they have to deal.<sup>241</sup>

One of the reasons courts are unaware of the imprecisions in the data might be that the U.S. Life Tables (2008), published by the CDC in the U.S. Department of Health and Human Services, do not contain any estimates of variance or standard deviation.<sup>242</sup> As a result, courts seem to believe the published averages offer a good estimate of the entire distribution.<sup>243</sup> This assumption is incorrect. Indeed various scholars have made attempts to estimate the precision of life expectancy data.<sup>244</sup> For example, according to Ciecka and Ciecka, the CDC table suggests that thirty-nine-year-old men have, on average, thirty-six years left to live.<sup>245</sup> However, their calculated standard deviation of 14.1 suggests that most men, in fact about two-thirds of them, really have between about twenty-two and fifty years left to live.<sup>246</sup>

Similar difficulties plague worklife expectancy data as well. Skoog, Ciecka, and Krueger show that the worklife expectancy table’s standard deviation is sometimes greater than both its estimated mean and median, especially for older individuals.<sup>247</sup>

Finally, large variances within the BLS wage table data also exist.<sup>248</sup> This is particularly true for some occupations experiencing a high variation in pay.<sup>249</sup>

<sup>240</sup> Kent Gilbreath, *Experiences from Two Decades: Some Practical Advice for Forensic Economists*, LITIG. ECON. DIG., Spring 1996, at 35, 38.

<sup>241</sup> *See id.*

<sup>242</sup> Arias, *supra* note 39, at 10 tbl.1.

<sup>243</sup> *See, e.g.*, Baker v. John Morrell & Co., 263 F. Supp. 2d 1161, 1178 (N.D. Iowa 2003), *aff’d*, 382 F.3d 816 (8th Cir. 2004).

<sup>244</sup> *See generally* HUGH RICHARDS & MICHAEL DONALDSON, LIFE AND WORKLIFE EXPECTANCIES (2d ed. 2010); James Ciecka & Peter Ciecka, *Life Expectancy and the Properties of Survival Data*, LITIG. ECON. DIG., Spring 1996, at 19 (attempting to estimate the precision life expectancy data).

<sup>245</sup> Ciecka & Ciecka, *supra* note 244, at 29 tbl.2. *See generally* RICHARDS & DONALDSON, *supra* note 244.

<sup>246</sup> *See* Ciecka & Ciecka, *supra* note 244, at 26 tbl.1.

<sup>247</sup> Skoog et al., *Markov Process Model*, *supra* note 57, at 196 tbl.17.

<sup>248</sup> *May 2012 National Occupational Employment and Wage Estimates United States*, BUREAU LAB. STAT., [http://www.bls.gov/oes/current/oes\\_nat.htm](http://www.bls.gov/oes/current/oes_nat.htm) [<https://perma.cc/2TA3-SAMZ>] (last modified Nov. 27, 2013).

<sup>249</sup> In the legal occupation, for example, the difference in pay between the seventy-fifth and twenty-fifth percentiles is actually greater than the median pay. *See Occupational Employment and Wages in 2014*, BUREAU LAB. STAT. (Apr. 2, 2015), <http://www.bls.gov/pub/ted/2015/occupational-employment-wages-2014.htm> [<https://perma.cc/YA9X-ZCG4>]. For almost all other major occupational groups, the difference between the ninetieth and tenth percentile is greater than the median pay. *See id.*

One might conjecture that using blended tables will reduce the variance, as many more observations are thrown into the mix. Mathematically, however, this outcome is not guaranteed.<sup>250</sup> Thus, only in those cases where it is possible to know that the variance of the blended distributions is indeed smaller, using blended tables might be welfare-increasing.<sup>251</sup> Similar to the mechanism of insurance, whereby risk-averse individuals prefer a small loss over a small chance to suffer a large loss, from a welfare perspective it might be preferable to miscompensate many people by a little (when using blended tables with smaller variances) than to miscompensate a smaller number of people by a lot (when using nonblended tables).<sup>252</sup>

## 2. Distributions Are Skewed

As we saw, using blended tables does not guarantee more precision; indeed, until more of the underlying data from which the tables are constructed is released, courts are unlikely to know whether or not using blended tables will reduce the variance.<sup>253</sup> Therefore, the previous argument probably does not provide a strong enough reason to abandon race- and gender-based tables on efficiency grounds.

Now we turn to another feature of the distribution, which measures a distribution's asymmetry or skewness. As the next figure shows, in general, distributions can be symmetric, where the mean, the mode, and the median converge. But they can also be asymmetric, in which case these three statistics do not converge. The skewness of the data raises an interesting problem. First, if the distribution of the advantaged group is positively skewed and that of the disadvantaged group is negatively skewed, then even if the difference between the means of the distributions is statistically significant, the difference between

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<sup>250</sup> SARA E. BURKE, COMBINED VARIANCE OF TWO GROUPS WITH EQUAL NUMBERS OF OBSERVATIONS 3 (Jan. 2014), <http://www.saraemilyburke.com/stats/CombinedVarianceEqualNs.pdf> [<https://perma.cc/7UYA-8489>] (showing that “as the sample sizes increases,” the variance of the combined sample of two identical distributions “approaches the mean of the two variances plus the square of half the distance between the two means”). That is, if  $x$  and  $y$  are two distributions and  $c$  is the combined distribution, then  $[(\text{Var})]_c = (V_x + V_y)/2 + [((\bar{x} - \bar{y})/2)]^2$ . *Id.* Depending on the size of the second argument on the right-hand-side,  $\text{VAR}_c$  might be smaller or larger than the larger of the original two distributions. *Id.*

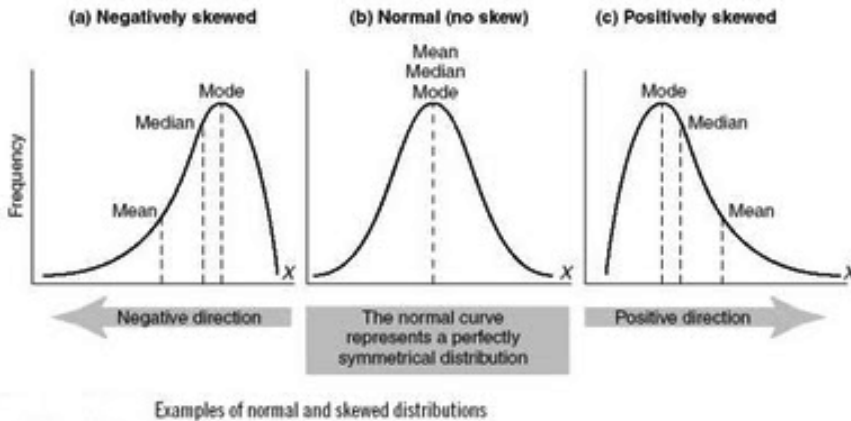
<sup>251</sup> *See id.*

<sup>252</sup> Further inaccuracies at the individual level might arise because courts routinely make use of tables that are in some way mismatched between their intended use in policy making and their actual use in courts. *See* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 842–50 (2014) (discussing discrepancies between “prediction intervals” for an individual forecast and “confidence intervals,” which are estimated for the group mean or for the effect of a given variable, in the context of predicting criminal recidivism).

<sup>253</sup> *See id.*

the modes or medians may not be. In that case, the justification to treat differently men and women, or whites and blacks, is significantly weakened.

Figure 1: *Long-Tail Versus Normal Distributions*<sup>254</sup>



As Figure 1 shows, when the distributions face away from each other, the distance between the medians and the modes is smaller than the difference between the means.<sup>255</sup> Theoretically, it is possible that these differences are statistically insignificant even when the difference between the means *is* statistically significant. Where that is the case, the argument goes, these two groups should be treated as one. The normative justification for ignoring the tails (as when one uses the median instead of the mean of the distribution) is that it might make little sense to let people at the tails of the distribution determine the destiny of the entire group. After all, courts are attempting to predict what would be the long-run losses of a child, with a level of confidence of “more likely than not.” Therefore, if courts seek to maximize the accuracy of compensation, and they have to choose one statistic to reflect the entire distribution, they should perhaps choose the mode, which reflects the salary earned (based on life expectancy or worklife expectancy) by the largest number of people. Alternatively, they can choose the median, which reflects the salary (based on life expectancy or years at work) that at least 50% of the population will achieve.

*b. Second Potential Outlet: Existing Discrepancies Between Groups Are a Result of Market Failures that Require a Fix*

In the previous Part, we argued that courts systematically use inaccurate and therefore inadequate tables that might distort parties’ diligence incentives.

<sup>254</sup> Jacob Montgomery, *Measures of Central Tendency*, WASH. U. ST. LOUIS (Sept. 5, 2016), <http://pages.wustl.edu/montgomery/articles/2577> [<https://perma.cc/L64C-PWDX>].

<sup>255</sup> *Id.*

In this Part we explore the argument that this practice also distorts victims' incentives to invest in their skills.

It is well known that employers value job attachment.<sup>256</sup> Yet, historically, women have had lower job market attachment than men.<sup>257</sup> Several nonmutually exclusive reasons could underlie this phenomenon. A particular woman's job attachment may be low because of employer discrimination—either direct (such as when employers prefer to fire women or blacks first and then men and whites),<sup>258</sup> or indirect (such as when a white male-dominated workplace is hostile toward women or blacks, causing women or blacks to quit their jobs or miss out on important bonding opportunities essential to advancement).<sup>259</sup> Alternately, job attachment may be low due to choices some female employees make: women may prefer to be involved directly in child-rearing, and workplace policies governing staff promotion may lack the requisite flexibility that would enable working mothers to satisfactorily complete their employment duties while raising children.<sup>260</sup>

In either of these indirect cases, employers may rationally prefer hiring white males over otherwise identical blacks or female candidates because, probabilistically speaking, there are higher profits to be had from hiring a white man as the return on job-specific training is higher.<sup>261</sup> The question is whether this rational discrimination by employers is socially inefficient, and if so, why?

