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The Feedback Loop: A Critical Race Theory Interpretation of the Relationship Between Compensatory Damages and Environmental Justice

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The Feedback Loop:
A Critical Race Theory Interpretation of the Relationship between Compensatory Damages and Environmental Justice

Abstract: This paper identifies the role of race-based actuarial tables commonly used to calculate tort damages in perpetuating environmental racism. Race-based actuarial tables often result in racialized minorities receiving a smaller award of damages than their white counterparts are in tort, making it less expensive for defendants to risk exposing racialized minorities to environmental hazards. Racialized minorities are statistically more likely to live near an environmental hazard than their white counterparts are and are thus more likely to suffer an injury. Because the use of race-based actuarial tables makes it significantly less expensive to pay damages to racialized minorities, however, defendants have little incentive to prevent or even mitigate harm to these communities. In order to prevent this cycle from continuing, the use of race-based actuarial tables must either be reformed or abolished. At present, the environmental justice movement has been focused on other aspects of litigation and legislative reform. This analysis aims to introduce another front to consider in the campaign for environmental justice. If the defects of race-based actuarial tables are appropriately addressed, individual racialized plaintiffs could recover the same amount as their white counterparts and would-be defendants would be deterred from targeting racialized communities.

Introduction

This paper seeks to analyze remedies law through a Critical Race Theory (CRT) lens. This paper will specifically focus on how compensatory remedies—namely money damages-- have failed to achieve justice for racialized victims, both on the individual and structural level. Race is implicated in whether or how much a plaintiff is awarded compensatory damages and whether a court issues a structural injunction. Race-specific demographic and social science data reveals inequalities in income, health outcomes, and working lifespan. Tables based on this data, which are informed by racist logics, often suggest that Black people as a general matter will have a lower lifetime income than their white counterparts and are thus entitled to a smaller compensatory damages awards. Despite a legislative movement to prohibit the use of race-specific demographic social science data in the calculation of compensatory damages and persuasive legal authority prohibiting the reduction of compensatory damages because of race, many civil defendants continue to use such data to argue they should pay smaller compensatory damages to Black victims. Compounded with jurors' potential implicit anti-Black bias, the prevalence of race-

specific data makes it likely that Black people are likely to recover less in compensatory damages than their white counterparts are. This leads to serious implications for Black individuals and communities, who are subsequently less effectively protected against tortfeasors. Replacing race-based actuarial tables with a more neutral metric presents its own challenges but stands to be a promising potential alternative to the status quo.

This paper has three sections. The first section serves as an introduction to race-based actuarial tables and includes possible explanations for the origins of the reported disparities, how courts employ them, and the impacts of their use. The second section reviews potential constitutional arguments against the use of race-based actuarial tables. The final section introduces alternative approaches to race-based actuarial tables.

I. Courts generally permit the use of race-based actuarial tables in the calculation of compensatory damages, which perpetuates racial subordination on both individual and systemic levels.

Compensatory damages lay at the foundation of most causes of action in tort. Compensatory damages seek to restore the plaintiff as closely as possible to their rightful position before the defendant's wrongful act, which is often referred to as making the plaintiff whole. Compensatory damages compensate the plaintiff for lost earnings, medical costs, and pain and suffering.[1] In order to determine how much the plaintiff is entitled to for lost earnings, medical costs, and pain and suffering, the court must consider expected wages, work-life expectancy, and life expectancy.[2] Both plaintiffs and defendants present expert testimony, usually by forensic economists, to provide the judge and jury with estimates of how much compensation it would take to make the victim

[1] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 331 (2018).
[2] *Id.*

whole.[3] These experts employ actuarial tables to estimate expected wages, work-life expectancy, and life expectancy, especially when calculating damage awards for child victims, whose educational and work histories are too incomplete to contribute to a more specific prediction of future earnings.[4] The demographic and social science data included in these tables are usually race- and sex-specific.[5] Thus, these tables reflect racial disparities and encourage the award of compensatory damages that reflect and further perpetuate these disparities.

A. The disparities observed in race-based actuarial tables can be attributed to oppression experienced by racialized minorities.

1. Racial disparities in wage tables reflect a history of oppression of racialized minorities.

People of color are disproportionately impacted by poverty.[6] In 2021, the median household income in the United States, across all ethnicities, was $71,186.[7] For Black households, the median income was only $48,175.[8] While it often takes several generations for families of color to accumulate wealth, systemic factors make it remarkably easy for any accumulated wealth to disintegrate.[9] Under a critical race theory analysis, racial disparities in wealth are often attributed to various systemic factors, including the use of redlining and the denial of mortgages to enforce residential segregation.[10] Race is understood to produce class, while class is understood to produce

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[3] *Id.* at 330
[4] *Id* at 327.
[5] DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS (5th ed. 2019).
[6] KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2019)
[7] United States Census Bureau, Current Population Survey, 2021 and 2022 Annual Social and Economic Supplements.
[8] *Id*.
[9] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (3rd ed. 2017).
[10] *Id*.

