Imagine you are a high manager at FedEx. Among other things your role is to find ways to cut costs associated with accidents of trucks delivering packages. FedEx has more than 30,000 motorized vehicles traveling every day. With three accidents every day and with accidents involving fatalities or injuries on average every 2.5 days, lots of harm and lots of money is on the line.¹

Your idea is to find safer routes for your trucks, as long as these routes do not extend the delivery time by too much. You ask your team to find routes that would cut on accident costs without losing too much time or paying too much on gasoline and truck maintenance if the routes happen to be longer. Your goal is to cut accident costs by half. After a week, the team comes back to you with a map of new routes. They met the goal of cutting accidents costs by half. Their idea is very simple: all else being equal, trucks should go through towns or neighborhoods predominantly populated by blacks and not by whites. Why? Because even if the accident rate stays the same, the damages paid by FedEx will be much lower. Tort law, as it comes out, routinely compensates people based on their race and gender, and because blacks in the U.S earn less and live shorter lives than whites, the damages owed to them for future losses due to bodily injury or wrongful death is much lower than to equivalent whites.

As a manager, this is your chance to cut costs significantly, but you feel uncomfortable “targeting” blacks in this way. You call the legal department and they tell you that you can do it—that it is perfectly acceptable. They emphasize that tort law is about restoring people to where they would have been before the accidents. The fact that blacks are disadvantaged in the U.S in terms of their job market prospects and life span is not FedEx’s problem to solve. Tort law is private law; it is about corrective justice between the doer and the sufferer. It is not about problems of distributive justice in society as a whole.

What would you do?

Here is how damages are calculated in tort law. In the dark past, judges made “intuitive” judgments about damage awards which allowed “race and racism to have tremendous influence in ways that are nearly impossible to prove.”² Today, although much of the damage calculation

² Jennifer B. Wriggins, Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007, 27 REV. LITIG. 37, 56 (2007) (discussing The Saginaw and The Hamilton, 139 F. 906, 910 (S.D.N.Y. 1905)). In The Saginaw and 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 of the coast of Delaware. 139 F. at 910, 914-16. 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. 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.
process is much more methodical, race and gender still have tremendous influence on each component of monetary remedies. Here is why: the plaintiff in a bodily injury case is usually entitled, upon proving the defendant’s liability, to be awarded economic and non economic damages, both for past and future harm. The economic damages are comprised of medical costs and loss of income, again, for past and future losses. There are three major types of statistical tables that are in use by courts every day that form the basis of these calculations. Courts use *mortality tables* to determine statistical life expectancy, which is an important factor in determining the life span multiplier in future non economic damages and future medical costs. Courts use *worklife expectancy tables* to determine statistical worklife expectancy, which is an important factor in determining the remaining worklife multiplier in future loss of earning capacity damages. 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.

Problematically, mortality and worklife expectancy tables often delineate on racial lines, and all three types of tables delineate on gender lines. Traditionally, courts accept life expectancy, worklife expectancy, and average income values particularized to the plaintiff’s gender and, where available, race. The result is a caste of tort remedies, reliant on distinguishing plaintiffs by their race and their gender.

Is that unconstitutional? The tension is between basic notions of anti-discrimination as we understand them today (roughly speaking, that race and gender should not determine one’s opportunity to lead her life in a meaningful way) and the fundamentals of tort law that every first year student learns: that the defendant “takes the victim as he finds her,” and that the goal of the damage award is to “make the plaintiff whole” and “put her back in the position she was before the negligent act.” Is it not part of tort law structure—or even logic—that a black woman should be made whole in accordance with her lower life span, shorter worklife years, and lower wage, as compared with a white man?

In this Article, I will attempt to argue that tort law’s remedial damage scheme is an unconstitutional violation of equal protection and due process that both perpetuates existing racial and gender inequalities and creates perverse ex-ante incentives for potential tortfeasors that encourage future discriminatory harm. The last point is what the FedEx example was attempting to demonstrate. I first discuss tort law as state action, and then move to a survey of current approaches by courts, states, and scholars in determining tort damages. I then analyze why this bias is inherent in tort law, and the effects of this bias on perpetuating inequality by creating perverse incentives for potential tortfeasors. Finally, I propose race and gender neutral statistics as the appropriate solution.

**I. TORT LAW AS STATE ACTION**

At the broadest level, protections for liberty and against discrimination arise from the Constitution and its amendments, which protect almost exclusively against governmental actions.\(^3\) Actions by private actors typically do not come within the scope of the constitutional

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\(^3\) See, e.g., RONALD D. ROTUNDA & JOHN E. NOWAK, 2 TREATISE ON CONST. L. § 16.1(a) (5th ed.). The only exception to the governmental action requirement within the Constitution itself is the Thirteenth Amendment, which
framework, unless such action can be tied to a governmental entity.\textsuperscript{4} In contrast, tort law most often protects against harmful private actions. Most often, tort suits involve one private actor bringing suit against another because of some harm that he caused.