The answer is that such discrimination is indeed inefficient, and the reasons are myriad. First, the inefficiency may arise from the self-perpetuating nature of this cycle of thinking. If employers (i) are less likely to employ women in jobs that require job attachment, (ii) fail to offer workplace initiatives to create more suitable workplaces for women, and/or (iii) inadequately balance the needs of women who choose to rear children by failing to institute workplace initiatives designed to improve retention of those employees, then some (if not many) women may respond rationally by getting more involved in child-rearing than men.<sup>262</sup> Thus, they become less likely to acquire the skills necessary to perform well in those jobs, inadvertently confirming the erroneous beliefs held by employers regarding job market

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<sup>256</sup> Kenneth A. Couch & Robert Fairlie, *Last Hired, First Fired? Black-White Unemployment and the Business Cycle*, 47 DEMOGRAPHY 227, 229 (2010).

<sup>257</sup> *Id.*; see also Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847, 856–57 (1997).

<sup>258</sup> Couch & Fairlie, *supra* note 256, at 227; Note, *Last Hired, First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544, 1544 (1975); see also *Guthrie v. Colonial Bakery Co.*, No. 16455, 1972 WL 276, at \*1, \*4 (N.D. Ga. Mar. 9, 1973) (order and final decree) (deciding a case where women were being laid off while men were allowed to continue working during a restructuring).

<sup>259</sup> See Finley, *supra* note 257, at 856–57.

<sup>260</sup> See *id.* at 861–62.

<sup>261</sup> See *id.*; see also Couch & Fairlie, *supra* note 256, at 227, 229.

<sup>262</sup> See Finley, *supra* note 257, at 861–62.

attachment.<sup>263</sup> In this case, such beliefs are self-confirming. The same thinking can be applied to black employees.<sup>264</sup> Assuming female and black employees' inherent and unchanging preferences are not driving this assumption on the part of employers, this is inefficient at the societal level because women and blacks—the disadvantaged groups—could yield higher profits for their employers if common employment practices within the labor market were not discriminatory and beliefs were not asymmetric across groups to begin with.<sup>265</sup>

Since this job market discrimination is socially undesirable, the argument goes, courts should implicitly correct for the market failures stemming from sexist or racist practices as well as from asymmetric beliefs across groups by ignoring those wage gaps. Accordingly, tort law should award loss of future income based on a hypothetical nondiscriminatory efficient market.

One may consider the difficulty with this argument in the context under discussion to be the seeming unlikelihood that victims'—especially children's or their benevolent agent's—incentives to invest in developing their human capital would really be influenced by the fact that courts use nonblended tables in tort cases. Whereas almost everyone seeks a job, only very few face accidents. Thus, it is easier to see how job market imperfections might lead to distorted incentives for young adults from disadvantaged groups toward investing in their human skills. Since accidents are so rare, the broad principle that discriminatory practices in tort law lead to inefficient investment in human capital is a harder sell—especially in regard to children. The law and economics movement has yet to prove empirically the first order effects of legal rules; namely, the effects on parties' incentives to take care. The existence of second-order effects—the effects on victims' incentives to invest in their human capital—is a much longer shot.

### *c. Third Potential Outlet: Economic Efficiency Does Not Require a Distinction Between the Willingness-to-Pay of the Rich and the Poor*

A classic result in the economic analysis of law is that policies should always be contemplated by performing a cost-benefit analysis that relies on people's willingness-to-pay (WTP) without any distributive weights attached

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<sup>263</sup> Couch & Fairlie, *supra* note 256, at 227, 229.

<sup>264</sup> If employers fail to offer mentorship opportunities for black employees and policies that encourage bonding with black employees, the same self-confirming pattern emerges. See David A. Thomas & Suzy Wetlaufer, *A Question of Color: A Debate on Race in the U.S. Workplace*, HARV. BUS. REV., Sept.–Oct. 1997, at 118, 122. For example, some black employees have reported feeling alienated by golf outings, given that sport's generally high front-end costs and greater popularity with higher-income individuals. *Id.*

<sup>265</sup> See Andrea Moro, *Statistical Discrimination*, NEW PALGRAVE DICTIONARY ECON., [http://www.dictionaryofeconomics.com/article?id=pde2009\\_S000544](http://www.dictionaryofeconomics.com/article?id=pde2009_S000544) [<https://perma.cc/2H66-XL9N>].



to it.<sup>266</sup> And since the WTP of the rich is greater than that of the poor, policies—such as safety decisions—should reflect these differences.<sup>267</sup>

Recently, Professors Ariel Porat and Avraham Tabbach have suggested that the economic analysis of law does not require society to place a different value on safety measures for the rich and the poor.<sup>268</sup> Porat and Tabbach start by observing that wealthy people are willing to spend more than poor people on self-risk-reduction because they ascribe a higher value to their ability to consume their wealth during their lifetimes.<sup>269</sup> However, since wealth is transferable, society should invest in those individuals equally when deciding to invest in rich or poor people's safety, as it should consider social rather than private values.<sup>270</sup> Therefore, the value of life should be determined irrespective of wealth.<sup>271</sup>

Albeit correct, Porat and Tabbach's argument cannot save law and economics from the unpalatable realities we focus on in this Article. Our claim transcends theirs in that we argue that tort law should also not consider *human capital* in determining optimal safety investments. Human capital, unlike existing monetary wealth, is not transferable. Essentially, Porat and Tabbach say that at age seventy, there is no reason to take more care to protect, for example, Mark Zuckerberg's life than anyone else's because he's already created the wealth he has.<sup>272</sup> If he dies, someone else will get it. But at age eighteen, this is not the case. If Zuckerberg were to have died then, all that wealth would not have been created and the human capital that created that wealth would have disappeared. Therefore, even if it accepts Porat and Tabbach's pointed argument,<sup>273</sup> the law and economics movement will still hold that, *ceteris paribus*, society ought to spend more resources to protect human capital that has greater value. Unlike the case of accumulated wealth, there is no corresponding positive externality to third parties when human capital dies.

We argue, in contrast, that statistical differences in human capital related to race and gender should be ignored; therefore, Porat and Tabbach's argument cannot save law and economics.

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<sup>266</sup> A general articulation of this statement can be found in Kaplow, *supra* note 216, at 159–75.

<sup>267</sup> See Porat, *supra* note 204, at 100; see also Ariel Porat & Avraham Tabbach, *Willingness to Pay, Death, Wealth, and Damages*, 13 AM. L. & ECON. REV. 45, 45–52 (2011).

<sup>268</sup> Porat & Tabbach, *supra* note 267, at 45–52.

<sup>269</sup> See *id.* at 52–57.

<sup>270</sup> *Id.* at 55.

<sup>271</sup> *Id.*

<sup>272</sup> See *id.* at 55–57.

<sup>273</sup> *Id.* at 45–57.

d. *Fourth Potential Outlet: Private Law Should Not Only be Geared Toward Economic Efficiency*

Another potential outlet through which law and economics scholars could avoid their—in our view, unacceptable—association with discriminatory targeting practices is to incorporate the notion of equality, first into the social welfare function, and second into private law. Kaplow and Shavell have no problem with the former, but they object to the latter.<sup>274</sup> Specifically, they theorize that principles of fairness, specifically distributive justice principles, may be incorporated into social welfare analysis as individuals may well have preferences for equality, and those preferences affect their well-being just like their preference for art, nature, or fine wine.<sup>275</sup> The two issues that arise are first, how exactly should we account for equality in the social welfare function, and at what cost; and second, should we account for equality within the boundaries of private law? We address these two questions in turn.

i. *What Is the Trade-Off Between Equality and Efficiency?*

We start with the first issue. One way of accounting for equality is to grant equality lexical priority over efficiency. Accordingly, one may argue that ultimately, the principle of *restitutio ad integrum* cannot be normatively superior to the principle that all people are created equal. Simply put, no one deserves to be targeted because of race or gender or because of the impact of race and gender on one's "value" in the legal system. The school bus example was designed to demonstrate our distaste for both *ex post* differential treatment and the distorted *ex ante* incentives to take proper care.<sup>276</sup> The example is troubling because it *feels unfair to pay* lower damages to victims belonging to disadvantaged groups, but also because it *feels unfair to allocate* buses and drivers in a way that targets those groups to begin with. We are troubled by these feelings because individuals who are equally worthy of society's protection are underprotected.<sup>277</sup> Cost-benefit analysis, so goes that argument, should start only after the commitment to strict equality has been established.<sup>278</sup> Thus, society should not abandon the commitment to equality

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<sup>274</sup> See Kaplow & Shavell, *supra* note 215, at 332–33, 336, 351–52.

<sup>275</sup> *Id.* The authors argue that policy assessment should be based exclusively on well-being (including the impact of equality on well-being), but that no weight should be accorded to independent notions of fairness. *Id.* at 360. In this Article, we accept their framework and therefore ignore alternative consequentialist views (as opposed to simple welfarists) according to which equality is intrinsically valuable (in general, or in specific contexts such as saving lives). See *id.* at 332–33.

<sup>276</sup> See *supra* Part IV.C.1.

<sup>277</sup> See Porat & Tabbach, *supra* note 267, at 73.

<sup>278</sup> See *id.* at 49–50, 50 n.4 (citing Tomas J. Philipson et al., *Terminal Care and the Value of Life Near Its End* (Nat'l Bureau of Econ. Research, Working Paper No. 15649, 2010), <http://www.nber.org/papers/w15649.pdf> [<https://perma.cc/NT72-5CZU>]).

and allow women and minorities to be “targeted,” but rather should abandon the purportedly accurate statistical application of *restitutio ad integrum* for a less accurate statistical application that recognizes the priority value society places on equality.