race.[11] Race has produced class because people of color have been denied access to resources while capital is directed towards privileged groups.[12] Class produces race describes how socioeconomic differences materially reflect the social construct of race.[13]

2. Racial disparities in life-expectancy tables reflect racially disparate health outcomes.

The racial disparity in life-expectancy tables likely stems, at least to some degree, from the well-established racial disparities in health. Generally, people of color are more likely to be sick and die younger than white people in the United States. [14] This disparity exists at almost every stage of life. The infant mortality rate for Black babies is more than twice that of white babies. [15] Hypertension, which leads to heart disease and stroke, is significantly more prevalent among Black adults than any other group. [16] Several studies have found that these racial disparities in health exist even when the research controls for socioeconomic class. [17] Theories for racial health disparities can be categorized as structural and individual explanations. [18]

Structural explanations of racial disparities in health look to environmental factors stemming from persisting residential segregation, such as a lower quality of education and employment opportunities and diminished access to healthy food, quality health services, and safe and clean housing.[19] This disparity may also be a result of increased exposure to environmental hazards.

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[11] KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2019).
[12] *Id*.
[13] *Id*.
[14] Ctrs. For Disease Control & Prevention, *CDC Health Disparities and Inequalities Report—United States 2013*, MORBIDITY & MORTALITY WKLY. REP. (Nov. 22, 2013), at 1, 184, https://www.cdc.gov/mmwr/pdf/other/su6203.pdf.
[15] *Id*. at 172-173
[16] KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 3 (2019)..
[17] *Id*. at 4.
[18] *Id*. at 15-25.
[19] *Id*. at 16.

Individual explanations for racial disparities in health include factors such as stress and provider bias.[20] Experiencing racism, such as being profiled by the police or being denied employment opportunities, may partially explain why the racial health disparities exist at every socioeconomic level.[21] Additionally, under the John Henryism theory, people of color endure excessive amounts of stress to overcome socioeconomic barriers. [22] The provider bias theory suggests that the racial health disparity exists at least in part because people of color receive poorer care from their healthcare providers.[23] Studies have shown that people of colors are more likely to receive older, cheaper and more conservative medical treatments, as well as undesirable treatments.[24]

3. Racial disparity in work-life expectancy tables may be understood as a function of wage disparities and health outcome disparities.

Taken together, the above explanations for the racial disparity in wages and life expectancy also offer insight into the racial disparity in work-life expectancy. Work-life expectancy tables aim to predict how long an individual would have worked and what they would have earned in this time. Low wages limit the amount that an individual can earn over the course of their life, while poor health is a major limiting factor for work-life duration. Because racial disparities in both

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[20] *Id*. at 17-24.
[21] *Id*. at 19.
[22] *Id*.
[23] INST. OF MED., ADDRESSING RACIAL AND ETHNIC HEALTH CARE DISPARITIES: WHERE DO WE GO FROM HERE?, at 3 (2005).
[24] DAYNA BOWEN MATTHEW, JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTH CARE 58, 61 (2015) (finding that Black patients are more likely to be prescribed limb amputation or castration than white patients); see, e.g., David E. Fleck et al., Differential Prescription of Maintenance Antipsychotics to African American and White Patients with New-Onset Bipolar Disorder, 63 J. CLINICAL PSYCHIATRY 658 (2002)(finding that Black patients are more likely to be prescribed anti-psychotics to treat bipolar disorder, despite negative side-effects and a general consensus that anti-psychotics are not an effective means of treating bipolar disorder.).

finances and health disfavor people of color, it is reasonable to expect this trend to be reflected in work-life expectancy tables as well.

B. Race-based actuarial tables are used widely in tort litigation and have a significant impact on litigants.

Courts rely on work-life expectancy to calculate lost future earnings, as juries usually determine a plaintiff's future earnings based on the remainder of their work-life expectancy.[25] Courts use life expectancy data to calculate a plaintiff's future medical expenses, as well as pain and suffering damages.[26] Experts sometimes use "relative mortality ratios" to reduce life expectancy based on disability or health factors.[27] Both general life expectancy data and the relative mortality ratios are often particularized to race and sex.[28]

Courts often admit race- and sex-specific data without objection to determine and discount present value for compensatory damages because it is readily available, seems more precise, and is attractive to defendants seeking to show that the plaintiff will likely have lower earnings and a shorter working life or would have died sooner.[29]

Use of race- and sex-based data is very widespread, even in discrimination cases under the civil rights laws.[30]

C. The jury's application of data from race-based actuarial tables is especially concerning when there is a high likelihood of racial bias among jurors.