For this reason, scholars have traditionally assumed that tort law and constitutional law are distinct categories and, therefore, that constitutional challenges to tort law’s compensatory framework would be inappropriate. However, recent years have shown an outpouring of scholarship addressing the claim that tort law constitutes state action,\textsuperscript{5} particularly in our context as related to the judicial decision to admit expert testimony reliant upon race and gender based statistics.\textsuperscript{6}

Beginning with a series of cases in the mid-twentieth century, the Supreme Court has held that private tort actions can have constitutional implications when a court decides to apply unconstitutional state law or rules in the course of the litigation.\textsuperscript{7} In those circumstances, the court’s decision is a “state action,” and can face constitutional scrutiny, at least under the First and Fourteenth Amendments.\textsuperscript{8} Under this doctrine, the Court has found state action in lower courts’ decisions to enforce damage actions, promissory estoppel, and contracts.\textsuperscript{9} Rejecting the contention that courts might be insulated from Fourteenth Amendment liability when ruling on disputes between private parties, the Court noted “it has never been suggested that state court action is immunized from the operation of [Fourteenth Amendment] provisions simply because the act is that of the judicial branch of the state government.”\textsuperscript{10} Rather, judges—


\textsuperscript{6} \textit{N.Y. Times Co. v. Sullivan}, 376 U.S. 254, 265 (1964) (holding that Alabama courts’ choice to apply a state rule of law that allegedly violated First Amendment rights was sufficient to constitute state action in a damages action for libel); \textit{Shelley v. Kraemer}, 334 U.S. 1, 19 (1948) (holding that the state court’s ruling to grant judicial enforcement of racially discriminatory restrictive covenants was sufficient to constitute state action and in violation of Fourteenth Amendment’s equal protection).

\textsuperscript{7} \textit{Id.}; see also \textit{Edmonson v. Leesville Concrete Co.}, 500 U.S. 614, 622-24 (1991) (holding that a judge’s choice to enforce a discriminatory peremptory challenge constituted state action); \textit{Cohen v. Cowles Media Co.}, 501 U.S. 663, 668 (1991) (holding that the Minnesota courts’ enforcement of a private cause of action for promissory estoppel—and the resulting application of state rules of law in a manner restricting First Amendment freedoms—would constitute state action for the purposes of the Fourteenth Amendment).

\textsuperscript{8} \textit{Id.}

\textsuperscript{9} \textit{Shelley}, 334 U.S. at 18. It is true that judicial immunity may shield judges from liability for unconstitutional state action; nevertheless, this does not illegitimate the state action claim in its entirety. For a practical discussion of how to litigate the use of race or gender based statistics under 42 U.S.C. § 1983, see \textit{Wriggins, supra} note 6, at 274-5.
as public officials—are responsible for ensuring that prejudices against constitutionally protected interests not be given effect under the law.\(^{11}\)

Under this doctrine, judges who choose to present race or gender based damage calculations to the jury should be subject to constitutional scrutiny under the Fourteenth Amendment’s equal protection standard.\(^{12}\) As Martha Chamallas argues, the judge’s decision to admit such calculations is ultimately a decision to apply a discriminatory common law rule to the plaintiff’s case.\(^{13}\) Because applying discriminatory common law rule is akin to applying a discriminatory state law, it should be unconstitutional state action under the canon of cases discussed above and cognizable in court.\(^{14}\)

Additionally, there may be grounds to criticize the practice for due process reasons. In *Martinez v. State of California*, the Supreme Court commented that a tort cause of action by the state could be “a species of ‘property’ protected by the Due Process Clause.”\(^{15}\) Several years prior, the Supreme Court held that the federal due process guarantee protects against discriminatory judicial actions when those actions amount to state action.\(^{16}\) Therefore, to the extent that judges may be applying discriminatory law, due process rights should be implicated. Additionally, John Goldberg posits that the federal Constitution includes an inherent due process right to redress, which is realized in the present-day tort system.\(^{17}\) Should that be the case, it would seem to eliminate the state action requirement altogether and would provide a due process remedy for discriminatory tort damage calculations, irrespective of meeting the state action requirement.

Indeed, it is not entirely clear to me why so much attention was given by scholars to the question of state action. First—already back in 1994—Chamallas made it convincingly clear that claims about lack of state action cannot block equal protection claims in tort law.\(^{18}\) Second, no court, as far as I can tell, has ever rejected claims against race and gender based tables on state-action grounds. So it seems that scholars have been focusing their attention for decades on a somewhat esoteric question.

The most recent and potentially most interesting development happened in 2008, when Judge Jack Weinstein in the Eastern District of New York became the first judge to explicitly reject the use of race-based statistics to calculate a plaintiff’s life expectancy for the purpose of future

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\(^{11}\) *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. ‘Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.’” (citing *Palmer v. Thompson*, 403 U.S. 217, 260–26 (1971) (WHITE, J., dissenting)).

\(^{12}\) Chamallas, *supra* note 6, at 104 (“The constitutional guarantee of equal protection, the provision which supports the prohibition on race and sex discrimination, protects individuals only against governmental or state action. A finding of sufficient state action is required, therefore, before any constitutional challenge can be made to the use of race-based or gender-based data in tort litigation.”); see also Wriggins, *supra* note 6, at 272 n.48.

\(^{13}\) *Id.* at 105-6.

\(^{14}\) *Id.*

\(^{15}\) 444 U.S. 277, 281-82 (1980).