One of the problems with this potential outlet is that many people may not believe that notions of equality should *always* trump efficiency regardless of the costs to society. Indeed, most people do not lend equality lexical priority. More likely, they believe in some trade-off between equality and the costs to society from the “inefficiencies” involved in having an egalitarian damages rule.<sup>279</sup> Thus, a moderated version of the argument advances the position that, while preferences for equality should comprise part of the social welfare function, they should not be considered lexically prior to efficiency;<sup>280</sup> rather, they should be given some weight. Since policymakers need to maximize welfare and not just wealth, and because welfare includes people’s preference for equality, policymakers should account for equality, but only in as much as it affects people’s well-being.<sup>281</sup> Accordingly, since most people have preferences that are nondiscriminatory, at least to some extent, economic analysis of law should support nondiscriminatory policies—at least as long as such policies are not too costly in terms of misallocation of resources.<sup>282</sup>

The main problem with this line of thought is that it does not produce the “desired” result when a sufficient number of people have racist or sexist (other-regarding) preferences in society, or think that welfare maximization justifies inequality such that the overall welfare analysis yields that the maintenance of discrimination.<sup>283</sup>

Another possible reason why policymaking should not always be geared to narrow efficiency considerations involves Rule Utilitarianism.<sup>284</sup> The idea in Rule Utilitarianism (to be distinguished from Act Utilitarianism) is that following general rules that tend to lead to the greatest good will have better consequences overall than allowing ad hoc efficient exceptions to be made in

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<sup>279</sup> See *id.* at 45.

<sup>280</sup> See *id.* at 58–59.

<sup>281</sup> See *id.*

<sup>282</sup> See Porat, *supra* note 204, at 102 (“I cannot see how the efficiency goal would be frustrated if society were to ascribe identical value to the lives and limbs of all its members.”).

<sup>283</sup> Interestingly, one can find both economists and egalitarians that agree such preferences should be excluded. John Harsanyi, a Nobel Laureate in economics, argued such preferences should be excluded from the social welfare function. JOHN C. HARSANYI, RATIONAL BEHAVIOR AND BARGAINING EQUILIBRIUM IN GAMES AND SOCIAL SITUATIONS 62–64 (1977). So did Ronald Dworkin, a political philosopher. RONALD DWORIN, TAKING RIGHTS SERIOUSLY 234 (1977). A complete treatment of the problem of external preferences is beyond the scope of this Article, but observe that in the main text we count external preferences.

<sup>284</sup> HARSANYI, *supra* note 283, at 62–64; BARBARA MACKINNON, ETHICS: THEORY AND CONTEMPORARY ISSUES, CONCISE EDITION 37–39 (2d ed. 2013).

individual acts, even if better consequences can be demonstrated in those instances.<sup>285</sup>

Rule Utilitarianism certainly provides stability compared to Act Utilitarianism.<sup>286</sup> It seems appealing, as most of us would prefer not to live in a society in which each decision is made by ad hoc robotic cost-benefit analyses, but rather in a society where generally efficient rules are always enforced, even if in some rare cases they generate undesirable outcomes.<sup>287</sup> Why? Because history and common sense teach us that the former comprises an inferior society to be in.<sup>288</sup> A rule against murdering is an efficient rule even if by murdering one, society can save five.<sup>289</sup> Indeed, too much Act Utilitarianism, so goes the argument, would lead to a continuous pattern of targeting disadvantaged groups, which in turn would lead to negative external effects outside the actor's decision to target the group.<sup>290</sup>

Rule Utilitarianism provides a potential outlet to the targeting problem in tort law, the argument continues, because it suggests that not targeting the disadvantaged may be beneficial overall, even if in a given case it is demonstrably not.<sup>291</sup>

To see this more clearly, observe the similarity between the problem at hand and the famous "trolley problem," which deals with the dilemma of killing one or killing five.<sup>292</sup> How would we like our company manager to train her drivers in cases similar to the "trolley problem"? Imagine the morning brief: can we picture the manager briefing her drivers that if the bus's brakes malfunction and they have to run over a child, and if there is a white boy on the right and a black girl on the left, the drivers should avoid the former? For a simple Act Utilitarian, the driver should take the path toward the individual who has the lowest cost: this would mean killing the black girl versus the white boy, or the one person standing on the track versus five in the original trolley problem.<sup>293</sup>

One of the classic approaches to the original trolley problem is a Rule Utilitarian solution: one should not take affirmative action to save others from inevitable harm if that means harming another innocent life, as the violation of such a rule would degrade the moral significance of the individual and his/her

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<sup>285</sup> HARSANYI, *supra* note 283, at 62–64; MACKINNON, *supra* note 284, at 37–38.

<sup>286</sup> HARSANYI, *supra* note 283, at 61–63; MACKINNON, *supra* note 284, at 37–38.

<sup>287</sup> See MACKINNON, *supra* note 284, at 38–39.

<sup>288</sup> HARSANYI, *supra* note 283, at 62–64.

<sup>289</sup> See MACKINNON, *supra* note 284, at 37–38.

<sup>290</sup> See *id.* at 36–37.

<sup>291</sup> See *id.* at 37–38.

<sup>292</sup> Originally proposed by Philippa Foot, the basic "trolley problem" asks whether one, in the position of a driver in control of a trolley with failed brakes heading toward five men, would use a spur on the track to avoid the five men but kill one man standing on the spur. See PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 23–25 (1978); see also MACKINNON, *supra* note 284, at 36.

<sup>293</sup> See MACKINNON, *supra* note 284, at 36–38; see also FOOT, *supra* note 292, at 19–24.

associated rights.<sup>294</sup> From a social welfare perspective, Rule Utilitarianism might entail that the driver needs to randomize her actions so that no single group is targeted.<sup>295</sup> Targeting the black girl might undermine social cohesion in a manner that would create a greater loss in future welfare than would be gained by an “optimal” tailoring of the driving rules now.<sup>296</sup>

Unfortunately, Rule Utilitarianism is unlikely to provide an adequate outlet for the problem at hand. First, Rule Utilitarianism cannot simply assert that adherence to the driver’s code (of not always targeting blacks or women) will maximize overall social welfare. Rule Utilitarianism will have to demonstrate empirically or to provide a sounder theoretical argument for how *exactly* eliminating the use of nonblended tables will improve welfare in the long run.<sup>297</sup> While some believe this might be achievable, it has not been proven. Simply asserting that Rule Utilitarianism will resolve our problem flirts with begging the question.<sup>298</sup> Second, and relatedly, even under Rule Utilitarianism, it might be desirable to kill the one in order to save, say, one hundred, or one hundred thousand.<sup>299</sup> Thus, under not implausible assumptions, Rule Utilitarianism might still require drivers to target the disadvantaged groups. For example, suppose that the kids in a disadvantaged neighborhood will really not contribute much to society’s overall welfare. Perhaps because they are all sick, or drug addicts, or whatever. Furthermore, suppose that the preferences for equality of the members in the advantaged groups are not strong enough to overcome their resistance to seeing trucks diverted towards their kids. Under these assumptions, targeting might still be desirable even under Rule Utilitarianism. And yet, that seems wrong. At the end of the day, even Rule Utilitarianism requires some cost–benefit analysis.

To conduct *any* cost–benefit analysis, one must explore what the costs involved in targeting the cheaper, disadvantaged groups really are.<sup>300</sup> For law and economics scholars, this entails an investigation of the *ex ante* incentives stemming from the fact that courts evaluate *ex post* damages more “accurately”—that is, by using nonblended tables.<sup>301</sup> To concretize this idea, we start with the classic example, à la Kaplow, where potential tortfeasors cannot anticipate in advance the value of the losses they create (imagine a driver passing through a place she is unfamiliar with and therefore not knowing anything about the typical profile of her potential victims in that area).<sup>302</sup> In such a case, assuming that accuracy is costly, requiring the court to

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<sup>294</sup> See MACKINNON, *supra* note 284, at 36–39.

<sup>295</sup> See HARSANYI, *supra* note 283, at 61–64; MACKINNON, *supra* note 284, at 37–39.

<sup>296</sup> See HARSANYI, *supra* note 283, at 61–64; MACKINNON, *supra* note 284, at 37–39.

<sup>297</sup> See HARSANYI, *supra* note 283, at 61–64; MACKINNON, *supra* note 284, at 37–39.

<sup>298</sup> See HARSANYI, *supra* note 283, at 61–64; MACKINNON, *supra* note 284, at 37–39.

<sup>299</sup> See HARSANYI, *supra* note 283, at 61–64; MACKINNON, *supra* note 284, at 37–39.

<sup>300</sup> See Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 307 (1994).

<sup>301</sup> See *id.* at 307, 311–16.

<sup>302</sup> *Id.* at 313–14.

award accurate damages amounts to a social waste because that information cannot improve the level of care tortfeasors already chose to undertake.<sup>303</sup> Accordingly, courts should award “inaccurate,” or average, damages, thus saving on litigation costs.<sup>304</sup> But since in our case both blended and nonblended tables are equally costly—they are both free—this analysis does not help us decide whether using one type of table is more efficient than using the other.

The picture changes when potential drivers *can* anticipate, and thus affect, whether their accidents will involve a “low value” victim, such as when routing trips through predominantly black neighborhoods.<sup>305</sup> If, in the latter case, the *ex post* damages award reflects the magnitude of the actual loss caused, future decisions regarding levels of care and activity will be adjusted accordingly.<sup>306</sup> Kaplow’s classic framework asks us to consider in such cases whether a change “in behavior on account of accuracy is sufficiently desirable to justify the cost of greater accuracy.”<sup>307</sup>

But again, since the government provides the statistical tables at no cost, the use of race- and gender-based statistical tables is free. Therefore, according to Kaplow’s framework, greater accuracy should be always desirable, as it incentivizes the potential tortfeasor to make decisions that minimize her potential damages.<sup>308</sup> This result is also considered *socially* desirable because, again under Kaplow’s framework, the damages the tortfeasor pays equal the social harm she inflicted.<sup>309</sup> By minimizing the amount of damages paid, the tortfeasor also minimizes the social harm she causes.<sup>310</sup> From this perspective, targeting is not only *not* problematic but actually desirable.<sup>311</sup>

But for societies that prioritize equality in their social welfare function, a tortfeasor’s damages liability does not equal the social harm she caused.<sup>312</sup> In such societies, reducing the tortfeasor’s damages when she harms blacks or women, instead of whites or men, does *not* reflect the collective value society places on the social harm caused.<sup>313</sup> There, the preference for equality entails that social harm is the same in all cases, regardless of whether the injured party is black or white, male or female.<sup>314</sup> Therefore, greater accuracy (even if costless) is of no value in such societies, as it does not really save social costs

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<sup>303</sup> *Id.*

<sup>304</sup> *See id.* at 321–22.