The use of race-based actuarial tables are especially concerning when one considers the likelihood and implications of implicit bias against Black people by members of the jury. Research

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[25] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 331 (2018).
[26] *Id.* at 332.
[27] *Id.*
[28] *Id*.
[29] DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS (5th ed. 2019).
[30] Ronen Avraham & Kimberly Yuracko, TORTS AND DISCRIMINATION, 78 Ohio St. L.J. 661 (2017).

has found that "[i]f a juror strongly identifies with the defendant . . . as part of the same in-group—racially or otherwise— the juror may shift standards of proof upwards in response to attack by an outgroup plaintiff."[31] Thus, when a plaintiff is outside the juror's "preferred" racial group, the juror will likely require more evidence than normal to side with the plaintiff.[32] It is very likely that these tendencies would apply to the jury's calculation of damage awards to tort victims. When extended to the damage calculation process, this research suggests that it would take more evidence than normal to award any specific amount to a plaintiff whom the juror perceives as a racial threat. Thus, racialized plaintiffs before predominantly white juries face an even more daunting challenge when they contest the unfairness or unconstitutionality of race-based actuarial tables that stand to reduce their damages award. Even conventional arguments, like prioritizing the consideration of education and family background over race, would be less likely to be accepted by a jury that views the plaintiff as a racial threat.

D. Race-Based actuarial tables have a profound impact on individual tort victims.

The use of race-based actuarial tables directly leads to racial dipartites in compensation.[33] Specifically, Black tort victims receive smaller damage awards than their white counterparts.[34] Race-based actuarial tables function by using data tainted by the effects of racial discrimination to predict individual outcomes.[35] Furthermore, by categorizing individuals based on their race, race-based actuarial tables struggle to recognize individual outliers and raise concerns about accuracy.[36]

[31] Jerry Kang et al, IMPLICIT BIAS IN THE COURT ROOM, 59 UCLA L. Rev. 1124 (2012).
[32] *Id.*
[33] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 331 (2018).
[34] *Id.*
[35] *Id.* at 336.
[36] *Id.*

E. Race-Based actuarial tables have serious systemic implications.

The use of race-based actuarial tables in calculating damages incentivizes systemic actors like companies and governments to disproportionately select minority communities for high-risk endeavors, as race-specific tables make it less expensive to pay tort damages to racial minorities.[37]

When racialized minorities are likely to receive less in damages, there is less incentive for defendants to take precautions in predominantly minority neighborhoods.[38] "[W]hen damages for injuring members of minority groups are lowered, the legal regimen [has] the perverse result of encouraging torts against them." [39] Critical race theorists have long considered the disparate distribution of environmental danger and biohazards to minority communities.[40] Corporations generally defend their decision to seek out minority communities for environmentally hazardous developments by arguing that they are merely seeking the best market.[41] Scholars generally focus on the role financial vulnerability plays in minority communities accepting high-risk environmental hazards such as sewage treatment plants for potential employment they will provide.[42] However, the role played by low compensatory damages in the corporation's decision making process warrants further analysis.

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[37] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 327 (2018).
[38] Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1441 (2005).
[39] Michael I Meyerson & William Meyerson, *Significant Statistics: The Unwilling Policy Making of Mathematically Ignorant Judges*, 37 PEPP. REV. 771, 808 (2010).
[40] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (3rd ed. 2017).
[41] Id.
[42] Id.

1. Race-based actuarial tables incentivize the placement of environmental hazards in racialized communities.

Low-income, minority communities bear the brunt of environmental hazards, as they experience disproportionate amounts of pollution, landfills, incinerators, and other polluting facilities.[43] Minority communities are disproportionality chosen as the location for toxic waste sites and sewage-treatment plants.[44] In 1992, a United Church of Christ report found that the single best predictor of the location of commercial hazardous waste facilities was race. [45] Another 1992 study confirmed that race was a better predictor of proximity to environmental hazard than any other predictor of disempowerment.[46] Because compensatory damages for racialized minorities are lower, corporations face less of a financial risk when they plan sites of environmental hazards in minority communities rather than white communities.

2. Race-based actuarial tables discourage the timely and complete resolution of environmental hazards in minority communities.

Not only are minority communities saddled with environmental hazards, there are often fewer clean-up plans for environmental hazards located in minority areas.[47]A study of cleanup patterns of abandoned waste sites found that Superfund sites take twenty percent longer to reach national priority status than those in white communities.[48] The same study found that violation penalties also varied drastically based the community's racial composition.[49] Penalties for violations of federal environmental laws were fort-six percent higher in white communities than

[43] Commission for Racial Justice, United Church of Christ, *Toxic Wastes and Race in the United States* xiii (1987).
[44] *Id*.
[45] *Id*.
[46] Mohai & Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards,* 63 Colo. L. Rev. 921 (1992).
[47] Lavelle & Coyle, *Unequal Protection: The Racial Divide in Environmental Law,* Nat'l L.J., Sept. 21, 1992, at 1.
[48] *Id*.
[49] *Id*.