\(^{18}\) Chamallas, *supra* note 6, at 105-06.
medical costs on constitutional grounds.\textsuperscript{19} (Interestingly, Judge Weinstein did not hold that race-based tables are unconstitutional for calculating wage or worklife expectancy, nor that gender based tables are not allowed.)\textsuperscript{20} He invalidated the use of the statistics on two constitutional\textsuperscript{21} grounds: equal protection and due process. First, he held that race-based life expectancy calculations were racial classifications impermissible under the Equal Protection clause, noting precedent holding that “judicial reliance on ‘racial’ classifications constitutes state action.”\textsuperscript{22} Moving to a due process analysis, he also held that allowing the use of race-based life expectancy calculations violated due process because the court creates “arbitrary and irrational state action,” which unfairly burdens a racial class of plaintiffs.\textsuperscript{23} Five years have passed and Judge Weinstein’s ruling has been totally ignored by courts, like one would ignore an annoying wake up call.

\section*{II. CURRENT APPROACHES FOR DETERMINING TORT DAMAGES}

\subsection*{i. COURTS}

As a general practice, plaintiffs suing for future medical expenses, future pain and suffering or future loss of earning capacity must present expert testimony that statistically demonstrates the harm that the plaintiff will suffer over his or her remaining lifetime. Traditionally, these statistical calculations have infused race and gender bias into damage calculations through three major datasets: life expectancy, worklife expectancy, and average national wage. I discuss each in turn below.

\subsubsection*{a. Life expectancy}

Life expectancy is a major component in calculating a plaintiff’s future medical expenses and future pain and suffering. To determine future medical expenses, courts typically instruct the jury to determine the total cost of future medical payments that the plaintiff must endure over the rest of his or her life time. A similar exercise applies for future pain and suffering, except that that the type of evidence presented to the jury is of course different; it is not about the plaintiff’s costs of care, but about her pain and suffering remaining after all her economic costs have been reimbursed. To no surprise, life expectancy becomes a critical factor in the size of a plaintiff’s damage award for future medical costs and pain and suffering.

\begin{thebibliography}{99}
\bibitem{20} The reason might be that the plaintiff has made a tactical decision to not seek damages for future loss of earning “to avoid evidence of reduced earning capacity that might have prejudiced his case.” McMillan v. City of New York, 2008 WL 4287573, *2 (2008). As with regard to the gender tables, was it because the plaintiff was a man and the Judge wanted to help him? Was it because the defendant did not object to using gender-based tables to not risk losing on race-based tables? Or is it because gender, unlike race, is fixed and immutable?
\bibitem{21} Apart from constitutional arguments, Weinstein also commented that life expectancy tables are not good predictors of life span because race is a social construct (and not fixed or immutable), and there are other more accurate socio-economic predictors. McMillan, 253 F.R.D. at 249; see also Wriggins, supra note 6, at 266, n.9 (noting scholarship on race as a social construct).
\bibitem{22} Id.
\bibitem{23} Id. at 256.
\end{thebibliography}
Proof of remaining life expectancy usually begins with a mortality table. Although tables are not conclusive proof of life expectancy—and the jury is encouraged to adjust the figure up or down based on evidence of the plaintiff’s health and habits—the tables are oftentimes determinative of the plaintiff’s life expectancy. Generally, courts prefer to receive the best and most reliable table available, which usually means that the expert should present evidence based on the most recent version of the federal government’s U.S. Life Table. The U.S. Life Tables provide life expectancy statistics for the population as a whole, for each gender, for certain racial categories (White, Black, Hispanic, Non-Hispanic White, and Non-Hispanic Black), and for genders within those racial categories.

Most commonly, experts provide life expectancy statistics specific to the gender and race of the plaintiff. Practically, this means that a white brother and sister, both identically injured at age one, would receive significantly disparate awards for future medical expenses. A simple, and even simplistic, back of the envelope calculation is nonetheless illuminating. Using the most recent U.S. Life Tables and assuming $2,000 in annual medical expenses, the brother would receive $9,600 less than his sister, simply because of his gender. Similarly, after applying the calculation to a black and a white boy, both identically injured at age one, the black boy would receive $11,000 less than the white boy, simply because of his race.

Traditionally, courts have accepted such race and gender based life expectancy statistics to calculate future medical expense without questioning the racial and gender biases, and continue to do so.

b. Worklife Expectancy

24 4-36 DAMAGES IN TORT ACTIONS § 36.02; see also T.W. ANDERSON, LIFE EXPECTANCY IN COURT 21 (2002) (using U.S. Life Tables as 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). There are other life expectancy tables available for use, including the American Experience Table, the Carlisle Table, the Wigglesworth Table, the Northampton Table, the Commissioners Standard Ordinary Mortality Table, and tables contained in insurance manuals, but these are older tables (some based in pre-20th Century data) that are less preferred. 4-36 DAMAGES IN TORT ACTIONS § 36.02.


26 According to the 2008 U.S. Life Tables, the statistical life expectancy for a one-year-old white male is 76.1 years. The statistical life expectancy for a one-year-old white female is 80.9 years. To calculate the difference above, I multiplied the life expectancy by the assumed $2,000 annual medical expenses for both individuals. The difference was $9,600.