<sup>305</sup> *Id.* at 314–16.

<sup>306</sup> Kaplow, *supra* note 300, at 314–15.

<sup>307</sup> *Id.* at 315.

<sup>308</sup> *Id.* at 314–16.

<sup>309</sup> *Id.* at 318–19.

<sup>310</sup> *Id.*

<sup>311</sup> *See id.*

<sup>312</sup> *See* Kaplow, *supra* note 300, at 314–16, 321–23.

<sup>313</sup> *See id.*

<sup>314</sup> *See id.*

but only shifts them, regressively, to blacks and women, thus reducing the overall social welfare.<sup>315</sup>

ii. *Is Private Law the Place to Take Preferences for Equality into Account?*

We now turn to the second question, of whether private law is at all the right locus for dealing with society-wide problems of discrimination. Even if one accepts that equality matters to the social welfare function, as well as the extent to which it matters, it is still not clear that society should worry about inequality between groups in the rare context of injury or death. Rather, society should reduce inequality between groups in effective, fiscal ways within relevant distributive justice institutions (namely the tax and transfer system).<sup>316</sup> Therefore, the argument goes, tort law should still be geared only toward efficiency, compensating victims according to the real harm they have suffered.<sup>317</sup> Put differently, tweaking tort law to fix problems of discrimination is like fixing a dent in a car that has a weak engine: it might improve things a bit, but would not really solve the problem of discrimination in society.

Indeed, realms of legal analysis have been devoted to the question of whether private law should be geared toward efficiency only or whether it should take distributive justice concerns into account.<sup>318</sup> As Kaplow and Shavell famously argued, for every distribution made via private law, in an alternative legal regime private law is geared toward efficiency and distribution is undertaken via the tax and transfer system, which leaves everyone better off.<sup>319</sup>

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<sup>315</sup> A related argument emerges when one considers tortfeasors' incentive to invest in learning about their potential victim's "value." As Kaplow demonstrated, potential tortfeasors' incentive to invest in learning about their potential victims' value (as reflected by courts) will depend on the degree of accuracy courts employ in determining damages. *Id.* at 316. A sufficient incentive exists where the tortfeasor's potential gains exceed the cost of the information. *Id.* at 317. Put differently, in Kaplow's framework, information about the *ex post* loss is valuable only if it is reflected in the court's *ex post* awards. *Id.* But those who care about equality would not necessarily want the potential tortfeasor to invest in learning where the "low value" victims (as determined by courts) are—namely, they do not want tortfeasors to learn where the disadvantaged victims are—because they believe targeting would result in social waste. *See id.* Thus, for them, blended tables are superior.

<sup>316</sup> *See* Kaplow & Shavell, *supra* note 25, at 667–69.

<sup>317</sup> *See* Keren-Paz, *supra* note 161, at 276–79.

<sup>318</sup> *E.g.*, Ronen Avraham et al., *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125, 1126–32 (2004); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1653–58 (1998); *see also* Kaplow & Shavell, *supra* note 25, at 669; Keren-Paz, *supra* note 161, at 278–86; Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1005–14 (2001); Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797, 797–98 (2000).

<sup>319</sup> Kaplow & Shavell, *supra* note 25, at 669.

In contrast, Kyle Logue and the first Author described conditions under which private law can be more efficient “on the ground” than the tax and transfer system to distribute wealth.<sup>320</sup> Indeed, even if theoretically, distribution via the tax and transfer system is more efficient than via private law, in reality distribution via the former is subject to distortions and various market failures of its own.<sup>321</sup> Thus, in practice, distribution via private law is often preferable. As an analogy, consider the problem of developing a fast aircraft:

whereas it is theoretically possible to approach the speed of light, the practical difficulties involved in actually implementing this theoretical possibility prohibits the creation of super high-speed spacecraft. [And yet,] [n]o one argues that we should stop building slow yet practical spacecraft because for every such spaceship, there is an alternative, albeit purely theoretical, design that would travel faster.<sup>322</sup>

In sum, according to this outlet, as long as enough people have sufficiently strong preferences for an egalitarian legal regime, it might be efficient to eliminate the discriminatory impact of tort law.<sup>323</sup> Such a regime would mimic the hypothetical Coasean bargaining that would have occurred between tortfeasors, victims, and the rest of society—as the latter presumably suffer from the external harm generated from knowing they live under a system in which blacks and women are targeted.<sup>324</sup> And, since the tax and transfer system is not free of distortions or inefficiencies, it might be efficient to eliminate the discriminatory impact of tort law by changing tort law itself and using blended tables.<sup>325</sup>

Moreover, the argument about the pointlessness of using private law as a way to fix all problems of discrimination writ large overlooks a very important issue. Eliminating nonblended tables aims at eliminating the smaller problem of the *ex ante* targeting incentives tort law creates.<sup>326</sup> Indeed, shifting to blended tables is costless and will immediately eliminate the *ex ante* targeting incentives, whereas increasing equality between the genders and races writ large as a way to eliminate the *ex ante* incentives comprises a costlier, lengthier process.<sup>327</sup> The claim that we should not fix a dent in the car with a weak engine is misleading. As long as we have to drive a car with a weak engine, fixing the dent might well be optimal.

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<sup>320</sup> Avraham et al., *supra* note 318, at 1149.

<sup>321</sup> *Id.* at 1127–30.

<sup>322</sup> *Id.* at 1154.

<sup>323</sup> *See id.* at 1127–30.

<sup>324</sup> *See* John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1589–90, 1601 (1992) (book review).

<sup>325</sup> *See id.*

<sup>326</sup> *See* Kaplow, *supra* note 300, at 314–16, 321–23.

<sup>327</sup> *See id.* at 312–20.



### 3. Summary

Any compensatory tort scheme that statistically accounts for race and gender will encourage rational actors to make choices that disadvantage individuals in demographics that warrant lower tort liability costs. In practice, this means that the tort system not only perpetuates race and gender discrimination by relying on historical data, but also pushes discrimination into the future by providing potential tortfeasors with perverse *ex ante* incentives.<sup>328</sup>

We hold that economic analysis of law should support blended tables not only because when considering notions of equality, blended tables are welfare-maximizing, but also because they are more efficient than nonblended tables. Given the tables' inaccuracies, outdated nature, and the fact that they might describe skewed distributions by using averages, using blended tables seems like the efficient thing to do. But our goal was more ambitious than that; we sought to explore the extent to which even using *accurate* nonblended tables is inefficient. Our aim was not so much to engage in the debate about the classic trade-off between efficiency and fairness, but rather to demonstrate that tort law can be made both more efficient and fairer simultaneously. Ultimately, our argument is that targeting the disadvantaged is inefficient because, under reasonable assumptions about the role of equality in the social welfare function, targeting does not save social costs to defendants (but only private costs) while imposing extra costs on those already worse off; therefore, such targeting is welfare reducing.<sup>329</sup>

When viewed as an attempt to make tort law more efficient (and not just to solve problems of discrimination), this call to change the way damages are calculated is no different from the hundreds of other research articles written within the law and economics tradition that attempt to increase the efficiency of tort law by suggesting tweaks to existing doctrines.<sup>330</sup>

Indeed, when comparing contemporary tort law's approach to valuing injuries with the approach taken by agencies conducting cost-benefit analyses, the similarity of the approach proposed here and the one taken by agencies

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<sup>328</sup> See *id.*

<sup>329</sup> One can reach the same results from two other perspectives. First, given that the magnitude of the loss of a child to his or her parent is so big, the *percentage* difference in the loss of a disadvantaged child and an advantaged child, from a social welfare perspective, is nil, therefore it should be ignored. Second, one can adopt a behavioral approach and welfare gain in using nonblended tables, even if one accepts the premises that targeting the disadvantaged is welfare-increasing.

<sup>330</sup> See generally, e.g., Avraham et al., *supra* note 318 (considering when tax and transfer systems may be more efficient than private law); Donohue, *supra* note 324 (arguing that the harm which results from a known discrimination system reduces efficiency); Kaplow, *supra* note 300 (discussing the role accuracy of information plays in efficiency); Porat, *supra* note 204 (discussing the negative impact of wealth on disincentives for causing harm); Weinrib, *supra* note 22 (advocating for a justice system that reflects only the relationship between the two parties, ignoring society).

becomes clear.<sup>331</sup> For example, in the environmental realm, uniform monetary figures are placed on different injuries (as is a uniform cost for lost life), irrespective of the actual loss.<sup>332</sup> This rule-like approach, which utilizes very little ad hoc information, would be quite efficient in adjudication. The use of a uniform approach is remarkable considering the fact that agencies using cost-benefit analysis are probably far more effective in affecting accident prevention than tort law is.<sup>333</sup> Similarly, various highway safety-related decisions are made both by courts adjudicating tort cases and by agencies in building and repairing highways, inspecting automobiles, setting speed limits, etc.<sup>334</sup> But whereas tort law attempts to use a more “accurate” compensation methodology, the agencies involved apply simple uniform charts.

Perhaps closer to home, insurers in their role as private safety regulators also use uniform tables.<sup>335</sup> For example, experience rating formulas for setting third party liability premiums in car insurance take into account past accidents, but not whether the driver injured a man or a woman, a black individual or a white one.<sup>336</sup> The increased premium is blind to this factor perhaps because insurers believe that the identity of the victim is random.<sup>337</sup> Private insurance companies price in advance the same car accident that generates gender- and race-based damage awards, as if the damage award were gender- and race-neutral.<sup>338</sup> Courts can do the same and should use only blended tables.