in minority communities.[50] Overall, the study found that Superfund cleanups aimed for risk elimination in white communities, while accepting a lower standard of risk management in minority communities.[51] Exposure to such pollutants is directly linked to poor health outcomes. Minority populations have been found to have higher levels of lead in their blood and greater exposure to air pollution.[52] These disparities have been attributed to the racially discriminatory distribution of environmental hazards.[53] This could arguably constitute environmental racism, which occurs when racial discrimination prevents the achievement of environmental justice.[54]

3. Approaches to environmental justice litigation are hampered by race-based actuarial tables.

Environmental justice litigation are usually based on one of three approaches: civil rights law, the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, and federal and state environmental laws.[55]

In civil rights law litigation of environmental justice, proof of intent is often the plaintiff's greatest obstacle.[56] Generally, plaintiffs are most successful when they seek compensation for battery, as intent for battery extends to include consequences the defendant would believe were likely to flow from his conduct.[57] In an environmental battery case, the plaintiff need only demonstrate that "a reasonable person in the defendant's position would believe that a physical

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[50] *Id*.
[51] *Id*.
[52] Janet Phoenix, *Getting the Lead Out of the Community*, *in* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS, 77 (1993).
[53] Robert D. Bullard, *Anatomy of Environmental Racism, in* TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE (1993).
[54] Gerald Torres, *Introduction: Understanding Environmental Racism,* 63 Colo. L. Rev. 839 (1992).
[55] 4 Treatise on Environmental Law § 9.10 (2023).
[56] *Id.*
[57] *Id*.

impairment would result from the harmful or offensive contact…"[58] A major limitation of environmental battery litigation is its retroactive nature: this cause of action cannot be used to obtain equitable, preventative relief.[59] As such, this approach is only effective at deterrence when the defendants must pay sufficient damages. Because racial minorities are most likely to be exposed to environmental hazards and also have the lowest calculated damages when race-based actuarial tables are used, there is reason to presume compensatory damage awards for plaintiffs of color would not deter defendants the same way compensatory damages for white plaintiffs would.

Equal Protection Clause litigation imposes a higher standard of proof on plaintiffs, as the *Arlington Heights* standard applies.[60] Under *Arlington Heights*, plaintiffs must prove that the defendant had intent to discriminate, making it nearly impossible for environmental justice plaintiffs to prevail.[61] Intent to discriminate is challenging to establish in the context of environmental decision-making, as few organizations would explicitly cite race as a factor in its decision to place an environmental hazard in a particular community.[62]

Litigating based on federal and state legislation features various standards for burden of proof on the plaintiff, but plaintiffs of color continue to be limited in their recovery as long as race-based actuarial tables are used to calculate compensatory damages.

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[58] *Id.*
[59] Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 Wm. & Mary Envtl. L. & Pol'y Rev. 485, 560–588 (1997).
[60] 4 Treatise on Environmental Law § 9.10 (2023).
[61] *Id.*
[62] Donna Gareis-Smith, *Environmental Racism: The Failure of Equal Protection to Provide a Judicial Remedy and the Potential of Title VI of the 1964 Civil Rights Act,* 57 Temp. Envtl. L. & Tech. J. 57, 67 (1994).

4. The use of race-based actuarial tables positive feedback loop in environmental justice litigation.

A positive feedback loop refers a situation that worsens over time because the undesirable result of the system fuels the system, which in turn creates even more of the undesirable result. The use of race-based actuarial tables in civil cases addressing injuries caused by environmental racism creates a positive feedback loop, as the tables almost guarantee that the defendants will pay less in damages to Black victims. Because of their exposure to environmental hazards, such as excessive pollution or lead-laden water, Black victims of environmental injustice are at risk face poor health outcomes, shorter life expectancies, and perhaps diminished earnings if their ability to work is impacted by a disability caused by exposure to environmental hazards. When entire communities are affected, these negative outcomes can become wider trends, which are then reflected in the demographic data used to create race-based actuarial tables. Environmental injustice could thus drag down the race-specific data in actuarial tables used to calculate tort damages, making it even less expensive and prohibitive for corporations to place their environmental hazards in minority communities.

II. Advocates may employ several potential constitutional arguments to curtail the use of race-based actuarial tables.

As recognized by several federal courts, the use of race-based actuarial tables raises serious constitutional concerns under the Equal Protection Clause of the Fourteenth Amendment. Under an equal protection analysis, the use of race-based actuarial tables constitutes a racial classification, while the reliance of judges and juries on race-based actuarial tables constitutes state action. As such, the use of race-based actuarial tables must examined under strict scrutiny, which the tables fail to satisfy. Thus, the use of race-based actuarial tables in calculating tort damages are arguably unconstitutional.

A. Race-based actuarial tables may function as a racial classification.

Race-based actuarial tables function as a racial classification. Racial classification triggers different levels of scrutiny, depending on the subject matter. For instance, in police profiling and voting access cases, the case law is more permissive of the use of racial classifications.[63] In cases of affirmative action and the death penalty, the case law is far less accepting of racial classifications.