27 According to the 2008 U.S. Life Tables, the statistical life expectancy for a one-year-old white male is 76.1 years. The statistical life expectancy for a one-year-old black male is 70.6 years. To calculate the difference above, I multiplied the life expectancy by the assumed $2,000 annual medical expenses for both individuals. The difference was $11,000.

28 See, e.g., Smith v. United States, 08-2375-JWL, 2009 WL 5126623 (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); 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); Diebold v. Gulf States Optical Lab., Inc., CIV.A. 96-3579, 1997 WL 537689 (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 based on $40.00/month chiropractic treatment over his remaining life, which for a white male of his age was 9.6 years).
Worklife expectancy is a major component in calculating a plaintiff’s future loss of earning capacity. To determine future loss of earning capacity, courts typically instruct the jury to determine the plaintiff’s future earnings for the duration of his worklife expectancy. Like life expectancy in future medical expense calculations, worklife expectancy becomes a determinative factor in the size of the ultimate damage award.

Like life expectancy tables, worklife expectancy tables are the starting place for determining future loss of earning capacity. Although various tables are available, most experts rely on the tables set forth by the Bureau of Labor Statistics (BLS) in calculating worklife expectancy. The BLS tables provide worklife expectancies for each gender, for certain racial categories (White and “Black and other”), and for genders within those racial categories.

Experts usually provide worklife expectancy statistics specific to the particular race and gender of the plaintiff. Like with race and gender based life expectancy, this results in seriously disparate damage awards for similarly situated plaintiffs. For example, according to the most recent BLS statistics, a white boy and a black girl, identically injured at age 16 in an accident and having the same projected educational levels, would receive monumentally different damage awards. Assuming a $25,000 annual income for each, the same back of the envelope calculation reveals that the white male would receive $302,500 more in future loss of earning capacity than the black woman, simply because of his race and his gender. In practice, even their projected educational attainment chances as determined by forensic economists will be based on race and gender, so the gap will be even larger. This gap will increase even more if their expected annual income was larger than $25,000. This might happen for example if they already applied for college.

Again, courts have traditionally accepted the inherent race and gender biases in these damage awards and continue to do so today. 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 a wrongful death case,” even though he had performed thousands of lost

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30 10 DAMAGES IN TORT ACTIONS § 10.03 (2012); *see also* Hon. D. Duff McKee, 29 AM. JUR. PROOF OF FACTS 3D 259 (2013) (using Department of Labor statistics as the basis for average worklife expectancy in model expert testimony regarding loss of earning capacity).


32 According to the BLS Bulletin 2254, *id.*, sixteen-year-old white males have a statistical worklife expectancy of 39.9 years. Sixteen-year-old black female have a statistical worklife expectancy of 27.8 years. To calculate the difference above, I multiplied the worklife expectancy by the assumed $25,000 annual income for both individuals. The difference was $302,500.

income analyses during his career. Speaking with a couple of lawyers, this has also been my experience. They had no clue how the expert got the numbers, and never thought about questions of race and gender discrimination in this context.

c. Average National Wage

Average national wage can be important in future lost earning capacity calculations where plaintiffs lack an established earnings record. Generally, courts use the plaintiff’s established earnings record as the multiplier with worklife expectancy to predict future loss of earning capacity. However, when the earnings record is not reflective of the individual’s projected earnings—either because s/he is a child and has no earnings record, or because s/he is a young adult and his or her current job is not reflective of his or her ultimate career—some courts rely on the Bureau of Labor Statistics’ annual wage tables. For example, the Mississippi Supreme Court has held that, in wrongful death cases for children where there is no earnings record to establish future lost earning capacity, the Department of Labor’s average national wage is the appropriate starting point for calculating future lost earning capacity. At their most general, these tables provide average national wage statistics for males and females, but they also provide data by educational level and occupation.

Most courts prefer that projected average earnings be adjusted according to predictions particularized to the plaintiff about likely educational attainment, in light of the plaintiff’s personal characteristics and familial background. Such projections problematically reinforce discriminatory effects of the plaintiff’s race or gender on access to education and opportunities, and perpetuate that discrimination into the future.

Another quick example is illuminating. In a recent Mississippi case, an expert testified that the average income for a high school graduate was $28,631 and for a junior college graduate was $36,021. Let’s say the court is calculating future lost earning capacity for our white male sixteen year-old from the last example (with a worklife expectancy of 39.9). If the court chooses the average national earnings for the junior college graduation, our plaintiff will receive $294,861 more in damages than he would if the high school graduate earnings were used.

36 Greyhound, 765 So. 2d at 1277.
39 For a discussion on this issue in the international context, see the Israeli case Migdal Ins. v. Rim Abu Hanna, as discussed in Eliezer Rivlin, Thoughts on Referral to Foreign Law, Global Chain-Novely, and Novelty, 21 FLA. J. INT’L L. 1, 22 (2009) (commenting that “restoring the status quo under the heading of loss earning power means bringing the injured person to a place destined for him in the future, not returning to the place where his forefathers (and foremothers) were.”).
40 Sears, Roebuck & Co. v. Learmonth, 95 So. 3d 633, 639 (Miss. 2012).
41 To calculate the difference above, I multiplied the 39.9 year worklife expectancy by each annual income amount. The difference was $294,861.
d. Shifting Trends