## V. DISCRIMINATORY DAMAGE CALCULATION IN FEDERAL LAWS

The discussion so far has focused on tort law, which is based on common law. Yet surprisingly, courts consider race and gender even when calculating the damages given to plaintiffs suffering from violations of *federal* law; and not just any federal law, but also some of our most progressive statutory frameworks: Title VII,<sup>339</sup> The Americans with Disabilities Act,<sup>340</sup> and The National Childhood Vaccine Injury Act.<sup>341</sup> In such cases, one would expect that the unconstitutionality of this practice could be easily demonstrated in court, because the Constitution is more easily applicable. And yet, courts

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<sup>331</sup> See Porat & Tabbach, *supra* note 267, at 50 & n.4 (citing Philipson et al., *supra* note 278).

<sup>332</sup> W. Kip Viscusi, *Regulation of Health, Safety, and Environmental Risks*, in 1 HANDBOOK OF LAW AND ECONOMICS 591, 592–654 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

<sup>333</sup> See Porat & Tabbach, *supra* note 267, at 50 & n.4 (citing Philipson et al., *supra* note 278).

<sup>334</sup> Viscusi, *supra* note 332, at 592–654.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> 42 U.S.C. § 2000e-5(g) (2012).

<sup>340</sup> *Id.* § 12117(a).

<sup>341</sup> *Id.* § 300aa-15(3)(A).

routinely use race- and gender-based tables when awarding damages to victims protected by these laws. This Part provides a brief overview of the problem.

### A. Title VII

The most ironic race- and gender-based damage award calculations occur in Title VII cases. Title VII is the statutory cause of action for workers suffering discrimination in the workplace due to their race, color, religion, sex, or national origin.<sup>342</sup> In landmark case law, the Supreme Court held that Title VII prohibits employers from requiring female employees to make higher contributions to their retirement fund—regardless of the employer’s use of life expectancy tables to construct and support the policy.<sup>343</sup> In *City of Los Angeles Department of Water & Power v. Manhart*, the employer used life expectancy tables to determine that female employees live longer than male employees, therefore concluding that pension costs are higher for retired females because more payments would have to be made to the women.<sup>344</sup> The *Manhart* Court noted that “[a]ctuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex. But [the] statute . . . was designed to make race irrelevant in the employment market.”<sup>345</sup> Shortly after, in *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, the Court similarly held that women should not receive lower retirement benefits on the basis of their increased longevity.<sup>346</sup> The Court held that “[e]ven a true generalization about [a] class’ cannot justify class-based treatment.”<sup>347</sup>

Although race- and gender-based compensatory damage awards in the Title VII context seem at odds with the statute’s purpose, evidence exists that courts are permitted to use race- and gender-based considerations, including race- and gender-based tables, in determining the appropriateness of front-pay.<sup>348</sup> While courts are unlikely to use statistical tables to determine a plaintiff’s wage when evaluating the appropriateness of front-pay,<sup>349</sup> they are

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<sup>342</sup> *Id.* § 2000e-2.

<sup>343</sup> *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 705, 702, 716–17 (1978).

<sup>344</sup> *Id.* at 705.

<sup>345</sup> *Id.* at 709 (footnote omitted). The Court noted the case did not “involve a fictional difference between men and women. It involve[d] a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men.” *Id.* at 707.

<sup>346</sup> *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1086 (1983) (per curiam).

<sup>347</sup> *Id.* at 1084–85 (alterations in original) (quoting *Manhart*, 435 U.S. at 708).

<sup>348</sup> Front-pay means “the wage differential between [plaintiff’s] current position and the position which he was denied.” *Colwell v. Suffolk Cty. Police Dep’t*, 967 F. Supp. 1419, 1432 (E.D.N.Y. 1997), *rev’d*, 158 F.3d 635 (2d Cir. 1998).

<sup>349</sup> Statistical wage tables are unlikely to be used because compensatory damage awards are limited to a maximum amount of \$300,000 in the Title VII context. 42 U.S.C. § 1981a(b)(3) (2012). Because Title VII deals with discrimination in the workplace,

likely to consider life and worklife expectancy—both of which could be determined by reference to nonblended statistical tables.<sup>350</sup> In *Baker v. John Morrell & Co.*, the court noted that the plaintiff “assumed she would work until age sixty-five.”<sup>351</sup> At the time, the plaintiff was forty-four.<sup>352</sup> The court took judicial notice that the current life expectancy of a woman is 79.5 years, citing to the U.S. Life Tables when referring to Baker’s life expectancy.<sup>353</sup> Although the female plaintiff was the one who asked the court to take judicial notice of her life expectancy, this consideration by the court has implications for courts’ views on these tables in other cases or other areas of law as well. Interestingly, the court in *Baker* characterized the plaintiff’s life expectancy as “a neutral consideration in the determination of the front pay award.”<sup>354</sup>

Admittedly, the effect of these tables in the Title VII context often may be quite limited, because a central part of front-pay damage doctrine requires the mitigation of damages—requiring the court to cut off the damage award after the period of time that the plaintiff should have been able to find comparable work.<sup>355</sup> Moreover, courts also use other data points related to worklife expectancy, including mandatory retirement ages or plaintiff testimony regarding anticipated retirement.<sup>356</sup> Nonetheless, however small the actual impact of these tables are in employment discrimination cases, their very use

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plaintiffs generally have an established income such that wage tables are not necessary. *See, e.g.*, *Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 90 (3d Cir. 2009).

<sup>350</sup> *See, e.g.*, *Donlin*, 581 F.3d at 87 (describing the factors); *Baker v. John Morrell & Co.*, 263 F. Supp. 2d 1161, 1178 (N.D. Iowa 2003) (“The court finds that the fifth factor—Baker’s life and work expectancy—are neutral considerations in the front pay analysis.” (citation omitted)), *aff’d*, 382 F.3d 816 (8th Cir. 2004).

<sup>351</sup> *Baker*, 263 F. Supp. 2d at 1178.

<sup>352</sup> *Id.* at 1176.

<sup>353</sup> *Id.* at 1178.

<sup>354</sup> *Id.*

<sup>355</sup> *E.g.*, *Gilster v. Primebank*, 884 F. Supp. 2d 811, 856, 859 (N.D. Iowa 2012) (finding that the plaintiff’s additional life expectancy was 49.8 years, but limiting front-pay damages to five years because the period would be “sufficient for Gilster to gain the qualifications necessary to become competitive in a different field and to complete her education”), *rev’d and remanded on other grounds*, 747 F.3d 1007 (8th Cir. 2014); *see also* *Dollar v. Smithway Motor Xpress, Inc.*, 787 F. Supp. 2d 896, 920 (N.D. Iowa 2011) (“[A]n award of front pay until retirement ignores the plaintiff’s duty to mitigate damages and the district court’s corresponding obligation to estimate the financial impact of future mitigation.” (quoting *United Paperworkers Int’l Union v. Champion Int’l Corp.*, 81 F.3d 798, 805 (8th Cir. 1996))), *aff’d in part, vacated in part*, 710 F.3d 798 (8th Cir. 2013); *Baker*, 263 F. Supp. 2d at 1184–85 (reducing the plaintiff’s front-pay to three years, even though her remaining life expectancy was over twenty years).

<sup>356</sup> *E.g.*, *Gotthardt v. Nat’l R.R. Passenger Corp.*, 191 F.3d 1148, 1156 (9th Cir. 1999) (upholding the front-pay award until the plaintiff’s mandatory retirement age of seventy); *Warren v. Cty. Comm’n*, 826 F. Supp. 2d 1299, 1313–16 (N.D. Ala. 2011) (awarding front-pay until the plaintiff’s assumed mandatory retirement age of sixty-five); *Baker*, 263 F. Supp. 2d 1161, 1178 (accepting the plaintiff’s testimony that “she would work until age sixty-five” as evidence of her worklife expectancy).

is jarring even on a symbolic sphere, in light of the statute's attempt to reduce discrimination based on race and gender.

### B. *The Americans with Disabilities Act*

The Americans with Disabilities Act (ADA) uses remedies authorized by Title VII.<sup>357</sup> Thus, for example, in *Colwell v. Suffolk County Police Department*, three police officers brought a suit against the police department, alleging that they were denied promotion as a result of their physical disabilities, in violation of the ADA.<sup>358</sup> The court defined the plaintiffs' remaining life and worklife years in reference to the New York Pattern Jury Instructions Table 1, which provides life expectancy values for males (albeit without reference to race).<sup>359</sup> In *Tobin v. Liberty Mutual Insurance Co.*, a plaintiff received a damage award that included additional pension benefits due to the employer's failure to accommodate his bipolar condition.<sup>360</sup> When challenged, the court upheld the jury's award despite the fact that it predicted the defendant would outlive statistical expectations.<sup>361</sup> Despite the proven (and frankly obvious) discriminatory effect of nonblended tables, in absence of a clear legal directive otherwise, courts have used and will continue to use nonblended tables in awarding damages for discrimination under the ADA.<sup>362</sup>

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<sup>357</sup> 42 U.S.C. § 12117(a) (2012).

<sup>358</sup> *Colwell v. Suffolk Cty. Police Dep't*, 967 F. Supp. 1419, 1422 (E.D.N.Y. 1997), *rev'd*, 158 F.3d 635 (2d Cir. 1998).

<sup>359</sup> *Id.* at 1435 n.14. "Based on the life expectancy table utilized by the [c]ourt, the jury was told that the life expectancy for a 52 year-old male is 76.7 years, for a 48 year-old male is 76.1 years, and for a 47 year-old male is 75.9 years." *Id.* "The jury was told that, according to the same table, a 52 year-old has 10.8 more active years in the labor force, a 48 year-old has 13.9 more years, and a 47 year-old has more [sic] 14.7 years." *Id.* at 1435 n.15.