Some critics of this view argue that the race is a biomarker that merely describes groups.[64] However, race-based actuarial tables actually function as predictors of future behavior and preferences based on an individual's group membership.[65] When these tables are race-specific, they aim to predict an individual's future behavior and preferences based on their racial classification.

Some proponents of race-based actuarial tables argue that race is simply one factor in race-specific tables.[66] We can draw insight from contemporary police profiling cases law in the Ninth to better understand the propriety of racial classifications that purportedly treat race as one of multiple factors.[67] For example, in *United States v. Montero-Carmargo*, the court found that consideration of race remained constitutionally problematic even when other, nonracial considerations were in play.[68] Specifically, the court warned against the use of racial classification to predict the proclivities or individuals.[69]

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[63] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 339 (2018).
[64] *Id.*
[65] *Id.*
[66] *Id.* at 340.
[67] *Id.* at 341.
[68] *United States v. Montero-Carmargo*, 208 F.3d 1122, 1135 (9th Cir. 2000).
[69] *Id.* at 1135.

Contemporary racial profiling cases suggest that a multi-factor analysis does not necessarily negate the constitutional implications of considering race in the tort context.[70]

Voting rights law applies the predominant-factor test to determine whether the use of racial classifications is constitutionally suspect.[71] Unlike in voting rights cases, however, race consciousness is not necessary to dismantle traditional racial hierarchies in the awarding of tort damages.[72] As such, there is no reason to import the predominant-factor test of voting rights law to tort law.

Instead, some scholars argue that considerations of race in tort should be treated more as it is in death penalty and affirmative action cases, in which considerations of race always constitute racial classifications that trigger strict scrutiny.[73] The Court imposes a different, lower racial causation burden in death penalty cases than in voting rights cases.[74] While this approach would reduce the burden on the plaintiff to make a showing of racial classification, it also supports a race-neutral interpretation of the constitution, which may conflict with a more race-conscious approach preferred by critical race theorists.

In *McCleskey v. Kemp,* the court found that the petitioner need only show that race was a factor in his death sentence, not that race was the "but for cause" or even a predominant factor in his death sentence.[75]

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[70] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 345 (2018).
[71] *Id.*
[72] *Id.* at 346
[73] *Id.*
[74] Julian A. Cook, Jr. & Mark S. Kende, *Color-Blindness in the Rehnquist Court: Comparing the Court's Treatment of Discrimination Claims by a Black Death Row Inmate and White Voting Rights Plaintiffs*, 13 T.M. COOLEY L. REV. 815 (1996).
[75] *McClesky v. Kemp*, 481 U.S. 279, 292-93.

As noted above, the Court has also found that any racial classification triggers strict scrutiny in affirmative action cases. In *Regents of the University of California v. Bakke*, the Court found that even though race was one factor in a multi-factor admissions process, its use was immediately suspect and subject to the most rigid of scrutiny because it curtailed the civil rights of a single racial group.[76] Likewise in *Grutter v. Bollinger*, the Court required the school to demonstrate that its race-conscious admissions process was narrowly tailored to achieve a compelling state interest.[77]

Although some may argue that race-based actuarial tables are facially neutral, the Court often looks beyond facially neutral framing when there is facially disparate treatment, which often manifests on an individual level.[78] In *Loving v. Virginia*, the Court looked beyond the facial neutrality of Virginia's anti-miscegenation statute to find that it rested solely upon racial classifications and on an individual level, prohibited a Black person from marrying someone that a white person could.[79] In *Shelley v. Kraemer*, the Court looked beyond the neutral framing of restrictive covenant enforcement to examine the effect of state enforcement on the rights and opportunities of individuals.[80] The Court based its determination of the appropriate degree of scrutiny in the impact of state conduct on rights and opportunities of individuals.[81]

Race-based actuarial tables are used to calculate tort damages by assuming that members of the same race have the same life trajectory.[82] At the individual level, race-based actuarial tables

[76] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291; see also *Korematsu v. United States*, 323 U.S. 214, 216 (1944).
[77] *Grutter v. Billinger*, 539 U.S. 306, 322 (2003).
[78] Kimberly Yuracko and Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 347 (2018).
[79] *Loving v. Virginia*, 388 U.S. 1, 7-9, 11 (1967).
[80] *Shelley v. Kraemer*, 334 U.S. 1 (1948).
[81] *Id.* at 22.
[82] *Id.* at 345.

result in different damage awards for victims based on their race.[83] These tables function by identifying, classifying, and judging individual victims based on their race, thus constituting a racial classification.[84]

A. Use of race-based actuarial tables may constitute a state action.

The Equal Protection Clause of the Fourteenth Amendments prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[85] State action doctrine determines whether the actor is a state or private individual, but the doctrine is complicated and largely depends on the context and consequences of the case at hand.[86] One could argue that judges and juries are state actors when acting in their capacity to award tort victims damages. Because the Constitution applies only to state actors, and not private business entities, for example, judges or juries awarding Black victims smaller damages on the basis of personal their race would seem to offend equal protection guarantees.[87] Because race-based actuarial tables reflect private and public racial bias, scholars have argued that their use by judges and juries to justify lower damage awards to Black victims gives effect and reinforces both private and public racial bias.[88] However, because the use of tables reflect both private and public racial bias, it is more difficult to argue that their use is constitutionally governed conduct. Although generally interpreted as having a much narrower holding, some scholars have read *Shelley v. Kraemer* as holding that state enforcement of private prejudice could constitute state action under the Fourteenth Amendment.[89] Under this interpretation, *Shelley v. Kraemer* can be read as broadly