Despite the long history of race and gender based damage calculations, some courts have begun to shift toward a race or gender neutral framework, particularly with regard to future lost earning capacity awards. For example, in Wheeler Tarpeh-Doe, the D.C. district court required that the loss of future earnings of the mixed-race plaintiff be based on race and gender neutral calculations.\footnote{Wheeler Tarpeh-Doe, 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).} The court found that because of the plaintiff’s mixed-race, average black male earnings were not statistically accurate in the situation, 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.”\footnote{Id.} And, in United States v. Bedonie, the district court of Utah declined to apply race and gender based data in future loss of income in the damage assessments for a Native American accident victim.\footnote{Bedonie, 317 F.Supp.2d at 1319.} While the court did not outlaw race or gender based calculations as facially unconstitutional, it concluded that race and gender neutral data should be used, unless the defendant could prove that the reduction based on race or gender was warranted.\footnote{Id.} Finally, in United States v. Serawop, the Tenth Circuit affirmed the district court’s determination that reducing the damage award based on race or gender based statistics was inappropriate in the circumstance.\footnote{United States v. Serawop, 505 F.3d 1112, 1126-27 (10th Cir. 2007). See also In Caron v. United States, 548 F.2d 366, 371 (1st Cir. 1976) (rejecting the government’s attempt to reduce a loss of earnings award for a female infant, stating “we see no reason to distinguish between the sexes, as the Government indicates.”); Theodile v. Delmar Systems, 2007 WL 2491808, *8 (W.D. La. 2007) (deferring to the jury’s preference for the plaintiff’s race-neutral work life expectancy tables over the defendant’s work life expectancy tables).} The district court had “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 within the district court’s discretion to thus reject a race-based approach.\footnote{Serawop, 505 F.3d at 1126.}

Some courts have also declined to use race or gender based statistics, using the rationale that racial and gendered disparities should have little effect in the long-term. For example, in Reilly v. United States, the Court rejected the expert’s reduction of the female plaintiff’s loss of earning capacity by 40%, which was based on the Bureau of Labor Statistics’ determination that a woman of her age would have less remaining years in the workforce than a man of her age.\footnote{Reilly v. United States, 665 F. Supp. 976, 997 (D. R.I. 1987).} The Court commented, “[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.”\footnote{Id.} Similarly, in Drayton v. Jiffee Chemical Corp., the Court declined to reduce the 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.”\footnote{Drayton v. Jiffee Chemical Corp., 591 F.2d 352, 368 (6th Cir. 1978).}
Interestingly, even these courts did not make any constitutional argument about using race and gender, but only argued that as a matter of actuarial science, using these tables is inappropriate.

The time has come to strike down these tables on normative anti-discrimination grounds—and not just because mixed-marriages problematize the practical use of these tables from an actual science perspective. Recall that even though Plessy was 7/8th white, his mixed-race did not prevent him from being kicked out of the train.

At this point it might be useful to remind the reader, and readers of future generations, that while Plessy v. Ferguson was decided in 1896, the year now is 2013.

**ii. **STATES

Tort law is a state law and therefore can be reformed by states’ legislatures. Indeed, over the past few decades states have routinely passed laws which override the common law of torts. Caps on damages are the classic example. Interestingly, almost every cap ever enacted by the legislature was challenged in its state courts for violating various constitutional provisions, including equal protection and due process. Thus, one would expect (I did) that states will enact statutes which mandate neutral mortality tables. Indeed, throughout the country, some states have elected to adopt statutes and to support pattern jury instructions that express preference for certain mortality or worklife expectancy tables in damage awards. Although some jurisdictions have codified or in practice strived to neutralize their damage awards by relying on race and gender neutral tables, most tables supported by statute or pattern jury instructions delineate on race or gender lines.

Four states have codified their own mortality tables. Of these states, Colorado and North Carolina have codified blended tables that are based only on age and do not delineate between races or genders. The other two states—South Carolina and Virginia—have codified tables that are race-neutral, but distinguish between genders.

Separately, two states—Georgia and Rhode Island—have passed statutes that guarantee admissibility of certain mortality and worklife expectancy tables for proof of life and worklife expectancy. Although the tables that the states have expressed preference for are traditional tables often accepted by courts, they have data separated by race and gender.

Many more states have pattern jury instructions that express preference for certain life expectancy tables. Of the jury instructions I examined and the eleven that had relevant provisions, ten delineate along gender lines. While six are race-neutral, five also distinguish along racial lines.

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52 GA. CODE ANN. § 24-14-44; R.I. GEN. LAWS ANN. § 9-19-38.
iii. SCHOLARS

Since the 1990s, a growing body of literature has problematized the discriminatory effects of race and gender based tables in calculating damage awards. As discussed above in part I, these scholars recognize tort law as state action, and argue that admitting race and gender based tables to calculate damage awards is unconstitutional. They generally argue that race and gender based tables perpetuate existing social inequalities by locking plaintiffs into the life expectancies or work life expectancies of their historical racial and gendered predecessors.

Scholars argue for two major solutions to the problem: using blended tables to calculate loss of earning capacity,55 or using male tables to calculate loss of earning capacity.56 Although the scholars refer to race and gender based life expectancy statistics generally, they do not discuss the impact that these statistics have on future medical expenses and future pain and suffering in much detail. Rather, scholars limited their analysis to questions regarding future loss of income. As discussed in part IV, infra, these expenses form an important part of companies’ ex-ante liability calculations, and are a critical component in damage award calculations.

