

## Can Damage Calculations in Tort Cases be Unconstitutional Because They Discriminate on the Basis of Race? Yes, and Here's Why.

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**Date :** February 20, 2019

Ronen Avraham & Kimberly Yuracko, [\*Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damage\*](#), 106 **Cal. L. Rev.** 325 (2018).

In basic tort damage doctrine, a person injured by a tort can recover lost wages. This means it costs less to harm some people than others. People who earn less, whether because of reduced educational opportunities, racism, geography, family responsibilities, or other factors, will suffer lower damages than people who earn more. Defendants (and insurance companies) will have to pay less to “make them whole.” This aspect of tort damages is in tension with, if not in contradiction to, the notion that—*formally*—everyone counts equally in torts. This tension rarely gets attention or critique, in part because tort damages are determined individually, usually through informal and private settlements

In one context of U.S. tort law, however, the relationship between damages and inequality is on the surface and subject to critique. When an injured individual lacks an earnings history, race-based statistical tables estimating wages, life expectancy, and work-life expectancy are still routinely used in calculating tort damage awards. African-American plaintiffs, as a result, receive lower damage awards than white plaintiffs in such circumstances. Many people are surprised to hear this practice endures, although scholars have criticized it for decades.<sup>1</sup> *Valuing Black Lives* is the most detailed explanation yet published as to why the use of race-based tables in calculating tort damages is unconstitutional. It is a companion piece to the authors' previous article, *Torts and Discrimination*, earlier reviewed in Jotwell.<sup>2</sup> *Valuing Black Lives* is excellent. In this era of resurgent racism, it is also particularly timely.

A key question in tort damages, especially where a child is grievously injured, is how much the child would have earned if she had not been hurt. This question is particularly challenging because the child obviously does not have a personal earning history that could be used to estimate lost future earnings. Courts and experts often use race-based and gender-based tables to calculate future lost wages in such a situation. Yuracko and Avraham argue that the use of race-based tables to calculate damages disadvantages individuals and creates incentives for companies to disproportionately allocate risks to minority communities so as to minimize tort damages. They claim, for example, that it would be economically rational for a large delivery company to concentrate its routes and its risky drivers in African-American neighborhoods because the company would end up paying lower damages as a result. As they note, the use of tables ‘embeds effects of racial discrimination into individual tort awards and channels past levels of racial discrimination into predictions about the future.’ The authors painstakingly and persuasively argue that race-based tables are racial classifications when used in court. Further, tables ‘stereotype individuals and make predictions about individual preferences and proclivities based on group membership,’ much like racial profiles. Because tables operate as race-based classifications, their use will be subject to strict scrutiny as long as state action is present. Based on a detailed discussion of state action doctrine, the authors methodically show how judicial reliance on race-based tables to calculate tort damages constitutes state action. Then they carefully apply strict scrutiny and conclude use of the tables doesn’t pass muster. They close by highlighting important aspects of tort damages calculations that will *not* be remedied by simply discarding race-based tables. As noted above, an injured person whose education and employment opportunities have been stunted by racism will have lower lost wages than a more privileged, higher earning person who suffers a similar injury. Inequality rooted in race and privilege pervades our torts damage calculation regime. The authors provide no solution to this deeper problem; I hope they write an additional article which focuses on that topic. I also hope they focus on gender-based tables which are also still used but are not discussed in *Valuing Black Lives* (perhaps because of the different standard of review). Their analysis provides a strong and detailed foundation for a court to hold that use of race-based tables to determine tort damages is unconstitutional.

The article and the earlier *Torts and Discrimination* join a growing literature on race and torts. This literature goes beyond targeting use of race-based tables which is perhaps the only remaining overt use of race on the surface of tort litigation. Up until the 1960s judges generally mentioned the race of tort litigants if they were not white; there are hundreds of published tort opinions dealing directly or indirectly with race to which few torts scholars have paid attention.<sup>3</sup> Now that race is absent from the surface of tort opinions, the topic is even harder hard to study. A race-based discount was clear from older opinions.<sup>4</sup> Race-based devaluation probably persists in many contexts, such as settlement, that are exceedingly difficult to study. A fascinating empirical analysis published in 2016 argues that the failure of some Southern states to adopt reforms such as comparative negligence can be traced to race and geography rather than explanations such as economics.<sup>5</sup> A recent international comparative analysis shows that the use of race-based and gender-based tables is neither universal nor inevitable.<sup>6</sup> There is more work to do.

It is or should be widely seen as extremely objectionable that race-based tables are still used in tort litigation and the authors' concentrated attention to this issue is welcome. Other aspects of race, racism and torts deserve more attention than they have received. It's high time outstanding work like this gets center stage.

1. The first published argument that the use of race-based and gender-based tables is unconstitutional was published by Martha Chamallas in 1994. See Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 **Fordham L. Rev.** 73 (1994). Later publications making similar arguments and discussing other aspects of race, gender, and torts include: Martha Chamallas & Jennifer B. Wriggins, *The Measure of Injury: Race, Gender, & Tort Law* (2010); Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 **Loy. L. Rev.** 1435 (2005); Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 **Tenn. L. Rev.** 51 (2003); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 **U. Pa. L. Rev.** 463 (1998); Jennifer B. Wriggins, *Constitution Day Lecture: Constitutional Law and Tort Law: Injury, Race, Gender, and Equal Protection*, 63 **Me. L. Rev.** 264 (2010); Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865-2007*, 27 **Rev. Litig.** 37 (2007); Jennifer B. Wriggins, *Whiteness, Equal Treatment, and the Valuation of Injury in Torts, 1900-1949*, **FAULT LINES; TORT LAW AS CULTURAL PRACTICE** (David M. Engel & Michael McCann eds. 2009).
2. Ellen Bublick, [How Much is Your Injury Worth? First Tell Me Your Race and Gender](#), JOTWELL (July 6, 2017) (reviewing Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, Law and Economic Research Paper No. E570 (2017), available at [SSRN](#)).
3. See generally Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920*, **The Annals of Iowa** 62 (2003); Martha Chamallas & Jennifer Wriggins, *The Measure of Injury: Race, Gender, and Tort Law* (2010); Jennifer Wriggins, *Torts, Race, and the Value of Injury, 1900-1949*, 49 **How. L. Rev.** 99 (2005); Jennifer Wriggins, *Towards a Feminist Revision of Torts*, 13 **Amer. U. Jnl. of Gender, Soc. Pol. & Law** 1 (2005).
4. See, e.g., Jennifer Wriggins, *Race, Torts, and the Value of Injury, 1900-1949*, 49 **How. L. Rev.** 99 (2005).
5. Donald G. Gifford & Brian Jones, *Keeping Cases from Black Juries: An Empirical Analysis of How Race, Income Inequality, and Regional History Affect Tort Law*, 73 **Wash. & Lee L. Rev.** 557 (2016).
6. Goran Dominioni, *Biased Damages Awards: Gender and Race Discrimination in Tort Trials*, 1 **Int'l Comp., Pol'y & Ethics L. Rev.** 269 (2018).

Cite as: Jennifer Wriggins, *Can Damage Calculations in Tort Cases be Unconstitutional Because They Discriminate on the Basis of Race? Yes, and Here's Why.*, JOTWELL (February 20, 2019) (reviewing Ronen Avraham & Kimberly Yuracko, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damage*, 106 **Cal. L. Rev.** 325 (2018). ), <https://torts.jotwell.com/can-damage-calculations-in-tort-cases-be-unconstitutional-because-they-discriminate-on-the-basis-of-race-yes-and-heres-why/>.