<sup>360</sup> *Tobin v. Liberty Mut. Ins.*, No. 01-11979 DPW, 2007 WL 967860, at \*10 (D. Mass. Mar. 29, 2007), *aff'd and remanded*, 553 F.3d 121 (1st Cir. 2009).

<sup>361</sup> *Id.* at \*1, \*10. In *Tobin*, the trial court "took judicial notice of the life expectancy charts provided by the Plaintiff and instructed the jury that a white 60 year old male is expected to live for another 20.3 years." *Id.* at \*10. The jury determined that the defendant would live 7.5 years longer than the chart's prediction. *See id.* The court upheld the jury's award, finding that "[l]ife expectancy is inherently speculative, and jurors are not bound by actuarial tables, which do not provide evidence of how long any *particular* individual will live." *Id.* (citation omitted).

<sup>362</sup> *See, e.g., Hillmann v. City of Chicago*, 14 F. Supp. 3d 1152, 1177 (N.D. Ill. 2014) (acknowledging that the expert witness's analysis "did not consider Plaintiff's health condition or specific life expectancy, only the statistical average life expectancy for a *man* Plaintiff's age" (emphasis added)), *aff'd in part, rev'd in part, and remanded*, 834 F.3d 787 (7th Cir. 2016), *cert denied*, No. 16-903, 2017 WL 236881 (S. Ct. May 15, 2017) (mem.); *Rutledge v. United States*, No. 06-00008, 2008 WL 3914965, at \*11 (D. Guam Aug. 21, 2008) (accepting the testimony of the United States' economic expert, which in turn relied on the U.S. Life Tables of 2003, which includes tables delineating on both race and gender lines), *aff'd*, 417 F.App'x 635 (9th Cir. 2011). *But see Webner v. Titan Distrib., Inc.*, 101 F. Supp. 2d 1215, 1237 (N.D. Iowa 2000) (finding the plaintiff's work and life expectancy

### C. *The National Childhood Vaccine Injury Act*

Another important federal compensatory framework is found in the National Childhood Vaccine Injury Act of 1986.<sup>363</sup> This law allows those injured or killed by certain vaccines to claim compensation outside the traditional tort system, while reducing the liability, insurance, and litigation costs of vaccine manufacturers.<sup>364</sup>

Recall that future loss of earnings calculations require knowledge not only of the average wage but also of worklife statistics.<sup>365</sup> One of the most interesting cases is *Childers v. Secretary of Health & Human Services*,<sup>366</sup> which is notable for its reasoning on the issue of worklife expectancy.<sup>367</sup> In *Childers*, the petitioner's expert presented gender-blended worklife expectancy data and the respondent's expert presented gender-differentiated worklife expectancy data.<sup>368</sup> Conflicting precedents were found for the use of gender-based worklife expectancies of female children.<sup>369</sup> The court ultimately rejected gender-based worklife expectancy, stating:

Does it follow that because *some* women have historically been able to spend years out of the workforce, female children in the Program should always get substantially smaller awards for "lost earnings" than male children? I do not think so. Rather, I note that nowhere in the statutory formula of 300aa-15(a)(3)(B) is there any express, or even implied, distinction between males and females. Indeed, the formula *mandates*, as discussed above, that the basic earnings figure be determined by averaging the earnings of *all* workers, even though historically female workers have earned somewhat less than male workers. Therefore, just as we do not under the formula use different *average*

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were factors in the calculation of front-pay awards; however, given a lack of testimony "regarding the significance of [these factors] to [the plaintiff's] ability to secure comparable employment," the court refused to speculate on such significance, and disregarded these factors), *aff'd in part, rev'd in part, and remaded*, 267 F.3d 828 (8th Cir. 2001).

<sup>363</sup> 42 U.S.C. §§ 300aa-1 to -34 (2012). Section 300aa-15(3)(A) provides compensation for "actual and anticipated loss of earnings" for those injured after the age of eighteen. Section 300aa-15(3)(B) provides the compensatory framework for "loss of earnings" for those injured before eighteen and likely to "suffer impaired earning capacity."

<sup>364</sup> *See Schaefer v. Am. Cyanamid Co.*, 20 F.3d 1, 2-3 (1st Cir. 1994).

<sup>365</sup> *See supra* Part II.

<sup>366</sup> *Childers v. Sec'y of Health & Human Servs.*, No. 96-194V, 1999 WL 218893 (Fed. Cl. Mar. 26, 1999).

<sup>367</sup> *See id.* at \*16-18.

<sup>368</sup> *Id.* at \*16.

<sup>369</sup> *Id.* at \*17.

*earnings* figures for males and females, I see no good reason to use different *work-life expectancy* figures based upon gender.<sup>370</sup>

*Childers*'s express rejection of gender-differentiated worklife expectancy seems to be an exception to the rule among the cases that addressed worklife expectancy, despite the special master's finding of conflicting precedent.<sup>371</sup>

In contrast, *Edgar ex rel. Edgar v. Secretary of the Department of Health and Human Services* was a case involving a female petitioner injured before the age of eighteen.<sup>372</sup> The victim's total worklife earnings were based on the estimated worklife of a high school-educated female, despite the petitioner's projection of a total worklife of the median of historical male and female worklife for college-educated persons.<sup>373</sup> Indeed, more generally, our investigation reveals that regarding life or worklife expectancies, special masters in the sample more frequently used gender- and race-based statistics.<sup>374</sup> Four out of nine cases that provide life or worklife expectancy

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<sup>370</sup> *Id.* Special Master Hastings continues his reasoning in the accompanying footnote and draws parallels between his result and cases not involving Vaccine Injury Program claims that have "found it to be inappropriate to construct 'lost earnings' awards differently for men and women based upon gender." *Id.* at \*17 n.20. Specially, Special Master Hastings acknowledged *Caron v. United States*, 548 F.2d 366, 371 (1st Cir. 1976), and *Reilly v. United States*, 665 F. Supp. 976, 997 (D.R.I. 1987), two instances where courts declined to distinguish between gender in determining lost earnings awards.

<sup>371</sup> *Childers*, 1999 WL 218893, at \*17.

<sup>372</sup> *Edgar ex rel. Edgar v. Sec'y of the Dep't Health & Human Servs.*, 26 Cl. Ct. 286, 287-88 (Cl. Ct. 1992), *vacated on other grounds*, 989 F.2d 473 (Fed. Cir. 1993).

<sup>373</sup> *See id.* at 291-93. Although an exact match in BLS statistics for an estimated worklife of twenty-nine years was not found, there were very similar figures in Tables A-5, which is gender- and race-based, and A-6, which is gender-based. BUREAU OF LABOR STATISTICS, *supra* note 50, at 19 tbl.A-5, 20 tbl.A-6.

<sup>374</sup> There were nine cases in the sample that discussed life expectancy figures. *See Childers*, 1999 WL 218893, at \*16-18 (rejecting worklife expectancy based solely on experience of women in favor of an average worklife for persons of both genders); *Edgar*, 26 Cl. Ct. at 291-93 (reviewing the special master's consideration of various worklife earnings projections based on gender and educational level); *Sheehan v. Sec'y of the Dep't of Health & Human Servs.*, 19 Cl. Ct. 320, 322 (Cl. Ct. 1990) (assuming the petitioner had "at least twenty more years work," without citation); *Hanagan ex rel. Hanagan v. Sec'y of the Dep't of Health & Human Servs.*, 19 Cl. Ct. 7, 16 (Cl. Ct. 1989) (stating the male petitioner's assumed average life expectancy without specifying gender or race); *First Commercial Bank v. Sec'y of the Dep't Health & Human Servs.*, No. 89-14-V, 1989 WL 250131, at \*15 (Cl. Ct. Oct. 30, 1989) (recommending a finding of at least twenty-seven years' productive work if not for injury, without citation); *Shaw v. Sec'y of the Dep't of Health & Human Servs.*, No. 89-7-V, 1989 WL 250126, at \*8 (Cl. Ct. Sept. 22, 1989) ("At age 18, the average worklife expectancy of a white male is 39.4 years." (citing BUREAU OF LABOR STATISTICS, *supra* note 50, at 13 tbl. A-2)); *Strother v. Sec'y of the Dep't of Health & Human Servs.*, No. 88-32V, 1989 WL 250120, at \*11 (Cl. Ct. Sept. 18, 1989) (projecting worklife expectancy based on race- and gender-differentiated Table A-2 from BUREAU OF LABOR STATISTICS, *supra* note 50); *Schroeder ex rel. Meland v. Sec'y of the Dep't of Health & Human Servs.*, No. 88-22V, 1989 WL 250110, at \*12 (Cl. Ct. Aug. 29, 1989) (using expert testimony to determine life expectancy, but not citing any particular

figures cited, or were traceable to, the BLS's *Worklife Estimates: Effects of Race and Education* (February 1986), which differentiates on the basis of race and gender.<sup>375</sup>

## VI. THE SOLUTION

We have argued that using race- and gender-based tables is unjust and inefficient because it has the devastating effect of perpetuating discrimination—by both providing inaccurate discriminatory damage awards and creating perverse *ex ante* incentives for potential tortfeasors. In this Part, we will sketch out what we consider to be the preferable alternative.

One simple solution in the case of wrongful death—supported by Ariel Porat—is to award damages that are not dependent on the victim's income.<sup>376</sup> Accordingly, killing a Wall Street lawyer or a homeless person would have the same monetary consequence. The tortfeasors would pay the same amount of damages to all victims.<sup>377</sup> The amount would reflect the value society places on people's lives, period.<sup>378</sup> By extension, when the victim does not die but is only injured, damages should be based on the injury itself and not depend on the income of the victim. Thus, damages can equal some multiplier of the medical costs to reflect the fact that bodily injury victims suffer correlated monetary and nonmonetary losses beyond their medical costs.<sup>379</sup>

While such an approach yields various benefits, including lower litigation costs and the fact that it eliminates the *ex ante* incentives to target the disadvantaged, it is unlikely to be adopted by courts any time soon, as it contradicts centuries of common law precedents. Nor is it likely to be adopted by legislatures, at least in the United States, although similar conceptions are often employed in mass disasters when victim compensation funds are created.