III. TORT LAW AS REASON FOR BIAS

At its core, tort law functions to financially restore the plaintiff to where he would have been, but for the injury he suffered. Because of the individualized nature of this function, it logically follows that courts would account for characteristics specific to the plaintiff in determining damage awards. In the abstract, then, it is no surprise that courts would include racial and gender characteristics alongside age, education, health, and habits when reimagining the plaintiff but for the injury suffered. Given the function of tort law, it seems appropriate—and, perhaps, even obvious—that race and gender based statistics would be commonplace in damage determinations.57

However, as we dig deeper into the sometimes competing rationales of tort law, the rationality of race and gender based statistics becomes much less clear. Two major rationales pose special problems: the corrective justice rationale, and tort law’s deterrence function.

54 Of the states above, Alaska, California, Minnesota, New Jersey, New York, and Washington expressed preference for race-neutral tables or statistics. Id. The remainder of the states supported race-based tables. Id.
57 Chamallas argues that the “make whole” notion of tort law is nevertheless in conflict with race and gender based statistics because the statistical estimates “do not mirror current or future realities” and thus do not make a plaintiff any more whole than blended tables would. Chamallas, supra note 55, at 1451-53.
The corrective justice rationale conceptualizes tort law as redressing the harm the plaintiff has suffered at the hands of the defendant.\textsuperscript{58} Narrowly read, it works to hold defendants accountable for the harms that they’ve caused—and provides some ex-post justice to redress that harm.\textsuperscript{59} But that is not the only conception of corrective justice in existence. More broadly understood, the corrective justice rationale can be seen to embrace notions of anti-discrimination. The Israeli Supreme Court used this broader notion of corrective justice as part of its rationale in holding race and gender neutral statistics were necessary in calculating the loss of earning potential of an Arab girl. One of the justices on the case deems the rationale a “new reading of corrective justice which embraces fundamental values and universal creeds.”\textsuperscript{60} Under this conception of corrective justice, race and gender based statistics are in conflict with the goals of tort law.

Perhaps more strikingly, race and gender statistics rub against tort law’s goal to “deter[] . . . undesirable behavior.”\textsuperscript{61} As discussed in detail in part IV, infra, the effects of race and gender based statistics incentivize potential tortfeasors to behave in ways that will harm classes of individuals based on race or gender. Certainly, this is “undesirable behavior,” and I argue that the deterrent goal of tort law should therefore prevent the use of race and gender based statistics.

\textbf{IV. CREATING PERVERSE INCENTIVES FOR POTENTIAL TORTFEASORS}

Because tort law is a system of deterrence, it incentivizes companies to engage in behavior that results in the least amount of liability. In general terms, this has a positive effect on companies’ choices and incentivizes product safety testing and less expensive ex-ante solutions to avoid incurring the liability costs of damages. However, it also means that rational companies operating from an economic standpoint will choose among alternatives by determining which have the lowest potential liability costs. Recall the FedEx example.

Paired with a race and gender biased compensation scheme, the incentive structure encourages rational actors to disproportionately make choices that allocate harm on the least costly race or gender class.\textsuperscript{62} Let’s consider three other examples:

Imagine that a manager of a school bus company that serves private schools is deciding how to assign his bus routes.\textsuperscript{63} He has safe buses and unsafe buses, as well as good drivers and bad drivers. Half of his schools are for boys only and half his schools are for girls only. Acting rationally, he will choose to send his better drivers and safer buses to the boys’ schools, because, in the aggregate, his economic liability is higher in the boys’ schools than in the girls’ schools. Things become worse when we imagine that all boys are white and all girls are black.

Or, imagine a factory owner is deciding where to purchase land to build her new factory. She can choose between two identically sized plots of land that have equal access to the highway that her suppliers and distributors use—one in a predominantly white neighborhood, and one in a

\textsuperscript{58} DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 10 (2d ed.).
\textsuperscript{59} Id.
\textsuperscript{60} Rivlin, supra note 39, at 23.
\textsuperscript{61} DOBBS, supra note 58.
\textsuperscript{62} Ariel Porat has discussed this misalignment in tort in the context of the poor and the rich. See generally Ariel Porat, Misalignments in Tort Law, 121 YALE L.J. 82, 86 (2011).
\textsuperscript{63} In this hypothetical, neither the school bus company nor the schools would receive public funds.
predominately black neighborhood. Acting rationally, she’ll place her factory in the black neighborhood to take advantage of the lower liability costs she might incur from pollutants over the long-term.  

Or, imagine a company that produces products for use in plastic surgery, including breast and chin implants. Let’s assume that the company sells all of its products in equal proportion and it has a strict budget for products testing. Acting rationally, the company will allocate less funding for testing breast implants in favor of testing products that are equally implanted in men and women (like chin implants), because, in the aggregate, it will suffer greater liability for products used by men than by women. But perhaps this is not the ideal example due to other forms of sexism in our society: a woman’s “value” might be perceived to depend on physical attractiveness, so juries may well award a lot of money to women damaged by faulty breast implants.