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[83] *Id.* at 348.
[84] *Id.*
[85] U.S. CONST. amend. XIV, § 1.
[86] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 348 (2018).
[87] *Id.* at 349.
[88] *Id* at 349-350
[89] *Id.* at 350; see also Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

defining state action as state enforcement, more realistically defining state action as furthering important interests, and more narrowly defining state action as symbolic encouragement.

Under the broadest interpretation of *Shelley*, any private conduct that this state recognizes and enforces may be considered state action and subject to constitutional constraints.[90] This broad interpretation of *Shelley* does not reflect legal reality[91] and thus will not be considered at length in this paper.

Under a more realistic interpretation of *Shelley*, state enforcement of private discrimination qualifies as a potentially unconstitutional state action only when the private discrimination affects highly important interests in social or economic participation.[92] In *Shelley*, the Court articulated its concern about the right to of Black people to participate with white people in economic market.[93] Lower courts have adopted this approach by finding enforcement of covenants an unconstitutional state action when the interest at stake for the plaintiff is very important. [94] In *West Hill Baptist Church v. Abbate,* the court held enforcement of a private covenant unconstitutional when they limited land use in such a way that it prohibited the construction of houses of worship, thus implicating plaintiff's First Amendment rights.[95] In *Franklin v. White Egret Condominium, Inc.*, the court held that state enforcement of a covenant prohibiting children from living on the premises was unconstitutional because the plaintiff's burdened interest in a right to marry and procreate was of high importance.[96] Like the plaintiffs *Shelley*, *West Hill Baptist Church*, and

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[90] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 351 (2018).
[91] *Id.* at 350.
[92] *Id.* at 352.
[93] *Id.* at 353.
[94] *Id.*
[95] *West Hill Baptist Church v. Abbate* 261 N.E.2d 196 (Ohio C.P. Summit Cty. 1969).
[96] *Franklin v. White Egret Condominium, Inc.,* 358 So. 2d 1084 (Fla. Dist. Ct. App. 1978).

White Egret Condominium, the substantive interests of tort victims relate directly to full and equal participation in the economic sphere.[97] As such, the use of race-based actuarial tables would constitute state action and trigger the application of strict scrutiny under this interpretation of *Shelley*.

An even narrower reading of *Shelley* looks to "the state's role in encouraging and promoting widespread social discrimination with respect to important social goods."[98] Under this interpretation, the state must have encouraged community-wide race-based classifications to constitute a state action that would trigger strict scrutiny. The courts' use of race-based actuarial tables in the calculation of tort damages functions as encouragement to allocate risk to racial minority communities disproportionately.[99] Thus, the use of race-based actuarial tables would constitute state action and trigger the application of strict scrutiny even under this narrower interpretation of *Shelley*.

B. The use of race-based actuarial tables may be subject to strict scrutiny.

Strict scrutiny is the highest standard of review to which state action is subjected when its use of racial classification raises questions of constitutional infirmity. Strict scrutiny requires that the use of racial classification must be narrowly tailored and further a compelling governmental interest.[100] The exact burden presented by strict scrutiny leaves significant room for interpretation. Courts have interpreted strict scrutiny as "fatal in fact," a device to reveal invidious motive, and a balancing test.

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[97] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 355 (2018).
[98] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 355 (2018)
[99] *Id.* at 357.
[100] *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200,227 (1995).

The most common interpretation of strict scrutiny is that it functions as nearly "fatal in fact."[101] Under this interpretation, racial classifications only survive strict scrutiny if they are necessary to "avert imminent catastrophic harms." [102] The majority of laws subjected to strict scrutiny fail to meet its burden.[103] Laws only survive strict scrutiny when the state actor can demonstrate that the racial classification is necessary to avoid social emergency or violence. The use of race-based actuarial tables in the calculation of tort damages is not necessary to "avert imminent catastrophic harms" and would fail to survive this application of strict scrutiny.