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source of data). In *Euken ex rel. Euken v. Secretary of the Department of Health & Human Services*, No. 91-1059V, 1992 WL 132548, at \*7 (Cl. Ct. May 28, 1992), *rev'd*, 34 F.3d 1045 (Fed. Cir. 1994), the special master referenced BLS figures as the basis for a 39.4 years worklife expectancy, but did not name a specific publication or table. However, the BLS gives a figure of 39.4 years for expected active life for seventeen-year-old white men in Table A-2, and none of its other worklife expectancies in Table A-1 or Table A-3 is a match. See BUREAU OF LABOR STATISTICS, *supra* note 50, at 9 tbl.A-1, 13 tbl.A-2, 14 tbl.A-3.

<sup>375</sup> BUREAU OF LABOR STATISTICS, *supra* note 50, at 13 tbl.A-2. Four cases determined life or worklife expectancy but did not provide adequate information to find any particular statistical source for the special master's assumptions or the expert's testimonies. *Euken*, 1992 WL 132548, at \*7; *Sheehan*, 19 Cl. Ct. at 322; *First Commercial Bank*, 1989 WL 250131, at \*15; *Schroeder*, 1989 WL 250110, at \*12.

<sup>376</sup> See Porat, *supra* note 204, at 102.

<sup>377</sup> See *id.* at 101–02.

<sup>378</sup> See *id.* at 97–107. It is not clear whether Porat holds the same views on killing the old versus killing the young—that is, whether their lives should be evaluated as equal.

<sup>379</sup> See Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 110–15 (2006).



Therefore, in this Article, we defend the simplest possible practical solution: courts should adopt one blended worklife table, one blended life expectancy table, and one blended wage table for use in damage calculations in tort cases. It is a solution that can be implemented immediately by any court in the country.

Specifically, calculating damages for future pain and suffering requires that the plaintiff's pain and suffering be established, as well as her expected longevity. As for the first component, courts can continue estimating pain and suffering in the same way they have been doing it so far.<sup>380</sup> To the extent that any changes are required, they are beyond the scope of this Article.<sup>381</sup> As for the second component, our proposal is to use blended life-expectancy statistics rather than a gender- and race-based table. Next, calculating damages for future medical costs requires the plaintiff's medical expenses, as well as expected longevity, to be established. Under our proposal, for the first component, courts would still require expert testimony to establish the plaintiff's annual medical expenses.<sup>382</sup> For the second component, however, courts would use a race-blind, nongendered life expectancy statistic and eliminate the bias from the calculation.<sup>383</sup>

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<sup>380</sup> *See id.* at 111.

<sup>381</sup> Many problems exist in the way courts estimate pain and suffering. *See id.* at 93–97. However, that discussion is well beyond the scope of this Article.

<sup>382</sup> An open question remains regarding the current practice of courts' adjusting the life expectancy statistic based on the particular health characteristics or habits of the plaintiff (e.g., she suffers from heart disease, everyone in her family lives until age ninety, etc.).

<sup>383</sup> Studies have demonstrated that, controlling for socioeconomic factors, the life expectancy differences between races are seriously minimized or disappear. *See* Hilary Waldron, *Mortality Differentials by Race* (Office of Policy, U.S. Soc. Sec. Admin., Working Paper No. 99, 2002), <http://www.ssa.gov/policy/docs/workingpapers/wp99.html> [<https://perma.cc/F8ZE-FZET>]; *see also* Morgan Kelly, *Study Reveals Impact of Socioeconomic Factors on the Racial Gap in Life Expectancy*, PRINCETON U. (Apr. 4, 2012), <http://www.princeton.edu/main/news/archive/S33/35/55M88/> [<https://perma.cc/WG-F4-HU4W>] (finding that socioeconomic differences account for 70%–80% of the life expectancy divide between blacks and whites). In reality, it is entirely appropriate that race-neutral life expectancy be used as a basis for future medical expenses. Reasons for the life expectancy divide between genders are less clear, and may include genetic factors, social choices (including building a strong support network), and employment status. *Id.* Certainly, some may argue that if the differential is due to positive choices made by women, women should benefit from a higher life expectancy prediction. *See id.* However, given the difficulty in disentangling competing genetic, social, and employment factors influencing female life expectancy, we argue that it is most appropriate to defer to blended gender tables. Additionally, as discussed by Cary Franklin in other contexts, courts are skeptical about attempts to defend discriminatory laws by arguing that the laws benefit women, since women's rights litigators in the 1970s pushed for total gender equality by convincing courts that laws that seem to benefit women are more often part of a broader framework that disadvantages women on the whole. *See generally* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010) (discussing the litigation strategy of the 1970s and its implications for the modern court).

Lastly, calculating damages for future loss of income requires establishing future wages as well as expected working years. We offer two propositions in this regard. First, when calculating the future wages of plaintiffs, courts should not require expert testimony to determine plaintiffs' future income. Instead, they should use the average national wage, absent any account for race or gender. Our suggestion deviates from that put forward by Chamallas and Wriggins to use white males' tables for everyone, on the basis that their proposal will lead to over-deterrence, which will unnecessarily increase liability costs, potentially making products and services more expensive.<sup>384</sup> Second, for the expected worklife calculations, courts should use blended statistical worklife tables. The outcome would be a nondiscriminatory and unbiased damage award.<sup>385</sup>

While adoption of these proposals would certainly bring those disadvantaged by race or gender in the current system to a more equal level, it would reduce the damages for those who are currently advantaged in the system because of their race or gender. The solution, however, is simple: advantaged people who are worried that the average income will not fully cover their losses in the case of an injury should purchase first-party (private or public) insurance. Similarly, those worried that they might live longer or work more years than average, and therefore might not receive sufficient damages for future harm, should also purchase insurance.

Law and economics scholars might be concerned that using blended tables could create a moral hazard problem whereby victims' incentives to take precautions are distorted; the more one is compensated, the less care one will take. However, such a worry is unfounded. First, moral hazard is much less likely to arise in the case of bodily injury accidents than for property losses. Whereas there may be some people who might prefer to be severely disabled for the rest of their lives as long as they are guaranteed a stable income, most people would not risk their lives in such a way. Second, and more importantly, our argument here is most persuasive when applied to children. Thus, to the extent that children are the focus of such a policy change, it is extremely implausible to expect children to behave in such a morally hazardous way.

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<sup>384</sup> See Chamallas, *supra* note 106, at 1445; Wriggins, *supra* note 105, at 272–73.

<sup>385</sup> Some questions remain about whether we should adjust the loss of income up or down based on personal merits particularized to the plaintiff. While the concept seems appealing in theory (and more closely aligned with the “make whole” goal of tort law), such an attempt poses some problems in application. First, it may assume away the possibility of career change for adult plaintiffs. If we adjust down based on a plaintiff's occupation as a janitor, we assume that he would never have moved into a more lucrative career. However, if we allow claims that plaintiffs intended to change careers, this may inappropriately incentivize strategic behavior and encourage plaintiffs to falsely argue that they planned to take this course of action. Second, such a practice allows for back-end discrimination based on family demographics. Allowing for adjustment may leave room for defendants to argue that family dynamics and parental decisions correlate with the plaintiff's income. Doing so would replicate the existing socioeconomic gap in damage awards, but through the lens of family background.

Indeed, the tort system can be conceptualized as a system of insurance prefabricated into the costs of goods and services.<sup>386</sup> Therefore, there is something intuitive about making the system an egalitarian one—providing basic identical coverage—and having those dissatisfied by their potential lot purchase additional insurance to meet their individual needs.<sup>387</sup>

Once we conceptualize tort damage awards as a form of insurance, the proposal becomes more in line with current trends.<sup>388</sup> Many state legislatures have codified statutes that expressly permit the use of gender-neutral blended tables in life insurance policies (although, admittedly, most do not preclude the use of gender-based tables as an alternative).<sup>389</sup> Similarly, many states prohibit gender discrimination and most prohibit race discrimination in disability insurance.<sup>390</sup> Obamacare prohibits both gender and race discrimination in health insurance.<sup>391</sup>

Our proposal can be compared to an approach set forth by the Israeli Supreme Court, which is among the most progressive supreme courts in the world in this context.<sup>392</sup> First, whereas our analysis so far has been most persuasive when applied to children, nothing in the *logic* of our analysis prevents courts from applying it to all plaintiffs without established earnings records, regardless of their age. By contrast, the Israeli Supreme Court, which requires the use of the national average wage for the calculation of damages, irrespective of race, gender, origin, or religion, limits its holding to minors and young adults without established earnings records.<sup>393</sup> Because the bulk of personal injury plaintiffs will be adults—many (especially women) without established earning records—limiting equality to minors will have a smaller effect on the system as a whole.<sup>394</sup> And yet, proposing to apply blended tables to adults as well will require a much greater deviation from the current regime. Since our intention is to first convince courts to start using blended tables for children, we leave the potentially more complicated case of adults open for further consideration. A second point of comparison between our approach and that of the Israeli Supreme Court is that we propose to apply the national average wage without exception.<sup>395</sup> In contrast, the Israeli Supreme Court uses

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<sup>386</sup> See Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1569–70 (1997).

<sup>387</sup> See *id.*

<sup>388</sup> This understanding of tort law is well-established. See, e.g., *id.* at 1569 n.9 (listing economic scholars' discussions of tort law as an insurance theory).

<sup>389</sup> Ronen Avraham et al., *Understanding Insurance Antidiscrimination Laws*, 87 S. CAL. L. REV. 195, 246–50 (2014).

<sup>390</sup> See *id.* at 232–52.

<sup>391</sup> 42 U.S.C. § 18116(a) (2012).