So let’s consider a different example, and imagine a company that produces men and women’s bikes. In the same budget-restricted, equal sales scenario, the company would allocate less funding for testing the female bikes than the male bikes, because in the aggregate, it might suffer greater liability for damages resulting from the male bikes than the female bikes.

These scenarios play out in a multitude of contexts. Any compensatory tort scheme that statistically accounts for race and gender will encourage rational actors to make choices that disadvantage the categories of persons that cost less. In practicality, 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 perverse ex-ante incentives to potential tortfeasors.

V. PROPOSED SOLUTION

If I am correct that using race and gender based tables is unconstitutional on equal protection and due process grounds, a claim that I have not really proven in this draft, and would require serious investigation, because using these table has a devastating effect in perpetuating discrimination—both by providing discriminatory damage awards and creating perverse ex-ante incentives for potential tortfeasors—then I must propose an alternative. I propose that courts adopt one blended

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64 While the literature on environmental justice has documented a correlation between the locations of disadvantaged towns or neighborhoods and industrial activities, there isn’t much evidence which shows ‘causation.’ Thus, it is possible that what explains the correlation is that disadvantaged groups chose to live near industries because of the benefits they receive, such as lower property prices and proximity to work. Lynn E. Blais, Environmental Racism Reconsidered, 75 N.C. L. Rev. 75, 80-81 (1996). It is worth recalling that many economists—including the World Bank in its infamous leaked memo—note that from a purely economic perspective, polluting industries should relocate to developing nations because their liability costs to the surrounding population will be lower. See Memo from Lawrence Summers to Distribution (Dec. 12, 1991), available at http://twentyfive.ucdavis.edu/includes/tt/10/summers-memo.pdf.

65 Note that this case is not as clear-cut as the cases above. Generally, the bulk of damage awards come from loss of future earning capacity, which is based on statistics that disadvantage women. However, a proportion of the damage awards (future medical expenses and pain and suffering) will be based in life expectancy statistics that disadvantage men. If the companies were to determine that future medical expenses and pain and suffering would constitute the bulk of their potential damage liability, these examples may reverse—and result in less testing for the male-targeted products.
worklife table, one blended mortality table, and one blended income table for use in damage calculations. The first one, the blended worklife tables has been vigorously proposed by others. The other two blended tables were as far as I know never proposed by anyone to use in tort law.

Here is how it would work. For future medical expenses, courts will still require expert testimony to establish the plaintiff’s annual medical expenses. However, they’ll then use a non-racial, non-gendered life expectancy statistic and eliminate the bias from the calculation.

For future loss of income capacity, courts should require no expert testimony. Instead, they should be able to multiply the average national wage by the plaintiff’s statistical worklife expectancy and come to a non-discriminatory and unbiased damage award.

Of course, while this solution will bring those disadvantaged by race or gender in the current system to a more equal level, it will reduce the damages for those who are currently advantaged in the system for their race or gender. I propose that those persons who are worried that the average income will not cover them should purchase additional insurance. Similarly, those worried that they might live longer than average and therefore might not have received sufficient damages for future medical costs should purchase insurance. Since the tort system is itself a system of insurance pre-factored into the costs of goods and services, it’s only appropriate that

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66 I still need to think if I want to leave room, as exists today, for courts to adjust the life expectancy statistic based on particular health or habits of the plaintiff (e.g. she suffers from heart disease / everyone in her family lives until 90 years old, etc.), or if I want to keep it a strictly statistical calculation—particularized to the plaintiff only to the extent it covers medical costs.

67 Studies have demonstrated that, controlling for socio-economic factors, the life expectancy differences between races are seriously minimized or disappear. HILARY WALDRON, MORTALITY DIFFERENTIALS BY RACE, U.S. SOC. SEC. ADMIN. OFFICE OF POLICY (Dec. 2002), available at http://www.ssa.gov/policy/docs/workingpapers/wp99.html; see also Morgan Kelly, Study reveals impact of socioeconomic factors on the racial gap in life expectancy, NEWS AT PRINCETON (Apr. 4, 2012), available at http://www.princeton.edu/main/news/archive/S33/35/55M88/ (finding that socioeconomic differences account for 70-80% of the life expectancy divide between blacks and whites). Given that reality, it’s entirely appropriate that race-neutral life expectancy be used as a basis for future medical expenses.

Reasons for the life expectancy divide between genders is less clear. There are various possible reasons accounting for the divide, including genetic reasons, social choices (including building a strong support network), and employment. Certainly, some may argue that if the differential is because of positive choices made by women, women should benefit from a higher life expectancy prediction. However, given the difficulty in disentangling competing genetic, social, and employment factors influencing female life expectancy, I 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 disadvantage 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).

68 Some question remains about whether we should adjust the loss of income up or down based on personal merits particularized to the plaintiff. While the concept sounds positive in the abstract (and more closely aligned with the “make whole” goal of tort law), it 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 career, it may inappropriately incentivize strategic behavior, and encourage all plaintiffs to argue that they planned to pursue more lucrative careers. Second, it 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 socio-economic gap in damage awards, but through the lens of family background.
that system be an egalitarian one—and that those dissatisfied by their potential lot purchase additional insurance to meet their individual needs. [I think I prefer this option over the option of giving everyone while male’s tables, but I am not yet decided on this point].