A narrower interpretation views strict scrutiny as a means by which to uncover invidious state motives.[104] Under this view, it is not the racial classification or the impact on the protected group that makes the state action unconstitutional, but rather the illegitimate state motive.[105] While it is unlikely that courts or expert witnesses employ race-based actuarial tables with the invidious motive of oppressing Black tort victims, not even under this interpretation is illicit motive necessary to making a racial classification fail strict scrutiny.[106]

Courts have also applied strict scrutiny as a balancing test in which racial classifications are viewed as a harm to be balanced against compelling social benefits.[107] In *Adarand Constructors, Inc. v. Pena*, Justice O'Connor described that "[t]he application of strict scrutiny…

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[101] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 359 (2018), Richard H. Fallon, Jr. Strict Judicial Scrutiny, 54 UCLA L. REV. 1267 1302 (2007).
[102] *Id.* at 1303.
[103] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796-797 (2006).
[104] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 360 (2018).
[105] *Id.*
[106] *Id.* at 361.
[107] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 361-62 (2018).

determines whether a compelling governmental interest justifies the infliction of that injury."[108] In present case, the harm of using race-based actuarial tables would need to be weighed against the compelling interest in award accuracy, which ensures appropriate compensation to victims while protecting tortfeasors from undue burdens, encouraging optimal levels of social caretaking by would-be tortfeasors without stifling economic growth.[109] That said, the purported benefits of race-based actuarial tables do not seem as significant as other compelling interests that courts have found to satisfy strict scrutiny.[110] Additionally, the compelling interest in award accuracy is more theoretical than practical, as damage awards very rarely reflect the true costs of harm and are instead almost always an over- or underestimate of true damages.[111]

G. Contemporary judicial and legislative responses to the use of race-based actuarial tables suggest potential for a shift in their acceptance.

1. While many courts accept the use race-based actuarial tables, some have contested their constitutionality.

Some courts have refused to use race- or sex-based tables to protect fundamental principles of fairness or public policy.[112]

In *United States v Bedonie*, the court noted that the use of race and sex in damage calculation was potentially constitutionally concerning and rejected the use of the tables on the narrower grounds of fairness.[113] The court considered two claims for restitution under the

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[108] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-230 (1995).
[109] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 362 (2018).
[110] *Id.* at 363.
[111] *Id.* at 367.
[112] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 328 (2018).
[113] *Bedonie*, 317 F. Supp. 2d at 1319 (noting that the Chamallas' constitutional argument against the use of race and sex in damage calculations is worth serious attention) (rejected use of race and sex distinction on a narrower fairness ground.).

Mandatory Victim Restitution Act stemming from two homicides.[114] These claims involved the killing of a twenty-one-year-old Native American man with a high school education and the killing of a three-month-old Native American girl.[115] The court calculated damages using data differentiated for sex.[116] The court's expert predicted that the young man's projected earnings would be $433,562, reflecting the average earnings of a high school graduate when adjusted for the victim's race and sex.[117] If the court had used data undifferentiated by race and sex, the young man's projected earnings would have been $744,442, roughly 72 percent higher.[118] The court's expert predicted that the baby girl's projected earnings would be $171,366, reflecting the average earnings of a non-high school graduate when adjusted for the victim's race and sex. *Id*. If the court had used data undifferentiated by race and sex, the baby girl's projected earnings would have been $308,633, roughly 80 percent higher.[119] The court found these disparities constitutionally concerning and rejected the use of race- and sex-based tables in the process of calculating lost earnings for tort victims.[120] Similarly, in *Tarpeh-Doe v. United States*, the court found that it was "inappropriate to incorporate current discrimination resulting in wage differences between sexes or races or the potential for any future such discrimination into calculation for damages resulting from lost wages."[121]

In *McMillan v. City of New York,* Mr. James McMillan, a forty-four year old Black man, was knocked down and struck in the neck when a ferryboat operated negligently by the City of

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[114] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 333 (2018).
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* at 333-334.
[120] *Id.* at 334.
[121] 771 F. Supp. at 455.

New York collided at full speed with a concrete pier.[122] He sustained several spinal fractures and lost sensation from the shoulders down. Following several other complications, McMillan was discharged but unable to eat, dress, use the bathroom, or shower independently. Judge Jack Weinstein rejected the use of race-based actuarial tables on constitutional ground, explaining that "[e]qual protection in this context demands that the claimant not be subjected to a disadvantageous life expectancy solely on the basis of 'racial' classification."[123] The court explained that the legal system does not work according to due process if the application of inappropriate race-based statistics unduly burdens one class of litigants.[124]

In *G.M.M. v. Kimpson*, another Judge Weinstein opinion, race-based data had the potential to cause a $1.9 million disparity in the victim's lost earnings.[125] The court held that it is unconstitutional to reduce damages on the basis of race or ethnicity.[126] This positive treatment of *McMillan* rejected the use of race-based actuarial tables on constitutional grounds. As the discussion above shows, some courts have held that the use of race-based statistics to obtain a reduced damage award—which is now extended to the use of ethnicity based statistics, to calculate future economic loss—is unconstitutional.[127]

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[122] *McMillan v. City of N.Y.*, No. 03-CV-6049, 2008 U.S. Dist. LEXIS 76711 (E.D.N.Y. Sep. 19, 2008)

[123] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 328 (2018); *McMillan v. City of New York*, 253 F.R.D. 247, 256.

[124] *Id*.

[125] *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126 (E.D.N.Y. 2015).