<sup>392</sup> CA 100064/02 Migdal Ins. Co. v. Abu-Hana (3) TakSC 3932 (2005) (Isr.).

<sup>393</sup> *Id.*

<sup>394</sup> See *id.*

<sup>395</sup> Cf. Sherri R. Lamb, *Toward Gender-Neutral Data for Adjudicating Lost Future Earning Damages: An Evidentiary Perspective*, 72 CHI.-KENT L. REV. 299, 338 (1996)

the average income in society as a presumption, but then allows the parties to argue for deviations upward or downward if they believe they can prove that the earning capacity would have been higher or lower than the national average because of qualifications, educational attainment, or aspirations for future success.<sup>396</sup> However, the *ex ante* benefits of allowing for such deviations are nil, and again we argue that a better way to address this problem within tort law is to allow concerned individuals to purchase insurance.

Third, while the Israeli Supreme Court's approach uses an identical retirement age for men and women (even though in practice men and women may retire at different ages), it does not use identical life expectancy tables for men and women.<sup>397</sup> We suggest using identical life expectancy tables. Observe that, unlike the cases of wage tables and worklife tables, using blended life expectancy tables hurts women, as women's life expectancy is generally higher. Our approach of using blended life expectancy tables stems from our belief that tort law should not create targeting incentives aimed at any race or gender, no matter who the targeted group is.<sup>398</sup>

A defendant forced to compensate a plaintiff according to blended tables would likely raise an obvious criticism of our proposal: why should the defendant have to pay the bill for the proposed discrimination "fix"? After all, a defendant may argue, discrimination is a societal problem and, as such, should burden everyone equally. Accordingly, a just solution could be to have the defendant pay the exact damages using nonblended tables, and victims from disadvantaged groups could be rewarded the difference from the government via the tax and transfer system.<sup>399</sup> This way, the burden would be shared across society rather than being placed with the defendant to shoulder the blame for a societal problem. However, this fix does nothing to address the fact that our courts would continue to perpetuate discriminatory practices—

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(suggesting to "consider each person as equivalent to the average, unless evidence is produced which removes the plaintiff from the normal range").

<sup>396</sup> *Migdal Ins. Co.* (3) TakSC 3932. Judge Weinstein, though not discussing the option at length, highlights the possible use of a national average unless evidence is produced to remove the plaintiff from the range as consistent with his general conclusion that tort law should be an individualized assessment based on individual characteristics. See *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, 116 F. Supp. 3d 126, 153–54 (E.D.N.Y. 2015).

<sup>397</sup> *Migdal Ins. Co.* (3) TakSC 3932.

<sup>398</sup> In a recent case by the Court of Justice of the European Union, it was determined that men and women should be priced the same even though their risk is different. Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL v. Conseil des ministres*, 2011 E.C.R. I-800, at I-805. A similar approach was taken by the U.S. Supreme Court in the landmark cases of *Norris* and *Manhart* mentioned earlier. See *supra* notes 343–47 and accompanying text.

<sup>399</sup> See, e.g., Kaplow & Shavell, *supra* note 25, at 667 (noting that criticisms of economic analysis and its focus on efficiency rather than normative factors "would be moot if the income tax system—understood here to include possible transfer payments to the poor—could be used freely to achieve any desired distribution of income").

practices that inspire revulsion in other institutions. More importantly, such an approach would maintain the *ex ante* incentives to target the disadvantaged.<sup>400</sup>

And yet a tweak to the proposed rule could ostensibly rectify this problem: the defendants would pay in courts according to blended tables and then receive a tax *credit* for the difference. This solution, although successful in spreading costs and protecting the image of courts, is deficient on another ground. Defendants receiving tax credits would have a continued incentive to base their liability on nonblended characteristics. Hence, under this alternative, society would still subsidize targeting.

Another argument defendants may raise relates to Title VII, which prohibits discrimination in the workplace only among employers with fifteen or more employees.<sup>401</sup> This cutoff reflects a societal judgment that small employers should not bear the costs of antidiscrimination norms.<sup>402</sup> Accordingly, only tort defendants who are large corporations should be held liable, using blended tables, whereas smaller tort defendants should be subject to nonblended tables. The response to this argument might be that society should instead take inspiration from the Fair Housing Act (FHA) that forbids everyone, big or small, from discriminating in housing (with limited exemptions for certain single-family homes and owner-occupied dwellings).<sup>403</sup> Clearly, society is willing to put the burden of compliance on both large and small property owners through the FHA to combat discrimination in the housing market. Accordingly, at least some societal indication exists that tort defendants of all sizes should sometimes pay based on blended tables.

## VII. CONCLUSION

A 2003 review of the available and relevant empirical data suggested that courts reproduce the economic inequalities associated with race and gender in tort damage awards.<sup>404</sup> These differences were commonly attributed to judges'

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<sup>400</sup> See *supra* Part I.

<sup>401</sup> 42 U.S.C. § 2000e(b) (2012).

<sup>402</sup> Jacqueline Louise Williams, Note, *The Flimsy Yardstick: How Many Employees Does It Take to Defeat a Title VII Discrimination Claim?*, 18 CARDOZO L. REV. 221, 233 (1996) ("One of the principal objections was that the employer-employee relationship in a small business is a personal one . . ." (citing 110 CONG. REC. 13085 (1964) (remarks of Sen. Cotton))).

<sup>403</sup> 42 U.S.C. § 3603.

<sup>404</sup> EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 54–58 (2003). An earlier study conducted by the Rand Corporation in 1985 concerning 9,000 civil jury trials in Cook County between 1959 and 1979 found that blacks received smaller awards, about three-quarters of those pertaining to an equivalent white. AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS, at v, viii (1985). However, the data on the effect of a plaintiff's race on jury awards are extremely limited and, on closer inspection, suggest mixed results. GREENE & BORNSTEIN, *supra*, at 54–55. The findings from one study on this topic (a simulated civil rape case) were mixed, with college students awarding higher

and jurors' bigoted perceptions.<sup>405</sup> In this Article, we showed that the blame might (also) lie with the core "neutral" practice of awarding damages by using government race- and gender-based statistical tables.<sup>406</sup> We argued that current practice in the awarding of damages in courts is not only unfair but also inefficient and therefore should be abolished. We started by examining the current approaches for determining tort damages. These approaches include courts' use of life expectancy, worklife expectancy, and average wage statistical tables. As we have noted, many of these tables provide granular data delineated by both gender and race. The scholarly response to the use of these tables and resulting discrimination has been focused mainly on average wage tables, largely ignoring discrimination arising from both life expectancy and worklife expectancy tables. This lack of attention continues to perpetuate in most tort case law books, indoctrinating the next generation of lawyers with the perception that questions of discrimination are not central to tort law.

Next, we moved on to an examination of the various theories pertaining to tort law: corrective justice, distributive justice, and efficiency. We demonstrated how the use of blended tables was not detrimental to tort theorists' approach.

We focused mainly on analyzing the problem from an efficiency perspective. In this regard, the analysis is gloomier. The conventional wisdom purports that efficiency calls for the use of nonblended tables and views targeting the disadvantaged as an efficient result. We have showed that adherence to maximizing social welfare not only tolerates the use of nonblended tables but actually *demand*s it. The practical success of such an attempt remains to be determined.

Finally, we exposed and examined the ironic—and in our view, unacceptable—usage of nonblended tables in federal laws, including laws whose sole purpose is to fight discrimination.

Several principled questions remain open. Can the arguments presented in this Article be expanded beyond race and gender? For example, there are separate tables that adjust average life expectancy for disability, including tables for those suffering from quadriplegia.<sup>407</sup> The use of these tables means that the more severely injured the plaintiff is, the greater a "discount" the defendant receives for the harm she has caused, which is problematic in terms

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damages to the white plaintiff and jury-eligible adults awarding higher damages to the black plaintiff. *Id.* The authors did not find any significant empirical support for possible reasons as to the difference in damage awards by plaintiff's race. *Id.* More data is available on the effect of plaintiffs' gender; this data suggests that men fare better than women in courts of law. *See id.* at 55–58. Archival datasets from the Jury Verdict Research Corporation and the Washington State Task Force on Economic Consequences of Gender in Civil Litigation were reported with more granularity and showed male plaintiffs receiving higher damage awards than female plaintiffs. *See id.* at 55–56.

<sup>405</sup> *See* GREENE & BORNSTEIN, *supra* note 404, at 54–58.

<sup>406</sup> *See* Chamallas, *supra* note 115, at 467.

<sup>407</sup> *McMillian v. City of New York*, 253 F.R.D. 247, 248 (E.D.N.Y. 2008).

of overall fairness but also in terms of incentives.<sup>408</sup> A related question involves the extent to which the arguments presented in this Article can be applied to plaintiffs of all ages. As we saw, the Israeli Supreme Court limits its protection of disadvantaged groups to minors and young adults who have not yet established earning records. It is easier to assimilate the idea that children of all genders and races should receive the same damages for the same injury than it is to digest this notion for adults. The arguments and logic presented here, however, suggest similar conclusions for adults as well.

Another interesting question relates to the use of nonblended tables when such usage *helps* minorities. Judge Weinstein seems to think that such usage is legitimate on affirmative action grounds.<sup>409</sup>

Lastly, perhaps the most important question left involves the extent to which the practice of using nonblended tables is not only unfair and inefficient, but also *unconstitutional*. Despite some—regrettably largely ignored—assertions that this practice is indeed unconstitutional, the question is not at all simple, and therefore is discussed elsewhere.<sup>410</sup>

For now, the most pressing issue is this: courts should stop using nonblended tables—with immediate effect.

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<sup>408</sup> See Chamallas, *supra* note 106, at 1441.

<sup>409</sup> See *McMillian*, 253 F.R.D. at 255–56.

<sup>410</sup> See generally Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, CALIF. L. REV. (forthcoming 2018) (on file with the authors). Martha Chamallas and Jennifer Wriggins have long argued that using wage tables is unconstitutional. *Id.* (manuscript at 5).