It is interesting to compare my approach with approach set forth by the Israeli SC, which is among the most progressive SC in this context. First, I propose attaching this calculation scheme to all plaintiffs, regardless of established earnings record. In contrast, the Israeli SC, which required the use of national average wage for all minors, irrespective of race, gender, origin, or religion, limited its holding to minors without established earnings records. While this approach may be more consistent with the traditional “make whole” notion of tort law, it does nothing to redress the current system’s perverse incentives to potential tortfeasors. Because the bulk of personal injury plaintiffs will be adults, limiting the equality to minors will have only a minimal effect on the system as a whole. Second, I apply the national average wage without exception. In contrast, the Israeli court uses the average income in society as a presumption, but then allows the plaintiff to deviate upwards if s/he can prove that his or her earning capacity would have been higher than the national average because of qualifications, educational attainment, or aspirations for future success.69 The Israeli SC’s approach seems to come from a place of discomfort that the average income scheme might seriously disadvantage some plaintiffs who would have achieved higher economic outcomes than the average. However, I argue that it is nonetheless inappropriate, because it recreates the perverse incentives for potential tortfeasors. The way to address this problem in tort is to create a statistical damage award scheme and allow “worried” plaintiffs to purchase insurance. [I need to reconsider my views here as I have hard time digesting the implications.] Third, while the Israeli SC’s approach uses identical retirement age for men and women, it does not use identical mortality tables for men and women. My approach is to use identical mortality tables, even though it hurts women, even though gender is more fixed and immutable than race, and regardless of whether gender mortality gaps are caused by choices, genetics, or a combination of both.

In the next draft, I would like to incorporate more rigorous calculations of the race and gender gaps in the entire tort system, aggregated per year. I also plan to explore expanding my argument beyond race and gender. For example, there are separate tables that adjust average life expectancy for disability, including tables for those suffering for quadriplegia.70 Use of these tables means that the more severely injured the plaintiff, the more the defendant benefits in the discount for harm, which is problematic in terms of incentives and perhaps even overall fairness.

Another expansion might be to explore cases in which victim's current earnings are lower for reasons that include discrimination. When the court uses those current earnings as the multiplier with worklife expectancy to calculate lost earning capacity, the court system is giving effect to discrimination in society at large. Is this so different from using the adjusted tables? What if an adult victim’s expert could show that on average, someone like the plaintiff, who is female, would have a 20% higher salary if she were male instead? Should her current salary data still be used to calculate lifetime earnings?

THE END

69 CA 10064/02 Migdal Ins. v. Rim Abu Hanna [2005] (Isr.).
Dear Faculty:
I am interested in your advice on the following issues
1. Is there enough novelty in this project?
   - The fact that courts use different worklife tables has been criticized for decades by scholars. The fact that courts used different wage tables has been raised in one court in Utah, and in the context of lead poisoning cases, in a student note. The fact that courts use different life span tables for future medical costs and P&S has not, as far as I know, been recognized. The distorted ex-ante incentives point has also not been recognized.
   - The EP argument has been discussed in the literature. The DP argument not so much. Is it worth developing it? I have no clue what the challenges facing me are.
2. Developing the ex-ante argument:
   - Should the focus of the paper be on finding examples where defendants “target” plaintiffs based on their low expected damages? Think about the Fedex example, the bikes, the decisions about where to locate factories, etc.
3. Should I try to work from within the tort paradigm?
   - Should I try to argue that forensic economists should at least take into account future trends in closing the gender and race gaps in their calculations for future damages?
   - Should I try to develop the argument that “making whole” really means bringing the injured person to a place destined for him in the future, not returning to the place where his forefathers were? The idea is that we should compensate for the loss of earning capacity in its aspirational sense. Earning capacity, capability, or opportunity, resonates with classic literature in distributive justice (Sen, Elizabeth Anderson, Dworkin, etc.). There, one’s capability should not be determined by gender or race.
4. Developing the argument regarding life span for future medical expenses:
   1) Requiring blended tables for medical costs is going to make women worse off. Cary Franklin’s N.Y.U L. Rev. piece about the anti-stereotyping principle suggests women are better of losing specific battles to win the greater war.
   2) But perhaps future medicals should be based on race and gender. Here would be the rationale: worklife is socially constructed, whereas longevity might be biologically determined (at least for genders, but not for race). According to this view, women work fewer years, primarily because of discrimination, and less so because of their choices. In contrast, so goes the argument, women live longer not due to any choices they make, but due to biological differences. In my view, even if this is correct, then there should still be race-blended tables for future medicals.
   3) Should the fact that gender is immutable and fixed (and race isn’t) matter?
   4) Even assuming women live longer only due to biological reasons, should there still not be gender-specific tables? Why not blended tables and have women buy insurance?
   5) What if women live longer due to their choices? because they have more friends, do not smoke, etc. Does that entitle them to gender-specific tables?

What if women live longer because they work less? Then, the same discrimination that causes them to work less also causes them to live more. So we should either use blended tables for both types of damages (loss of income and medical costs), or gender specific for both, but should not mix. As between the two I prefer the blended ones. After talking a bit with Cary Franklin, I believe the default should be no gender differences, unless there is a really good reason for it. Overall, because there are many reasons why women live longer and it is really hard to disentangle them, the default should be blended.