[126] *Id.* (finding that data on the general population is almost always available, but testifying experts often use race- and sex-specific data unless challenged on it specifically.)

[127] *G.M.M. v. Kimpson*, 116 F. Supp. 3d at 152.

2. State and federal legislatures are currently grappling over the appropriateness of race-based actuarial tables.

New Jersey, Oregon, and California have enacted statutes banning race-based actuarial tables in computing compensatory damages. [128] Three states seem to require race-based actuarial tables by statute. Ten states embed race-based actuarial tables in pattern jury instructions.[129] In Georgia and Rhode Island, state statute guarantees the continued admissibility of life expectancy and work-life expectancy tables that are particularized to race and sex, creating a higher legislative hurdle for reform.[130] Kansas, Kentucky, Michigan, North Dakota, and Tennessee have pattern jury instructions that encourage the use of race-specific life expectancy tables.[131]

On a federal level, the Fair Calculations on Civil Damages Act of 2022 was introduced to the House in November 2022 and calls for the prohibition of awarding damages to civil plaintiffs based on a calculation for projected future earning if that calculation considers the plaintiff's race, ethnicity, gender, religion, or sexual orientation.[132] Rather, bill would require the Department of Labor and the Department of Justice to develop guidance for states to calculate future earnings in a bias-free manner.[133] The bill would also require the Judicial Conference of the United States to report damages awarded in federal civil cases when the plaintiff's identity is legally protected against discrimination.[134]

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[128] Charles Toutant, *'It's Hard to Have a Discussion About This': The Uncomfortable Truth About Setting Tort Damages*, N.J. L. J. (2022).
[129] DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS (5th ed. 2019).
[130] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 332 (2018).
[131] *Id.* at 333.
[132] H.R. 6758, 117th Cong. (2022).
[133] *Id.*
[134] *Id.*

III. There are several alternative approaches to race-based actuarial tables.

One alternative to race-based actuarial tables is a quasi-colorblind approach, in which all racial identifying markers should be sealed at the damages stage of litigation, unless the claim itself is race-based. This alternative approach then raises the question of how to neutralize race in the datasets themselves.

Although the current system of race-based actuarial tables results in Black tort victims receiving less in compensatory damages than their white peers, fully blended expected wage tables would not necessarily increase damages for Black men in particular.[135] Blending tables fully would lower expected wages for Black men, as it would factor in expected wages of women, which are disproportionately lower.[136]

Another alternative would be applying the statistics of the highest-earning demographic—white men—to tort victims of all classes.[137] This is not unlike the approach taken by Kenneth Feinberg, Special Master of the September 11 Victim Compensation Fund.[138] Although the fund structure did not serve the function of deterrence, Feinberg recognized that equity could not be served by adhering strictly to the provided traditional actuarial tables. By beginning the damage calculation process at the highest possible baseline, this alternative does not risk awarding any tort victim less than would be necessary to compensate them fully.[139] While some argue that this approach would place an unfair burden on tortfeasors, it is unclear whether ensuring tortfeasors

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[135] Kimberly Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 Calif. L. Rev. 325, 333 (2018).
[136] *Id.*
[137] *Id.*
[138] Feinberg, Kenneth. *What is Life Worth?: The Unprecedented Effort to Compensate the Victims of 9/11* (2005), Perseus Books Group.
[139] *Id.*

are likely to pay less to compensate for harm done unto Black tort victims would constitute a compelling public interest.

Conclusion

At present, many courts permit the use of race-based actuarial tables in the calculation of compensatory damages. This process perpetuates racial subordination on both individual and systemic levels. The disparities reflected in race-based actuarial tables can be attributed to oppression experienced by racialized minorities, and the use of these tables have a significant impact on litigants. Additionally, the damage of the disparate data embedded in race-based actuarial tables is compounded by the risk of an implicitly biased jury applying it. As a result, race-based actuarial tables have a profound impact on individual tort victims and serious systemic implications. On a systemic level, race-based actuarial tables incentivize the placement of environmental hazards in racialized communities and no incentive to remove them and rehabilitate the area in a timely or complete manner. Concerningly, race-based actuarial tables hamper the most prominent approaches to environmental justice litigation. Additionally, the use of race-based actuarial tables positive feedback loop in environmental justice litigation.

Advocates seeking the discontinuation of race-based actuarial tables may employ several potential constitutional arguments to curtail their use. They may argue that race-based actuarial tables may function as a racial classification, that they constitute a state action, and that they may be subject to strict scrutiny. Current judicial and legislative responses to the use of race-based actuarial tables suggest that these branches of government may be prepared to discard these tables as a tool for calculating compensatory damages. While many courts still accept the use race-based actuarial tables, some contest their constitutionality. State and federal legislatures are currently grappling over the appropriateness of race-based actuarial tables, as states are split on the issue

and the House is currently considering a bill on this subject. There are several alternatives that could replace race-based actuarial tables, and each has its own strengths and weaknesses.